TOAEP | Torkel Opsahl Academic EPublisher

Power in International Criminal Justice

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E-Offprint:

Marieke de Hoon, "Negotiating the Crime of Aggression: Between Legal Autonomy and State Power", in Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (editors), *Power in International Criminal Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2020 (ISBNs: 978-82-8348-113-6 (print) and 978-82-8348-114-3 (e-book)). This publication was first published on 9 December 2020.

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Front cover: *Octavian, known as Caesar Augustus (63 BC–AD 14), the first Roman emperor, who enjoys a 2000-year old legacy as one of the most effective leaders in human history. He is a symbol of power. But this famous fragment of a bronze equestrian statue in the National Archaeological Museum of Athens is also a hollow mask. This book is about unmasking power.*

Back cover: *Excerpt from Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report, 30 September 2020. The experts showed courage and incision by challenging power in the International Criminal Court system in their report.*

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Negotiating the Crime of Aggression: Between Legal Autonomy and State Power

Marieke de Hoon*

11.1. Introduction

On 17 July 2018, the jurisdiction of the International Criminal Court ('ICC') over the crime of aggression was activated.[1] With the crime of aggression, the ICC can prosecute State leaders for resorting to armed force against another State. Coming to agreement on whether the ICC would have jurisdiction over the crime of aggression, how the crime of aggression would be defined, and how long the arm of the ICC would be in relation to States that opposed this expansion of the ICC's reach, proved, however, to be a long and arduous road.

This chapter analyses why this is the case. While the chapter offers insights into the legal question of what the definition and criminalization of aggression provides, its main aim is to address the socio-legal questions of how the notion and crime of aggression was constructed, what reasons were invoked to argue for different positions in the negotiation process, and what can be learned from this process for the construction of international criminal justice norms at large.

To that end, the chapter discusses the negotiation history of the crime of aggression. It thereby focuses on the role of States and of diplomats or representatives that function as legal entrepreneurs or norm con-

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1 ICC, Activation of the Jurisdiction of the Court over the Crime of Aggression, Resolution ICC-ASP/16/Res.5, 14 December 2017 (http://www.legal-tools.org/doc/6206b2/).

structors when they negotiate international criminal justice's norms. The analysis is based on discourse analysis of the reports and documents relating to the negotiation history of the establishment of the United Nations ('UN') in 1945, the 1945 London Conference, the 1945 Nuremberg Tribunal, the 1974 Definition of Aggression adopted by the UN General Assembly, the 1998 Rome Statute of the ICC, the 2010 Kampala amendment to the Rome Statute, and the 2017 activation decision of the ICC's crime of aggression in New York. Moreover, participant observations at the diplomatic meetings in Kampala in 2010, in several other sessions of the Assembly of States Parties ('ASP') to the ICC, and at the 2017 New York decision contribute to the analysis.

This chapter has two aims: first, to provide insight into how the crime of aggression was negotiated and what considerations lay behind some of the key elements to the provision; and second, to provide a case study into how norm negotiators navigate between State power and (supra-State) legal autonomy in the construction of the international legal order.

The argument that is developed in this chapter shows that the construction of the crime of aggression, and international criminal justice as such, generates a clash between (State) power and (supranational) legal autonomy. The crime of aggression's negotiation history illustrates well the tensions at the crossing point of the horizontality of the international legal order of independent, autonomous and equal sovereign States on the one hand, and the verticality of the international legal order as a shared aspiration to jointly address serious human rights violations and conflict on the other. It comprises an intersection of both the desire to retain autonomy (leaving for themselves the possibility and legal space to use force) and the desire to allow the international legal order to prevent others from using aggressive force against oneself or allies or in other manners inconsistent with national or international interests.

11.2. Creating a United Nations Against Aggression

During the creation of the UN in 1945, the question of how to define 'aggression' already caused much contention. Having just experienced two major world wars and a failing League of Nations that was created after the first, the UN's primary purpose would be "to maintain international peace and security; and to that end to take effective collective measures

for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace".[2]

Collectively addressing aggression was thereby placed at the centre of the UN's tasks. While the UN comprised of separate, sovereign and equal States, the idea behind the UN was that the world would act as a united front against those that threatened international peace and security, which was considered the gravest violation of international relations. Yet, States could not agree on how to define aggression. Behind that disagreement lay fundamental dilemmas: What distinguishes aggression from lawful or legitimate war? Who should decide this in a concrete situation: States themselves or a supra-State authority, and if the latter, a judicial or political body?

Not only how to define aggression, but even the question whether a definition should be included in the UN Charter at all, consequently caused considerable contention.[3] Those opposing the inclusion of a definition of aggression were in the majority, led by the United States ('US') and the United Kingdom ('UK'). After protracted discussion, any definition of aggression was omitted from the UN Charter and it was decided to "leave to the [Security] Council the entire decision as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression".[4] With this conclusion, the UN Charter was born, as well as the discussion that prolongs to date on where the distinguishing line lies between *illegal* (but not aggressive) use of force on the one hand and *aggressive* use of force on the other, and who decides if not each State for itself.

The next sections show how this discussion evolved over the period from the Second World War until the recent activation of the ICC's crime of aggression. Over and over again, the reluctance to provide legal autonomy to a supranational legal body to decide over aggression returned at the negotiation table. Repeatedly, different ways to mask this reluctance and disagreement in legal texts were found and presented as resolution. By 17 July 2018, the ICC may exercise jurisdiction over the crime of ag-

2 Proposals for a General International Organization, Washington Conversations on International Peace and Security Organization, 7 October 1944, chap. I, Article 1.

3 Benjamin B. Ferencz, *Defining International Aggression. The Search for World Peace: A Documentary History and Analysis*, vol. 1, Oceana Publications, New York, 1975, p. 39.

4 Report of M. Paul-Boncour, Rapporteur, on Chapter VIII, Section B, in *Documents of the United Nations Conference on International Organization*, United Nations Information Organizations, San Francisco, 1945, vol. 12, p. 448.

gression, following exhaustive negotiations in the ASP where 'clocks had to be stopped' both in 2010 in Kampala and in 2017 in New York. In the end, however, consensus agreements followed, which were celebrated as historic achievements for the purpose of suppressing aggression. Nevertheless, this chapter argues that while it certainly is a breakthrough that the ICC may exercise jurisdiction over aggression, the message of progress, resolution and consensus is not as complete as it may appear: fundamental issues remain unresolved today as they did in the preceding decades.

11.3. Prosecuting World War II Aggressors in Nuremberg and Tokyo

Should the ICC indeed prosecute individuals for the crime of aggression, they would not be the first. In parallel to the negotiations of the UN Charter, discussions took place on whether and how to punish Nazi and Japanese leaders for their role in the atrocities and aggressive warfare during the Second World War. The victorious States – the US, the UK, France and the Soviet Union ('USSR') – came together between June and August 1945 in what is now known as the London Conference, and agreed on setting up the Nuremberg Tribunal. They drafted the Charter[5] and decided that this Tribunal would charge Nazi leaders with aggression – then called 'crimes against peace' – as a criminal act.[6] They would subsequently also create the Tokyo Tribunal, prosecuting Japanese leaders for the same crimes.

In addition to the four allied powers, the Charter of the Nuremberg Tribunal was adhered to by 19 nations[7] and subsequently received the approval of the UN General Assembly. This Charter formed the basis of the criminal indictments of the leaders of the Nazi regime who were charged

[5] Charter of the International Military Tribunal ('IMT'), 7 August 1945 (https://www.legal-tools.org/doc/64ffdd).

[6] "American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945", in Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials: London, 1945*, US Department of State, Pub. 3080, Washington, D.C., 1949, pp. 24, 27.

[7] Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela, and Yugoslavia, see letter of Robert H. Jackson, 29 December 1947 (on file with the author). However, Paraguay and Uruguay are not mentioned by Jackson in the records of the trial proceedings, see IMT, *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946*, vol. II, Nuremberg, 1947, p. 143 (https://www.legal-tools.org/doc/3c08b1).

with personal responsibility for aggressive war. However, nowhere in the eventual Charter was aggression further defined.

The French and the Russians were against defining aggression in the Charter, whereas the representatives of the UK and the US found it essential, despite earlier effort to leave it out of the UN Charter. Sir David Maxwell Fyfe of the UK and Justice Robert Jackson of the US argued that for the purpose of criminal trials, not having a definition of aggression and precise specification of the elements of the crime would allow for successful defence strategies such as anticipated self-defence and other arguments why the acts undertaken would not constitute aggression.[8]

An underlying contention in this debate was the disagreement whether aggression was a crime under international law at all. The US and the UK argued that it was, based on international instruments such as the 1924 Geneva Protocol, the 1927 League of Nations Resolution on Aggression, and the 1928 Kellogg–Briand Pact. These agreements showed that international law had the goal "to make war less attractive to those who have governments and the destinies of people in their power".[9] Accordingly, from these treaties it could be derived, the US and the UK argued, that aggressive war was both a violation of international law (at least for the States Parties thereto) and a crime.

France, represented by Professor André Gros, believed that this was too expansive a view of international law and did not see how these agreements could be considered legal foundations for a criminal provision, nor were the French interested in creating such international law that would create precedence for future supranational judicial authority.[10] Their proposal was to keep the provision vague and without the term 'criminal' or 'crime'. They suggested that the Tribunal would have jurisdiction over those who directed the preparation and conduct of "the policy of aggression […] in breach of treaties and in violation of international law",[11] and refrain from defining the notion of aggression further.

