

The crime of ‘Aggression’: Does its narrow definition and limited jurisdiction affect criminal responsibility at the International level?

Georgia Abbott

Final Year LLB (Hons) Student, Bournemouth University

Abstract

The path to legitimising the International Criminal Court (ICC) has been met with its fair share of challenges, and the implementation of the crime of aggression into the Rome Statute is no exception. The conceptualisation of ‘aggression’, mainly considered an unjustified attack from an individual with some level of power from one state to another state, has been discussed in global affairs as far back as World War II. Since then, the emphasis on the requirements of the definition and corresponding clauses has changed dramatically. Codified in articles 8bis and 15bis and 15ter of the Rome Statute, the crime has been formulated for the court to focus on the most important officials waging acts of aggression. However, in light of the Rome Statutes, this paper considers that the current substantive, procedural and jurisdictional definition is ‘too narrow’, and the jurisdictional threshold ‘too high’ to successfully achieve the goals of international criminal justice and bring perpetrators to trial. Whether this is a convincing argument, considering the purpose of the court and the ICC system has yet to be seen. As such, this article presents an analysis of the crime of aggression against the background of international legal discourses on the chequered history, relevance and effectiveness of its codification and enactment into the Rome Statute. Building on the evidence in literature, the paper demonstrates that the current literal text of the definition cannot be expanded to include non-state actors and quasi-state entities that do not necessarily possess state-like characteristics yet have the capacity to commit the crime. Re-characterisation of the definition and jurisdictional threshold of the crime, in particular, the material elements, requirements and specifications for ‘opt in’ and ‘opt out’ of state parties are imperative to making the codification

of the crime more effective. In turn, the prospects of successful prosecution of perpetrators will be more likely.

Keywords: *International Law, Rome Statute, Aggression, Jurisdiction, United Nations*

I. Introduction

Enacted by the Rome Statute in 2002¹, the formation of the International Criminal Court (ICC) was an indication of the international community's resolve to bring to justice the perpetrators of serious international crimes and core crimes respectively.² Arguably, the history and record of human atrocities that deeply shocked the conscience of humanity in Yugoslavia, Srebrenica, Cambodia and Rwanda clearly underscored the need for establishment of an international criminal court that has the 'power to exercise its jurisdiction over persons for the most serious crimes of international concern'.³ The Rome Statute defines more than ninety specific crimes under international law⁴, with each falling within the four broad categories of core crimes⁵—genocide, war crimes, crimes against humanity, and, the main focus of this paper, the crime of aggression.⁶ These crimes are said to constitute a violation of *jus cogens* norms of international law⁷, and as such states have *erga omnes* responsibility to either prosecute or extradite individuals⁸ accused of committing any of the core crimes.⁹ In order to enable the ICC to investigate and/or prosecute individuals for these crime in the event that states are not willing or unable genuinely to investigate or prosecute under their primary jurisdiction, the statute gives the court complementarity jurisdiction over all states who have

¹ See Statute of the International Criminal Court (enacted 17 July 1998) 2187 UNTS 3 (hereinafter, The Rome Statute 2002)

² Sascha D Bachmann and Eda L Nwibo, 'Pull and Push—Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges' (2018) 43 Brooklyn Journal of International Law 459

³ The Rome Statute 2002, Article 1

⁴ See Mahmoud Cherif Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 Law and Contemporary Problems 63. See also John F Murphy, 'Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution' (1999) 12 Harvard Human Rights Journal 1

⁵ See Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, p 245

⁶ The Rome Statute 2002, Articles 6, 7, 8 and 8bis

⁷ See generally Article 5(1) of the Statute; *Cf Arts. 16-18 and 20 International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind (ILC Draft Code)*, 1996, 51 UN GAOR Supp. (No. 10) at 14, UN Doc A/CN.4/L.532, corr.1, corr.3 (1996); The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. X (1949) p 69

