

The ICC and the Crime of Aggression: Justiciability of an Act of Aggression

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Abstract

Though agreement was reached on the inclusion of the crime of aggression in the ICC Statute, the controversy over the jurisdictional issues of this crime has continued. One of the important points of the disagreement is whether the ICC is an appropriate body to determine an alleged act of aggression committed by a state which is a basis for prosecution of the crime of aggression. This reflection investigates the act of aggression, as set under the ICC statute, from the perspective of its justiciability.

Introduction

The incorporation of aggression as an international crime under the ICC statute has brought about diverging views. The explanations to the diverging views on the crime of aggression, as it stands today under ICC Statute, rely mainly either on political perceptions of states towards the ICC or the Westphalian proposals. Some explanations also rely on the effectiveness of the Court to handle the crime of aggression. The most important and overlooked issue which could help us in explaining the divergence, however, is the question of whether the act of aggression that is an essential *actus reus* element of the crime of aggression inherently justiciable. This work will, therefore, investigate the act of aggression, as set under the ICC statute, from the perspective of its justiciability and aims at contributing a modest enlightenment to the broader debate on whether the Court's judicial function could be complicated through exercise of jurisdiction over the crime of aggression.

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The scope is thus limited to the act of aggression and does not address the justiciability of the crime of aggression in its general sense. An investigation on the justiciability of an act of aggression is both relevant and timely given the current controversy surrounding the jurisdiction of the ICC over the crime of aggression and due to the fact that a decision on activation of such jurisdiction can be made any time once we are in 2017. Such an investigation would also be a relevant addition to the attempts to clear the doubt on which international body is appropriate to determine an act of aggression.

As exploring justiciability of an act of aggression would require considering both legal and extra-legal contexts of this act, this work will employ both legal and political perspectives. Relevant case law and contemporary literature on both legal and political aspects of an act of aggression will, thus, be used to analyze the relevant provisions of the ICC Statute with a view to appraise the justiciability of an act of aggression, which is an essential *actus reus* element of the crime of aggression as defined under the ICC statute. Accordingly, the next section will discuss aggression as an *actus reus* element of the crime of aggression. Section three will explore the justiciability of aggression. Finally, section four will provide concluding remarks.

1. Aggression as an *actus reus* Element of the Crime of Aggression

Despite the lack of a universally recognized definition, aggression is generally viewed as a crime violating customary international law (CIL).¹ The crime of aggression was tried at the international level by the Nuremberg Tribunal (NT) for the first time as ‘crime against peace’.² In response to the challenge to its jurisdiction based on the ‘*nullum crimen sine lege*’ principle, the Tribunal

¹ Malcolm Shaw, *International Law* (Cambridge University Press, 2014), p. 316.

² Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014), p. 307.

employed several sources to construct aggression as a crime under CIL.³ As stated under the Charter of the NT, the judgment of the Tribunal and later in the ICC Statute, the crime of aggression requires an act of aggression as a prerequisite.⁴ This element of the crime of aggression has made it difficult to attain consensus on the content and application of this crime.

Cognizant of the lack of consensus on the act of aggression, the International Law Commission (ILC) left the determination of this act out of the jurisdiction of the ICC in the draft it prepared for the negotiation on the establishment of the Court.⁵ To be precise, the ILC suggested the ICC jurisdiction on crime of aggression to be dependent on determination of the alleged act of state by the United Nations Security Council (UNSC).⁶ The diverging views then resulted in Art 15 *bis* of the Rome Statute which made the ICC jurisdiction on crime of aggression subject to ratifications and a decision to be made after 1 January 2017.⁷

Though a consensus was reached on the inclusion of the crime of aggression in the ICC Statute, the controversies about the jurisdictional issues of this crime continued.⁸ One of the important points of the disagreement, as Erin Creegan put it correctly, is ‘whether there should be a jurisdictional triggering mechanism, such as the approval of the UNSC, the General Assembly (GA) or the ICJ, before a case of alleged aggression is referred to the ICC.’⁹ This controversy has directly to do with the nature of aggression. The ‘planning, perpetration, initiation or execution of an act of aggression’¹⁰ by a person having the position stated under Art 8 *bis* constitutes a crime only if such act of aggression, ‘by its character, gravity and

³ Ibid, p.118.