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8 "Minutes of Conference Session of July 19, 1945" ('Minutes of 19 July 1945'), in Jackson, 1949, p. 300, see above note 6; see also Ferencz, 1975, vol. 1, pp. 378-379, 387, 392, see above note 3.

9 "Report to the President by Mr. Justice Jackson, June 6, 1945", in Jackson, 1949, p. 53, see above note 6.

10 Minutes of 19 July 1945, p. 297, see above note 8.

11 "Draft Article on Definition of "Crimes", Submitted by French Delegation, July 19, 1945", in *ibid*., p. 293.

Likewise, General Nikitchenko of the Soviet Supreme Court also did not want the Tribunal to come up with a definition of aggression. The primary concern of the USSR was to punish the Nazi criminals and not to create international law for the future, which may turn out to be opposed to the USSR's national interest. Moreover, Nikitchenko argued that if the delegates that discussed the issue of aggression at the creation of the UN had been unable to define aggression, those drafting the Nuremberg Charter should not do it either. If the drafters of the Nuremberg Charter would formulate a definition, he argued, it would set the door open for arguments of inconsistent interpretations on what was or was not a crime under international law.[12] The Soviet delegation therefore supported the French proposal that did not include a definition.

Eventually, the parties to the London Conference could not agree on whether or not to include a definition of aggression. They compromised in the end that the crime of aggression was included (then called crimes against peace) but not a definition of what it was. Instead, the judges would be referred to the relevant treaties that did exist, following the argument made by the US and the UK.[13]

The resulting Article 6(a) of the Nuremberg Charter provides:

> The Tribunal […] shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.[14]

In his opening statement when the Nuremberg Trial commenced, Justice Robert Jackson, who had by then become the prosecutor for the United States, denounced aggressive war as "the greatest menace of our

[12] Minutes of 19 July 1945, p. 297, see above note 8.

[13] Ferencz, 1975, vol. 1, pp. 394-396, see above note 3.

[14] Charter of the IMT, Article 6, see above note 5.

times".[15] And the Tribunal concluded in the beginning of the judgment that:

> [t]he charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. 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.[16]

On that basis, the Nuremberg Tribunal and later the Tokyo Tribunal prosecuted Nazi and Japanese leaders for committing aggression.

The defence attorneys of these leaders argued that at the time when the alleged criminal acts were committed, aggressive war was not generally considered a crime, that no statute had defined aggressive war, that no penalty had ever been fixed for its commission, and that no prior court had ever been established to try the offence. Therefore, they argued, prosecuting the defendants was in violation of criminal law's fundamental principle of legality.

However, the judges of the Nuremberg Tribunal – and subsequently also those of the Tokyo Tribunal (although with vehement dissenting opinions by Judges Pal and Röling, see below for a discussion) – did not accept the defence's arguments. Instead, the Nuremberg Tribunal (followed by the Tokyo Tribunal) declared that it found that the Charter was an expression of international law existing at the time of the commission of the indicted acts, and not, as the defendants had argued, an arbitrary exercise of power on the part of the victorious nations.[17] The core of this decision lay in the argument that the nations who signed the Kellogg–Briand Pact, including Germany, unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it.[18] Accordingly, this "renunciation of war as an instrument of national policy

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15 Robert H. Jackson, "Opening Address for the United States", in Ferencz, 1975, vol. 1, p. 437, see above note 3.

16 IMT, *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946*, vol. I, Nuremberg, 1947, p. 186 (https://www.legal-tools.org/doc/f21343).

17 *Ibid*., p. 218.

18 *Ibid*., p. 220.

necessarily involves the proposition that such a war is illegal in international law",[19] the judges concluded.

The Nuremberg Tribunal lasted from November 1945 to October 1946 and ruled that the invasion of Austria, on 12 March 1938, was a premeditated aggressive step in furthering the carefully prepared plan to wage aggressive wars against Czechoslovakia, Poland, Norway, Denmark, Belgium, the Netherlands, Luxemburg, Yugoslavia, Greece, and the USSR.[20] In this major trial against the Nazi leadership, eight defendants were found guilty for committing crimes against peace.[21] In the subsequent trials under Control Council Law No. 10,[22] another 52 defendants were charged with crimes against peace, of which five were convicted. In the *Ministries* case, aggression was considered at length and the Nuremberg Military Tribunal went a step further than the original Nuremberg Tribunal.[23] Whereas the original Nuremberg Tribunal had found that the *Anschluss* of Austria in 1938, whereby Austria was incorporated by Germany, was not as such an act of aggression,[24] the Tribunal in the *Ministries* case argued against that ruling and decided that it was an act of aggression, since it would not be reasonable to assume that the nature of the invasion depended on whether it was met with military resistance or not.[25] In addition, the *Ministries* judgment considered that the defence of "military necessity was never available to an aggressor as a defense for invading the rights of a neutral".[26]

In these judgments, some contours emerged of what the crime of aggression for which Nazi leaders were sentenced to death actually en-

19 *Ibid*.

20 *Ibid*., pp. 194-215.

21 Göring, Hess, Keitel, Jodl, Von Neurath, Von Ribbentrop, Rosenberg, and Raeder.

22 Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945 (http://www.legal-tools.org/doc/ffda62/).

23 Ferencz, 1975, vol. 1, p. 44, see above note 3.

24 In the opinion of the original Tribunal, the *Anschluss* had been an 'aggressive step' in furthering the plan to wage aggressive war.

25 Nuremberg Military Tribunals ('NMT'), *The Ministries Case*, Judgment, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10: Nuremberg, October 1946–April 1949*, vol. XIII, US Government Printing Office, Washington, DC, 1952, p. 331 (www.legal-tools.org/doc/eb20f6/).

26 *Ibid*., p. 334.

tailed. Nowhere, however, did the Nuremberg Tribunal or the subsequent trials define concretely what 'aggressive war' was.[27]

Neither did the Tokyo Tribunal. On 26 July 1945, the Republic of China ('ROC'), the US and the UK signed the Potsdam Agreement in which they demanded Japan's unconditional surrender, warning that if Japan would not surrender, it would face "prompt and utter destruction", and announcing that "stern justice shall be meted out to all war criminals".[28] On 14 August 1945, six days after the US dropped the second atomic bomb on Nagasaki, Japan surrendered. At the subsequent Moscow Conference in December 1945, the USSR, the UK and the US (with concurrence of the ROC) granted General MacArthur, as Supreme Commander of the Allied Powers, the authority to "issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and all directives supplementary thereto".[29] Acting pursuant to this authority, General MacArthur issued a special proclamation in January 1946 that established the International Military Tribunal for the Far East (the Tokyo Tribunal), and its Charter. Like the Nuremberg Tribunal, the Tokyo Tribunal had jurisdiction to try individuals for crimes against peace, war crimes, and crimes against humanity. The Tokyo Tribunal had jurisdiction over a longer period than the Nuremberg Tribunal, namely from Japan's invasion of Manchuria in 1931 to its surrender in 1945.

The Tokyo Trials took place from May 1946 to November 1948. In general, the Tokyo Tribunal has been reviewed critically by most commentators and is particularly famous for its strongly worded dissenting opinions.[30] Most particularly, the dissenting opinions of Judges Pal and Röling submitted that the crime of aggression did not exist under the international law of the time.[31] Judge Röling argued that the Japanese were

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27 Ferencz, 1975, vol. 1, p. 42, see above note 3.

28 Proclamation Defining Terms for Japanese Surrender, 26 July 1945 (http://www.legal-tools.org/doc/f8cae3).

29 US Department of State, Office of the Historian, "Milestones 1945-1952", available on its web site.

30 See, for instance, Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press ('OUP'), Oxford, 2008; Kirsten Sellars, "Imperfect Justice at Nuremberg and Tokyo", in *European Journal of International Law*, 2010, vo. 21, no. 4, pp. 1085-1102 and Kirsten Sellars, "William Patrick and 'Crimes against Peace' at the Tokyo Tribunal, 1946-48", in *Edinburgh Law Review*, 2011, vol. 15, no. 2, pp. 166-196.

31 Sellars, 2010, p. 1097, see above note 30.

being tried for 'political crimes'. Moreover, Judge Pal stated that the distinction between aggressive and defensive wars was of purely "propagandist relevance",[32] that it was defeat rather than aggression that was criminalized, and that aggression was a political act falling outside of the realm of legality.[33] He asserted that the criminalization of aggression was simply a way of freezing the status quo, and thus revealing international law as a project for stabilizing and securing existing power distributions within international society.[34] Nevertheless, the majority decision followed the example of the Nuremberg Tribunal and convicted the Japanese leaders for aggression, without defining clearly what the elements of the crime of aggression were and how to distinguish aggression from non-aggressive use of force. For that, the world looked at the UN to clarify and to decide if and how future prosecutions for aggression would be conducted.

11.4. Defining Aggression in a Polarized World: Negotiating the 1974 Definition of Aggression

To get a more specific definition of aggression than could have been agreed on so far, the UN General Assembly directed the Committee on the Codification of International Law to formulate a codification of "offences against the peace and security of mankind"[35] shortly after the UN was created. Decades of protracted and fundamental disagreement followed. Nevertheless, in 1974, the General Assembly adopted a consensus resolution called the "Definition of Aggression".[36]

This section provides analysis of those negotiations. This is not only insightful for understanding how in various ways the same tension between legal autonomy and State power re-emerged, but also for understanding the ICC's crime of aggression provision, which is to large extent based on the 1974 agreement.

