

## The History of Aggression in International Law, Its Culmination in the Kampala Amendments, and Its Future Legal Characterization

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The term aggression first appeared in official international legal literature in connection with the definition of “crimes against peace” in article 6(a) of the Charter of the International Military Tribunal (IMT),<sup>1</sup> followed by article 5(a) of the Statute for the International Military Tribunal for the Far East (IMTFE),<sup>2</sup> and in article II(a) of Control Council Law No. 10 (CCL No. 10).<sup>3</sup> But there was no legal precedent for such an international crime, even though much effort was made to link “crimes against peace” as it appeared in the IMT, IMTFE and CCL No. 10 to the Kellogg-Briand Pact of 1928, which does not, contrary to its plain terms, criminalize aggression or renounce “war as an instrument of national policy.”<sup>4</sup> Between 1928 and 1945 nothing occurred to criminalize aggression or any state action by which war was an instrument of national policy. It was therefore an unjustifiable legal argument for IMT, IMTFE, and CCL No. 10 to take for granted that aggression or “crimes against peace” were indeed internationally criminalized. Certainly, if nothing else, such an extrapolation violates the principles of legality that are part of general principles of international law.

This author, as well as many of his contemporaries, joined this effort to criminalize aggression, though always raising doubts about the international community would meet this hopeful expectation.

The United Nations undertook a codification effort following World War II, as a fulfillment of the Nuremberg Principles and a continuation of international accountability and international criminal justice. That effort, which started with the Draft Code of Offenses Against the Peace and Security of Mankind in 1947,<sup>5</sup> faced obstacles as of 1948 with the onset of the Cold War.

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<sup>1</sup> Charter of the International Military Tribunal art. 6(a), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

<sup>2</sup> Charter of the International Military Tribunal for the Far East art. 5(a), Jan. 19, 1946, 4 Bevans 20.

<sup>3</sup> Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Control Council Law No. 10 (Dec. 20, 1945), Official Gazette Control Council for Germany 50–55 (1946).

<sup>4</sup> Kellogg-Briand Pact, Aug. 27, 1928, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>5</sup> G.A. Res. 177(II), ¶1(b), U.N. Doc. A/RES/177(II) (Nov. 21, 1947).

Disagreement between states leading the two opposing blocs spilled into this legal effort. The *realpoliticians* of the time were able to separate the definition of aggression from other crimes, placing it into a committee of government-appointed representatives that took its sweet time (twenty-six years) to reach a definition of aggression. Even at that time, however, rather than adopting a convention, the UN General Assembly adopted a resolution on the definition by consensus in 1974.<sup>6</sup> In the opinion of this writer, this does not make the definition of aggression, contained in that resolution, an international crime. Most significantly, neither the General Assembly nor the Security Council ever relied on that definition, notwithstanding the number of conflicts and issues regarding war and peace that they have had to deal with over these many years. Aggression thus remained in a legal and political limbo. Then came the International Criminal Court, and again a definition for aggression could not be reached either during the General Assembly's four years of preparatory work or at a later diplomatic conference. It took twelve years for diplomatic initiatives, and the dedicated efforts of a few working behind the scenes, to develop a text with which that major states could agree. That text was included in the 2010 Kampala Review Conference work plan.<sup>7</sup> The text was adopted as an amendment to article eight of the Rome Statute, but it would only be binding upon those States Parties that have specifically adhered to and elected to be bound by it. This left a considerable number of States Parties out of the scheme altogether. The thirty states required for the amendment to enter into force have since been reached (which includes Palestine).

With some poetic license, I can say that aggression has been a crime in the minds of many for such a long time that they have come to take it for granted, as if it were a legal reality. Unfortunately it was not, and there does not seem to be much of a reason to continue that illusion.

There are two powerful reasons why aggression should finally be abandoned. The first is that, over the last thirty years, the number of conflicts between states that could fall within the definition of aggression have become few and far between. States that use their armed forces outside their territory always find some legal basis under international law to justify their foreign presence. This was the case with the United States in its invasion of Iraq in 2003<sup>8</sup> and its intervention in Afghanistan as of 2001.<sup>9</sup> It was the case with respect to Russia in Ukraine,<sup>10</sup> though that was more blatantly in violation of international law and had much less legal justification. Russia's direct military involvement in Syria

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<sup>6</sup> Definition of Aggression, G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. No. 31, at 142, U.N. Doc. A/9631 (Dec. 14, 1974).

<sup>7</sup> International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res. 6 (June 11, 2010).

<sup>8</sup> Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, S/2003/351 (Mar. 20, 2003).

<sup>9</sup> Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, S/2001/946 (Oct. 7, 2001).

<sup>10</sup> *Ukraine Crisis: Does Russia Have a Case?*, BBC NEWS (Mar. 5, 2014), <http://www.bbc.com/news/world-europe-26415508>.

advances this trend one step beyond anything international law could find permissible, but it is more about its consequences, namely the crimes against humanity and war crimes committed by its troops against civilians in the country.

There are no other known cases of one state invading another or using force against another, except for the cases cited above and the United States' use of drones and autonomous weapons systems (AWS). If we consider the use of cyber technology by one state against another, and its harmful effects, then that includes a number of states such as the United States, Russia, North Korea, China and possibly other states.

The second reason is that the classical form of aggression, or any of its variations, is not likely to occur again in this age of globalization. Now AWS and cyber technology can be used as a way for states to accomplish goals for which they historically had to resort to the type of aggression witnessed in World War One and World War Two to achieve. It is, therefore, not aggression as we knew it that should be pursued by those in the international community who want to advance international accountability and international criminal justice. They should, instead, focus on these new forms of violence and the more traditional, and well-established, crimes, e.g., war crimes and crimes against humanity. We therefore need to develop a new legal concept for linking these two crimes and uses of AWS and cyber technology so as to increase the international criminal responsibility of those engaging in violence. This is especially important for the policymakers and technical operators of these new devices. This is our new challenge.