Understanding Aggression

Legal Status and Individual Criminal Responsibility before the 2010 Kampala Conference

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Abstract

The Nuremberg Charter introduced the crime of aggression into international law. The American Chief Prosecutor Robert Jackson gave a famous promise that offenders who commit acts of aggression shall be prosecuted and international criminal law would be applied against them. Notwithstanding the efforts of the United Nations to criminalize aggression, in the period between the Nuremberg trial and the Kampala Conference in 2010 there has not been a universally accepted definition of aggression. Even though the Nuremberg Principles had been recognized and the Tokyo judgment followed the Nuremberg precedent, a universally accepted definition of the ‘supreme crime’ was missing for more than 60 years. One could argue that the Cold War was the main reason for the absence of international follow-up to the criminalization of aggression after 1947; or one may also say that the international community relied on the UN Charter provisions as a trustworthy bulwark against acts of aggression. The definition of ‘act of aggression’ from 1974 could not be labeled as ‘historic’ simply because in reality nothing truly changed. The international tribunals prior to the establishment of the International Criminal Court did not have the crime of aggression in their statutes. In this article the author describes the development of the ‘supreme crime’ specifically after the Nuremberg trial, with a focus on the UN efforts in dealing with acts of aggression. Individual responsibility for the crime of aggression as such is also examined in this ‘vacuum period’ where the international consensus was missing.
1. Introduction

The night of 11–12 June 2010 in Kampala will be remembered as a historical moment when the first Review Conference of the Statute of the International Criminal Court (ICC Statute)\(^1\) reached the agreement on the crime of aggression. Despite years of multilateral negotiations pre- and post-Rome, delegates arrived at Kampala with the whole set of contentious issues and the definition of the crime of aggression enjoyed a shaky consensus.\(^2\) When the presidential hammer went down, announcing the achievement of finding the compromise, an outburst of collective joy spread across the whole room.\(^3\) The 60 year long process of criminalizing aggression finally reached its end.

The first international trial for the crime of aggression was before the Nuremberg International Military Tribunal (IMT) following the Second World War (WWII), under the name of ‘crimes against peace’.\(^4\) Article 6(a) of the IMT Charter\(^5\) defines crimes against peace as ‘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.’ Notwithstanding the positive effects of the judgment on international criminal law, the contemporary response was predominantly critical. The judgment failed to provide a plausible argument that the verdicts for this crime were in line with the fundamental principle of *nullum crimen sine lege*.\(^6\)

While acknowledging the flaws of the process and the shortcomings of the judgment, no one can deny that the Nuremberg trial was the trigger for the international community to define the rules of waging war in a more detailed manner. The General Assembly of the United Nations (UN) soon after recognized the Nurnberg Principles as international law.\(^7\) However, initial enthusiasm died somewhere on the road and the process of criminalization aggression became rather onerous and daunting.

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7. GA Res. 95 (I), 11 December 1946, para. 1.
I assert that the reasons for the 60 year long process in reaching a compromise for the crime of aggression were predominantly political.\textsuperscript{8} The purpose of this paper, therefore, is to provide for a reader better understanding of the legal status of aggression in this ‘vacuum period’, with a criminal law perspective. By looking at the work of different bodies of the UN in the period between the Nuremberg trial and the Kampala Conference, I shall explore the notion of individual criminal responsibility in this respect and I will try to give an answer for the question: How international law defined the crime of aggression in the period before the Kampala Conference?

I will attempt to assess how the political interference influenced the processes of making the consensus on criminalizing aggression. The discussion begins with a historical overview on the shift between the two cultures of prosecuting state leaders. Section 2 gives an account of UN efforts to codify the crime of aggression. Finally, individual criminal responsibility as an intrinsic part of this notion shall be examined separately.

2. From ‘Impunity’ to ‘Accountability’

It is perhaps rather difficult for one to understand why the international community after more than two millennia of history of warfare had to struggle to bring those who were seen as most responsible for the atrocities occurred during WWII to face the trial. One of the reasons was the prevailing opinion concerning individual criminal responsibility prior to the wake of the 20\textsuperscript{th} century, which was remarkably different from the one accepted today. In effect, state leaders enjoyed absolute impunity for most of the time throughout the course of history. Up until the end of WWII, it was held that emperors, kings, tsars etc. should not be responsible to other states for the crimes committed within the borders of their country.