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[32] Radha Binod Pal, *Crimes in International Relations*, University of Calcutta Press, Kolkata, 1955, p. 264; Gerry Simpson, *Law, War and Crime*, Polity Press, Cambridge, 2007, p. 15.

[33] International Military Tribunal for the Far East, *United States of America et al. v. Araki Sadao et al.*, Judgment of The Honorable Mr. Justice Pal, Member from India, 31 October 1948 (http://www.legal-tools.org/doc/712ef9/).

[34] Simpson, 2007, p. 147, see above note 32.

[35] Affirmation of the Principles of International Law Recognised by the Charter of the Nurnberg Tribunal, 11 December 1946, UN Doc. A/RES/95(I) (http://www.legal-tools.org/doc/bb7761/).

[36] Definition of Aggression, 14 December 1974, UN Doc. A/RES/3314(XXIX) ('Definition of Aggression') (https://www.legal-tools.org/doc/95a6b0/).

11.4.1. Special Committee after Special Committee

Having been tasked with defining aggression shortly after the creation of the UN in 1945, by 1947, the Committee on the Codification of International Law had concluded that it had failed to come to agreement and recommended the establishment of the International Law Commission ('ILC') to deal with this problem.[37] After this, very little progress had been made due to rising tensions between the USSR and its former war time allies. Despite having opposed the inclusion of a definition of aggression during the London Conference for establishing the Nuremberg Tribunal, the USSR now proposed to come to a definition of aggression in order to eliminate justifications for aggressive wars that it feared and was facing.[38] However, the US also turned position yet again and with France and Canada now led the protest against any form of a fixed definition.[39] They argued that the determination of aggression should be up to the discretion of the Security Council.[40]

Several reports followed. In 1952, the 15-member First Special Committee on the Question of Defining Aggression was established.[41] Its report summarized many of the problems but was unable to reconcile many of the differences.[42] Argentina and Denmark, for instance, were doubtful that a definition would be progress at all. Others expressed general support for a definition (France had moved to this camp now), some in favour of a detailed one (the USSR).[43] Amid the deadlock, a new Second Special Committee on the Question of Defining Aggression was established, consisting of 19 members.[44] At the same time, there had also been a committee that considered 'international criminal jurisdiction', in

[37] UN Sixth Committee, Report of the Committee on the progressive development of International Law and its codification, 20 November 1947, UN Doc. A/504.

[38] Duties of States in the event of the outbreak of hostilities: draft resolution on the definition of aggression, Union of Soviet Socialist Republics, UN Doc. A/C1/608, 4 November 1950.

[39] Ferencz, 1975, vol. 2, p. 2, see above note 3.

[40] *Ibid*.

[41] Question of Defining Aggression, 20 December 1952, UN Doc. A/RES/688(VII) (https://www.legal-tools.org/doc/766be2/).

[42] Report of the Special Committee on the Question of Defining Aggression, 24 August – 21 September 1953, UN Doc. A/2638.

[43] Comments received from Governments regarding the report of the Special Committee on the Question of Defining Aggression, 6 August 1954, UN Doc. A/2689.

[44] Question of Defining Aggression, 4 December 1954, UN Doc. A/RES/895(IX) (https://www.legal-tools.org/doc/47b440).

which the establishment of an international criminal court was discussed. The General Assembly decided to defer any consideration of such an international criminal court as well as discussion on the Draft Code of Offences against the Peace and Security of Mankind that the ILC was working on, until the new Special Committee would produce its report. They were eventually deferred for many years.[45]

This Second Special Committee produced a report that examined the desirability, the functions, the kinds of activity covered, and the various types of definitions.[46] In the meantime, the USSR, supported by the armed forces of its satellite States, had invaded Hungary to suppress a revolt, on which the UN had been unable to act. War also erupted in the Middle East between Egypt and Israel and around the Suez Canal, as well as in Vietnam where the US tried to fight communist forces. By 1957, very little progress had been made.[47] The same differences of opinions existed between those in favour of and those opposed to a definition. To some members, the growing international tension required a clear definition of aggression. Others – such as the US, the UK, Japan, the ROC, and Canada – argued that a definition might make peace more difficult, since they thought a definition would restrict the discretion that the Security Council and the General Assembly possessed under the UN Charter.[48] Most members wanted to postpone the matter, and the US now proposed that it would be postponed indefinitely.[49]

For several years, the issue was adjourned because there was no change of attitude. Still another new committee, the Third Special Committee, was formed with 21 members in 1959.[50] Nevertheless, it took until 1967 before the Committee actually met with a view to defining aggression. Meanwhile, even more tensions had arisen throughout the world, and many accusations of aggression were expressed. The conclusion reached by the Third Special Committee was to establish yet another committee, the Fourth Special Committee, consisting of 35 members,

45 International Criminal Jurisdiction, 14 December 1954, UN Doc. A/RES/898(IX) .

46 Question of Defining Aggression: Report of the 1956 Special Committee: Report of the 6th Committee, 27 November 1957, UN Doc. A/3756 ('Report of the Sixth Committee').

47 Ferencz, 1975, vol. 2, p. 6, see above note 3.

48 Report of the Sixth Committee, see above note 46.

49 UNGA Doc. A/C.6/L.402.

50 Question of Defining Aggression, UN Doc. A/RES/1181(XII), 29 November 1957 (https://www.legal-tools.org/doc/852ceb).

"taking into consideration the principle of equitable geographical representation and the necessity that the principal legal systems of the world should be represented".[51]

The Fourth Special Committee started its work in 1968 and would eventually agree on a consensus definition in 1974, subsequently adopted by the General Assembly.[52]

11.4.2. Producing Consensus on Whether to Define Aggression

Even though there were many disagreements on different issues – including whether there should be a definition at all – the Fourth Special Committee met several times and its members continued their discussion. On 6 July 1968, they voted (with no votes against and eight abstaining) for a resolution that the Committee would continue its work "so that it can complete its work by submitting a report containing a generally accepted draft definition of aggression".[53] Many interpreted this as a consensus that it was *possible* to draft some form of definition of aggression. However, for some years after, several States continued to express their reservations on the possibility and desirability of defining aggression.

The reasons why the represented States eventually agreed to come to a definition varied. Some representatives argued that a legal definition of aggression would provide necessary guidance for States and for the UN and particularly its Security Council. For others, a definition of aggression was necessary to quell or manage existing international tensions that grew out of the aggressive policies of imperialist and colonialist States. The absence of a definition of aggression, they argued, had made it easier to commit "crimes against the peoples of dependent countries in all parts of

[51] Needs to Expedite the Drafting of a Definition of Aggression in the Light of the Present International Situation, 18 December 1967, UN Doc. A/RES/ 2330(XXII) ('Resolution 2330(XXII)') (https://www.legal-tools.org/doc/e9b6d2).

[52] The Committee was set up by Resolution 2330(XXII) that provided that the task of the Committee was to submit specific proposals for the definition of aggression, Report of Special Committee, Question of Defining Aggression, 1968, UN Doc. A/7185/Rev. 1, p. 12. The members of this Committee were Algeria, Australia, Bulgaria, Canada, Colombia, Congo (Democratic Republic of), Cyprus, Czechoslovakia, Ecuador, Finland, France, Ghana, Guyana, Haiti, Indonesia, Iran, Iraq, Italy, Japan, Madagascar, Mexico, Norway, Romania, Sierra Leone, Spain, Sudan, Syria, Turkey, Uganda, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, and Yugoslavia.

[53] Report of Special Committee, Question of Defining Aggression, 1968, pp. 34-35, see above note 52.

the world, to carry out acts of military aggression against national liberation movements, and to intervene forcibly in the domestic affairs of other States".[54] Most representatives, however, used a normative argument, in that a definition of aggression could constitute a legal and political indictment of aggression in any form. The definition would be of fundamental importance for the development of international law, for the maintenance of international peace and security, and as a moral authority.[55] Many also emphasized the expressive effect: a definition would reinforce the idea that aggression is an international crime and it would help create the system of collective security.[56]

Several representatives argued that what was needed was not a definition but, instead, the *application* of the existing collective security system. The reason that aggression occurred, they asserted, was the lack of willingness of Member States to respect their UN Charter obligations. A definition would, in their view, create "an illusion of accomplishment when none in fact had been made".[57] Another argument against was that a legal definition would function as a signpost to commit those acts that were not included but may be just as aggressive or even worse, and that it would provide the argument that these would not constitute aggression since these acts were not expressly provided for in the definition and that thus the intention of the drafters would have meant to exclude them from the definition, when instead, the States involved could simply not agree on them and thus decided to keep it open.[58]

In the 1969 sessions, three proposals for defining aggression were submitted for discussion. The first proposal was from the USSR,[59] which other States critiqued particularly for extending the concept of aggression

[54] *Ibid*., p. 13.

[55] *Ibid*., p. 18.

[56] *Ibid*.

[57] *Ibid*.

[58] *Ibid*., p. 19. See also Julius Stone, *Conflict through Consensus: United Nations Approaches to Aggression*, Johns Hopkins University Press, Baltimore, 1977; and Martti Koskenniemi, "A Trap to the Innocent…", in Claus Kreß and Stefan Barriga (eds.), *The Crime of Aggression – A Commentary*, Cambridge University Press ('CUP'), Cambridge, 2016. See also Julius Stone, "Hopes and Loopholes in the 1974 Definition of Aggression", in *American Journal of International Law*, 1977, vol. 71, no. 2, pp. 224-246.

