

1 The crime of aggression under the Rome Statute of the International Criminal Court: an introduction

A crime of aggression at last

At a little after midnight on the final day of the First Review Conference of the Rome Statute (Review Conference), the planning, preparation, initiation and execution of the most serious forms of the illegal inter-State use of force were criminalised under the Rome Statute of the International Criminal Court (Rome Statute). It was a portentous moment. The decision to criminalise State acts of aggression marks a significant step in ending the impunity that has so long shadowed the illegal use of inter-State armed violence. It evidences the commitment of the international community to the International Criminal Court (ICC or the Court). It also quite possibly signals a dramatic paradigm shift in the global politics that dictate when and how States use armed force.

The striking of the President of the Assembly of States Parties' (ASP)¹ gavel at 12.17am on 12 June 2010, signalling the adoption by the Review Conference of a resolution annexing provisions on the crime of aggression, unleashed a wave of emotion in the Speke Ball Room at the Munyonyo Commonwealth Resort in Kampala, Uganda. Like many delegates, I found myself swallowing and blinking rapidly in an effort to conceal my tears. Undeniably, the palpable emotion in the room was partly the product of the roller coaster that was the preceding two weeks of fever-pitched negotiations, wherein every advance and retreat towards consensus was overshadowed by the very real spectre that the goodwill of the majority would be trumped by cards held by

¹ Ambassador Christian Wenaweser, Liechtenstein's Permanent Representative to the United Nations, who served as Chairman of the Special Working Group on the Crime of Aggression between 2003 and 2009, presided over the Review Conference.

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the UK or France, or any number of smaller States doing the bidding of the US.

But to focus on the immediate events that led up to the adoption of the resolution would be to overlook the telling history of the crime of aggression, a history that by June 2010 extended some ninety-odd years, and which has been controversial for reasons that are largely self-evident. For unlike the other crimes under the ICC's jurisdiction, which are based on the *jus in bello* and international human rights law, the crime of aggression is a child of the *jus ad bellum*. And it is something of an understatement to say that the prohibition of the threat or use of force is one of the most fraught areas of international law. As Theodor Meron wrote in the context of the crime's long incubation period, '[t]he mission is more sensitive, the precedents fewer, the implications for the integrity of international law and the UN Charter deeper and broader, and national security interests more directly involved'.²

The early history of the crime of aggression

The controversial history of the crime of aggression begins with the early, largely unsuccessful, attempts to regulate, and then prohibit, the use of inter-State armed force. In one sense such attempts are as old as the use of armed violence itself, but in a more consequential sense, they date back to the Covenant of the League of Nations,³ reaching a pre-World War II high point with the adoption of the Kellogg-Briand Pact.⁴ The attachment of individual criminal responsibility to such uses of armed force was marked by the inclusion of crimes against peace in the Statutes of the Nuremberg and Tokyo Tribunals. While the trial of German and Japanese defendants for crimes against peace (defined in the International Military Tribunal (IMT) Charter as the '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'⁵) was not

² Theodor Meron, 'Defining Aggression for the International Criminal Court' (2001) 25 *Suffolk Transnational Law Review* 1, 3.

³ *Treaty of Peace Between Allied and Associated Powers and Germany, Peace Treaty of Versailles*, signed 28 June 1919, 2 Bevans 43 (entered into force 10 January 1920).

⁴ *General Treaty for the Renunciation of War as an Instrument of National Policy*, opened for signature 27 August 1928, 94 LNTS 57 (entered into force 24 July 1929).

⁵ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal*, signed 8 August 1945, 82 UNTS 279 (entered into force 8 August 1945) (IMT Charter).

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without controversy, the crime was given the imprimatur of subsequent international acceptance and approval, over time solidifying its place as a crime under customary international law.⁶

I have published elsewhere a critique of the scholarly review of the judgments of the Nuremberg and Tokyo Tribunals.⁷ Scholars typically conclude that the Tribunals failed to define crimes against peace. I have shown, however, that the Tribunals' factual findings demonstrate that the definition of the State act element of the crime must include:

- (i) war with the object of the occupation or conquest of the territory of another State or part thereof;
- (ii) war declared in support of a third party's war of aggression; and
- (iii) war with the object of disabling another State's capacity to provide assistance to (a) third State(s) victim of a war of aggression initiated by the aggressor.

Translating the somewhat unsatisfactory and outdated notion of crimes against peace into a crime responsive to both twenty-first century uses of armed force and twenty-first century understandings of the prohibition of the threat or use of force was, however, no easy task. Before the Nuremberg and Tokyo trials had even started, the international community had adopted the Charter of the United Nations,⁸ which introduced a new lexicon to describe inter-State armed violence. While the intention was to remove any room for argument over definitions of terms of art having been met, faith in collective security soon melted (exacerbated by the onset of the Cold War and the fast-paced evolution of military technology) resulting in the fierce defence on the part of many States of their right to use inter-State armed force in certain situations. This in turn led to protracted debates over the meaning of the prohibition of the use of force and its exceptions under the Charter, as well as the meaning of 'act of aggression', which is one of the terms used to describe inter-State armed violence in the Charter, and which had been the subject of an unresolved definitional debate during

⁶ For a detailed demonstration of the customary status of the crime see Chapter 4.

⁷ Carrie McDougall, 'The Crime of Aggression: Born of the Failure of Collective Security – Still Shackled to its Fate? Time to Catch Up or Part Ways' in David A. Blumenthal & Timothy L. H. McCormack (eds.), *The Legacy of Nuremberg*, The Hague: Martinus Nijhoff Publishers, 2007, 131–167. See also a forthcoming chapter in Stefan Barriga & Claus Kress (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, forthcoming 2014.

⁸ *Charter of the United Nations*, opened for signature 26 June 1945, 1946 UKTS 67 (entered into force 24 October 1945).

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the inter-war years.⁹ This had important ramifications for the codification of a post-Charter equivalent of crimes against peace.

In late 1950, the Soviet Union presented the UN General Assembly (GA) with a draft resolution defining aggression.¹⁰ Resolution 378B, adopted by the GA on 17 November 1950, referred the Soviet proposal to the International Law Commission (ILC) for consideration in conjunction with its work on the draft Code of Offences Against the Peace and Security of Mankind (Draft Code).¹¹ Article 2 of the ILC's first Draft Code, published in 1951, included a list of crimes that had their roots in crimes against peace but which reflected the development in the *jus ad bellum* represented by Article 2(4) of the UN Charter. These included Article 2(1): '[a]ny act of aggression including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations'.¹²

The transformation of crimes against peace into the crime of aggression under the 1951 Draft Code was not merely a nicety of nomenclature. The content of the crime was uncertain, exacerbated by the fact that the Draft Code did not provide a definition of the term 'act of aggression'. This was a subject of much controversy. ILC Special Rapporteur for the Draft Code, Mr Jean Spiropoulos, had recommended that the Commission abstain from defining aggression because it would be a 'waste of time', arguing that everyone could recognise aggression, although it was impossible to define comprehensively.¹³ Not completely convinced, various members of the ILC proposed draft definitions and one was put to a vote, but it was rejected, as was a proposal to

⁹ For a detailed account of the meaning of the Charter's terms and the reasons behind the focus on the meaning of an 'act of aggression' see Chapter 3.

¹⁰ Union of Soviet Socialist Republics, *Draft Resolution on the Definition of Aggression*, UN Doc. A/C.1/608 (1950), 4–5. The Resolution was similar to a definition of aggression proposed by the Soviet Union at the 1933 Disarmament Conference.

¹¹ *Resolution on the Duties of States in the Event of the Outbreak of Hostilities*, UN Doc. A/RES/378B (1950).

¹² Also highly relevant was Article 2(8): 'Acts by the authorities of a State resulting in the annexation, contrary to international law of territory belonging to another State or of territory under an international regime.' *Report of the International Law Commission on the Work of its Third Session*, in 1951 *Yearbook of the International Law Commission*, vol II, UN Doc. A/CN.4/SER.A/1951/Add.1 (1951), 135–136.

¹³ *Report by J. Spiropoulos, Special Rapporteur in 1950 Yearbook of the International Law Commission*, vol II, UN Doc. A/CN.4/SER.A/1950/Add.1 (1950), 262.

