The International Criminal Court and the Crime of Aggression

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1. Introduction

It is the design of this paper to discuss the implications of including “aggression” as a crime under the jurisdiction of a proposed international criminal court. In so doing, it is necessary to briefly chronicle the history of aggression in the international environment, for the simplicity of the term disguises its long and sordid past. Further, the paper describes how aggression is woven into the structure of the current draft statute, examining the procedural role of the Security Council and the practical limits this process imposes on charging individuals with the crime. Lastly, consideration is given to the propriety of including aggression as a subject of the Court given what may become competing international goals of peace and justice.

2. The Crime of Aggression

A. Customary Law

Customary international law protects State sovereignty by prohibiting “intervention” generally. In principle, then, all States are autonomous, existing with territorial integrity, free from coercion or intervention by other States. But it has long been recognized that States exist interdependently. And much like the protection of individual autonomy makes possible relations between persons, the recognition of State sovereignty is an essential component of relations between States. By ensuring States’ rights to non-intervention, the harmonious and complementary co-existence of States is enhanced. Consequently, the question of what constitutes improper intervention is of great concern to the international community. Unfortunately, the precise meaning and content of this term has long been in disagreement among jurists and the practice of States is in confusion.

“Aggression,” at its earliest, is a concept that grew out of an intention by States to outlaw war. This occurred when the term “war” fell from favour
because its legal determination was subjective. War doesn’t occur without intent. This is called the State of War Doctrine and it acts as a loophole, enabling States to engage in activities equally forceful and coercive to war, but avoid international liability by distinguishing their acts from war. By the turn of the century, the State of War Doctrine had all but eliminated the usefulness of the term. In response, new concepts of law emerged prohibiting measures short of war such as “use of force”, “breaches of the peace” and “aggression”. But, the semantic evolution from “war” to these newer terms has had little practical value in identifying what behaviour is to be condemned. It should be noted that although this paper concentrates on use of the term “aggression,” acts constituting that crime are not necessarily distinct from those comprising “use of force” or “breaches of the peace.”

B. Early Definitions of Aggression

It was and remains the practice of States to declare the commission of “an act of aggression” whenever threatened by another State’s action. In this sense, “aggression” acts more like a judgment than a crime. But as early as the Paris Peace Conference in 1919, attempts were being made to criminalize aggression. At that time, it was thought that aggression entailed the initiation of war by declaring war first. Article 231 of the Treaty of Versailles identified the initiation of war with the policy of aggression. The Covenant of the League of Nations in Article 10 defined aggression as an attack against the territorial integrity and political independence of Member States. Examination of these early definitions unveils a political dimension, an inherent element of the crime that will continue to haunt those intent on applying it consistently against nations. In October 1943, at the Moscow Conference, World War II victors pledged their support to two enterprises that would significantly elevate the importance of “aggression” in international law. These twin offspring were 1) the pledge to punish German and Japanese war criminals (the Nuremberg and Tokyo trials) and 2) the establishment of an international organization to maintain worldwide peace and security (the United Nations).

C. The Nuremberg Trials

The London Agreement following World War II created an International Military Tribunal in which war criminals were put on trial by the Allies. Two principal problems immediately faced the Tribunal in its charge to prosecute the German defendants. First, it was the general rule that municipal law governed individuals and no other entity could exercise authority over the nationals of a State without its consent. Second, it had to be established that the crime for which the defendants were charged existed in law at