⁸ See Malcolm N. Shaw, *International Law* (8th edn, CUP 2017) 612

⁹ The Rome Statute 2002, Article 4(2)

ratified it, subject to satisfaction of all conditions in the exercise of jurisdiction. While the definitions of three of the core crimes i.e., genocide, war crimes and crimes against humanity are clear, the quest to define and codify the crime of aggression has been most contentious. Dating back to the Nuremburg Trials post-World War II,¹⁰ the nature, definition, and jurisdiction of the crime of aggression were all factors delaying its codification until 2010. In 2010, the parties to the ICC implemented a set of amendments that solidified its definition.¹¹ This very fact illustrates the decades of rich historical and legal debate which surrounded the Rome Statute and the crime of aggression. Furthermore, the development of its definition and jurisdiction are plentiful. However, as discussed below, the question is whether the requirements set out in the definition of aggression are too narrow, and whether its jurisdictional threshold is too high, making it difficult for suspected perpetrators to meet the conditions for them to be tried and prosecuted.

The paper is presented as follows. First, there will be a consideration of the historical context of the definition (part II) about the meaning of ‘state’ and who can be brought to trial, focusing on the ‘leadership element’ and whether this limits the definition. Thereafter the discussion will move on to the elements of ‘control or direct’, ‘manifest violation’ as well as ‘character, gravity and scale’ which must all be specifically established before the crime of aggression can be successfully prosecuted (part III). Further, Part III will also analyse whether these elements of the crime of aggression are adequate for the purpose of the ICC to investigate any claims, and consequently prosecute and achieve justice. How the court exercises its jurisdiction will be covered in part IV of this paper, as laid out in sections 15*bis* and 15*ter*. Part IV will further consider how the Rome Statute implements jurisdiction and the options the ICC can take to exercise its jurisdiction alongside the obstacles it may face in doing this. The limitations of the courts will also be analysed and its power over states in conjunction with the United Nations (UN) will be debated. Reflecting on the preceding arguments and in summarising them, the paper will consider the vetoing powers of the security council and their problematic nature in terms of the court’s fair jurisdiction over potentially offending states, before setting out the final conclusions.

¹⁰ Antonio Cassese and others, *Cassese’s International Criminal Law* (3rd edn, OUP 2013) 136

¹¹ Matthew Gillett, ‘The Anatomy of International Crime: Aggression of the International Criminal Court’ (2013) 13 *International Criminal Law Review* 1

II. The definition of the crime of aggression

1. The current definition

The crime of aggression as it is currently known is –

‘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.’¹²

Constructed by the Special Working Group (SWG) of the Assembly of State Parties to the Rome Statute,¹³ prior to the Statute Review Conference in Kampala 2010,¹⁴ it is imperative to consider the major stages of development of the definition in order to understand its context and meaning as it stands today.

2. The evolving nature of the definition of the crime of aggression

Implemented into the ‘Nuremburg Charter’¹⁵ by the European Advisory Commission in 1945, the first consideration of the crime of aggression, formerly integrated under the ‘crime against peace’¹⁶ was outlined as the ‘planning, preparation, initiation, or waging of wars of aggression ... or participation in a common plan or conspiracy’.¹⁷ It was intended to be applied to each individual on trial,¹⁸ suggesting this definition does not specify conditions of who could be prosecuted. Crimes against peace were similarly prosecuted in the Tokyo tribunal, however they referred to those who could be tried as ‘those who ... were parties ... to the criminal conspiracy’ or even just had knowledge.¹⁹ Both tribunals, therefore, left open the question of who could be tried, broad and open to interpretation. It is also stipulated that a war of aggression

¹² The Rome Statute 2002, Article 8*bis*

¹³ ICC, ‘Annex II: Report of the Special Working Group on the Crime of Aggression’ (2009) ICC-ASP/7/20/Add.1 (hereinafter, Report on the Crime of Aggression 2009)

