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Individual Criminal Responsibility for the Crime of Aggression: Why and How?

SUSANA SÁCOUTO†

I. INTRODUCTION

Aggression, previously known as “crimes against peace,” was the central focus of the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE) and featured prominently in the post-World War II cases tried by United States and French military tribunals. Although it now appears in the Rome Statute that established the International Criminal Court (ICC),¹ aggression has not been prosecuted by an international court since an amendment to criminalize it was adopted in 2010.² In this short piece, I will address how aggression came to be accepted or recognized as criminal—as opposed to prohibited—argue for and against prosecuting Russia’s invasion of Ukraine as aggression, and present some challenges by such a prosecution under the Rome Statute’s definition of aggression.

II. AGGRESSION AS A CRIME: WHAT LED US HERE AND WHY?

Before the IMT and IMTFE, aggression had not been explicitly recognized as an international crime.³ As a result, one of the first

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1. Rome Statute of the International Criminal Court, art. 5, 2187 U.N.T.S. 90, 17 July 1998, entry into force Jul. 1, 2002 [hereinafter, “Rome Statute”].

2. Int’l Criminal Court, Assembly of States Parties to the Rome Statute, *Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of such Victims*, Res. 1/6, ICC Doc. ASP/1/Res. 6 (June 11, 2010).

3. GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 481 (2009).

questions those tribunals addressed was whether individuals could be held criminally liable for aggression without running afoul of the principle *nullum crimen sine lege* (*no crime without law*), which prohibits retroactive application of criminal laws.⁴

There was some precedent for the prohibition on aggressive war, of course. The 1929 Kellogg-Briand Pact, for instance, condemned resorting to war as a solution to international controversies.⁵ Still, it did not criminalize that conduct. As the IMT pointed out, neither did the Hague Conventions criminalize or proscribe penalties for inhumane treatment of prisoners or use of poisonous weapons, and yet these were recognized as crimes and prosecuted as such.⁶ In the opinion of the IMT, aggressive war was worse than any breach of the laws of war, and thus, aggressive war could not be considered any less of a crime.⁷ To the argument that States—not individuals—should bear responsibility for international law violations,⁸ particularly when the act in question is an act of state, the IMT responded with its now famous line: “Crimes committed 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.”⁹

Still, the inclusion of this crime was later criticized as an invention of the Allies in 1945, in violation of the principle of legality.¹⁰ Despite this criticism, aggression is now widely recognized

4. M. Cherif Bassiouni, *Principles of Legality in International and Comparative Criminal Law*, in 1 INT’L. CRIM. L. 73 (M. Cherif Bassiouni ed., 2d ed. 2008).

5. General Treaty for Renunciation of War as an Instrument of National Policy, art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter, “Kellogg-Briand Pact”] (“The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.”).

6. *The United States of America, et al. v. Hermann Wilhelm Goering, et al.*, Judgment, 50–51 (International Military Trib. Oct. 1, 1946) [hereinafter, “IMT Judgment”], http://www.worldcourts.com/imt/eng/decisions/1946.10.01_United_States_v_Goering.htm.

7. *Id.* at 50–52 (concluding that “resort to a war of aggression is not merely illegal but is criminal.”).

8. Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT’L L.J. 327, 327 (2006) (“Consisting of a largely separate set of legal rules and institutions, international law has long governed relationships among states. Under the traditional rules of international law, the claims of individuals could reach the international plane only when a state exercised diplomatic protection and espoused the claims of its nationals in an international forum.”).

9. IMT Judgment, *supra* note 6, at 53.

10. *See, e.g.*, Payam Akhavan, *The Perils of Progressive Jurisprudence: The Nullum Crimen Sine Lege Principle in International Criminal Law*, 75 CURRENT LEGAL PROBS. 45, 49–50 (2022).

as a crime under customary international law.¹¹ This is particularly surprising, perhaps, given that customary international law is based on state practice¹² and the crime has not been prosecuted since the post-WWII trials. Yet, there is a reasonable explanation for the absence of prosecution of the crime since the mid-1940s. Aggression is a leadership crime involving the use of armed violence between states; as such, it has been viewed as a crime more appropriately prosecuted by an international tribunal than a domestic court.¹³ However, until the ICC, no other international tribunal established after the post-WWII tribunals had jurisdiction over the crime of aggression.