⁴ Art 6(a) of the Charter of the Nuremberg Tribunal and Art 8 *bis* of the ICC Statute.

⁵ Cryer, *An Introduction*, fn 2, p. 310.

⁶ Ibid.

⁷ Art 15 *bis* (2 and 3) of the ICC Statute.

⁸ Erin Creegan, ‘Justified Uses of Force and the Crime of Aggression’ in *Journal of International Criminal Justice* (Oxford University Press, Oxford 2012), pp. 59-82.

⁹ Ibid

¹⁰ Art 8 *bis* (1).

scale, constitutes a manifest violation of the UN Charter.’¹¹ This would require a two levels test: firstly, determining if the act is aggression under Art 8 *bis* (2) and secondly, if so, whether its ‘character, gravity and scale’ depicts a manifest violation of *jus ad bellum* under 8 *bis* (1). Both levels would require a close investigation of a state’s act and such an investigation is prone to the controversies surrounding the act of aggression.

The two fundamentally opposed views raised on crime of aggression at the ICC Review Conference in 2010 were evidences of the intricate issues associated with the determination of the act of aggression. The US delegate insisted that it is quite difficult to prosecute aggression as it involves political issues.¹² Other delegates rejected this position and held that denying the ICC such a jurisdiction would make little sense given the fact that the crime of aggression is long considered as one of the four international crimes and it remains the ‘supreme international crime’ as declared by the NT.¹³ The two positions beg for the question whether an act of aggression is inherently justiciable.

2. Justiciability of Aggression

Before evaluating the justiciability of aggression, it is appropriate to indicate the essentials of the doctrine of justiciability. Justiciability does not have a fixed content and its application is dictated by the delicate and conflicting forces revolving around the appropriateness of an issue for adjudication.¹⁴ As Thomas Barton rightly stated it, ‘justiciability is a tool to assess what sorts of problems are, and are not, suitable for adjudication.’¹⁵ In international law, justiciability

¹¹ Ibid

¹² Mary Ellen O’Connell and Mirakmal Niyazmatov, ‘What is aggression?’: Comparing the Jus and Bellum and the ICC Statute in *Journal of International Criminal Justice* (vol. 10, 2012), pp. 189-207.

¹³ Ibid

¹⁴ Thomas Barton, ‘Justiciability: A Theory of Judicial Problem Solving’ in *Boston College Law Review* (vol. 24, 1983), pp. 505-634.

¹⁵ Ibid

principally refers to the determinacy of an issue through the ‘application of legal principles and techniques.’¹⁶

At the core of this work is whether an act of aggression, by its nature, is suitable for adjudication. In other words, how easily could an act of aggression be handled by the ICC through application of law and legal techniques? Though it was not directly framed and debated, justiciability of an act of aggression was and continues to be the source of the major controversies in the discussions over the content of the crime of aggression. The supporters of the Kampala amendments applaud such amendments and see them as instruments of maintaining the Nuremberg legacy.¹⁷ The details provided by the amendments regarding the content of the crime of aggression are seen as adequate responses to the challenges related to legal certainty which were experienced during NT. If we endorse the views of these supporters, an act of aggression is a justiciable subject matter which can be effectively held by the ICC and thus there will be no need to separately deal with the ICC’s jurisdiction over an act of aggression as a discussion on its jurisdiction over the crime of aggression would suffice.

For the opponents of the Kampala amendments, although the details about the crime of aggression are positive developments, determination of an act of aggression is not a subject that can be automatically exercised by the ICC. The US is the prominent protestor and has rejected the ICC’s jurisdiction over the crime of aggression let alone the Court’s jurisdiction to determine an act of aggression which is the very reason for all the controversies.¹⁸ In the 2015 American Society of International Law annual meeting, Sarah Sewall raised three points in defense of the US position. The third point has to do with justiciability of aggression (i.e. the political issues associated with aggression) while the remaining two are related to

¹⁶ P. Ingram, ‘Justiciability’ in *American Journal of Jurisprudence*, (vol. 39, 1994), 353-372.