¹⁴ First Review Conference of the ICC Statute, Kampala, Uganda 2010: A conference which on the Special Working Groups proposal for the Crime of Aggression definition clarified its definition and when it should be ratified. First Review Conference of the ICC Statute (hereinafter, Special Working Group, Kampala 2010)

¹⁵ United Nations, Charter of the International Military Tribunal: annex to the agreement for prosecution and punishment of the major war criminals of the European Axis (London Agreement) 1945 (hereinafter, Charter of the United Nations 1945)

¹⁶ Agreement for the prosecution and punishment of the major war criminals of the European Axis (adopted 8 August 1945, entered into force 8 August 1945) UNTS 251, Article 6(a)

¹⁷ The Rome Statute 2002, Article 8*bis*

¹⁸ *Judgment of the Nuremberg International Military Tribunal 1946* (1947) 41 AJIL 172, 196-7

¹⁹ Charter for the International Military Tribunal for the Far East 1946, S. 2 Article 5(a)

meant just that: the crime could only take place in times of war.²⁰ Coincidentally, the defence in Tokyo claimed there was no jurisdiction to prosecute individuals as ‘war is the act of a nation for which there is no individual responsibility under international criminal law’.²¹ The current definition accommodates acts of aggression ‘regardless of a declaration of war’,²² which in principle widens the scope of scenarios in which prosecution and investigation can occur. In addition, the current definition enforces the element ‘by a person’ affirming that the crime of aggression committed by an individual is recognised by international criminal law.

After the trials of Nuremburg and Tokyo, there was a further attempt to clarify the meaning of aggression. It was established by the consensus non-binding resolution of the UN General Assembly in 1974; ‘*A War of aggression is a crime against international peace. Aggression gives rise to international responsibility*’.²³ The International Law Commission argued the definition was only concerned with aggression by states, not individuals, and is there ‘as a guide for the Security Council’ as opposed to judicial use.²⁴ The Rome Statute as it was codified in 1998, therefore included a condition that the ICC could exercise jurisdiction once they had a suitable definition in place, which was finally achieved at the Kampala Review Conference in 2010.²⁵ However, the crime was not to be enacted until certain conditions were met, including the requirement that 30 states needed to ratify it first. Encompassing influence from the UN Charter, which requires states to prohibit the actual use and threats of use force against other states²⁶ and a mix of elements from its development, it was finally enacted in December 2017.

III. The current definition and the limitations it may present

1. Requirements set out in the definition – too narrow to effectively achieve justice?

The acts of aggression listed in article 8bis²⁷ do not amount to crimes of aggression by themselves and will only do so when the requirements set out in section 1 are met. Firstly, there

²⁰ Special Working Group, Kampala 2010 (n 14), p 12

²¹ *Judgment of the International Military Tribunal for the Far East Part A* (1948), Chapter II, p 42

²² The Rome Statute 2002, Article 8bis (2)

²³ United Nations General Assembly (UNGA) Res 3314 (XXIX) (Definition of Aggression) (14 December 1974)

²⁴ See generally the Draft Statute for an International Criminal Court with Commentaries, International Law Commission, 1994

²⁵ Special Working Group, Kampala 2010 (n 14)

²⁶ Charter of the United Nations 1945, Article 39

²⁷ The Rome Statute 2002, Article 8bis (2)(a)-(g)

