



<https://openaccess.leidenuniv.nl>

License: Article 25fa pilot End User Agreement

This publication is distributed under the terms of Article 25fa of the Dutch Copyright Act (Auteurswet) with explicit consent by the author. Dutch law entitles the maker of a short scientific work funded either wholly or partially by Dutch public funds to make that work publicly available for no consideration following a reasonable period of time after the work was first published, provided that clear reference is made to the source of the first publication of the work.

This publication is distributed under The Association of Universities in the Netherlands (VSNU) 'Article 25fa implementation' pilot project. In this pilot research outputs of researchers employed by Dutch Universities that comply with the legal requirements of Article 25fa of the Dutch Copyright Act are distributed online and free of cost or other barriers in institutional repositories. Research outputs are distributed six months after their first online publication in the original published version and with proper attribution to the source of the original publication.

You are permitted to download and use the publication for personal purposes. All rights remain with the author(s) and/or copyrights owner(s) of this work. Any use of the publication other than authorised under this licence or copyright law is prohibited.

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please contact the Library through email: OpenAccess@library.leidenuniv.nl

Article details

Herik L.J. van den (2018), Crime of Aggression Library *** The Crime of Aggression: A Commentary Review of: Kreß C., Barriga S. (2017) The Crime of Aggression: A Commentary (vols 1-2), The Crime of Aggression Library, Leiden Journal of International Law 31(3): 723-728. Doi: 10.1017/S0922156518000365

BOOK REVIEWS

Claus Kress and Stefan Barriga (eds.), *Crime of Aggression Library* *** *The Crime of Aggression: A Commentary, Volumes 1 & 2*, Cambridge, Cambridge University Press, 2017, 1583 pp, ISBN 978-1-107-01526-5
doi:[10.1017/S0922156518000365](https://doi.org/10.1017/S0922156518000365)

On 14 December 2017, the Assembly of State Parties to the Rome Statute of the International Criminal Court adopted Resolution ICC-ASP/16/Res.5,¹ and thereby activated the Court's jurisdiction over the crime of aggression. This decision positively transmitted the Nuremberg legacy on the crime against peace to a twenty-first century setting. Not without compromises though. The irony that the four states which enabled Nuremberg back in 1946 were now arduously avoiding the extension of the Court's jurisdiction over the crime of aggression has not gone unnoticed.² The trajectory of the crime of aggression, the compromises, the technicalities, the politics and the sentiments are authoritatively recorded in the *Crime of Aggression Library* *** *The Crime of Aggression: A Commentary, Volumes 1 and 2*. This two-volume work has been composed and edited by two patrons of the Crime of Aggression, namely Claus Kress and Stefan Barriga, the scholar and the diplomat. Both editors have in their respective capacity indefatigably striven for the creation of a robust accountability regime for the illegal use of force. The two tomes that they have put together are, in a way, further proof of their dedication to this ambitious undertaking. This is not to say that all chapters are unequivocally supportive of the core idea of criminalizing aggression with wide potential for ICC jurisdiction. On the contrary, the book is very rich in perspective. In its five parts on (i) history; (ii) theory; (iii) the crime of aggression under current international law; (iv) national law; and (v) the future world order, this work assembles opposite opinions and it offers an enormously wide variety of understandings and views, marrying also more legal-technical accounts with the philosophical, the political and the historical. Given that many authors of various chapters have participated at some point in the legal development of the crime of aggression, the work is also an addendum to the *travaux préparatoires* compiled by

¹ Resolution ICC-ASP/16/Res.5, adopted at the 13th plenary meeting, 14 December 2017.

² J. Trahan, 'One Step Forward for International Criminal Law; One Step Backwards for Jurisdiction', *Opinio Juris*, 16 December 2017.

the same editors in 2011,³ with authors putting on record their understanding of what was agreed by a certain text and explaining the negotiating context.⁴ Many of the chapters will provide guidance to the Court and to other international actors on the intricacies of key legal issues of the Kampala arrangements and the activation decision, and their relation to the ICC Statute and to general international law. Yet, the significance of this work stretches much beyond these important contributions to doctrinal debates, as the writings grapple with foundational inquiries that underlie the criminalization of aggression. Part V considers how aggression prosecutions may shape our future world order. The theme of how Article 8*bis* of the ICC Statute affects the *jus contra bellum* is obviously present throughout. The ambivalent role of the human rights community towards the project of criminalizing aggression is also discussed in various chapters, as are the costs and consequences of compromises made during the negotiations.