During the Medieval period — more precisely, in the sixteenth century — the theory of state sovereignty emerged as a core principle in interstate relations.\textsuperscript{9} It furthered this idea of impunity to the even greater extent. One of the main features was the state privilege to enjoy supreme authority over its own people within its borders. State leaders used it as a shield against individual responsibility for their personal wrongdoings as it was believed that they were acting in the name of the whole country. In that time, subjects of international law were only the states. Accordingly, individuals could not be internationally responsible and the only sovereign power that could try them was their own country. In reality, when one country conquers another or when the belligerents sign an armistice, leaders of both countries would be amnestied and allowed to return to their public life.

\textsuperscript{8} This assertion draws from scholarship on reasons for the absence of international follow-up to the criminalization of aggression after 1947, see A. Cassese, \textit{International Criminal Law}, (3\textsuperscript{rd} edn., Oxford: Oxford University Press, 2013), at 136–139.

At the same time, there was an ongoing struggle between the two naturally confronted sides, i.e. the government authority on the one, and the human rights movement embodied in, what we call today — civil society, on the other. States did not want to give up their privileges so easily in favor of civil rights and freedoms. One among those privileges was the absolute impunity of their leaders. Civil wars all across Europe were mired in the transition from a ‘culture of impunity’ to a ‘culture of accountability’. Human rights movement praised many glories in different fields of civil liberties. However, the question of international criminal responsibility was finally brought to the table only after the First World War (WWI).

WWI is seen as the seminal event in the transposition of a ‘culture of impunity’ to a ‘culture of accountability’. In the wake of war, the Allied countries started to promote the opinion that Kaiser Wilhelm II of Germany should face criminal responsibility for war crimes committed therein. The 1919 Treaty of Versailles provided the legal basis for the establishment of a special tribunal for Kaiser Wilhelm. Those occurrences sparked the paradigm shift between the two cultures, which resulted in the first attempt to try individuals for international crimes. Nevertheless, proceedings never took place as the Netherlands refused to surrender the Kaiser to the Allies.

As it is stated in the introduction, the first international trial for what amounts to today’s crime of aggression was held before the IMT following WWII, under the label of ‘crimes against peace’. The Tribunal held that ‘Crimes against International Law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.’ This revolutionary sentence represented the official end of era of ‘culture of impunity’. No longer could state leaders hide behind the veil of state sovereignty as they became legitimate subjects of international law. Moreover, this wording hallmarkd the emergence of international criminal law as a system of secondary provisions that should serve as a mechanism for enforcement primary norms of international law.

3. The UN Efforts to Codify Aggression after Nuremberg

In the immediate aftermath of WWII, international law emerged as a universally accepted system of norms with a primary goal to govern the relations between states. The first step in the creation of a new world order was the foundation of

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12 Ibid.
13 United States et al. v. Göring et al., Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945 – 1 October 1946, Vol. I (1947), at 447 (hereinafter the ‘IMT Judgment’).
the UN in 1945. The UN officially came into existence when the UN Charter was adopted.\(^{14}\)

The five major victorious powers (United States, Soviet Union, United Kingdom, China and France) that have formed an alliance during WWII envisaged the Security Council (SC) as the heart of the UN where they can continue their wartime alliance in perpetuity. By signing the Charter, UN members agreed to accept the authority of the SC. According to Article 24 of the UN Charter, the SC has primary responsibility for the maintenance of international peace and security. The SC, by maintaining peace and security shall determine act of aggression, and in order to suppress them it shall make recommendations.\(^ {15}\) Furthermore, the SC can decide to use measures other than use of armed force in order to give effect to its decisions and the member states of the UN are obliged to apply such measures.\(^ {16}\) If these measures are inadequate or have been proved to be inadequate, the SC can take action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.\(^ {17}\)

The UN Charter provides a legal regime for the prohibition of the use of force. However, the problem with the UN Charter structure is that it does not contain a definition or explanation of the elements of aggression.\(^ {18}\) Cherif Bassiouni and Benjamin Ferencz described the problem as follows:

*The text of Article 39 left the term “aggression” undefined and gave equal weight to the “threat to the peace, breach of the peace, or act of aggression.” It was hoped that Article 2(4) would satisfactorily prohibit a use of force unless it was “consistent with the purposes of the United Nations.” Should a “threat to the peace, breach of the peace, or act of aggression” take place, it is left in the hands of the Security Council to determine its existence and what sanctions should be used to end it. When the Charter was drafted, it was felt that (1) no definition of aggression could be established that could cover every possible case and (2) it was best to let the Security Council decide what had happened and what actions to take. Both reasons fall short of their objective.*\(^ {19}\)

The UN took several actions immediately after WWII in order to criminalize aggression. Only after two years an assignment of defining aggression was given to the International Law Commission (ILC). This initiative was the first out of many and in that time no one could expect that the international community will be ‘doomed’ on rules enshrined in the UN Charter for more than 60 years.