is a requirement that it must be committed ‘by a person in a position to effectively exercise control or to direct the political or military action of a state’.²⁸ There is a presumption that soldiers and lower level military will not fall under this category, thus significantly narrowing its definition, and preventing the ICC from trying to prosecute potential vast amounts of suspected perpetrators. This crime is therefore commonly referred to as a ‘leadership’ crime, whereby the only people who can be prosecuted must fulfil the requirement of being a state leader. It is expressed that a state cannot be held responsible for the crime of aggression, only an individual in line with principle of individual criminal responsibility enshrined in article 25 of the Rome Statute.²⁹ This provides clarity and enables the court to punish the appropriate individuals, as a state is an intangible body and is constantly changing. In the case of the Special Court for Sierra Leone, the Secretary-General acknowledged that a narrow interpretation can limit the number of those who could be prosecuted,³⁰ and the Human Rights Watch criticised the court for overlooking those who may not have been high-ranking but stood out due to their excessive brutality against civilians.³¹ One argument for this limitation is the sheer number of those who may have had to be tried, which could have caused the proceedings to delay. Furthermore, the definition needed to reflect the seriousness of the crimes and to avoid the most powerful perpetrators from slipping through the net or being glossed over, which may have happened had the scope been much wider. But where to draw the line is a difficult question to answer, because the definition also stipulates that the individual must be working on behalf of a recognised state. This can also be considered problematic.

Considering the case of Sierra Leone, we can look back at history to see where a wider scope has been successfully applied to a pool of suspected perpetrators. On the imposition of the ‘control or direct’ requirement, the SWG arguably retreated from the jurisprudence of the previous international criminal tribunals (Nuremburg, International Military Tribunal for the Far East).³² A comparison can be made with the Nuremburg Trials. The governing body of the Allied Occupation Zones in Germany and Austria post World War II enacted the Control Council Law No. 10 to enable the occupying authorities to try suspected perpetrators for war

²⁸ The Rome Statute 2002, Article 8bis (1)

²⁹ The Rome Statute 2002, Article 25(2)

³⁰ Charles C Jalloh, ‘Special Court for Sierra Leone: Achieving Justice?’ (2011) 32 Michigan Journal of International Law 395, 414

³¹ Human Rights Watch [HRW], *Bringing Justice: The Special Court for Sierra Leone Accomplishments: Shortcomings and Needed Support* (vol 6, HRW 2004) 19-20

³² Kevin J Heller, ‘Retreat from Nuremburg: The Leadership Requirement in the Crime of Aggression’ (2007) 18 European Journal of International Law 477

crimes.³³ Law No. 10 applied a wide scope to those who could be tried, and the case of *Farben*³⁴ illustrated how economic actors can be held responsible for crimes of aggression without falling under the state leader requirement. The case concerned members of the managing board of a company I.G. Farben, who participated in supplying weapons to the Nazis. In the trial, Judge Herbert recognised that the company provided the basis of raw materials ‘without which the policy makers could not have seriously considered waging aggressive war’.³⁵ A powerful point was made considering who should and should not be held responsible for acts of aggression –

‘Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he initiated. They are not to be deemed innocent because Hitler made use of them, especially if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts.’³⁶

The defendants were eventually acquitted, however Judge Herbert implied that the arguments made were ‘cogent’³⁷ stating the acquittal was due to insufficient evidence, as opposed to the ranking of the defendants on trial.³⁸ Herbert’s statement that the reasons for the inclusion of the defendants despite the fact they were not in a ‘leader’ position were cogent, illustrates his confidence in that these people in these positions were just as responsible for some of the crimes that took place as their higher ranking counterparts. The Nuremberg trials may have been over 70 years ago, however the reasoning in the *Farben* judgement could easily be as, if not more applicable, today.

In particular in the context of states and quasi-states, this wider interpretation may be more appropriate in handling the potential committing of acts of aggression with quasi-states. To be able to effectively analyse the leadership element, we must consider what is considered a ‘state’ under the Rome Statute. The ICC’s connection to the UN and the statutes adoption during diplomatic conference infers states under the Rome Statute are acknowledged in the same way as they are by the UN. Fulfilling certain requirements, each of these states are officially

³³ Allied Control Council Law No. 10, 20 Dec. 1945, 15 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951) (hereinafter, Law No. 10), Preamble