The acceptance of aggression as a crime—not just as prohibited conduct¹⁴—may also have to do with an increasing recognition that aggressive war not only violates states’ rights to sovereignty, but nearly always occasions, as Professor Dannenbaum has argued, “widespread killing and the infliction of human suffering without justification.”¹⁵ At the same time, many of the harms inherent in the crime of aggression would not be captured by other core international crimes such as war crimes. This is because once parties find themselves in an armed conflict, regardless of whether the use of force was justified, international humanitarian law (IHL)—or the law of armed conflict—applies.¹⁶ The rules of international humanitarian law

11. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 566 (5th ed. 1998) (“[W]hatever the state of the law in 1945, Article 6 of the Nuremberg Charter has since come to represent general international law.”); *R v. Jones et al.* [2006] UKHL 16 (Eng.), at para. 12–19 (Lord Bingham), paras. 44, 59 (Lord Mance); S. Glaser, *The Charter of the Nuremberg Tribunal and New Principles of International Law*, in *PERSPECTIVES ON THE NUREMBERG TRIAL* 67–68 (Guénaél Mettraux ed. 2008); ANTONIO CASSESE & PAOLA GAETA, *CASSESE’S INTERNATIONAL CRIMINAL LAW* 142–43 (3d ed. 2013); GERHARD WERLE & FLORIAN JESSBERGER, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 13 (3d ed. 2014).

12. Statute of the International Court of Justice, art. 38, para. 1, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 933 (defining customary international law as “a general practice accepted as law”).

13. See *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Bel.)*, Judgement, 2002 I.C.J. 121 paras. 58–61 (Feb. 14) [hereinafter, “Arrest Warrant Case”]. One of the chief reasons for this is that senior leaders, such as heads of state and foreign ministers, enjoy immunity from criminal proceedings in foreign domestic jurisdictions during their term in office for both “official” and “private” acts, committed during, or before, that term in office, even when accused of serious international crimes. *Id.* paras. 54–55.

14. A. Bianchi, *State Responsibility and Criminal Liability of Individuals*, in *THE OXFORD COMPANION TO INT’L CRIM. J.* 63 (Antonio Cassese ed., 2008) (“[C]ertain conduct is criminalized not only if that conduct is prohibited by the law of a given country, but also if the threat of a criminal sanction is attached to it in case of transgression.”).

15. Tom Dannenbaum, *Why Have We Criminalized Aggressive War?* 126 *YALE L.J.* 1242, 1263 (2017). As he notes, aggression is unjustified because it is not action “responding to human violence or its immediate threat.” *Id.* at 1264.

16. U.N. OFF. OF HIGH COMM’R FOR HUM. RTS. INT’L LEGAL PROT. OF HUM. RTS. IN ARMED CONFLICT, at 5, U.N. Doc. HR/PUB/11/01, U.N. Sales No. E.11.XIV.3 (2011)

permit parties to target and kill combatants of the opposing side,¹⁷ and even countenance the deaths of civilians if the civilian losses are not excessive in relation to the anticipated military advantage gained from targeting a legitimate military objective.¹⁸ Thus, as Jens David Olin has noted, aggression criminalizes state actions that have the effect of “bootstrapping” it into “the permissive legal regime of IHL.”¹⁹

Still, I have been skeptical of the idea of prosecuting Russian President Vladimir Putin or other top Russian officials for the crime of aggression for a number of reasons. First, the unique jurisdictional scheme of the ICC does not permit it to exercise jurisdiction with respect to aggression over states that are not party to the Rome Statute, like Russia.²⁰ Further, the laws of immunity bar prosecution of incumbent heads of state and other high officials before foreign domestic courts.²¹ Thus, any case against Putin and other top officials for the crime of aggression would likely necessitate the establishment of a special tribunal for aggression. The establishment of any such tribunal is likely to be costly and time-intensive. Indeed, every tribunal—whether international or hybrid—established since the early 1990s has taken longer and cost more than was anticipated at the start.²²

Moreover, unlike in other situations, we have seen an unprecedented response to the violence in Ukraine, including a very strong demand for accountability.²³ As a result, many other

(“[I]nternational humanitarian law has to be applied equally by all sides to every armed conflict, regardless of whether their cause is justified.”).

17. The standards for triggering what is known as the “combatant’s privilege,” or freedom from criminal liability for killing an enemy soldier, can be found in the Third Geneva Convention of 1949. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. *See also* GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 188–89 (2010).

18. The principle of proportionality in attack is codified in the Additional Protocol I to the 1949 Geneva Conventions. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 15, para. 5b, June 8, 1977, 1125 U.N.T.S. 3.

19. Jens David Olin, *The Crime of Bootstrapping*, in *THE CRIME OF AGGRESSION* 1454, 1454 (Claus Kreß & Stefan Barriga eds., 2017).

20. Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, art. 15*bis* (5), June 11, 2010, C.N.651.2010. TREATIES-8 (Depository Notification).

21. *See* Arrest Warrant Case, *supra* note 13, paras. 54–55.

22. *See, e.g.*, ELENA NAUGHTON, COMMITTING TO JUSTICE FOR SERIOUS HUMAN RIGHTS VIOLATIONS: LESSONS FROM HYBRID TRIBUNALS 8 (2018), https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf.

23. *See* Mark Kersten, *War Crimes in Ukraine: It’s time to move from counting crimes to results in court*, JUST. IN CONFLICT (Oct. 3, 2022), <https://justiceinconflict.org/2022/10/03/war-crimes-in-ukraine-its-time-to-move-from-counting-crimes-to-results-in-court/>.

accountability processes dealing with the crimes committed during the conflict are underway—including the ICC and investigations both within Ukraine and by other states under the concept of universal jurisdiction²⁴—making it difficult to justify the establishment of yet another court for this one crime arising out of the same context. Further, a tribunal to address the situation in Ukraine raises questions of selectivity: why establish a court to address this situation, as opposed to other cases of aggression?

Nevertheless, there are several compelling reasons for attempting to hold perpetrators accountable for the crime of aggression committed in Ukraine. First among them are the victims. Russia’s invasion of Ukraine has precipitated countless atrocities, including summary executions, torture, rape, ill treatment of captured combatants, the abduction and deportation of children and the indiscriminate targeting of civilians and civilian infrastructure—such as schools, hospitals, and train stations—among other crimes.²⁵ All these horrific crimes stemmed from Russia’s blatant invasion of Ukraine.²⁶ Moreover, for the reasons I noted earlier, many victims of the invasion—both those forced to take up arms to defend their country and civilians whose deaths are justified under proportionality and other IHL rules—would not be captured by war crimes cases brought by the ICC, Ukraine, or other states. On the other hand, a case of aggression, the crime that enabled all these other harms that flowed from it, would ostensibly recognize and cover all those forced to fight against, and affected by, the Russian assault on Ukraine.²⁷

It is also worth mentioning that war crimes or other core ICC crimes are unlikely to have been committed personally by Putin or his top officials. Thus, a prosecution for those crimes would likely have to rely on complex theories of liability like indirect perpetration, co-perpetration, or superior liability, which have posed significant

24. James Goldston, *How to Hold Russia Accountable for War Crimes in Ukraine*, OPEN SOC’Y FOUND. (July 2022), <https://www.opensocietyfoundations.org/explainers/how-to-hold-russia-accountable-for-war-crimes-in-ukraine>.

25. See Foreign Press Center Briefing from Beth Van Schaak, Ambassador-at-Large for Global Criminal Justice, on War Crimes and Accountability in Ukraine, (June 15, 2022), available at <https://www.state.gov/briefings-foreign-press-centers/war-crimes-and-accountability-in-ukraine>.

26. As the IMT noted in its judgment of 1946, the crime of aggression “is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” IMT Judgment, *supra* note 6, at 186.

27. It would arguably even cover those soldiers forced to fight on behalf of the Russians in its war against Ukraine.

challenges in the context of the ICC cases²⁸ and may be particularly difficult to prove in the context of the ongoing conflict. Aggression, on the other hand, focuses on the acts of state leaders themselves.

Finally, even an unsuccessful prosecution might be an important way to delegitimize Putin and other senior Russian officials, and to reinforce condemnation of Russia's aggressive war as well as the international norm against aggression more generally. This is particularly true if, as one commentator has noted, "a significant number of countries act as if the court's indictments are meaningful" by, for instance, threatening to arrest those indicted.²⁹

These may be reasons enough not only to consider the proposals being put forward for a special tribunal to prosecute the crime of aggression, but also to examine what it would actually take to successfully prosecute the crime. Thus, the next section will focus on the definition of the crime of aggression, as well as potential challenges involved in its prosecution.

III. PROSECUTING THE CRIME OF AGGRESSION: HOW DOES IT WORK?

Other participants at this conference have discussed the post-WWII precedents relating to the crime of aggression, so I will not spend too much time discussing those here, except to highlight some of the kinds of actions that the IMT found amounted to aggression.

