
Introduction

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This symposium deals with the age-old topic of the definition of aggression, which has gained new traction due to the inclusion of the crime of aggression in the Rome Statute of the International Criminal Court. The Statute, however, left the more difficult part for later decision, namely the definition of the crime and the conditions of the exercise of ICC jurisdiction over it. To the surprise of many, the Special Working Group on the Crime of Aggression of the Assembly of States Parties adopted, at its last session in February 2009, a proposal for a definition of the crime for possible adoption at the upcoming 2010 Review Conference in Uganda.¹ It failed to agree, however, on the conditions for the exercise of jurisdiction, in particular due to disagreements on the role of the Security Council *vis-à-vis* the ICC.

This symposium was inspired by a criticism I made from the floor during a panel at the American Society of International Law meeting in the spring of 2009, in which the panel seemed to paint an all-too-rosy picture of the ICC's assumption of jurisdiction over this crime. That criticism led to an ensuing discussion at EJILTalk.² On both occasions, my impression was that a disconnect had developed between the optimism of public statements by interested parties, whether from governments or NGOs, and private cynicism at the prospects of the codification and its impact on the still fledgling International Criminal Court. Even more importantly, the general impact of codification of the crime on the international legal system was not adequately addressed, at the very least not beyond the circle of international criminal lawyers participating in the Working Group or cheering its efforts from the sidelines. With all due respect for international criminal lawyers and their insights into general international law, aggression is too important an issue to be left to international criminal lawyers alone.

This symposium consists of four contributions. My own – extended – criticism of the Working Group draft concentrates on four main points – the inherent indeterminacy of the definition of aggression, its uncertain application to recent cases concerning

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¹ Report of the Special Working Group on the Crime of Aggression, International Criminal Court, Assembly of States Parties, Seventh Session (second resumption), New York, 9–13 February 2009, 20 Feb. 2009, Doc. ICC-ASP/7/SWGCA/2.

² See <http://www.ejiltalk.org/author/apaulus> (visited 24 Sept 2009).

the use of force, the involvement of the Security Council in the exercise of jurisdiction, and, finally, the danger of concentrating issues of *jus in bello* and *jus ad bellum* in one single court or tribunal. In his response,³ Claus Kress, one of the members of the Working Group, attempts to refute the arguments one by one and concludes that the ‘time for decision’ has arrived. Our disagreement is probably best captured by saying that Kress regards the problems with the current draft as minor compared to the historic achievement a definition of the crime of aggression may bring about, whereas in my view the dangers of the current proposal outweigh the probable benefits. In his contribution,⁴ Roger S. Clark, another member of the Working Group, describes the difficulties of codifying aggression as a crime and of fitting it into the current structure of the Rome Statute, and thus provides important insights into the process of codification. Finally, Sean D. Murphy critically assesses the current proposal for ICC jurisdiction over the crime of aggression⁵ through the lens of the criteria necessary for establishing the legitimacy of international norms and institutions, as elaborated by the late Thomas Franck.⁶ Murphy concludes that ICC jurisdiction under the proposed definition involves considerable risks to the legitimacy of both the substantive law being applied by the ICC and the ICC as an institution.

Thus, the general opinion in this symposium is divided between two contributions that criticize the definition proposed by the Working Group and point to the dangers for the Court in its current predicament, and two others that rather emphasize the historic achievement of the Working Group against considerable odds.

I have declined the generous offer by the Editors to write a response to the counter-critique, not out of disrespect for the important points advanced by Claus Kress and Roger Clark, but because I believe that this symposium has put the most important arguments plainly on the table. May the reader – and the States Parties assembling in Kampala next year – decide!

³ Kress, ‘Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression’, in this issue, at 1129.

⁴ Clark, ‘Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over it’, in this issue, at 1103.

⁵ Murphy, *Aggression, Legitimacy and the International Criminal Court*, in this issue, at 1147.

⁶ See T. Franck, *The Power of Legitimacy Among Nations* (1989).