³⁴ *The United States of America v. Carl Krauch et al.* (Case No. 6) 1948

³⁵ *ibid.*, 1216

³⁶ *ibid.*, 1302

³⁷ *ibid.*, 1306

³⁸ *ibid.*

recognised and listed on the UN database. However, within these states, or across states, other non-state actors have come to the forefront establishing their own bodies. They have their own aims and beliefs, which they wish to implement and essentially either overthrow a state, part of a state, or multiple states to put their own leaders and ‘governments’ into power.³⁹ Quasi states have been defined as a sort of ‘hybrid interstate’ which holds some of the status of a state at international level, but not all. An example of a quasi-state could be the Islamic State, described as a fusion of a state, an insurgency, and a terrorist organisation. Although it is a non-state actor, it exercised its own sovereignty and became fairly powerful.⁴⁰ The leadership requirement therefore may not apply to these quasi-states, as they fall short of being the concept of state adhered to in the Rome Statute. Considering the power, a quasi-state may acquire, it is alarming that the crime of aggression is not inclusive of these bodies.

It is obvious that the current definition although it establishes a clear and concise pool of perpetrators for the court to focus on, may not be entirely suitable. The analysis of past cases such as *Farben* can give current legislators an insight into how the crime of aggression can be applied to a wider group of individuals. Academic *Roger Clark* argues there is some support that ‘control or direct’ should be changed to ‘shape and influence’ to prevent unnecessary restriction.⁴¹ This would give the court more flexibility and can tailor who they believe should be put on trial in any case. This may also be relevant to the jurisdictional threshold.

Despite the specification of ‘by a person’ and individual responsibility, unlike the other three crimes, the crime of aggression links individual criminal responsibility to the wrongful act of the state.⁴² Section 243 of the article states that for an ‘act of aggression’ to take place by an individual, there must be a pre-requisite of an ‘act of aggression’ by the state. The definition refers to the ‘acts of aggression’ listed in Resolution 3314⁴⁴ suggesting it must be an illegal use of armed force in line with general customary international law.⁴⁵ Resolution 3314 states the list of acts is non-exhaustive, thus it must be inferred that although it is not alluded to in *8bis*, the list in section 2 is equally non-exhaustive. This means the ICC therefore has discretion over

³⁹ See generally Pål Kolstø, ‘The Sustainability and Future of Unrecognised Quasi-States’ (2006) 43 *Journal of Peace Research* 723

⁴⁰ Zenonas Tziarras, ‘Islamic Caliphate: A Quasi-State, a Global Security Threat’ (2017) 12 *Journal of Applied Security Research* 96, 101

⁴¹ Roger S Clark, ‘Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise for Jurisdiction over it’ (2010) 20 *European Journal of International Law* 1105

⁴² Douglas Guilfoyle, *International Criminal Law* (1st edn, OUP 2016) 292

⁴³ The Rome Statute 2002, Article 8*bis* (2)

⁴⁴ UNGA Res 3314 (XXIX) (14 December 1974)

⁴⁵ Claus Kreß and Leonie von Holtzendorff, ‘The Kampala Conference on the Crime of Aggression’ (2010) 8 *Journal of International Criminal Justice* 1190

what is constituted as an act of aggression, by widening the definition. Robert Heinsch argues this could be problematic, as punishable actions in criminal law should not be open to interpretation, and suggests that the definition should be narrower.⁴⁶ Political scientist Patrycja Grzebyk, however, believes that although this could affect the ‘certainty of law’, i.e., acts in the future that have so far not been attempted, could be classified under the crime,⁴⁷ making the provision more adaptable.