While the IMT never fully addressed the elements of aggression *per se*, the tribunal's judgment at Nuremberg discussed a few types of actions that would amount to aggression. For instance, being actively involved in the *planning* of an aggressive war³⁰ and, to

28. *See, e.g.*, Prosecutor v. Bemba, ICC-01/05-01/08 A, Judgement on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgement Pursuant to Article 74 of the Statute," paras. 194–96 (June 8, 2018), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF (reversing superior liability conviction of former military commander Jean-Pierre Bemba for the crimes against humanity of rape and murder and the war crimes of rape, murder, and pillaging committed by his troops in the Central African Republic).

29. Anthony Dworkin, *Aggression on trial: The tricky path towards prosecuting Russian war leaders*, EUR. COUNCIL ON FOREIGN REL. (Dec. 19, 2022), <https://ecfr.eu/article/aggression-on-trial-the-tricky-path-towards-prosecuting-russian-war-leaders/>.

30. IMT Judgment, *supra* note 6, at 108–10 (finding Goering—"the leading war aggressor," "the moving force, second only to his leader [Hitler]"—guilty of crimes against peace).

some extent, waging a war that was initiated by others³¹ qualified as criminal conduct amounting to aggression.

Notably, these are elements we see in the current definition of the crime of aggression under the Rome Statute.³² That definition, which was the product of negotiations among states at the Rome Statute Review Conference held in Kampala in 2010, is likely to be used in any special tribunal established to try the crime of aggression.³³ Under the Rome Statute, aggression means 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.”³⁴ This is followed by a number of acts that may constitute aggression,³⁵ including invasion by one state against the territory of another, military occupation resulting from the invasion, annexation by force of the territory of another state, military bombardment, and the blockade of ports.³⁶

A few aspects of this definition are worth noting. First, as mentioned earlier, this is a leadership crime. Only those in a position to effectively exercise control over or direct the political or military action of a state can be charged with aggression, which distinguishes it from all other Rome Statute crimes.³⁷ This, of course, raises the question of who exactly would be in a position to effectively exercise control over or direct the political or military action of a state. In the context of the assault on Ukraine, for instance, would it be just Putin, or could the top national security and military officials also be successfully prosecuted for aggression?

31. *Id.* at 137–38, 141 (finding Dönitz—Commander in Chief of the Navy who implemented Hitler’s policies through submarine warfare—was “active in waging aggressive war” and thus guilty of crimes against peace).

32. Rome Statute, *supra* note 1, art. 8 *bis* (1).

33. In Kampala, 110 States then party to the Rome Statute agreed to and adopted—with significant input from a number of non-party observer States, like the United States—the definition of the crime now in the Statute. *See generally* Beth Van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT’L L. 505 (2011). The consensus among states regarding this definition is a strong indication that a special tribunal would likely use this definition rather than engaging in a renewed diplomatic effort to adopt a new definition.

34. *Id.* at 520.

35. This list was taken from a 1974 United Nations General Assembly Resolution. G.A. Res. 3314 (XXIX), at 143 (Dec. 14, 1974).

36. Rome Statute, *supra* note 1, art. 8 *bis* (2)(a)–(g).

37. *See id.* at arts. 6, 7 and 8.

A model indictment drafted by the Open Society Justice Initiative suggests the latter is possible.³⁸ The indictment charges aggression not only against Putin but also against seven senior Russian officials, including the Secretary of the Security Council Nikolai Patrushev; Defense Minister Sergei Shoigu; and Director of the Foreign Intelligence Sergey Naryshkin.³⁹ In light of how unlikely it would be for a tribunal to secure custody of Putin, this approach may be the only way an aggression case may actually see the light of day. A related question is what exactly would meet the “control or direct” standard? As Kevin Jon Heller and others have noted, this is different than the “shape or influence” standard arguably used by the post-WWII tribunals.⁴⁰ Who, shy of Putin, would meet that standard is unclear.

A third question, of course, is what amounts to a “manifest violation of the Charter of the United Nations”? Most would agree that Russia’s full-scale invasion of Ukraine – without any evidence of an armed attack by Ukraine against Russia – was a clear violation of the UN Charter’s prohibition on the use of force. Yet if this is the paradigmatic case, what about less clear examples of aggression? As I mentioned, the definition lists other acts that qualify as acts of aggression, but could acts that fall short of a full-scale invasion be successfully prosecuted as aggression? The answer to that question is it depends.