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\(^{14}\) *Charter of the United Nations*, 1 UNTS XVI, 24 October 1945.

\(^{15}\) Art. 39 UN Charter.

\(^{16}\) ‘These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.’ Art. 41 UN Charter.

\(^{17}\) Art. 42 UN Charter.

\(^{18}\) G. Kemp, ‘Individual Criminal Liability for the International Crime of Aggression’ (PhD thesis at the Stellenbosch University, Stellenbosch), at 139.


The task of preparing a draft code of offences against the peace and security of mankind was entrusted to the ILC in 1947.\(^\text{20}\) The ILC began its work on the draft code of offences in 1949, when Jean Spiropoulos was appointed as Special Rapporteur for the subject.\(^\text{21}\) At its third session, in 1951, the ILC completed the Draft Code of Offences against the Peace and Security of Mankind (Draft) and submitted it to the General Assembly for circulation among governments.\(^\text{22}\) The UN considered that the Draft raised problems related to the definition of aggression and decided to postpone further consideration until the new special committee on the question of defining aggression had submitted its report.\(^\text{23}\)

One can argue that the norms in the Draft did not address the problem of a definition of aggression in a more comprehensive way. Provisions regarding the individual criminal responsibility were omitted. The main feature of the Draft was the paramount role of the SC in determining acts of aggression. During the 1950's this concept caused some political problems in the UN and led the international community to further examine the possibility of defining aggression.\(^\text{24}\) The question whether the nature of the problem of aggression should be politically or criminally oriented was raised. At this historic intersection emerged the overall development of international criminal law.\(^\text{25}\) The criminal lawyers got the important impetus in the quest for a definition of aggression.\(^\text{26}\)

It is essential to study the various ILC draft codes in order to understand the development of the notion of aggression. Gerhard Werle gave credit to the role of the draft codes by stressing that ‘the reports and drafts … are aids in determining customary international law and general principles of law, and thus have significant influence on the development of international criminal law.’\(^\text{27}\) In this paper I have chosen to assess only the first among the three ILC draft codes on the crime of aggression as it represents the cornerstone in the 60 year long process of criminalizing aggression. This legal document has shed light on the trends in international legal thinking and opened a room for the international criminal law.

B. 1974 UN Resolution on Aggression

Starting from 1967, the UN has given several special committees the task of defining aggression. A consensus definition was finally reached in the 1974 UN

\(^{20}\) GA Res. 177 (II), 21 November 1947.
\(^{22}\) *Ibid.*
\(^{23}\) GA Res. 897 (IX), 4 December 1954.
\(^{24}\) Kemp, *supra* note 18, at 146.
\(^{26}\) *Ibid.*
Resolution (the Resolution; 1974 Resolution). Although the Resolution was not legally binding, its value was rather significant in terms of interpretation. The purpose of this resolution was to guide the Security Council when invoking the norms of the UN Charter in order to secure the peace and security.

The definition lists specific examples of acts of aggression, following the definition of aggression in a broad sense. Article 5(2) stipulates that ‘a war of aggression is a crime against international peace. Aggression gives rise to international responsibility.’ In this provision there is a distinction between the war of aggression, that triggers individual criminal responsibility, and acts of aggression that engage the responsibility of states. The resolution as such did not provide a customary law definition for the individual criminal responsibility.

The significance of the Resolution was merely political since it provided indications of understanding of the notion of aggression. In the field of international criminal law nothing really changed. Notwithstanding the useful guidance for the SC, there was no purely legal contribution. Many concessions have been made in this definition in order to overcome political divisions at that time. The definition was essentially weak due to the predominant role of the SC that affected the aggression-debate. Undisputedly, this definition helped the SC on a number of occasions to classify certain conducts as act of aggression. The main contribution of this legal document was the segregation of the notion of aggression from the ambit of the UN Charter.

C. The Creation of the Permanent International Criminal Court

The successor to the post-WWII Tribunals came only after almost half of a century. The UN asked the ILC to draft a Statute for the future ICC and the ILC responded in 1994 producing a final text. According to Article 23(2) of this document, the crime of aggression would be within the jurisdiction of the ICC but that no complaint of an act of aggression could be tried unless the SC had first determined that a state had committed that act.