Similarly, Kriangsak Kittichaisaree points out the importance of a narrow definition, so as to ‘avert frivolous or vexatious prosecutions’ by highlighting it could burden the ICC’s workload with minor incidents such as a single bomb straying into the territory of another state.⁴⁸ However, the report of the SWG with the proposal of the current definition argued states recognised the inclusion of ‘manifest violation’ may cover minor and borderline incidents, as it suggests a violation must be reasonably high to fulfil this requirement.⁴⁹

2. Is there too much ambiguity surrounding the requirement of ‘manifest violation’?

The requirement of ‘manifest’ violations in the UN Charter excludes borderline or grey area cases,⁵⁰ in line with what is considered an ‘act of aggression’ in section 2. Influence from the 1945 UN Charter is evidenced by the provision to refrain from threat or force against another state.⁵¹ German Jurist Andreas Paulus argues that ‘manifest’ in terms of the requirement for a manifest violation, is unclear.⁵² He stipulates that the definition could be inferred from other legal authorities, such as the Vienna Convention,⁵³ which dictated a violation could be manifest if it would be ‘objectively evident to any state’. Paulus states one of the key issues with this is what is ‘objectively evident’ to one state, may not be so obvious to another.⁵⁴ The inclusion of ‘character, gravity and scale’⁵⁵ may also provide guidance, such as the need to be ‘sufficient’⁵⁶ to establish ‘manifest’. Nonetheless, it has also been stressed that the clause is unnecessary

⁴⁶ Robert Heinsch, ‘The Crime of Aggression after Kampala: Success or Burden for the Future?’ (2010) 2 Goettingen Journal of International Law 715, 724

⁴⁷ Patrycja Grzebyk, *Criminal Responsibility for the Crime of Aggression* (Routledge 2013) 73

⁴⁸ Kriangsak Kittichaisaree, *International Criminal Law* (1st edn, OUP 2001) 217

⁴⁹ Report on the Crime of Aggression 2009 (n 13) Annexe 2, 1.13

⁵⁰ Charter of the United Nations 1945, p 139

⁵¹ Charter of the United Nations 1945, Article 2(4)

⁵² Andreas Paulus, ‘Second thoughts on the crime of aggression’ (2010) 20 European Journal of International Law 1117

⁵³ Vienna Convention on the Law of the Treaties, s 46(2)

⁵⁴ Paulus (n 52)

⁵⁵ The Rome Statute 2002, Article 8bis (2)

⁵⁶ Douglas Guilfoyle, *International Criminal Law* (1st edn, OUP 2016)

because any act of aggression would constitute a manifest violation of the Charter of the UN,⁵⁷ leaving the legal status and therefore, the definition, ambiguous.⁵⁸ How the aggressor state and ICC interpret this provision could affect whether or not a perpetrator is found guilty, and so has the potential to widen the definition depending on the ICC's discretion. It is clear the current definition highlights some of the key problems of the application of the crime of aggression, with each individual clause shrouded in indefinite interpretation. It seems the statutes links to the UN Charter and the current global understanding of international law can offer guidance as to how the ICC and states should interpret this. It is safe to say however, that lawyers could face challenging responses from any individual accused and victims alike based on these interpretations, and due to the size of some international conflicts, the courts approach to how they interpret this definition should not be perfunctory.

IV. An effective system of implementing international law, or does the exercise of jurisdiction fall flat?

The ICC has also had to defend its right to exercise jurisdiction since its implementation. Antonio Cassese argued the ICC would be a 'revolutionary institution that intrudes into state sovereignty by subjecting states' nationals to an international criminal jurisdiction'.⁵⁹ This intrusion must therefore be justified, and the Rome Statute attempts to do this. Firstly, it must be established that the state has committed an act of aggression for there to be a crime of aggression by an individual⁶⁰ and that the state has ratified the Rome Statute. Secondly, the ICC may then exercise its jurisdiction by one of three ways: by a referral from a state,⁶¹ a referral from the UN Security Council,⁶² or thirdly, the ICC can conduct an investigation of its own accord if they have belief the crime of aggression has been committed (*Proprio Motu*).⁶³ How these are exercised specifically for the crime of aggression are located in articles 15*bis* and 15*ter*.

