

## The Crime of Aggression in the ICC and State Responsibility

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In a contribution to the debate regarding the Kampala Amendments on the Crime of Aggression, we argued that the jurisprudence of the International Court of Justice (ICJ) on use of force questions can be relevant in interpreting the now-defined international crime that will fall within the jurisdiction of the International Criminal Court (ICC).<sup>1</sup> This is in part because the crime of aggression, as defined in Kampala, requires the commission of an “act of aggression” that “by its character, gravity and scale constitutes a manifest violation of the United Nations Charter.”<sup>2</sup> The fact, however, that the finding of a state’s responsibility for such a manifest breach is required for a conviction of the crime of aggression raises questions about the involvement of the ICC in making determinations of state responsibility.

The jurisdiction of the ICC extends only to the determination of the criminal responsibility of individuals.<sup>3</sup> When those individuals are also officials or agents of states, questions may also be raised about the responsibility of the state to which the acts of the individual are attributable. Indeed, where an international crime within the jurisdiction of the ICC is committed by a state organ or person whose acts are otherwise attributable to the state, there will usually also be a case of state responsibility for breach of international law. This is because all the crimes within the jurisdiction of the ICC reflect the concept of “dual obligations.” That is to say, the prohibitions that underlie those “core crimes” are not addressed merely to individuals but are also related to the same (or substantially similar) obligations imposed on states.<sup>4</sup> The prohibition on genocide is addressed both to individuals and to states; war crimes are serious violations of international humanitarian law, which is clearly binding on states; and crimes against humanity are derived essentially from human rights law.

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<sup>1</sup> Dapo Akande & Antonios Tzanakopoulos, *The International Court of Justice and the Concept of Aggression*, in *THE CRIME OF AGGRESSION: A COMMENTARY* 214–232 (Claus Kreß & Stefan Barriga eds., 2017).

<sup>2</sup> Rome Statute of the International Criminal Court art. 8 *bis*(1), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 [hereinafter Rome Statute].

<sup>3</sup> *Id.*, art. 25(1).

<sup>4</sup> See Sotirios-Ioannis Lekkas, *Duality of Responsibility in International Law* (forthcoming D. Phil thesis, University of Oxford) (on file with the authors).

Although a finding that a state organ has committed an international crime for which he or she bears individual criminal responsibility will usually imply that the state to which his or her acts are attributable has committed an internationally wrongful act that generates state responsibility, it will not usually be the role of the ICC to make such a finding of state responsibility. Even where the ICC has to make a finding that state organs had a policy of committing such crimes or developed a plan to do so,<sup>5</sup> these findings would be not expressions or determinations of state responsibility but rather a statement of facts that would *imply* the responsibility of the state.

When it comes to the crime of aggression, however, the definition of the crime itself requires the ICC to make a determination of state responsibility as a prerequisite for the finding of individual responsibility for the commission of the crime. This means that we are not talking here about an implication—even a necessary implication—that emerges from the finding that a state organ has committed an act of genocide or a crime against humanity. We are actually talking about a direct determination of state responsibility as a prerequisite for the finding of individual criminal responsibility under international law. As Claus Kress has put it, “The crime of aggression . . . is . . . the only crime under international law that requires the commission of certain internationally wrongful conduct by a state.”<sup>6</sup>

This required link between state and individual responsibility with respect to the crime of aggression suggests that the crime of aggression is different from the other “international crimes.” For one thing, it may be argued that the project of international criminal justice is about establishing that “crimes against international law are committed by men and not by abstract entities,” with the emphasis and the focus being laid on the responsibility of the wrongdoing individual and that of the state being secondary.<sup>7</sup> However, with aggression, the focus on the state persists in that the court has *first* to pronounce on state responsibility, and only after it has done that can it proceed to determining individual guilt or innocence.

Furthermore, the required link between state and individual responsibility leads to a number of practical questions for the ICC, which we are merely highlighting in this brief contribution, along with some provisional responses to get the debate going. The first question is whether a state whose leader(s) are being prosecuted for the crime of aggression can possibly intervene in ICC proceedings in order to argue that no manifest breach of the UN Charter has occurred in the particular instance.<sup>8</sup> The second, related, question is whether the ICC actually has the competence to make an incidental, as it were, finding of state responsibility in the context of determining the existence of individual criminal responsibility under international law. Any court operating on a

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<sup>5</sup> See Rome Statute, *supra* note 2, arts. 7(2)(a), 8(1) (requiring, respectively, the Court to make findings as to (1) whether an attack directed against a civilian population is “pursuant to or in furtherance of a State or organizational policy to commit such attacks” and (2) whether war crimes were committed as “part of a plan or policy or as part of a large-scale commission of such crimes”).

<sup>6</sup> Claus Kress, *The State Conduct Element*, in *THE CRIME OF AGGRESSION: A COMMENTARY* 412 (Claus Kress & Stefan Barriga eds., 2017).

<sup>7</sup> 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 223 (1947).