Proposals that have been made concerning the definition of aggression were transmitted to the Rome Conference, but there was again failure to reach agreement on the definition and on a role for the SC. Nevertheless, the crime of aggression became one of the four crimes within the jurisdiction of the ICC. However, Article 5(2) of the ICC Statute prescribes that the ICC may not exercise that jurisdiction until a ‘provision is adopted … defining the crime and setting
out the conditions under which the Court shall exercise jurisdiction with respect to this crime.’

Only 12 years after the Rome Conference, a compromise for the definition has been finally reached at the first Review Conference of the ICC Statute in Kampala.

D. Reasons for the 60 Year Long Process of Criminalization of Aggression

The UN Charter spelled out conditions and rules for the use of armed force. At the time of the adoption of the Charter, the international community was relying on its provisions in order to prevent the future acts of aggression. For Antonio Cassese, this was one of the major factors that shaped the discourse in the process of criminalizing aggression.\(^{36}\) Yet, the existence of norms enshrined in the UN Charter was not the only reason for 60 years long quest for a definition of aggression.

When we study the historical development of the crime of aggression, in order to understand the discourse that preceded the Kampala Conference, inevitably, we need to take into account the notion of the Cold War and its effect on this process. The Cold War was a state of political and military tension between two powers. On the one side the United States with NATO and others created the so-called Western Bloc. On the other side, the Soviet Union (USSR) and its allies created the Eastern Block as opponent to the prior. During this period, the wartime alliance against Germany from WWII was broken, leaving the communist USSR and the capitalistic US with profound differences over democracy. The Cold War ‘prompted members of the two blocs to refrain from fleshing out the rules on the crime of aggression for fear that they might be used in the ideological and political struggle between the blocs...\(^{37}\) and rendered ‘a general hesitancy by all major powers to elaborate upon aggression, so as to retain as much latitude as possible in the application of the rules on self-defence.’\(^{38}\)

4. Individual Criminal Responsibility for the Crime of Aggression

A. The Notion of Individual Criminal Responsibility

Traditionally, public international law comprises norms about relations between states. By contrast, international criminal law governs the criminal liability of the individuals. The first time when individuals were prosecuted for crimes under international law was before the ITM in 1946. This can be seen as a milestone in the separation between these two branches of international law. Individual criminal responsibility is the key feature of international criminal law.

36 Cassese, supra note 8, at 138.
37 Ibid., at 139.
38 Ibid.
The main purpose of this notion is to punish individuals for their unlawful conduct. The gist is that individuals could be held responsible under international law for their unlawful conduct (actus reus) if they had the necessary intent and knowledge (mens rea). Further to the establishment of this principle of individual criminal responsibility, the ITM spelled out:

"If the principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings...individuals have international duties, which transcend the national obligations of obedience imposed by individual states."³⁹

According to Antonio Cassese, the rules from the customary international law and the treaty provisions of the UN Charter that stipulate prohibition of the use of force as an international unlawful act, are significantly different than those norms that criminalize aggression.⁴⁰ There are a few reasons why the two legal regimes are fundamentally different. First of all, they are linked to different ‘primary’ or substantive rules of customary international law. Moreover, norms of the prohibition of the use of force articulate responsibility of states, whilst provisions that criminalize aggression are subject to the legal regime governing the individual criminal responsibility for international crimes.⁴¹

B. Individual Criminal Responsibility for the Crime of Aggression before Kampala

Before the Kampala Conference and the adoption of the definition of the crime of aggression, the main legal sources concerning individual criminal responsibility in this respect were the Nuremberg trial and the 1974 Resolution. The notion of individual criminal responsibility contains two essential injunctions — actus reus and mens rea. Accordingly, one could be held accountable for international crimes only if his conduct was unlawful and he had the necessary intent and knowledge.

1. Actus Reus

The 1974 Resolution lists specific examples of acts of aggression, following the definition of aggression in a broad sense. Article 5(2) stipulates that ‘a war of aggression is a crime against international peace. Aggression gives rise to international responsibility.’ The 1974 Resolution comprises two basic approaches to aggression that have

³⁹ IMT Judgment, at 223.
⁴⁰ Cassese, supra note 8, at 143.
⁴¹ Ibid.
been disputed during the debates that preceded the adoption of the resolution.\textsuperscript{43} Article 1 of the Resolution sets out the general definition of aggression: ‘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.’\textsuperscript{40} Article 3 provides a list of acts that constitute aggression, such as invasion or attack, bombardment, the blockade of the ports or coasts, an armed attack etc.\textsuperscript{44}

The basis for the 1974 Resolution is the UN Charter that provided the framework for the definition of act of aggression. The list of conducts prescribed in Article 3 has been used to guide the SC in deciding upon which wrongful uses of force amount to acts of aggression.