[59] Report of the Special Committee on the Question of Defining Aggression, 24 February – 3 April 1969, UN Doc. A/7620, para. 9 ('Report of the Special Committee, 1969').

to indirect and non-armed aggression.[60] The second proposal was submitted by 13 countries: Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay, and Yugoslavia. This draft specifically excluded acts of indirect aggression, "subversive and/or terrorist acts by irregular, volunteer or armed bands organized or supported by another State", as acts against which recourse to self-defence under Article 51 of the UN Charter was allowed. This was to keep the exceptions to the prohibition to use force limited, in fear of creative argumentation to broaden the argumentative scope for self-defence.[61] Moreover, unlike the Soviet proposal, the 'Thirteen-Power proposal' did not specify whether the legal consequences for acts of aggression would include criminal responsibility for individuals. The third proposal was submitted by six countries: Australia, Canada, Italy, Japan, the UK, and the US. Like the Thirteen-Power proposal, it was silent on the kind of legal consequences for either States or individuals that had perpetrated aggression. The 'Six-Power proposal' was particularly critiqued for requiring aggressive intent, which would, according to many States, provide for the possibility to justify prohibited use of force by arguing that it was not done with bad intent, such as with what is now called 'humanitarian intervention'.

The three proposals were skilfully used to create consensus and thereby became a game-changer. The six States that had formulated the Six-Power proposal had previously been opposed to defining aggression at all. By now focusing instead on what was in the proposal, and on the differences between the three proposals for defining aggression, the issue of whether or not to have a definition was cleverly bypassed, and from then on disappeared from the agenda. Moreover, since all three proposals had included non-exhaustive lists of examples of acts of aggression, it was fairly easily decided that a definition of aggression would also include a non-exhaustive list of acts, although the exact wording would take until 1974 to be settled.

Smaller sub-committees, working groups, contact groups and eventually drafting groups were created with specific and confined mandates to talk about details of the provision, within the framework of a definition.

60 *Ibid*., para. 26.

61 *Ibid*., para. 10.

The issues they dealt with became increasingly smaller, taking the larger contentions off the table, and postponing at strategic moments.

As a result, at the end of the 1971 meeting, there was general agreement that there should be a definition of aggression. The detailed discussions in sub-groups led to a consensus text, which was subsequently adopted by the UN General Assembly as the definition of aggression. Since Article 8*bis*(2) of the amended Rome Statute[62] reflects Articles 1 and 3 of this 1974 Definition of Aggression, the 1974 definition largely functions as the basis for the ICC's crime-of-aggression amendment that was activated in 2018. The next sub-section zooms in on how some of the most disagreed upon issues were negotiated and brought towards specific provisions that States could agree on.

11.4.3. Agreeing to Disagree and the Role of the Security Council

The issues that the negotiators disagreed on most were – in addition to whether there should be a definition at all – (i) the premise that the first one to use armed force is the aggressor (the principle of priority); (ii) whether 'aggressive intent' should have a place in the definition; (iii) whether the definition should focus on State acts or also those of non-State actors, even if not attributable to States; (iv) whether and what kind of legal responsibility should arise for the acting State and/or individual; and, in general, (v) how to define aggression.

The agreed upon text in the 1974 definition includes as its Article 1 that:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.[63]

Article 3 then provides a list of acts that qualify as acts of aggression, such as an invasion, bombardment and blockade of a port. These two provisions are also included in the ICC's crime-of-aggression amendment.

The key to coming to an agreed upon text in 1974, however, lay not so much in Articles 1 and 3 but in Articles 2 and 4. As mentioned, there had been a lot of disagreement on many topics, such as the principle of

[62] Rome Statute of the International Criminal Court, 17 July 1998, Article 8*bis* ('Rome Statute') (http://www.legal-tools.org/doc/7b9af9).

[63] Definition of Aggression, Article 1, see above note 36.

priority and the need for aggressive intent. Those that opposed the inclusion of aggressive intent argued that it would allow justifications for illegal force by claiming there was not the required intent and that it would invite war,[64] because aggressors would always claim that their goal was legitimate.[65]

In the end, they agreed on the following formulation of Article 2:

> The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity. [66]

Article 4 follows the list of examples of acts of aggression in Article 3 and provides that "[t]he acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter". [67]

Articles 1 and 3 therefore give direction to how the notion of aggression is to be understood; in Article 2, States agreed that the first to use force is (only) *prima facie* assumed the aggressor; and aggressive intent was not included in the definition of aggression. However, the key to Articles 2 and 4 is the role of the Security Council. These provisions provide that in the end, the Security Council may decide that a presumed aggressor is absolved (Article 2) or that acts not listed in Article 3 may still amount to aggression (Article 4). In short, what is determined as aggression is up to the UN Security Council. Moreover, this provides the ability for the Security Council's permanent members to 'veto away' an allegation towards themselves or their allies. It thereby provided sufficient State power over any possible supranational power for those States to agree to the 1974 text.

Statements that representatives made on Article 2 showed that States interpreted the text fundamentally differently, even when they ap-

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64 Report of the Special Committee on the Question of Defining Aggression, 13 July – 14 August 1970, UN Doc. A/8019, para. 37.

65 Report of the Special Committee, 1969, para. 70, see above note 59.

66 Definition of Aggression, Article 2, see above note 36.

67 *Ibid*., Article 4.

parently reached their consensus agreement. For example, Romania and Yugoslavia declared that they understood this provision in the sense that the State who uses armed force first was committing an act of aggression, and that this State would be exculpated only if the Security Council was able to reach a decision that 'other relevant circumstances' led to a different conclusion. The US and the UK, however, claimed that Article 2 meant that the first use of force only gives *prima facie* evidence to a determination, meaning that the Security Council had to make a determination on whether or not an act of aggression was committed. They argued that if the Security Council would not be able to come to a decision that there had actually been an act of aggression, the Security Council must be presumed not to have found the *prima facie* evidence to be persuasive. The UK added that the first use of force should by no means be the sole or determinative piece of evidence.[68] Therefore, while States could agree on the textual provision of Article 2 (in light of the resolution as a whole), at the moment of coming to that 'agreement', there was in fact no real agreement on the role of the Security Council and on who the aggressor could be in a particular situation.

Another example of prolonged disagreement, as mentioned, was whether non-State actors such as terrorists could commit aggression (and consequently, whether States have the right to use force in self-defence against them and addressing terrorists would be part of the Security Council prerogative). The agreement that was reached was too restricted to some and too stretched for others. Article 3(g) provides that as acts of aggression also qualified:

> [t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[69]

It thereby provides that the definition of aggression applies to acts of non-State actors (only) if there is a significant link with the State – in particular, if the non-State groups are *sent* by or on behalf of a State and the acts are of sufficient gravity. For the 13 powers who had focused on excluding the right to self-defence against subversive and other non-State

[68] Report of the Special Committee on the Question of Defining Aggression, 11 March – 12 April 1974, UN Doc. A/9619, 1974, p. 31.

[69] Definition of Aggression, Article 3(g), see above note 36.

actors (and thus to exclude acts of non-State actors from the definition of aggression), this was sufficiently restricted to compromise on. For the USSR who had wanted to include non-State actors, Articles 2 and 4 provided sufficient space to use its powers in the Security Council to accept the compromise as it did for the other permanent members of the Security Council. Thereby, Articles 2 and 4 allowed for a resolution between the various views, because it provides that the Security Council can both decide that a determination of aggression would not be justified (Article 2) and thus restrict the application of aggression to non-State actors, as well as stretch the scope because in accordance with Article 4, the acts listed in Article 3 are not exhaustive and the Security Council has the power to determine other acts to be aggressive.[70]

11.4.4. The Legal Consequences of Committing Aggression

Another tough hurdle in the negotiation towards a definition of aggression concerned the legal consequences for aggressors. In particular, States disagreed on whether committing aggression constituted a crime. Those that were in favour argued that contemporary customary international law accepted that principle.

They referred to the Nuremberg and Tokyo Tribunals, and that their principles that had been widely accepted by States.[71] This was considered a rather weak argument by others, since in San Francisco the founding members of the United Nations had been unable to reach agreement on whether or not legal consequences should be attached to aggressive use of force. Those representatives that were against inserting any provision on the legal consequences of aggression expressed grave doubts regarding the necessity of such an article. They argued that whether and to what extent responsibility arises belonged to the law of State responsibility, but not the search for a definition of aggression.[72]

Eventually, consensus was reached, and Article 5(2) reads as follows: "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility".[73] The crux lay in the inser-

[70] Report of the Special Committee on the Question of Defining Aggression, 25 April – 30 May 1973, UN Doc. A/9619, Article 4 ('Report of the Special Committee, 1973a').

[71] Report of the Special Committee on the Question of Defining Aggression, 10 December 1973, UN Doc. A/9411, para. 29.

[72] *Ibid*., para. 30.

[73] Definition of Aggression, see above note 36.

tion of the word 'war' rather than 'act' of aggression. Many representatives thought it was a mistake to introduce the new expression 'war of aggression' here instead of 'act of aggression' that was used in the rest of the text. The Spanish delegate, for instance, stated that the reference to a *war* of aggression could not be interpreted to mean that that concept had been adequately defined by the definition of aggression and found it a vulnerable point in the draft.[74] Yugoslavia (along with the USSR) likewise expressed its disappointment on the use of the phrase and stated that it would have liked to see an act of aggression as a crime against international peace, which would more accurately have followed the Nuremberg and Tokyo precedents. According to Yugoslavia, this wording would create a way to argue that an act of aggression is not a crime. Bulgaria shared its concern for omitting to provide that 'aggression' rather than a 'war of aggression' was a crime against international peace. Likely, this was exactly why those opposed to connecting the term 'crime' to 'act of aggression' could agree to Article 5(2). By changing 'acts of aggression' into a 'war of aggression', enough leeway would exist within the definition to argue that certain prohibited uses of armed force do not qualify as wars of aggression, and are therefore not the worst imaginable offence, and thus not a crime of aggression.