The ICC Elements of Crimes indicate that in addition to proving that an act of aggression was committed, a separate analysis must be conducted regarding whether—by its character, gravity and scale—that act actually constitutes a manifest violation of the Charter of the United Nations.⁴¹ This, of course, raises the question of what acts qualify as sufficiently grave and of sufficient scale. We might think of a few examples—including humanitarian intervention, for instance—that might qualify as acts of aggression listed in the definition but may not constitute a violation of such gravity and scale that they would

38. *Model Indictment for the Crime of Aggression Committed Against the Ukraine*, OPEN SOC’Y JUST. INITIATIVE, (May 9, 2022), <https://www.justiceinitiative.org/publications/model-indictment-for-the-crime-of-aggression-committed-against-ukraine>.

39. *Id.*

40. Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. OF INT’L L. 477, 480 (2007).

41. International Criminal Court, *Elements of Crimes*, art. 8 *bis*, RC/11 (2013) [hereinafter, “*Elements of Crimes*”] (listing as one of the elements “The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.” separately from “The act of aggression... was committed.”); see also Dannenbaum, *supra* note 15, at 1304.

amount to manifest violations of the United Nations Charter. More to the point, if the jurisdiction of a special tribunal to try Russian leaders for aggression were to reach back to 2014, for instance, in order to address Russia's annexation of Crimea, an assessment of gravity and scale might lead to a finding of no criminal liability. This is because, as Professor Dannenbaum has argued, despite the use of military force in carrying out the act of aggression (in this case, the annexation of the territory of another state), the absence of significant casualties in that case might mean it was not of sufficient gravity or scale to amount to a manifest violation of the UN Charter.⁴²

Finally, the definition requires evidence that an accused planned, prepared, initiated or executed the act of aggression.⁴³ Significantly, the ICC Elements of Crimes provide that an act of aggression must have been committed for liability to attach.⁴⁴ Thus, planning or preparing for a crime of aggression can only lead to individual criminal responsibility if an act of aggression actually was carried out. Moreover, it is unclear what level of activity—how much planning, preparation or execution—will satisfy this element. Regarding “execution,” for instance, what level of support or contribution to the continued occupation of parts of Ukraine would suffice for liability to attach? Would the conduct of Belarus' leader, Alyaksandr Lukashenka, who allowed his country to be used by Russian forces, meet this requirement? Would any level of support suffice, regardless of its impact on the act of aggression? If the post-WWII cases that Jonathan Bush discussed in this conference are an indication of how this question might be answered,⁴⁵ cases before a special tribunal alleging that an accused *executed*—as opposed to planned or initiated—an act of aggression might prove difficult to prosecute successfully.

IV. CONCLUSION

On balance, despite legitimate concerns regarding costs, issues of selectivity and challenges raised by the definition of aggression, the establishment of a special tribunal to prosecute the crime of aggression could be worth the effort, particularly given the manifestly illegal

42. Dannenbaum, *supra* note 15, at 1288-89,1304-06.

43. Rome Statute, *supra* note 1, art. 8 *bis* (1); *Elements of Crimes*, *supra* note 41, art. 8 *bis*.

44. *Elements of Crimes*, *supra* note 41, art. 8 *bis* (requiring an “act of aggression...[to have been] committed”).

45. *See generally*, University of Maryland Francis King Carey School of Law Annual International and Comparative Law Symposium: Aggressive War (Nov. 3–4, 2022).

nature of Russia's attack on Ukraine and the countless victims that would not be captured by war crimes cases brought by the ICC, Ukraine, or other states. Moreover, it is possible that changed circumstances, like an internal leadership transition within Russia, could eventually bring Putin and other top leaders within the reach of such a tribunal.⁴⁶ Nevertheless, I want to conclude by saying that even if a special tribunal is set up, we should be mindful of unintended consequences that might flow from such an effort. Among other things, it might unduly raise expectations of the victims. While, as noted earlier, an indictment alone may be an important way to delegitimize Putin and other senior Russian officials, for some it may lead to disappointment and frustration if not accompanied by prosecution of the crimes alleged against them. And it may well be that we may not see indictments, much less judgments, for quite some time, if at all.

46. President of Serbia within Yugoslavia from 1989 to 1997, Slobodan Milošević, was indicted by the International Criminal Tribunal for the former Yugoslavia during the war in Kosovo and ended up before the tribunal after losing power in Serbia. *See* JUDITH ARMATTA, *TWILIGHT OF IMPUNITY: THE WAR CRIMES TRIAL OF SLOBODAN MILOŠEVIĆ* 3–4 (2010).