¹⁷ _____ *The ICC Crime of Aggression and the Changing International Security* (American Society of International Law) <<https://www.asil.org/blogs/icc-crime-aggression-and-changing-international-security-landscape>> accessed 18 March 2016

¹⁸ O’Connell, *What is Aggression*, fn 12, p. 190.

practical problems that the Court will face in exercising jurisdiction over the crime of aggression.¹⁹

There are also objections to the Court's jurisdiction over the crime of aggression based on the Westphalian system and the effectiveness and impartiality of the Court.²⁰ The objections which rely on the Westphalian system are less important so long as the ICC assumes jurisdiction based on a treaty to which states have given their consent.²¹ The arguments which are raised based on effectiveness and impartiality seem temporary and do not basically address structural problems related to the crime of aggression in general and the act of aggression in particular. They do not explain if an act of aggression is justiciable and can be determined by the ICC.

Determination of an act of aggression involves intricate issues as such act has to do with state responsibility. In determining an act of aggression, the ICC will have to consider the political motives of a state, the nature of an attack and the level of use of armed force as it has to assess whether an act of a state, 'by its character, gravity and scale, constitutes a manifest violation of the UN Charter.'²² Such an assessment cannot escape the political essentials inherent in the act of aggression. As over 40 civil society organizations stated it in their joint letter addressed to foreign ministers ahead of the Kampala conference, 'aggression raises fundamentally political considerations about a state's initial decision to resort to the use of force.'²³ The ICC, for example, will have to determine politically sensitive issues like which state is responsible for an inter-state conflict and who

¹⁹ *The ICC Crime*, fn 17.

²⁰ Ayla Prentice-Cuntz and Katie Flannery, 'The crime of aggression and the ICC in a quasi-Westphalian system', <<http://www.internationaljusticeproject.com/on-the-crime-of-aggression-and-the-icc-in-a-quasi-westphalian-system/>> accessed 19 March 2016

²¹ *Ibid.*

²² Art 8 *bis* (1 and 2).

²³ <http://www.iccnw.org/documents/Foreign_Minister_Letter_-_May_10.pdf> accessed 21 March 2016

has used armed force in self-defense.²⁴ By doing so, it will engage itself in political issues which are normally handled by international political bodies. The act of aggression is, therefore, non-justiciable by its nature. The content of aggression also suffers from indeterminacy. The disagreements on un(lawfulness) of use of force for humanitarian reasons following NATO's intervention in Yugoslavia and Russia in Georgia are among the noticeable examples depicting the indeterminacy of aggression.²⁵ Such uncertainty would make any argument in favor of justiciability of an act of aggression feeble.

It follows that the ICC is not an appropriate body to determine an act of aggression if not the crime of aggression. Despite the contrary formulation under its statute²⁶, the ICC should, therefore, seek determination of such an act by the appropriate political bodies before it starts to prosecute a crime of aggression. Some may say this would undermine the Court's independence. Nonetheless, this is an apt compromise as, unlike the other three crimes under the ICC jurisdiction, the crime of aggression constitutes not only the acts of an individual but also a state. The UNSC reluctance or blockage may, at times, be a real threat in this regard. Yet, the ICC can work on the ways of using the more democratic and impartial UN bodies (GA and ICJ) to get green light to prosecute the crime of aggression.

Conclusion

To sum up, given the fact that the determination of an alleged act of aggression involves an investigation into state responsibility and thus intricate political issues, such an act is non-justiciable by its nature. While exercising jurisdiction over the crime of aggression, the ICC should, therefore, rely on determination of an alleged act of aggression by the appropriate international political bodies. Such dependence

²⁴ <<http://www.state.gov/j/remarks/240579.htm>> accessed 24 March 2016

²⁵ Andreas Paulus, 'Second Thoughts on the Crime of Aggression' in *The European Journal of International Law* (vol. 20, 2010), pp. 1117-1128.

²⁶ Art 15 bis (8).

is a necessary evil in exercising jurisdiction over a crime which is closely linked to a political choice of a state and saves the Court from practical setbacks. As determination of an alleged act of aggression by the UNSC may be rare, the ICC has to develop mechanisms to utilize alternative ways of determination.