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continue the search for a definition.¹⁴ When the 1951 Draft Code was presented to the GA's Sixth Committee, however, questions as to the possibility and desirability of defining 'an act of aggression' were the focus of much debate, leading to the adoption, in 1952, of Resolution 599, requesting the Secretary-General to prepare a report on defining aggression.¹⁵

The Secretary-General's 1952 report provided a useful overview of the historical attempts to define aggression, but essentially served only to highlight the complexity of the definitional enterprise, concluding that '[t]here is not a single, universally recognized concept of Aggression, but, rather, several concepts which, according to their advocates, can either be combined or are mutually exclusive'.¹⁶ In response, the Assembly established a Special Committee and mandated it to study the concept of aggression, draft a definition and to study the role of such a definition in the *jus ad bellum* and international criminal law frameworks.¹⁷

That Committee failed to reach any conclusions and the ILC, in 1954, published a second Draft Code that again referred to an act of aggression without providing any definition of the term.¹⁸ On 4 December 1954 the GA established a second Special Committee, which was requested to submit a detailed report and a draft definition at the Assembly's Eleventh Session.¹⁹ On the same day the GA decided to postpone consideration of the 1954 Draft Code and the question of international criminal jurisdiction until the Special Committee had submitted its report.²⁰ It took twenty years for the successor of the second Special Committee to furnish a definition of aggression.

The Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX) (the 3314 Definition) adopted on 14 December

¹⁴ Report of the ILC on the Work of its Third Session, 133.

¹⁵ Resolution on the Question of Defining Aggression UN Doc. A/RES/599 (1952).

¹⁶ Report by the Secretary-General on the Question of Defining Aggression, UN Doc. A/2211(1952) reproduced in Benjamin B. Ferencz, *Defining International Aggression: The Search for World Peace: A Documentary History and Analysis*, New York: Oceana Publications, 1975, vol II, 112, 147.

¹⁷ Resolution on the Question of Defining Aggression, UN Doc. A/RES/688 (1952).

¹⁸ Report of the International Law Commission on the Work of its Sixth Session, in 1954 Yearbook of the International Law Commission, vol II, UN Doc. A/CN.4/SER.A/1954/Add.1 (1954), 151.

¹⁹ Resolution on the Question of Defining Aggression, UN Doc. A/Res/895 (1954).

²⁰ Resolution on the Draft Code of Offences Against the Peace and Security of Mankind, UN Doc. A/Res/897 (1954); Resolution on International Criminal Jurisdiction, UN Doc. A/Res/898 (1954).

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1974²¹ consisted of a chapeau definition ('[a]ggression 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'), a list of illustrative acts (arguably covering most conceivable uses of force in the 1970s), and a series of instructions as to how the definition was to be interpreted (aimed at overcoming differences in relation to issues such as the relevance of priority and intent, as well as ambiguities as to permissible uses of force, such as in the context of self-determination). The definition was most certainly a breakthrough; however, in many ways its formulation masked deep divisions of opinion.²² Nonetheless, it prompted the rehabilitation of the international criminal court project.

The lead-up to Rome

On 10 December 1981, the GA requested the ILC to resume its work on the Draft Code.²³ After much debate among members of the ILC as to the utility of various provisions of the 3314 Definition,²⁴ Article 15 of the Commission's 1991 Draft Code substantially mirrored it.²⁵ This caused concern for a number of States that submitted that Article 15 went 'beyond existing international law which criminalizes wars of aggression only'.²⁶ This division was replicated in the ILC's commentary to Article 20 of the Commission's 1994 Draft Statute for an international criminal court, which listed the crime of aggression as a crime within the jurisdiction of such a court.²⁷

²¹ *Resolution on the Definition of Aggression*, UN Doc. A/RES/3314 (1974).

²² For a detailed analysis of the 3314 Definition see Chapter 3.

²³ *Resolution on the Draft Code of Offences Against the Peace and Security of Mankind*, UN Doc. A/RES/36/106 (1981).

²⁴ *Third Report on the Draft Code of Offences Against the Peace and Security of Mankind by Mr Doudou Thiam, Special Rapporteur*, in 1985 *Yearbook of the International Law Commission*, vol II, UN Doc. A/CN.4/SER.A/1985/Add.1 (Part 1) (1985), 63, 72; *Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind*, by Mr Doudou Thiam, Special Rapporteur, in 1986 *Yearbook of the International Law Commission*, vol II, UN Doc. A/CN.4/SER.A/1986/Add.1 (Part 1) (1986), 83–84.