The final statements on Article 5(2) after reaching the consensus indeed showed that, rather than agreeing on what legal consequences followed for those committing aggression, the 'consensus agreement' entailed an agreement on a text that was interpreted in accordance with various views on the matter. For example, while various States concluded that the definition had reiterated that aggression was a crime, the Japanese representative concluded that, at least for the time being, Article 5(2) only referred to State responsibility and that the question of individual responsibility for an act of aggression should be left for future study.[75] France agreed on this point and added that the text was acceptable to the extent that it "merely noted the present status of international law without prejudging its development".[76] Australia pointed out that it had been anxious that any reference to criminal responsibility should not be construed as implying any individual responsibility, which the present text in Austral-

74 Report of the Special Committee, 1973a, p. 19, see above note 70.

75 *Ibid*., p. 16.

76 *Ibid*., p. 21.

ia's view did not. Notably, the US and the UK read in this provision a continued validity of the principles which formed the basis of the Nuremberg and Tokyo Tribunals, as well as State responsibility.[77]

11.4.5. Consensus Reached

The 1974 Definition of Aggression thus maintained different interpretations of what exactly constituted an act of aggression and its legal consequences. It moreover pointed to the Security Council to decide on these matters in concrete situations. Those partaking in this deliberative practice agreed on what they could, inserted some textual provisions to mask what was still disagreed on, and delegated the decision on these disagreements in concrete situations elsewhere, in the political playing field where this discursive practice continued, with the Security Council as its institutionalized space.

The purpose of this 1974 definition was fourfold: i) to serve as a guideline to the Security Council, ii) to deter the aggressor from taking the proscribed acts, iii) to help mobilize public opinion in case of aggression, and iv) to help facilitate immediate assistance to States that are victim of aggression by other States.[78]

The history of the following decades showed that the definition did not meet any of its four purposes. Instead, it was widely regarded as vague and toothless, or, in more euphemistic diplomatic terms, 'constructively ambiguous'. This celebrated vagueness was well captured by the statement of the UK during the discussion of the final draft, when it observed that the definition did not have the binding force of domestic law and constituted a "valuable guidance to the Security Council – no less and no more – in performing its functions under Article 39 of the Charter".[79]

With that, three decades of negotiation finished, a consensus was reached, and disagreement of what aggression is and amounts to was left unsettled, or, more precisely, left to be settled in the political arena, away from the sphere of an autonomous legal realm that could seriously intrude on State power. Not surprisingly, the same disagreements raised their head again in the context of the ICC's discussion on the crime of aggression.

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77 *Ibid*., pp. 24, 32.

78 Louis B. Sohn, "Introduction", in Ferencz, 1975, vol. 1, p. 1, see above note 3.

79 Report of the Special Committee, 1973a, p. 31, see above note 70.

11.5. Constructing the Crime of Aggression Within the Rome Statute

11.5.1. From 1974 to 2018: Producing "An Emerging Consensus"

After 1974, the debate on aggression continued, but the notion of aggression increasingly disappeared into the background. The Security Council only rarely condemned States for committing aggression,[80] and never mentioned the 1974 definition in doing so. The 1974 resolution was moreover rarely invoked elsewhere and was not included in the statutes of the *ad hoc* tribunals that were created in the 1990s, despite the Nuremberg judgment's qualification of aggression as the "supreme international crime".

Meanwhile, the ILC had also been considering the notion of aggression, in particular with regard to three of its projects: i) the ILC Draft Code of Crimes Against the Peace and Security of Mankind, ii) the ILC Draft Statute for an International Criminal Court, and iii) the ILC Draft Articles on State Responsibility. In each of these projects, the crime of aggression had played a relatively prominent role in the discussions,[81] but was scarcely present or relevant in them in the end, with the ILC rejecting the 1974 definition because it was too vague to serve as a basis for the

[80] The five situations in which the Security Council has used the term 'aggression' to qualify a violation of the prohibition to the use of force are:

(i) acts committed by Southern Rhodesia against other countries, including Angola, Botswana, Mozambique, and Zambia (Provocation by Southern Rhodesia, 2 February 1973, UN Doc. S/RES/326 (1973) (https://www.legal-tools.org/doc/f949b3) and subsequent resolutions, 1973–79);

(ii) acts committed by South Africa against other countries in southern Africa (Angola-South Africa, 31 March 1976, UN Doc. S/RES/387 (1976) (https://www.legal-tools.org/doc/e8e2be) and subsequent resolutions, 1976–87);

(iii) acts committed by mercenaries against Benin (Benin, 14 April 1977, UN Doc. S/RES/405 (1977) (http://www.legal-tools.org/doc/9fc598/);

(iv) acts committed by Israel against Tunisia (Israel-Tunisia, 4 October 1985, UN Doc. S/RES/573 (1985) (http://www.legal-tools.org/doc/9fc598/) and Israel-Tunisia, 25 April 1988, UN Doc. S/RES/611 (1988) (https://www.legal-tools.org/doc/6809f4/); and

(v) acts committed by Iraq against diplomats in Kuwait (Iraq-Kuwait, 16 September 1990, UN Doc. S/RES/ 667 (1990) (https://www.legal-tools.org/doc/44dbe9/), *Historical Review of Developments relating to Aggression*, United Nations Publications, New York, 2003, pp. 225-237 (https://www.legal-tools.org/doc/5535bc/).

[81] Simpson, 2007, p. 151, see above note 32.

prosecution of a crime of aggression.[82] In 1996, the ILC adopted the first project, the Draft Code, which provided for individual *criminal* responsibility with respect to a leader or organizer for the crime of aggression, based on the individual's participation in acts of aggression committed by a State.[83] However, the Draft Code did not provide a detailed definition of *what* the crime of aggression entails, and it was quietly dropped from the international agenda.[84]

In 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute of the International Criminal Court. While for many the inclusion of the crime of aggression was essential and they considered that without it, international criminal law would be incomplete, the problem that resurfaced during the negotiations in Rome was how to limit the possibilities of others to commit aggressive war, whilst maintaining (one's own) possibilities to resort to force when convinced of its necessity and/or justness but that others might look upon differently (however unjust that may be).

Disagreements thus persisted: on how to include aggression into the ICC Statute, how to define the crime of aggression, what its scope would be, and what the role of the Security Council would be. Eventually, the agreement made in Rome provided that the crime of aggression was included in the Statute, but the ICC would not exercise jurisdiction over it (yet). The States Parties decided that the ICC would only exercise jurisdiction over aggression once an amendment was adopted that defined the crime and conditions for the ICC to be allowed to exercise jurisdiction.[85] In 2010, such an amendment was adopted by the ASP, in Kampala, Uganda.[86] There, however, another delay clause was included: they agreed that

[82] Michael J. Glennon, "The Blank-Prose Crime of Aggression", in *Yale Journal of International Law*, 2010, vol. 35, no. 1, p. 79; see Report of the International Law Commission on the Work of Its Forty-Eight Session, 6 May – 26 July 1996, UN Doc. A/51/10 (https://www.legal-tools.org/doc/f6ff65); see also William Schabas, *An Introduction to the International Criminal Court*, CUP, Cambridge, 2007, p. 135.

[83] Yearbook of the International Law Commission 1996, vol. II, part 2, UN Doc. A/CN(SER.A/1996/Add.1 (Part 2), chap. II.D, para. 50.

[84] Simpson, 2007, p. 151, see above note 32.

[85] Rome Statute, Article 5(2) (prior to amendment), see above note 62.

[86] See for a thorough description of the Princeton Process and the negotiations, Stefan Barriga, "Negotiating the Amendments on the Crime of Aggression", in Stefan Barriga, Claus

in order for the ICC to exercise jurisdiction over aggression, the ASP needed to take an activation decision in or after 2017. On 14 December 2017 in New York, this decision was taken, although with yet another delay clause, providing that the activation of the 2010 Kampala compromise took place on 17 July 2018 – the International Criminal Justice Day, commemorating the adoption of the Rome Statute by 120 States 20 years ago.

The negotiation process from Rome through Kampala to New York was again characterized by many sessions, on many levels, between many States, and in many working groups. Again, reaching consensus was considered the only way to move forward instead of a majority vote, which was thought of as counter-productive: it would already be hard enough for the ICC to prosecute cases of aggression even without disagreements on core provisions.

Comparable to the 1974 process, but arguably even further perfected and executed, was how the Chairmen of the Special Working Group (first Christian Wenaweser and later Prince Zeid of Jordan when Wenaweser became President of the ASP) created consensus. In co-ordination with a small number of 'insiders', they managed to dominate the agenda-setting and create a pragmatic atmosphere where disagreements were circumvented through the multi-layered subdivision of topics and subgroups in which they were discussed. The discussions in the Special Working Group were focused on the papers that were drafted under the sole authority of the Chairman. These papers were presented and understood as reflecting, at least "to a reasonable extent, the variety of views in the room".[87] As Stefan Barriga, one of the trusted advisers to the Chairman throughout the process, describes:

> Over the course of time, this technique allowed delegations to identify "an emerging consensus" on various issues, and made it more difficult for delegations to bring up proposals that deviated from the thrust of the Chairman's papers.[88]

On the one hand, this allowed for a breakthrough that many had not predicted and consensus agreements on an amendment to the Rome Stat-

Kreß (eds.), *The Traveaux Préparatoires of the Crime of Aggression*, CUP, Cambridge, 2012, p. 5.