2. \textit{Mens Rea}

Individual criminal liability is not envisaged in the 1974 definition of aggression. The Resolution was primarily oriented towards the responsibility of states. There is no element of \textit{mens rea} in the definition and it cannot ‘really serve as a basis for individual criminal liability for the crime of aggression.’\textsuperscript{38} At the first glance, the absence of provisions on individual criminal liability in the 1974 definition represents a \textit{lacuna} from a criminal law perspective. However, it should be born in mind that the nature of the whole definition is state-centered and the definition itself cannot serve as the basis for individual criminal responsibility.\textsuperscript{47}

In the period prior to Kampala, the judgment of the IMT was the key material source with regards to the criminal responsibility for aggression. Yoram Dinstein contended that a special kind of subjective element was developed around the concept of crimes against peace.\textsuperscript{47} The IMT stated that \textit{mens rea} was a vital part of a crime together with the \textit{actus reus}.\textsuperscript{48} Kriangsak Kittichaiseree reaffirmed that \textit{mens rea} in the crime of aggression includes both intent and knowledge.\textsuperscript{49} He quoted the \textit{High Command} case\textsuperscript{50} in order to substantiate his view. The US Military Tribunal held that offenders who have been accused of the crime of aggression must have actual knowledge that an aggressive war is being intended and that if launched it will be an aggressive war. It requires in addition that the possessor of such knowledge, after he acquires it shall be in a position to shape or influence the policy that brings about its initiation or its continuance after its initiation, either by furthering, or by hindering or preventing it. If he then does the former, he becomes criminally responsible; if he does the latter to the extent

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\item[42.] Kemp, \textit{supra} note 18, at 162.
\item[43.] Art. 1 of the ‘Definition of Aggression’, annexed to the 1974 Resolution.
\item[44.] Art. 3 of the ‘Definition of Aggression’, annexed to the 1974 Resolution.
\item[45.] Kemp, \textit{supra} note 18, at 162.
\item[46.] \textit{Ibid.}, at 163.
\item[47.] Y. Dinstein, \textit{War, Aggression and Self-Defence} (4\textsuperscript{th} edn., Cambridge: Cambridge University Press, 2005), at 136.
\item[48.] \textit{Ibid.}, at 137.
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of his ability, then his action shows the lack of criminal intent with respect to such policy…

The 1974 definition deserves credits for bringing one closer to an understanding of the acts of aggression. However, as the subjective element was not included, after the post-WWII proceedings there is no legal document adopted in the international sphere specifying mens rea for the crime of aggression.

There has been little state practice in this respect, thus customary international law remains unchanged from the jurisprudence of Nuremberg and Tokyo trials. In 2006, the House of Lords issued a judgment declaring that the crime of aggression is criminalized under customary international law. Lord Binghan of Cornhill, Lord Hoffmann and Lord Mance held that the crime of aggression has a definition comprising both elements of actus reus and mens rea required for a criminal offence.

5. Conclusion

Criminal law was brought to the international level for the first time during the post-WWII trials. The ‘crimes against peace’, today’s crime of aggression, was regarded as a ‘supreme crime’— the crime that triggers mass carnages which occur during the warfare. During that time, the individuals that were seen most responsible for commencing a war were in the focus of the proceedings. After WWII the idea of trying state leaders for the crime of aggression lay dormant for more than six decades. However, efforts that have been made to criminalize aggression in this period were rather significant. Existence of the crime under customary international law most certainly substantiates this claim. Nevertheless, the most remarkable feature of this period was the absence of the codified definition for the crime of aggression. Legal documents that have been produced had a little substance regarding the individual criminal responsibility. As I endeavored to explain, justifications can be found in the political opportunities mired in the second half of the 20th century. Notably, the ITM judgment was the material source of law for the individual criminal liability, and customary international law was the formal.

The consensus that has been made in Kampala represents the beginning of the new era where the Prosecutor of the ICC has the ability to prosecute individuals for the crime of aggression. However, to the prototypical international lawyer, hesitancy that ruled the 60 year long process of reaching a compromise raise the skepticism towards the scope of application of this provisions. Was the night of 11–12 June 2010 in Kampala truly a historical moment and how often will national leaders be tried for the aggression, is yet to be seen.

51 Ibid., at 487.
52 Cryer, supra note 4, at 321.
54 Ibid., § 19, 59 and 99.