²⁵ *Report of the International Law Commission on the Work of its 43rd Session*, in 1991 *Yearbook of the International Law Commission*, vol II, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2) (1991), 95–96.

²⁶ *Thirteenth Report on the Draft Code of Crimes Against the Peace and Security of Mankind*, by Mr Doudou Thiam, Special Rapporteur in 1995 *Yearbook of the International Law Commission*, vol II, UN Doc. A/CN.4/SER.A/Add.1 (Part 1) (1995), 38 (comments of the Government of Australia).

²⁷ *Report of the International Law Commission on the Work of its 46th Session*, in 1994 *Yearbook of the International Law Commission*, vol II, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2) (1994), 38.

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In 1995 the ILC reported that there was broad agreement among Commission members 'both as to the character of aggression as the quintessential crime against the peace and security of mankind and as to the difficulties of elaborating a sufficiently precise definition of aggression for purposes of individual criminal responsibility'.²⁸ The Commission reported that it was split on the usefulness of the 3314 Definition. An alternative, general definition proposed by the Special Rapporteur ('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') found only limited support.²⁹ Linked to this was the ongoing disagreement as to whether individual criminal responsibility could arise from acts other than wars of aggression.³⁰

Article 16 of the ILC's 1996 Draft Code reversed the position the Commission had adopted in its 1991 draft. It provided that: '[a]n individual, who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State, shall be responsible for a crime of aggression.'³¹ The commentary to Article 16 stated that the question of the definition of 'aggression by a State' was 'beyond the scope of the Code'.³² Nonetheless, the ILC observed that '[t]he action of a State entails individual responsibility for a crime of aggression only if the conduct of the State is a sufficiently serious violation of the prohibition contained in Article 2, paragraph 4 of the Charter of the United Nations . . . The Charter and the Judgment of the Nürnberg Tribunal are the main sources of authority with regard to individual criminal responsibility for acts of aggression.'³³

The debate over the definition of the crime of aggression is, however, just one part of the story. When the ILC switched its attention to drafting a statute for an international criminal court in the early 1990s the issue of the conditions under which an international criminal court could exercise jurisdiction over the crimes listed in the Draft Code emerged as a significant issue. States were divided as to whether the future international criminal court should exercise universal

²⁸ *Report of the International Law Commission on the Work of its 47th Session, in 1995 ILC Yearbook*, 20.

²⁹ *Ibid.*, 20–22. ³⁰ *Ibid.*, 21.

³¹ *Report of the International Law Commission on the Work of its 48th Session in 1996 Yearbook of the International Law Commission*, Vol. II, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2) (1996), 42–43.

³² *Ibid.* ³³ *Ibid.*

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jurisdiction, or whether the court's jurisdiction should depend on the consent of the State of nationality of the perpetrator (or the victim), the State on whose territory the conduct occurred, and/or the State in possession of the alleged perpetrator.

The crime of aggression posed an added difficulty. There emerged a view that under Article 39 of the UN Charter, only the Security Council had the ability to determine that an act of aggression had occurred. The 1993 report of the ILC's Working Group on a draft statute, for example, proposed that 'a person may not be charged with a crime of or directly related to an act of aggression ... unless the Security Council has first determined that the State concerned has committed the act of aggression which is the subject of the charge'.³⁴ The commentary to the relevant Article explained that the Court would in effect only decide consequential issues, principally whether an individual has 'acted on behalf of that State in such a capacity as to have played a part in the planning and waging of the aggression'.³⁵ Not all members of the ILC, however, were prepared to concede such a significant role in international criminal law to the Security Council.

A second jurisdictional issue was highlighted in the final Draft Code adopted by the ILC in 1996. Article 8 provided that jurisdiction over the crime of aggression was to be exercised exclusively by the future international criminal court, unless a domestic court was trying its own nationals.³⁶ The commentary to Article 8 explained that:

An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.³⁷

³⁴ Article 27, International Law Commission, *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, UN Doc. A/CN.4/L.490 and Add. 1 (1993).

³⁵ *Ibid.*

³⁶ *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, in 1996 ILC Yearbook, Vol. II, Part 2.

³⁷ *Ibid.*, [14].

