Chapter 3

The ICC-Crime of Aggression

Proliferation or Politicization of International Criminal Law?

1 Introduction

Daily life is entrenched with all kinds of acts of aggression; murder, rape, arson, burglary, assault, but also less physical acts such as insult, intimidation, reckless driving. Yet, aggression as such has not been elevated into a separate crime within most of the domestic criminal codes. It is likely that, as of 1 January 2017, aggression features as an international crime within the prosecutorial ambit of the International Criminal Court (ICC) system. Furthermore, it is not unlikely that, as ICC States Parties are to transform the ICC crimes into their domestic criminal law systems, the crime of aggression may give rise to national prosecutions. The cardinal question is whether this prosecutorial expansion is to be seen as beneficial to international criminal justice. This article delves into several questions which are still left open by the drafters of the Rome Statute. First, is the ICC prosecutor still at liberty to proceed with an investigation into the crime of aggression, once the United Nations (UN) Security Council – a political organization – has not determined beforehand that a particular incident qualifies as a ‘manifest violation of the UN Charter’? And what about the ICC judges; are they bound to such determination by the Security Council? Secondly, this article discerns the question as to the impact of the crime of aggression – being a leadership crime – on the liability forms of article 25 of the Rome Statute. And thirdly, it addresses the question whether it is preferable for States to domestically investigate the crime of aggression pursuant to the principle of complementarity? Prior to examining these questions, definitional issues related to the crime of aggression will be discussed.

2 Defining the Crime of Aggression

The inclusion of the crime of aggression in the Rome Statute was already debated during the 1988 Rome Diplomatic Conference and the Diplomatic

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Conference in 1998; yet no agreement on the definition of this crime and related jurisdictional issues could be reached.\(^2\) The negotiation process resulted in the inclusion of the crime of aggression in the Rome Statute as one of its core crimes, yet, with the clause that jurisdiction could only be exercised after agreement on its definition and the conditions under which the Court could exercise jurisdiction.\(^3\) Only in 2010, during the ICC Review Conference in Kampala (Uganda), agreement was reached on the crime of aggression.

The extensive negotiation process preceding the adoption of the crime of aggression into the amendments of the Rome Statute is noteworthy when taking into account that ‘crimes against peace’ – the predecessor of the crime of aggression – were said to be the ‘most important’ crime prosecuted before the first international criminal tribunal, the Nuremberg tribunal.\(^4\) In 1950 the International Law Commission adopted the so-called Nuremberg principles, in which ‘crimes against peace’ were defined as the:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
(ii) Participation in a common plan or conspiracy for the accomplishment of the acts mentioned under (i).

During the ICC Review Conference in Kampala (Uganda) in 2010, the Assembly of States Parties adopted an amendment to the Rome Statute, defining the crime of aggression and the conditions under which the ICC could exercise jurisdiction. The amendment to the Rome Statute on the crime of aggression would enter into force no sooner than January 1, 2017 and only after 2/3 of the ICC Member States had ratified the amendments. During this conference, the Assembly of States Parties enacted the following definition of the crime of aggression:

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,