The origins of the idea of a crime of aggression and its relation to a nascent *jus contra bellum* in the interbellum and the post-Second World War decolonization era are very eloquently presented in the first chapters of part I on history by some of the most prominent authors on aggression and the crime against peace, namely Sellars, McDougall and Bruha.⁵ Defining the precedential value and legacy of Nuremberg and Tokyo, Sellars and McDougall agree that the immediate post-Second World War jurisprudence will be of limited interpretive significance for ICC judges given Article 8*bis*' manifest-requirement which had no equivalent in, then, relevant definitions of crimes against peace.⁶ Sellars explains how the respective dissenting opinions of both Pal and Röling flourished in early Cold War discussions and she, thus, also sets the stage for Bruha's chapter on the making of UN GA Resolution 3314 (XXIX) on the Crime of Aggression. Introducing Resolution 3314 as a political document and highlighting its inherent ambiguities, Bruha indicates that sincere doubts are justified on the normative link that was created between that Resolution and the Kampala definition, although he does not pursue the point, being confronted with a *fait accompli* that may well constitute the very core of the Kampala compromise.⁷ Moving away from the General Assembly and its (limited) contribution to defining aggression through Resolution 3314, Strapatsas details the practice of the Security Council regarding the concept of aggression, meticulously analyzing past and potential new practice and how this could or should inform future ICC proceedings.⁸

³ S. Barriga and C. Kress, *The Travaux Préparatoires of the Crime of Aggression* (2011).

⁴ See, e.g., on the discussion of applying the attempt provision of Art. 25(3)(f) of the ICC Statute to the crime of aggression and how this discussion was intertwined with or distorted by discussions on the role of the Security Council, R. Clark, 'General Principles of International Criminal Law', in C. Kress and S. Barriga (eds.), *The Crime of Aggression: A Commentary* (2017), 615. See also, at 618, where Clark explains that 'as one of those involved in the drafting of the Elements, I did not see Element 3 as addressed at all to the question of attempts'.

⁵ K. Sellars, 'The First World War, Wilhelm II and Article 227: The Origin of the Idea of "Aggression" in International Criminal Law' (Ch. 1); C. McDougall, 'The Crime against Peace Precedent' (Ch. 2); K. Sellars, 'The Legacy of the Tokyo Dissents on "Crimes against Peace"' (Ch. 3); T. Bruha, 'The General Assembly's Definition of the Act of Aggression' (Ch. 4).

⁶ *Ibid.*, at 77 and 105.

⁷ *Ibid.*, at 173.

⁸ N. Strapatsas, 'The Practice of the Security Council Regarding the Concept of Aggression' (Ch. 5).

The relationship between the Security Council and the ICC, and the possibility of the ICC to proceed without Security Council approval, obviously one the greatest breakthroughs of Kampala, gets excellent treatment in the chapters by Barriga and Blokker.⁹ The interrelationship between the Kampala crime of aggression and the *jus contra bellum* more generally is also discussed by Akande and Tzanakopoulos in their chapter on the ICJ and the concept of aggression.¹⁰ The two authors try to make sense of the plethora of rules and concepts (illegal use of force, armed attack, act/war/crime of aggression) and arrive at the conclusion that there are two sets of concepts based on different degrees of gravity, one for the exclusive purposes of state responsibility and one serving both purposes of state responsibility as well as individual criminal responsibility. The two sets do not necessarily correspond except for the concepts of 'armed attack' and 'act of aggression' which, according to the authors, can be equated.¹¹ This all makes for a very complex whole, and this complexity does not *per se* reinforce the robustness of the *jus contra bellum*. After all, only legal scholars may truly enjoy the many shades of grey while ultimately the added complexity of Kampala might detract from the clarity of the primary norm. In his *pièce de résistance* – the chapter on state conduct, which is actually an excellent treatise on the use of force and could be a monograph as such – Kress pursues the analysis into *jus contra bellum*. He offers in-depth discussion of the grey areas, including humanitarian intervention and pre-emptive self-defence, which will mostly fall outside the scope of Article 8*bis* because of the provision's threshold requirement that violations of the UN Charter be manifest.¹² The requirement, and Article 8*bis* more broadly, is extensively discussed, and criticized by other authors in the book for being indeterminate.¹³ In defence of the requirement, Koskeniemi, instead, states in his chapter that it is not the indeterminacy of the language or the norm of Article 8*bis* which is problematic, but rather the indeterminacy, or vagueness, of the world itself. Since the future will never be like the past, there is a need for evaluative standards, such as the manifest-clause, rather than 'idiot rules'.¹⁴ Elsewhere, the contrary argument has also been made that the differentiation between criminal and non-criminal uses of force may well result in an actual derogation of the comprehensive prohibition of the use of force, making ordinary violations of lesser concern because they are not criminalized.¹⁵ Article 2(4) as *jus cogens*, and Kampala's crime of aggression as some sort of *magna jus cogens*. Seen from this perspective, the question whether Article 8*bis* of the ICC Statute may inadvertently devalue Article 2(4) is not necessarily unjustified. And it is a tremendously important question given the prevailing climate of excessive invocation of the right to self-defence as in Operation

⁹ S. Barriga and N. Blokker, 'Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues' (Ch. 17) and 'Conditions for the Exercise of Jurisdiction based on Security Council Referrals' (Ch. 18).