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As the ILC's work progressed, the GA established, in 1994, the Ad Hoc Committee on the Establishment of an International Criminal Court to review the Draft Statute prepared by the ILC.³⁸ A year later, the GA established the Preparatory Committee on the Establishment of an International Criminal Court (Preparatory Committee),³⁹ which was mandated to complete the drafting of a text for submission to a conference aimed at finally adopting a statute to establish such a court.⁴⁰ The Preparatory Committee's Final Report⁴¹ indicated that in the lead-up to the United Nations Conference of Plenipotentiaries on the Establishment of the International Criminal Court (the Rome Conference) there was still no agreement in relation to the proposed crime of aggression. Nonetheless, the crime was listed as falling within the proposed court's jurisdiction under Article 5(b) of the Draft Statute annexed to the Report, accompanied by a note that this inclusion reflected 'the view held by a large number of delegations that the crime of aggression should be included in the Statute'.⁴²

The Rome Conference

The summary records of the Plenary and Committee of the Whole meetings at the Rome Conference reveal that of the 134 States that made statements in relation to the crime of aggression, only fifteen failed to indicate that they supported the crime's inclusion in the ICC's statute.⁴³ Of these, only Morocco, Pakistan, Turkey and the US questioned the idea that at least some State acts of aggression entail, or should entail, individual criminal responsibility. The remaining eleven States expressed only a fear that in the limited time allowed for the Conference, participants would be unable to overcome their differences

³⁸ *Resolution on the Establishment of an International Criminal Court*, UN Doc. A/RES/49/53 (1994).

³⁹ *Resolution on the Establishment of an International Criminal Court*, UN Doc. A/RES/50/46 (1995).

⁴⁰ *Resolution on the Establishment of an International Criminal Court*, UN Doc. A/RES/51/207 (1997). See also *Resolution on the Establishment of an International Criminal Court*, UN Doc. A/RES/52/160 (1998).

⁴¹ *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Draft Statute for an International Criminal Court*, UN Doc. A/CONF.183/2/Add.1 (1998).

⁴² *Ibid.*, 12, note 6.

⁴³ Australia, Brazil, Canada, Liechtenstein, Luxembourg, Malaysia, Mali, Mexico, Morocco, Norway, Pakistan, Rwanda, Togo, Turkey and the United States of America. It is noted that both Ghana and Israel made conflicting statements on their support (or lack thereof) for the crime of aggression.

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in relation to the definitional and jurisdictional issues associated with the crime.⁴⁴

The Preparatory Committee's Draft Statute had presented States with three different definitional models.⁴⁵ A number of States favoured a 'war of aggression' style definition reflecting the origins of the crime. Other States argued that the concept of a 'war of aggression' was outdated and failed to adequately capture the conduct prohibited by Article 2(4) of the UN Charter. Definitions modelled on the general language of Article 2(4), on the other hand, were said to raise concerns related to the scope of the prohibition of the threat or use of force and its exceptions. The third major definitional model, based on the 3314 Definition, found a significant degree of support on the basis that it represented agreed language. Others, however, argued that it was an unsuitable model because it was the product of an unsatisfactory political compromise, was full of ambiguities, and had never been intended to serve the purposes of international criminal law.

States were equally divided on the jurisdictional question. At one end of the spectrum, a number of States (including, unsurprisingly, the permanent members of the Security Council (the P5)) argued that the UN Charter requires the Security Council to determine the existence of an act of aggression as a precondition to the exercise of jurisdiction by the ICC. Others maintained that no such requirement exists and that any such role for the Council would infringe upon the independence of the ICC. In order to bridge the gap between these positions a number of compromise proposals providing roles for the GA or the International Court of Justice (ICJ) were suggested, but none attracted any significant level of support.

So deeply divided were States that it appeared for some time that the Rome Statute would omit the crime of aggression. The Conference Bureau's 6 July *Discussion Paper* listed the crime of aggression as optional under draft Article 5(d).⁴⁶ The options relating to the crime listed in the

⁴⁴ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Records of the Plenary and Committee of the Whole Meetings*, UN Docs A/CONF.183/SR.1-A/CONF.183/SR.8 (1998) and A/CONF.183/C.1/SR.1-A/CONF.183/C.1/SR.36 (1998).

⁴⁵ Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute*, 13–14.

⁴⁶ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Committee of the Whole, *Discussion Paper, Bureau Proposal, Part 2: Jurisdiction, Admissibility and Applicable Law*, UN Doc. A/CONF.183/C.1/L.53 (1998), 1.