87 *Ibid*., p. 18.

88 *Ibid*.

ute as well as its activation. On the other hand, however, it was also a repeated rehearsal of masking persistent fundamental disagreement behind euphemisms like 'consensus'. Or, in the words of Julius Stone, "a triumph of verbal skills […] to conceal conflicts" and to avoid "adding still another failure to the half-century of vain efforts to define aggression which had gone before".[89]

Taking the discussions concerning the Nuremberg and Tokyo Tribunals, those in the context of the United Nations between 1945 and 1974, and then again those revolving around the ICC's jurisdiction over aggression together, the image appears of a continuous strife between, on the one hand, wanting to condemn others that commit aggression (and have an international body to wield such power), and, on the other (particularly States with an active military power) seeking to retain space to resort to military means when so needed or wanted without running the risk that an external legal or political authority would decide otherwise. The compromise reached and activated on 17 July 2018 reflected this tension. It surfaced in particular in the negotiations regarding a threshold clause and the ICC's reach over its States Parties and non-States Parties. These aspects are covered in more detail in the next sub-sections.

11.5.2. The 'Manifest Violation' Criterion: Constructive Ambiguity 2.0.

Throughout the negotiation processes during the twentieth century, what was clear was that many States opposed equating the definition of aggression to the prohibition to use force – so that a violation of that prohibition would qualify as an act of aggression. Rather, 'aggression' was to be a narrower category. Every aggression is an illegal use of force, but not every illegal use of force is aggression.

This discussion returned in the negotiation on the crime of aggression in and ahead of Kampala, particularly how to exclude from its scope uses of force that may be illegal but not criminal, let alone part of the "supreme international crime". Many had humanitarian interventions in mind, but also actions to fight terrorism and situations in which force was used in (arguably) self-defence albeit not permitted by international law. The negotiations on this point resulted in the 'manifest violation'-criterion.

[89] Stone, 1977, p. 21, see above note 58.

The crime-of-aggression amendment provides that a crime of aggression entails

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, *by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations*.[90]

Thus, an illegal use of force is not as such a crime of aggression unless it is also a *manifest* violation of the UN Charter, by its character, gravity and scale.

Some delegations rejected the idea of a threshold clause because it would distinguish between acts of aggression that were worth prosecuting and others that were not, thus undermining the definition of aggression agreed on in 1974. This was countered by other delegations who argued it was necessary to ensure that the ICC would only take up "the most serious crimes of concern to the international community"[91] and not decide on borderline cases and acts with debatable illegality.[92] The report of the June 2008 Special Working Group meeting that prepared the Rome Statute Review Conference that was to be held in 2010 in Kampala declares:

> Delegations supporting this threshold clause noted that it would appropriately limit the Court's jurisdiction to the most serious acts of aggression under customary international law, thus excluding cases of insufficient gravity and falling within a grey area.[93]

'Gravity' and 'scale' were intended to exclude border skirmishes and the like, while 'character' needs to exclude genuinely legally controversial cases.[94]

Yet, inserting this threshold clause did not eradicate the disagreement on what a grey area is when the greyness itself is contested.[95] Rather,

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90 Rome Statute, Article 8*bis*(1), see above note 62 (emphasis added).

91 Referring to the Preamble of the Rome Statute, see above note 62.

92 Stefan Barriga, 2012, p. 29, see above note 86.

93 Stefan Barriga, Wolfgang Danspeckgruber and Christian Wenaweser (eds.), *The Princeton Process on the Crime of Aggression: Materials of the Special Working Group on the Crime of Aggression, 2003–2009*, Lynne Rienner, Boulder, 2009, p. 87, para. 68.

94 Claus Kreß, "Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus", in *European Journal of International Law*, 2009, vol. 20, no. 4, p. 1138.

again, once discussions became less abstract than 'aggression is a crime' and applied concretely to one or another actual conflict, the age-old problem remerged on what *exactly* aggression is. Fundamental disagreement regarding whether and whose invocation of the right of self-defence is actually lawful self-defence, whose interpretation of what a Security Council authorization includes or not is correct, and whose humanitarian intervention is properly humanitarian (and therefore perhaps excusable or justified and, as some may argue, not manifest or criminal).

This agreement in the abstract (aggression is criminal) and disagreement in the particular (this situation does or does not constitute the crime of aggression) has been translated in the crime-of-aggression norm through its threshold clause of 'manifest violation'. While there was little agreement among State delegations on how this 'manifest violation'-threshold would actually in practice eradicate the grey areas that surround the notion of aggression, the overriding shared (or at least as yet uncontested) assumption among the diplomatic community was that the ICC's judges could and should decide on this in a concrete case. In so doing, ICC judges are asked to distinguish between on the one hand crimes of aggression, and on the other "illegal but legitimate" uses of force:[96] uses of force that, though (possibly) illegal, are not (criminally) aggressive because even though in violation of the UN Charter, they do not constitute a manifest violation of it. The distinction thus becomes not only one of legal or illegal but also one of whether – even if illegal – it is also legitimate, such as for humanitarian purposes for some or for protecting sovereignty for others, to name a few possible justifications.

According to Article 46(2) of the Vienna Convention on the Law of Treaties, a violation of domestic law can be invoked as manifest "if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith".[97] The *Oxford English*

[95] For a more extensive analysis on the 'manifest' criterion and its consequences for future prosecutions at the ICC, see Marieke de Hoon, "The Crime of Aggression's Show Trial Catch-22", in *European Journal of International Law*, 2018, vol. 29, no. 3. The remainder of this subsection draws from this article.

[96] The Independent International Commission on Kosovo characterised the North Atlantic Treaty Organization's ('NATO') bombing campaign on Serbia "illegal but legitimate". See Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned*, OUP, Oxford, 2000, p. 4.

[97] Vienna Convention on the Law of Treaties, 23 May 1969, Article 46(2) (https://www.legal-tools.org/doc/6bfcd4/).

Dictionary defines manifest as "clearly revealed to the eye, mind, or judgement; open to view or comprehension; obvious".[98] As Andreas Paulus has observed, on the one hand, this amounts to an extremely restrictive standard, but, on the other hand, it is also an unclear standard, as what "is obvious for one is completely obscure to the other, in particular in international law".[99] With the 'manifest violation'-criterion, the ICC is therefore pushed beyond merely the realm of the *legality* of use of force (which is already a legal framework filled with contested norms and interpretations), into the realm of its *legitimacy*, just as political contestation on the legitimacy of use of force is transported into a criminal court of law.[100]

This raises the question of how 'substantial' the judges should understand their task of deciding whether a violation of the UN Charter is manifest, *or* whether they should dismiss as not manifest any situation that could be argued to be legitimate (that is, as *therefore* not a manifest violation of the UN Charter). The latter was argued by Harold Koh, who, on behalf of the US delegation, submitted in Kampala that 'manifest' simply excludes all situations that can be argued to be lawful or legitimate:

> If Article 8*bis* were to be adopted as a definition, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide—the very crimes that the Rome Statute is designed to

[98] "Manifest, adj. and adv.", August 2014 (available on the Oxford English Dictionary Online).

[99] Andreas Paulus, "Second Thoughts on the Crime of Aggression", in *European Journal of International Law*, 2010, vol. 20, no. 4, p. 1121. Paulus submits that the definition is therefore indeterminate. Dapo Akande agrees with Paulus, asserting how this "obviously illegal" requirement effectively provides for a "mistake-of-law" defence that is unavailable to the other crimes, see Dapo Akande, "Prosecuting Aggression: The Consent Problem and the Role of the Security Council", Oxford Legal Studies Research Paper No. 10 (2011). Sean Murphy, moreover, notes that it is a remarkable development to include a provision that says that some acts of aggression are thus not criminal and that even though the UN places aggression on the high end of coercive measures, an act of aggression may not be a 'manifest' violation of the UN Charter (Sean Murphy, "Aggression, Legitimacy and the International Criminal Court", in *European Journal of International Law*, 2009, vol. 20, no. 4, pp. 1150–1151). And Kai Ambos holds that the lack of precision of the threshold clause is embedded in the primary norm regulating the use of force and that because it is not possible to clearly delimitate lawful from unlawful use of force, no secondary norm could be drawn any clearer (Kai Ambos, "The Crime of Aggression after Kampala", in *German Yearbook of International Law*, 2011, vol 54, pp. 482–483 (https://www.legal-tools.org/doc/b83a69)).

[100] For a more elaborate analysis on this, see de Hoon, 2018, above note 95.

> deter—do not commit "manifest" violations of the U.N. Charter within the meaning of Article 8*bis*. Regardless of how states may view the legality of such efforts, those who plan them are not committing the "crime of aggression" and should not run the risk of prosecution. At the same time, in order for an investigation or prosecution to proceed it must be shown that it was manifest that the action was not undertaken in self-defense, without the consent of the state in question, and without any authorization provided by the Security Council.[101]

Moreover, Claus Kreß, member of the German delegation, asserted shortly before the Review Conference in Kampala that the 'manifest' criterion "will make proceedings for a crime of aggression an exceptional event" because the definition would exclude "seriously controversial cases" "in order not to decide major controversies about the content of primary international rules of conduct through the back door of international criminal justice".[102]

Since most use-of-force situations raise major and serious controversy (notwithstanding whether the situation actually *is* legally controversial or not),[103] if the ICC follows the reasoning of Koh and Kreß, the crime of aggression will remain of very limited scope and meaning. Situations like the annexation or secession of Crimea, the US–UK invasion of Iraq, and the NATO bombings related to Kosovo may well fall beyond the crime of aggression's scope. Some have questioned: if the substantive scope of the crime of aggression would not include such situations, what

[101] Harold Hongju Koh, "Statement at the Review Conference of the International Criminal Court", 4 June 2010 (available on the US Department of State's web site).

[102] Kreß, 2009, p. 1142, see above note 94.

[103] Although there are some widely agreed upon instances of aggression such as the Nazi invasions throughout Europe and Saddam Hussein's occupation of Kuwait, more often than not situations of (potential) resort to force spark discussions that law in and of itself does not seem to resolve. The argumentative practices in recent events such as, for example, the 1999 NATO bombing campaign in Belgrade, the 2003 US–UK invasion of Iraq, the discussions in and out of the Security Council on whether to intervene in Darfur, on whether and at what point a right to self-defence exists against States that increase their nuclear capability, on the scope of the right to self-defence against non-State actors including terrorists, on the interpretation of the Security Council authorization to use force against Libya, on whether or not to intervene in Syria, and if so to what extent, and on Russia's assistance in effectuating secession of Abkhazia, South-Ossetia, the Crimea and Eastern Ukraine, demonstrate that disagreements on where to draw the line between aggressive use of force and non-aggressive use of force continues.

is the crime of aggression for? Alternatively, judges would have to decide not only on the (il)legality of force, with all its difficulties in and of itself,[104] but also on the question of the (il)legitimacy of illegal force, where there is *fundamental* disagreement on what is just and necessary. Frequently heard responses to concerns that this places judges in a situation where their judgments are perceived as political rather than legal, neutral and objective, tend to invoke the need to have faith in judges and the reasonableness of lawyers. For example, Kreß submitted "that international legal method is advanced enough to enable reasonable lawyers to distinguish between a spurious attempt to justify an illegal use of force and an arguable case".[105]

The future will tell whether Kreß is correct. In any event, the 'manifest violation'-criterion allowed a consensus agreement on the definition of the crime of aggression: rather than narrowly defining what use of force would and would not constitute a crime of aggression, there was a textual provision that all could agree to and the real decision on determining aggression in concrete situations was delegated elsewhere again, this time not to the Security Council as occurred in 1974, but to the ICC's judges.

11.5.3. Opting In and Out of Criminal Law's Reach

The role of the Security Council had been another fiercely debated topic. Consensus agreement required agreement not only on the definition of the substantive norm, but also on the reach of the ICC's territorial and personal jurisdiction when it concerned the crime of aggression. Here, in particular, lay the reasons why a consensus agreement was possible. States that were reluctant or flat out against the ICC's ability to prosecute their nationals for alleged aggression fought hard to insert the ability to stay out of the ICC's reach.

Throughout the discussions in and towards Rome and Kampala, the permanent members of the Security Council and a number of other countries were uncompromising in maintaining their position that the ICC would be able to prosecute a case of aggression only if the Security Council had previously determined the occurrence of an act of aggression.

[104] For example, the legality of self-defence against non-State actors, the limits of anticipatory self-defence, and the interpretation of UN Security Council authorizations.

[105] Kreß, 2009, p. 1142, see above note 94.

France, for instance, in its opening statement at the Kampala Review Conference, drew such a 'line in the sand' – the so-called 'exclusive Security Council filter'.

This position was rejected by many other countries as flagrantly at odds with the independence of the ICC as a judicial institution and in violation of criminal law principles such as the presumption of innocence (if it were the Security Council's prerogative to decide who the aggressor was). Moreover, a number of States[106] demanded the consent of the aggressor State to trigger the ICC's jurisdiction, whereas mainly African, Latin American and Caribbean States disagreed with this requirement. At a certain point in the negotiations, it was agreed that if the crime of aggression would be adjudicated at the ICC, "the rights of the defendant as foreseen in the Statute must be safeguarded under all circumstances including in connection with prior determination by a body other than the Court".[107] This led to a strong majority of delegations that asserted that this implied that a determination by the Security Council or another organ could not legally bind the Court, though it would make a strong argument for its existence.[108] Because the discussions were thus placed into the frame of criminal law, the crime of aggression needed to be discussed on the terms of the criminal law paradigm accordingly, including respecting due process and rights of the defendant. This enabled the discussion on the role of the Security Council to move to the remaining question of whether or not the Security Council should be the exclusive jurisdictional filter at the stage of the proceedings where the Prosecutor has concluded the preliminary examination and intends to open a formal investigation.[109]

By that time, however, developments on other aspects of the crime of aggression had evolved so much into the direction of those demanding an exclusive Security Council filter, that compromising on this aspect would in fact no longer be a real compromise.

The eventual compromise reached was that when a situation is referred to the ICC by the Security Council, the ICC may exercise jurisdiction over States Parties and non-States Parties alike, just like it does for genocide, crimes against humanity and war crimes. However, when the

[106] Particularly the European States, with the exception of Switzerland and Greece.

[107] Barriga, 2012, p. 30, see above note 86.

[108] *Ibid*.

[109] *Ibid*., p. 33.

jurisdiction of the ICC is instead triggered by State referral or the Prosecutor's *proprio motu* investigation, the crime of aggression has different provisions than the other crimes.

First of all, a six-month delay provision was inserted there to ascertain whether the Security Council makes a determination of aggression. Article 15*bis*(7) provides that "[w]here the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression".[110] What remains interpreted differently among States, however, and may play out in future cases, is what 'inactivity' means: while many States believe that this means that if the Security Council is unable to come to a resolution that a situation is determined as 'aggression' the ICC may proceed, other States maintain that the ICC may only proceed if the Security Council issues a resolution in which it determines the existence of an act of aggression.

Furthermore, with the crime of aggression, not only nationals (both perpetrators and victims) of non-States Parties are excluded from jurisdiction, a (potentially aggressive) State Party can opt out in advance from the Court's jurisdiction under Article 15*bis*(4),[111] unless the Security Council refers the situation to the ICC. For those States that hold a permanent seat in the Security Council, or their allies, there is thus a *de facto* inviolability from a supposedly universal court.

This is an interesting characteristic of the crime of aggression. It provides for a criminal law provision according to which a subject to the Court's jurisdiction can declare itself not bound by it. It is an odd mixture of a vertically organized criminal law – between the law enforcer and the (alleged) criminal – and a decentralist and horizontally based pubic international law, based on sovereign equality of States; blending legal regimes that are in essence of a different nature. It contradicts rather fundamentally what a criminal legal system (as we know it on a non-international level) aims to do: to provide equality before the law and to impose a vertical, authoritative and coercive power relationship upon those that violate it.

[110] This means that the Prosecutor is allowed to start the investigations after six months of inactivity by the Security Council, provided that the ICC's Pre-Trial Division has authorized the investigation *and* that the Security Council has not decided otherwise in accordance with their powers under Article 16 to defer the investigation for a year (which is renewable).

[111] The State that opts out of the crime of aggression amendment remains part of the ICC, but merely excludes the ICC from investigating its potential aggressive use of force.

The crime of aggression thereby sits somewhat uneasily with criminal law's fundamental notion of equality before the law by adhering to State consent, the fundamental principle of public international law.

Nevertheless, it facilitated a compromise in Kampala: due to the opt-out possibility and the 'manifest'-threshold clause, States demanding an exclusive Security Council filter saw that their concerns were no longer challenged, and thus opened up to compromise. On the other side of the aisle, for the sake of consensual outcome and thus having a provision of the crime of aggression rather than none, the African States Parties were willing to accept a consent-based regime. However, they were of the view that it was too easy for States Parties to opt out of the Court's jurisdiction under draft Article 15*bis* and requested that such declarations would lapse after a certain time.[112] In the end, however, they gave up on such a sunset clause upon the opposition of States hoping to water down the jurisdictional provisions as much as possible.

Even though Wenaweser pushed for this compromise in his President's Papers during the last days in Kampala, the State consent approach was not yet generally agreed upon at the time of its presentation on the penultimate day of the Kampala Review Conference in 2010.[113] The delegation of Japan in particular criticized the use of an opt-out regime as conflicting with the entry-into-force procedure under Article 121(5),[114] since this was already based on an opt-in approach and thus would have contradicted the use of an additional opt-out procedure in Article 15*bis*. A large majority of States believed that upon activation the Kampala amendment would enter into force for all States Parties who could then decide to opt out, while others maintained that it would only enter into force for those that ratified the crime-of-aggression amendment. The issue remained disagreed upon in Kampala but was ignored for the time being.

Not surprisingly, the same issue flared up vehemently again towards the 2017 activation decision in New York. Many States, led by Liechtenstein, asserted that the decision in Kampala had meant that nationals of States Parties that have not accepted the crime-of-aggression amendment and had (thus) also not opted out would fall under the ICC's jurisdiction.

[112] *Ibid*., p. 53.

[113] *Ibid*.

[114] Article 121(5) provides that the crime-of-aggression amendment only enters into force for the nationals and territories of States Parties that accepted the amendment.

However, the UK, France, Japan, Canada, Norway and Colombia argued that the ICC would not have jurisdiction over aggression committed by nationals of non-ratifying States or on their territory in case of a State referral or the Prosecutor's *proprio motu* powers. Ultimately, in the late hours of the final day in New York on 14 December 2017, the ASP adopted a decision that favoured the latter, more restrictive view. The activation decision included in its Article 2:

> *Confirms* that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments[115]

11.6. Conclusion: Power versus Legal Autonomy in the Aggression Negotiations

With that conclusion of many decades of negotiation, the road was paved towards the activation of the ICC's jurisdiction over the crime of aggression on 17 July 2018.[116]

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[115] ICC, Activation of the Jurisdiction of the Court over the Crime of Aggression, 2017, see above note 1.

[116] In summary, the compromise that was reached contains an opt-out clause for any State that does not want to fall under the ICC's jurisdiction for the crime of aggression and excludes non-States Parties from the jurisdiction over aggression even if the alleged aggression would be committed by those States on the territory of a State Party (Article 15*bis*(5)), unless the situation is referred to the ICC by the Security Council. (Unlike the State referral or *proprio motu* jurisdictional triggers, if the Security Council refers a case to the ICC, the ICC also has jurisdiction over aggression committed by non-States Parties.) With regard to triggering the ICC's jurisdiction, the Kampala compromise provides that the different triggers of the ICC system are split between an Article 15*bis* (for when States refer a situation to the ICC or when the Prosecutor takes the initiative to investigate) and 15*ter* (for a UN Security Council referral). While in case of a Security Council referral the ICC's jurisdiction is immediately triggered, there is a six-month delay provision for the State referral and the Prosecutor's *proprio motu* power. This means that the Prosecutor is allowed to start the investigations after six months of inactivity by the Security Council, provided that the ICC's Pre-Trial Division has authorized the investigation *and* that the Security Council has not decided otherwise in accordance with their powers under Article 16 to defer the inves-

From great ideals to criminalize aggression for all by providing legal autonomy to the ICC to address the worst situations of aggressive use of force, the actual provision that States could agree on ensured that the ICC's ability to do so would be very limited.[117]

When analysing these decades of negotiating the aggression norm through the lens of State power versus (supranational) legal autonomy, what emerges is a repeating pattern in which i) States, particularly those which tend to use military means more frequently, remain reluctant to accept legal autonomy over the question of the aggressiveness of (their) use of force; ii) the vast majority of States, in particular those that are weary of becoming victims of others' aggression, look for ways to strengthen the international normative framework and supranational authority; and that iii) in their search for agreement, they repeatedly encounter the same disagreements that go to the heart of the world order: to what extent can supranational authorities limit States in their use of armed force.

In the creation of the Nuremberg Tribunal, the compromise that was reached was to give the Tribunal the power to judge over aggression but not define it; in the context of the United Nations, the definition remained vague and interpreted in contradicting ways, while pointing to the Security Council to decide on a case-by-case basis on what it deemed fit; and for the purpose of the ICC, an open definition was adopted, with as many limitations as possible to the ICC's ability to exercise jurisdiction over aggression. While in the background Russia annexes Crimea, the US and Iran bomb Syria, the African continent sees extensive acquisitions by in particular Chinese corporations, and the US fights its war on terror throughout the world with little regard for other States' sovereignty, the result of many years of attempting to protect States against other States' aggression remains modest.

Pragmatic outcomes were sought that escaped the aspects where disagreements persisted, such as on the actors involved, on humanitarian

tigation for a year (which is renewable). Finally, a threshold criterion that only *manifest* violations of the UN Charter qualify as crimes of aggression was inserted in Article 8*bis*.

[117] Unless the Security Council refers a situation of aggression to the ICC, non-States Parties do not fall under the ICC's reach and States Parties can opt out, and, even before then, have to opt in by ratifying the crime-of-aggression amendment, retaining their own discretion to decide whether or not legal consequences would follow a decision to use aggressive force against another State. In addition, the Security Council can still considerably influence the ICC's autonomy.

intervention, and on preventive use of force in the war on terror. As Barriga explains on the negotiations in Kampala:

> What can safely be said, however, is that there was the widespread concern that it would be inappropriate to deal with key issues of current international security law in the haste of the final hours of diplomatic negotiations.[118]

This is striking to say the least. The crime of aggression lies at the core of international security law and distinguishes between what is deemed criminal about it and what is not, which, on the contrary, might even be perceived as heroic (such as humanitarian intervention). Indeed, the reason why a genuine definition of aggression and serious legal consequences for committing aggression has not been achieved is that there is fundamental disagreement exactly about those key issues of international security law – in the present as it was in the past and will likely remain in the future.

Moreover, in light of the current international security challenges, one can wonder about the extent to which the crime of aggression, as thus constructed, is capable of capturing modern forms of aggression, such as when carried out by non-State actors in asymmetric conflicts.[119] Drumbl posits that the narrow framing of the crime of aggression keeps threats – such as internal armed conflict, attacks by States against their own populations, systematic attacks by narco-terrorist syndicates or other types of terrorist attacks, massive cyber-attacks or widespread, long-term, severe and deliberately inflicted environmental harms – off the discussion table even though each could well cause *effects* normally associated with inter-State war.[120] He argues that if the purpose of the criminalization of aggression is to protect security, stability, sovereignty and human rights interests, narrowing the conversation by focusing only on the core prohibitions that emerged six decades ago leaves a significant array of serious threats outside the framework of international criminal law.[121] Criminalizing only inter-State attacks that flagrantly violate the *ius ad bellum* does

[118] Stefan Barriga, Leena Grover, Leonie von Holtzendorff and Claus Kreß, "Negotiating the Understandings on the Crime of Aggression", in Stefan Barriga and Claus Kreß, 2012, p. 95, see above note 86.

[119] Ambos, 2011, p. 488, see above note 99.

[120] Mark A. Drumbl, "The Push to Criminalize Aggression: Something Lost Amid the Gains?", in *Case Western Reserve Journal of International Law*, 2009, vol. 41, no. 2, pp. 291-319.

[121] *Ibid*., p. 310.

not capture the key stability, security, human rights and sovereignty challenges that the international community faces. It excludes terrorist attacks. It excludes force used on foreign territory against such terrorist attacks, which meanwhile destroy the livelihood of innocent civilians who had nothing to do with, nor any power to prevent, the activities of those non-State actors. It excludes industrialists and businessmen that influence or even pull the strings in foreign policy agendas.

Since resolving such fundamental issues was beyond the realm of possibilities as this lengthy regulation and criminalization process demonstrated, agreement was instead sought in alternative terminology, circumventing disagreement, and agreeing on restrictive provisions, abstractions and vague language, delegating the eventual resolution between opposing claims elsewhere, to the discursive space where law is (re)constructed and (re)constituted, and ultimately, on the table of judges, if it ever gets to that.

And so, the crime of aggression was created. Like in the previous attempts to attach political and legal consequences to committing aggression, the provision was kept vague and restricted rather than made to explore the circumstances where armed force, in fact, threatens international peace and security. Nevertheless, despite heavy opposition and contestation, an actual provision was agreed upon. That is a further step in the development and crystallization of the aggression norm, and may enable the ICC to prosecute an aggressive leader one day. But it is quite clear which leaders it can never touch. That will be a reality challenging the perception of any aggression case that the ICC will undertake; in the pursuit of universal justice, for everyone, everywhere.

Publication Series No. 28 (2020):

Power in International Criminal Justice

Morten Bergsmo, Mark Klamberg, Kjersti Lohne and Christopher B. Mahony (eds.)

This book comprehensively explores the role and manifestations of power in international criminal justice. Twenty chapters discuss this topic in four main parts: power in international criminal justice institutions (Part I), representational power in international criminal justice (Part II), state power and autonomy in international criminal justice (Part III), and non-state power and external agents in international criminal justice (Part IV). The book invites the crystallisation of a sociology of international criminal justice, and argues that among its focuses should be the wielding of power within and over international criminal justice institutions, just as this is a feature of sociology of law within several countries.

The contributors to this anthology are Marina Aksenova, Mayesha Alam, Helena Anne Anolak, David Baragwanath, Morten Bergsmo, Mikkel Jarle Christensen, Marieke de Hoon, Djordje Djordjević, Gregory S. Gordon, Jacopo Governa, Alexander Heinze, Emma Irving, Mark Klamberg, Sarah-Jane Koulen, Kjersti Lohne, Christopher B. Mahony, Jolana Makraiová, Jackson Nyamuya Maogoto, Benjamin Adesire Mugisho, Tosin Osasona, Sara Paiusco, Barrie Sander, Joachim J. Savelsberg, Jacob Sprang, Chris Tenove and Sergey Vasiliev. The chapters draw on papers presented at a conference held in Florence in October 2017 co-organized by the Centre for International Law Research and Policy (CILRAP) and the International Nuremberg Principles Academy.

ISBNs: 978-82-8348-113-6 (print) and 978-82-8348-114-3 (e-book).

candidate for Prosecutor at the end of their term.

252. The Experts recognise the difficulty of applying a new tenure system to staff already in the Court, so they suggest that the system be applied only to new recruitments for P-5 and Director-level positions as these come vacant. This would not preclude the Court from encouraging senior staff who have served in the Court for a long time to consider taking early retirement, including through offering financial packages.

253. Notwithstanding that this would not apply to existing staff, there is likely to be considerable resistance to the introduction of tenure in many parts of the Court (even if there is also some enthusiasm for this approach in other quarters). But it is th this is a measure essential to addressing effectively a r knesses of the Court. Not least it would bring fresh ap well as more dynamism into the Court across all its Organs.

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