¹⁰ D. Akande and A. Tzanakopoulos, 'The International Court of Justice and the Concept of Aggression' (Ch. 6).

¹¹ *Ibid.*, at 229.

¹² C. Kress, 'The State Conduct Element' (Ch. 14).

¹³ See, e.g., McDougall, 'Article 8*bis* papers over rather than resolved debates on the contours of prohibition of use of force'; C. McDougall, 'The Crime against Peace Precedent', in Kress and Barriga, *supra* note 4, cf fn. 5, at 125.

¹⁴ M. Koskeniemi, 'A Trap for the Innocent ...' (Ch. 49).

¹⁵ A. Paulus, 'Second thoughts on aggression', (2009) 20 *EJIL* 1117–28, at 1124.

Olive Branch,¹⁶ the latest US Nuclear Strategy stating that the US may retaliate with nuclear weapons against non-nuclear attacks,¹⁷ and discussions over a bloody-nose strike against North Korea by the US.¹⁸ Obviously, views on the core question of how best to move towards a robust *jus contra bellum* differ, and it was the editors' explicit ambition to capture the full panoply of voices and policy views rather than to merely convey their own or majority perspectives.¹⁹ The different actors' views set out in Part V fully live up to this ambition, as they include perspectives from all P5 countries, but also Israel, Iran, Japan, South Korea, India, Egypt, Brazil and South Africa.²⁰

Weisbord's chapter on the perspective and role of civil society makes for a very interesting read as it dissects the 'faltering of civil society' in the lead-up to Kampala in strong contrast to civil society's notable force and successes during the adoption of the Rome Statute.²¹ Echoing critiques also expressed in the contributions of Schabas and Mégret, Weisbord sets out the different problems that NGOs have with the idea of a crime of aggression. Going one layer deeper, Schabas explores the roots of the human right to peace and makes the case that this notion could act as a unifying principle bringing human rights law, international humanitarian law and international criminal justice closer together, thereby countering the militaristic tendency in which the human rights movement has engaged by supporting the concepts of humanitarian intervention and responsibility to protect.²² In a similar vein, Mégret traces the failure of the human rights movement to speak out on aggression back to human rights law's deference to international humanitarian law.²³ He suggests, instead, that international human rights law should reconstruct itself and no longer see war as an impenetrable black box.²⁴ It should reconceptualize its relationship with international humanitarian law, which would pave the way for the understanding that the specific evil of aggression is not that it attacks sovereignty or threatens peace, but – in Mégret's view – aggression should be seen as a crime

¹⁶ A. Peters, 'The Turkish Operation in Afrin (Syria) and the Silence of the Lambs', *EJIL: Talk!*, 30 January 2018, available at www.ejiltalk.org/?s=silence+of+the+lambs.

¹⁷ 2018 Nuclear Posture Review, Department of Defence, US, February 2018, at 21: 'The United States would only consider the employment of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners. *Extreme circumstances could include significant non-nuclear strategic attacks.* Significant non-nuclear strategic attacks include, but are not limited to, attacks on the U.S., allied, or partner civilian population or infrastructure, and attacks on U.S. or allied nuclear forces, their command and control, or warning and attack assessment capabilities' (emphasis added).

¹⁸ The idea of a pre-emptive, limited attack on North Korean nuclear missile arsenal and infrastructure, also called the bloody nose option was considered by Trump in February 2018. Defense Minister Mattis warned that war with North Korea would be 'catastrophic' – 'probably the worst kind of fighting in most people's lifetimes', *New York Times*, 3–4 February 2018, at 5 ('White House presses for new options on North Korea').

¹⁹ C. Kress, 'Introduction: The Crime of Aggression and the International Legal Order', in Kress and Barriga, *supra* note 4, at 7, footnote 34.

²⁰ In the order of the chapters 33–47: M. Biato and M. Böhlke, Brazil; Zhou Lulu, China; E. Belliard, France; S. Wasum-Rainer, Germany; N. Singh, India; Djamchid Momtaz and E. Baghaei Hamaneh, Iran; R.S. Schöndorf and D. Geron, Israel; I. Komatsu, Japan; Y. Sok Kim, South Korea; R. Einar Fife, Norway; G. Kuzmin and I. Panin, Russia; A. Stemmet, South Africa; C. Whomersley, UK; H.H. Koh and T.F. Buchwald, US; N. Negm, Egypt.

²¹ N. Weisbord, 'Civil Society' (Ch. 48).

²² W. Schabas, 'Aggression and International Human Rights Law' (Ch. 12).

²³ F. Mégret, 'What is the Specific Evil of Aggression?' (Ch. 51), see also specifically at 1425.

²⁴ *Ibid.*, at 1434.

against humanity.²⁵ Pursuant to this argument, aggression engages the human rights responsibility of the aggressor state for the entirety of its human rights impact including impact emanating from the counter-violence committed by the state acting in self-defence. In this sense, the ultimate evil of aggression is that it makes violence legal because of the application of the laws of war. Mégret does not believe that the contradiction of behaviour being legal under one regime (laws of war) and illegal under the other (human rights) should necessarily be fatal.²⁶ Mégret's thinking is certainly refreshing and provocative. The question of the protected value of aggression and whether this should be framed in human rights terms rather than sovereignty or loss of territory is a recurring theme which is also analyzed in other chapters, particularly the chapter by May, Kress' introductory piece and, from a historical perspective, Sellars' chapter.²⁷

These reflections of a more philosophical nature may also inform very technical queries that were left unregulated in Kampala. One example concerns the question of victim participation and reparations. In a most illuminating chapter, Pobjie discusses how the victim provisions of the ICC Statute should apply to the crime of aggression with a specific focus on the question how harm should be interpreted in a case of aggression, and what kind of nexus should exist between harm suffered and the crime of aggression. This inevitably evokes questions of protected interest. Pursuing Mégret's line of thought, Pobjie discusses the potential of civil liability for individual perpetrators of aggression for harm caused by lawful acts of war, placing the analysis in the context of broader developments regarding possibly emerging procedural rights of individuals to reparation for *jus contra bellum* violations.²⁸ Obviously, the universe of victims is potentially massive. And even more so if states as victims of aggression are included, although it is not necessarily clear what states would gain from such a victim status in the ICC context, in addition to the procedural rights that already exist under general international law.

Another matter left unregulated in Kampala and a clear result of compromise concerns the role of the Pre-Trial Division. This administrative unit was given a judicial function in aggression proceedings without much deeper consideration of how such a regime would operate in practice. There is a question of composition as pre-trial divisions are currently composed of five, six or seven judges for a minimum period of three years and this number may even fluctuate within this three-year period. In addition to the inherent problem of a judicial organ being so flexibly composed, rules of decision-making – majority or unanimity – have also not been specified. The special authorization procedure may also affect the interplay between investigations into different crimes based on similar facts as the additional filters for aggression proceedings may result in a different pace for aggression investigations than for investigation into other Article 5 crimes which are subject to a different authorization scheme, thus requiring some kind of two-track investigatory approach

²⁵ Ibid., at 1445.

²⁶ Ibid., at 1437.

²⁷ L. May, 'Just War Theory and the Crime of Aggression' (Ch. 9). See also references in footnote 5 and 20.

²⁸ E. Pobjie, 'Victims of the Crime of Aggression' (Ch. 23).

by the Prosecutor. These questions are discussed in the outstanding chapter by Chaitidou, Eckelmans and Roche on the Pre-Trial Division.²⁹ These are detailed procedural and institutional questions that may seem overly technical, but if the crime of aggression is to become operative, they are ultimately as essential as the deep philosophical queries and the political considerations.

It is the great merit of this book to bring all those different issues together, and to do so in such an impressive fashion. The two magnificent volumes, rich in perspective and thorough in analysis, are therefore without any doubt among the most authoritative works on the crime of aggression.

*Larissa van den Herik**

²⁹ E. Chaitidou, F. Eckelmans and B. Roche, 'The Judicial Function of the Pre-Trial Division' (Ch. 22).

* Vice Dean of Leiden Law School and Professor of Public International Law at the Grotius Centre for International Legal Studies, Leiden University [L.van.den.Herik@LAW.leidenuniv.nl].

¹ See, for instance, the project carried out by the ICRC and Switzerland on how to enhance compliance in armed conflicts, available at www.icrc.org/en/document/strengthening-compliance-international-humanitarian-law-ihl-work-icrc-and-swiss-government (accessed 16 March 2018). For other studies on the topic, see the *Generating Respect for the Law* issue of the International Review of the Red Cross published in December 2015, (2014) 95/96 *International Review of the Red Cross* 684; and ICRC, 'Improving Respect for International Humanitarian Law in Non-International Armed Conflicts', 2008, available at www.icrc.org/sites/default/files/topic/file_plus_list/0923-increasing_respect_for_international_humanitarian_law_in_non-international_armed_conflicts.pdf (accessed 16 March 2018).

² E. Heffes and M. Kotlik, 'Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime', (2014) 96 *International Review of the Red Cross* 1201. See also ICRC, *Improving Respect for International Humanitarian Law in Non-International Armed Conflicts*, *supra* note 1, at 11–12.