⁵⁷ Report on the Crime of Aggression 2009 (n 13)

⁵⁸ Yoram Dinstein, *War, Aggression and Self-defence* (6th edn, CUP 2017) 143-144

⁵⁹ Antonio Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections' (1999) 10 *European Journal of International Law* 145

⁶⁰ The Rome Statute 2002, Article 8*bis*

⁶¹ The Rome Statute 2002, Article 13(a)

⁶² *ibid.*, Article 13(b)

⁶³ *ibid.*, Article 13(c)

The most straightforward form of action is a direct referral by the Security Council. The UN and ICC although separate, are governed by a Negotiation Relationship Agreement.⁶⁴ Under the UN Charter, the Security Council can determine whether there has been an act of aggression,⁶⁵ and under 15^{ter}, make a referral to the ICC.⁶⁶

A state may also make a referral; however, a state is also able to make a declaration that it does not accept jurisdiction for the crime of aggression⁶⁷ but still be a party to the rest of the provisions of the Rome Statute. The ICC may also be limited if a suspected act of aggression takes place in a territory or by an individual from a state who has not ratified it,⁶⁸ meaning if a non-party state were to commit an act of aggression on the territory of a state who is party, the ICC cannot prosecute.⁶⁹ Furthermore, individuals cannot be prosecuted when their home state is not a party to the act, potentially lessening protection for states party to the statute.⁷⁰ The statute relies on the act from the state to enable individual responsibility of the crime of aggression, significantly limiting who the ICC prosecutes. An individual from a state can therefore only be prosecuted if they and the victim state are party to the crime, however, being party to the crime may be a deterrent in itself. This opt-out clause in turn limits the jurisdiction of the crime of aggression compared to the other four crimes.

The ICC also has the right to carry out an investigation of its own free will if they believe a state has committed an act of aggression (*proprio motu*).⁷¹ This follows a similar process as a state referral, however it means it does not have to rely on the Security Council or a state to make an investigation, allowing them to apply their jurisdiction as they see fit.

1. Does the ICC truly have a level of self-government, or is their supposed autonomy a disguise for a dependent relationship?

Once it has been established that the court can exercise jurisdiction, the prosecutor of the ICC must check that the Security Council has not already made a ‘determination of an act of

⁶⁴ ‘International Law and Justice’ (UN) <www.un.org/en/sections/issues-depth/international-law-and-justice/index.html>

⁶⁵ Charter of the United Nations 1949, Article 39

⁶⁶ Rome Statute of the ICC 2002, Article 15^{ter}

⁶⁷ *ibid.*, Article 15^{bis} (4)

⁶⁸ *ibid.*, Article 15^{bis} (5)

⁶⁹ *ibid.*, Article 121(5)

⁷⁰ *ibid.*, Article 15^{bis} (5)

⁷¹ *ibid.*, Article 15^{bis}

aggression'.⁷² If not, six months after this notification the prosecutor may proceed with the investigation subject to provisions in 15bis.⁷³ The Security Council could be considered as a 'jurisdictional filter'⁷⁴ that the ICC must go through, however 15bis argues the courts determination of an act of aggression is 'independent of outside organs' and there are no provisions for whether any other 'organs' could determine an act of aggression, indicating the impossibility of prosecution without the Security Council's approval.⁷⁵ Interestingly, if the Security Council therefore does choose to go ahead with a referral of their own accord, they can assign jurisdiction even if a state is not party to it.⁷⁶ This would then override the opt-out provision to the crime if they have to go through the Council to prosecute. Whilst the jurisdiction of the ICC as an independent limb of international law is high, the Security Council can bring any party under its jurisdiction, making the threshold seemingly lower with the influence of the Security Council.

2. 'Veto powers' or the undermining of the ICC's jurisdiction?