<sup>8</sup> See Sarah Williams, *Aggression, Affected States, and a Right to Participate: A Response to Koh and Buchwald*, 109 AJIL UNBOUND 246, 246 (2016).

limited jurisdictional basis has to determine the extent to which it can make the incidental findings that are required in order to answer the main legal question falling within its jurisdiction. The ICJ has faced such questions in *Lockerbie*,<sup>9</sup> for example, and the issue has also been raised before other courts and tribunals, such as those operating under the dispute settlement system of the UN Convention on the Law of the Sea.<sup>10</sup> However, the issue that arises with respect to the crime of aggression is whether we are dealing, essentially, with a *Monetary Gold* issue—that is, a situation in which the incidental determination required for the Court to exercise its jurisdiction is such as to make the claim non-admissible.<sup>11</sup> The problem is not that the ICC has to make an incidental determination. The issue is that it has to make a determination of the responsibility of a state which is not before the Court.

The appropriateness, under the *Monetary Gold* principle, of the ICC making determinations as to whether states have committed violations of the UN Charter, depends essentially on whether the states in question have consented to the Court's engaging in this exercise. Under the ordinary jurisdictional regime of the ICC, acts committed by *any* individual on the territory of a state party will be subject to the jurisdiction of the ICC, whether that individual is a national of any party to the ICC statute or a national of a non-party.<sup>12</sup> Consent by the state of nationality is not a requirement for jurisdiction.<sup>13</sup> However, the possibility that the Court might determine whether an act of aggression has been committed by a non-consenting state is lessened by the fact that the Kampala amendments on aggression provide that, where the jurisdiction of the Court is triggered by a state referral or by the prosecutor *proprio motu*, the Court shall not exercise its jurisdiction over the crime of aggression when committed by the national of or on the territory of a state that is not party to the Rome Statute of the ICC.<sup>14</sup> Thus, under this provision, findings of state responsibility for acts of aggression may not be made by the ICC against states that have not given their consent to ICC jurisdiction.

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<sup>9</sup> Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, 1998 I.C.J. 115 (Feb. 27).

<sup>10</sup> See, e.g., Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, Award; South China Sea Arbitration (Philippines v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility (Oct. 29, 2015). In these cases (and others) one can argue that the question of incidental jurisdiction emerges because of the tendency of states (and their lawyers) to try to “shoehorn” particular disputes into narrow compromissory clauses (since these are the only jurisdictional bases that they can find) and thus to bring the relevant cases before not-obviously-competent courts and tribunals. See also Antonios Tzanakopoulos, *Resolving Disputes over the South China Sea under the Dispute Settlement System of the UN Convention on the Law of the Sea*, in THE SOUTH CHINA SEA DISPUTES AND INTERNATIONAL LAW (forthcoming 2017), <https://ssrn.com/abstract=2772659>.

<sup>11</sup> Dapo Akande, *Prosecuting Aggression: The Consent Problem and the Role of the Security Council* 12 (Oxford Legal Research Paper Series No. 10/2011, 2011); Peter Tzeng, *The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond*, EJIL:TALK! (Oct. 14, 2016), <https://www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-v-china-ukraine-v-russia-and-beyond/>.

<sup>12</sup> Rome Statute, *supra* note 2, art. 12(2)(a).

<sup>13</sup> See Dapo Akande, *Jurisdiction of the ICC over Nationals of Non-Parties: Legal Basis and Limitations*, 1 J. INT'L CRIM. JUST. 618 (2003).

<sup>14</sup> Rome Statute, *supra* note 2, art. 15 *bis*(5).

However, the question of ICC findings of state responsibility against potentially non-consenting states arises in two other cases. First, there is no such exclusion in cases where the jurisdiction of the Court is triggered by a Security Council referral.<sup>15</sup> Second, the Court's jurisdiction remains unclear with regard to acts of aggression committed by a party to the Rome Statute that has neither ratified (or accepted) the Kampala aggression amendments nor opted out of them.<sup>16</sup> In both of these cases, a determination of state responsibility by the ICC could breach the *Monetary Gold* principle.<sup>17</sup> Although it might be argued (as has been done elsewhere)<sup>18</sup> that the first scenario relating to Security Council referrals would not be problematic, the second scenario would likely offend against the *Monetary Gold* principle, especially in light of the provisions of the Rome Statute dealing with amendments.<sup>19</sup>

The fact that the ICC will have to determine questions of state responsibility in making determinations about individual criminal responsibility for the crime of aggression thus has implications for how we might think about the as yet unclear jurisdiction of the Court over the crime. It ought also to have implications for some of the procedures that the Court should adopt if and when it actually has a case dealing with the crime of aggression.

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<sup>15</sup> See *id.*, art. 15 *ter*.

<sup>16</sup> See Dapo Akande, *What Exactly Was Agreed in Kampala on the Crime of Aggression*, EJIL:TALK! (June 21, 2010), <https://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/>; Astrid Resinger Coracini, *More Thoughts on "What Exactly was Agreed in Kampala on the Crime of Aggression"*, EJIL:TALK! (July 2, 2010), <https://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/>.

<sup>17</sup> See Akande, *Prosecuting Aggression*, *supra* note 11.

<sup>18</sup> *Id.*

<sup>19</sup> In particular, see Rome Statute, *supra* note 2, art. 121(5) (second sentence noting, "In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory").