

What the ICC Can Learn from the Jurisprudence of Other Tribunals

Christopher Greenwood*

That the International Criminal Court (ICC) can, and should, learn from the jurisprudence of other international courts and tribunals is surely beyond doubt. Of course, international law knows no system of precedent comparable to that which exists in common law systems,¹ so the ICC is not bound by its own previous decisions, let alone those of other courts and tribunals. Nevertheless, as Judge Shahabuddeen has pointed out, consistency is an important attribute of law and justice, and the need to ensure consistency compels international courts to pay close attention to their own previous judgments.² Moreover, while there was once a tendency for some international judges to assume that their separate and distinct mandates meant that they were not obliged to pay much attention to the jurisprudence of other courts and tribunals, there is an increasing awareness that international law is a single legal system, not a series of isolated islands, and that attention to the pronouncements of other judicial bodies is both necessary and valuable.³

That has certainly been true for the ICC in its early years, when the quality of its reasoning and the legitimacy of its judgments have been enhanced by its ability and willingness to draw upon the jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, as well as that of other international courts. It might be thought, however, that the position is different in the case of the crime of aggression. Aggression was not included in the crimes over which the *ad hoc* tribunals were given jurisdiction and, although much effort went into producing a definition of aggression,⁴ there is very little practice of any kind in applying that definition.⁵

The most directly relevant jurisprudence, therefore, is that of the International Military Tribunals at Nuremberg and Tokyo, which were the first to rule upon the notion of “crimes against the peace.” That part of the judgments from these Tribunals is the most heavily criticized and most open to the charge of victors’ justice. In contrast to the comparatively well-established law on war crimes, judgments on crimes against peace were based

* Sir Christopher Greenwood, CMG, QC, Judge, International Court of Justice; formerly Professor of International Law, London School of Economics.

¹ See, e.g., Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 105, 33 U.N.T.S. 933.

² MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 31 (2007).

³ See Christopher Greenwood, *Unity and Diversity in International Law*, in A FAREWELL TO FRAGMENTATION 37 (Mads Endenas & Eirik Bjorge eds., 2015).

⁴ See 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) (the basis for article 8 *bis* of the Rome Statute).

⁵ An attempt to persuade the Security Council to characterize Iraq’s 1990 invasion of Kuwait as an act of aggression was dropped in favour of condemning it as a “breach of the peace”, as that formula commanded general acceptance. See S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990).

on the premise that the prohibition on states engaging in wars of aggression— itself a very recent development—entailed the criminal liability of those individuals who directed the affairs of the state and were therefore able to take the decision to embark upon aggression.⁶ If that deduction was controversial at the time, however, it is far less so today, when there is much wider acceptance of the principle that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁷

The Nuremberg and Tokyo International Military Tribunals’ judgments, however, say comparatively little about the scope of aggression in international law (although the Nuremberg Tribunal’s reasoning in rejecting the plea of anticipatory self-defence advanced by some defendants certainly merits further study). Of greater relevance in this respect are some of the later decisions by United States Military Tribunals in the Control Council Law No. 10 trials, which were also held at Nuremberg. Although the Tribunals were not international in the sense of having judges and prosecutors from a variety of states, their mandate was international as they came from a law adopted by the four Allied Powers occupying Germany. Two of the resulting judgments are particularly interesting.

In *United States v. von Leeb (the High Command Case)*,⁸ the Tribunal explored whether individuals might incur responsibility for crimes against the peace. It rejected the prosecution’s arguments that members of the German General Staff should be convicted of crimes against the peace. The Tribunal wrote that “it is not a person’s rank or status, but his power to shape or influence the policy of his State, which is the relevant issue for determining his criminality under the charge of Crimes against Peace.”⁹ The Tribunal required not only knowledge that the war being planned was one of aggression, but also that the person possessing that knowledge was “in a position to shape or influence the policy that brings about its initiation or its continuance.”¹⁰ In light of the requirement in article 8 *bis*(1) of the Rome Statute of the International Criminal Court that the crime of aggression be committed by “a person in a position effectively to exercise control over or to direct the political or military action of a State,”¹¹ the *von Leeb* judgment is clearly relevant to the work of the ICC.

Also of interest is the judgment in *United States v. List (the Hostages Case)*.¹² The Tribunal in that case rejected a prosecution argument that, because the German invasion of Yugoslavia and Greece had been an unlawful act of aggression, it necessarily followed that the actions taken pursuant to that invasion were war crimes. International law, the Tribunal held, does not differentiate between a lawful and an unlawful belligerent occupation in

⁶ See Judgments and Sentences, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 171–341, 365– 66 (1947).

⁷ *Id.* at 223.

⁸ The German High Command Trial, 12 LAW REPORTS OF TRIALS OF WAR CRIMINALS (U.N. War Crimes Commission, ed., 1949).

⁹ *Id.* at 69.

¹⁰ *Id.*

¹¹ 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.

¹² The Hostages Trial, 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34 (U.N. War Crimes Commission, ed., 1949).

determining the occupying state's powers, and the legality of its soldiers' actions, under the laws of war (or, as we would say now, international humanitarian law).¹³ Since the ICC has jurisdiction over war crimes, as well as its yet-to-be-realized jurisdiction over aggression, the distinction drawn in *List* between legality under the *jus ad bellum* and legality under the *jus in bello*—a distinction which has been reaffirmed on numerous occasions¹⁴—is also of clear relevance to its work.

Yet it would be a mistake to imagine that the ICC can learn only from the jurisprudence of courts and tribunals that have had to pronounce upon the crime of aggression or its forerunners. International law is a single legal system and the judgments of other courts or tribunals on more general matters are sources from which the ICC can and should draw. These obviously include the judgments of the ICTY and ICTR and other *ad hoc* courts and tribunals on the principles of international criminal justice, including the liability of secondary parties, admissibility and reliability of evidence, and the concept of due process. But it also goes beyond these examples. The judgments of the International Court of Justice in the *Corfu Channel*,¹⁵ *Nicaragua*,¹⁶ *Oil Platforms*,¹⁷ and *Armed Activities on the Territory of the Congo*,¹⁸ although concerned with state responsibility rather than individual criminal liability, constitute a significant body of jurisprudence on the legality of recourse to force and thus have an important bearing on defining the uses of force that amount to aggression.¹⁹ In addition, the Court's judgments and advisory opinions on matters of general international law, such as the interpretation and application of treaties and the law of state responsibility, are likely to be significant for the ICC.

It is difficult to think of a subject on which the ICC's decisions will be more important or far-reaching in their implications than aggression. It is essential, therefore, that, if the ICC is called upon to exercise jurisdiction with respect to a charge of aggression, its judgment be consistent with, and grounded in, the way in which prior tribunals have developed relevant international law. A deep understanding of all the relevant jurisprudence of other international courts and tribunals will be necessary if that objective is to be met.

¹³ *Id.* at 59.

¹⁴ See, e.g., Christopher Greenwood, *The Relationship between Jus ad Bellum and Jus in Bello*, 9 REV. INT'L STUD. 133 (1983).

¹⁵ *Corfu Channel* (U.K. v. Albania), Judgment, 1949 I.C.J. 1, 4 (April 9).

¹⁶ *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27).

¹⁷ *Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6).

¹⁸ *Armed Activities on the Territory of the Congo* (Dem. Rep. of the Congo v. Uganda), Judgment, 2005 I.C.J. 168 (Dec. 19).

¹⁹ See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).