Problematically, when the Security Council does vote on a referral, the 'concurring votes of the permanent members'⁷⁷ are required.⁷⁸ This means any permanent members can veto an investigation if it is not in their interests, thus allowing countries to block a referral. This could mean blocking a referral made against themselves, or even another state that they might have a political interest in. There have been arguments that the UN Security Council have failed to be consistent in their approaches to international conflicts⁷⁹ and have in cases only expressed disapproval and 'rhetoric criticism'.⁸⁰ Paulus argues this could have 'disastrous consequences' as it could entail a 'further devaluation on the prohibition of force', and thus be 'detrimental'

⁷² *ibid.*, Article 15bis (6)

⁷³ *ibid.*, Article 15bis (8)

⁷⁴ 'Role of the ICC: FAQ' (*The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression*) <<https://crimeofaggression.info/role-of-the-icc/faq/>>

⁷⁵ Paulus (n 52) 1124-25

⁷⁶ Charter of the United Nations 1945, Chapter VII

⁷⁷ The five permanent countries party to the UN Security Council are China, France, Russia, United Kingdom and the United States. See 'Permanent and non-permanent members' (*UNSC*) <www.un.org/securitycouncil/content/current-members>

⁷⁸ Charter of the United Nations 1945, Article 27(3)

⁷⁹ Kittichaisaree (n 48) 217

⁸⁰ Arthur Weisburd, *Use of Force: The Practice of States since World War II* (Pennsylvania State University Press 1997) 226

to fighting aggression.⁸¹ The Security Council's vetoing powers could undermine the ICC's jurisdiction. This would leave this power open to abuse and could weaken it.

V. Conclusion

The crime of aggression has a unique set of rules dictating its application. The definition has been debated for an extensive period of time, and its development shows how difficult it has been to pinpoint its specifications. It could be argued that certain parts of the definition are narrow and for good reason; the leadership element eliminates an excessive workload for the ICC. On the other hand, it also has the potential to overlook some of the most notorious perpetrators in a conflict. For practical reasons it makes sense, yet in reality, those who have suffered an act of aggression may not care about what works best for the courts time keeping and efficient procedure. Furthermore, the existence of quasi-states and the criticism that they do not fulfil requirements to be tried for any suspected crime of aggression additionally affects the strength of the definition. The definition leaves quasi-states and non-state actors in limbo without any hard and fast rules under this crime to follow. In turn, this narrows the definition even more and fails to be effective against those who may not be in a position of power within a state, but may be powerful with the means to commit atrocious crimes nonetheless. It is entirely plausible that the definition could be extended to non-state actors, and despite the example taking place over 70 years ago, the reasons behind widening the scope transcend time, and could be easily be applicable in the 21st century.

The characteristics of 'manifest violation' are likewise unclear, and although guidance is given, an unclear provision could mean perpetrators are not found guilty if they can persuade the court of their own interpretation of 'manifest'. What could be constituted an act of aggression can also limit individual responsibility as a state must commit an act, however, the implied non-exhaustive list of acts enables the ICC to have discretion, which keeps the law flexible and adaptable. The difficulties with the definition can only be highlighted even more when the court's jurisdiction is considered. The provisions in the Rome Statute exude a lengthy process, and the reliance on the Security Council brings its role as an independent court into question. In practice, the Security Council can supplement the ICC's jurisdiction by assigning

⁸¹ Paulus (n 52) 1124-25

it, however if the Security Council use their vetoing power, it means a referral is blocked, and the ICC cannot go ahead with their investigation.

The definition and jurisdiction combined therefore create obstacles for the ICC. For the most part, the conjunction of the requirements set out in *8bis*, *15bis* and *15ter* could together provide a tremendous challenge. To be able to satisfy each element set out in the definition, the act must be of a specific nature, by a specific person, to a specific magnitude. Even if these are all fulfilled, the state must have ratified the statute in the first place. Although a security council referral could override this, it may be brash, yet logical to assume that those countries who have ratified the statute would be less likely to commit one of these crimes than those who have not. The reasoning behind it may be understandable, however the difficulty in bringing a perpetrator to justice and the long delay that may take place when exercising jurisdiction, has the capability of severely undermining the crime of aggression.

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