

## State Responsibility for Aggression: A Human Rights Approach

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The insertion of aggression in the Rome Statute has created hopes that it might one day be prosecuted.<sup>1</sup> Nonetheless, the chances of anyone being prosecuted by the ICC for aggression seem rather dim at present given how unlikely it is that states who might commit aggression will recognize the Court's jurisdiction over it, and the inevitable difficulties of prosecuting senior leaders.

More importantly, even if aggression is prosecuted, it is hard not to see how the focus on individual criminal responsibility is even more problematic when it comes to aggression than it is with other crimes. Individual responsibility has a place within international law and is often associated with a level of targeted deterrence, as well as satisfying some of victims' needs to locate responsibility within particular individuals. Indeed, there may be room for strategic prosecution aimed at hyper-responsible individuals, those who have had a larger-than-life role in the launching of wars of aggression.

Nonetheless, the role of individual responsibility ought to remain a marginal one in relation to reckoning with broader issues of collective responsibility. It is not only that individual responsibility for aggression is dependent on a finding that the state engaged in aggression; it is that aggression is behavior that *is also* attributable to the state and should be seen as such.<sup>2</sup> It may be that some wars are launched primarily by individuals, but many have significant—even massive—popular support and/or are launched by democratically elected leaders. Because of the emphasis on aggression as a “leadership crime,” the degree to which the population and the military may willingly have embraced aggression risks being hidden from sight, possibly allowing both simply to “blame their leaders.”<sup>3</sup>

In addition, there is arguably a deeper problem than aggression itself understood as the first, unprovoked use of violence against another state—namely, the very existence of war as a possibility in international law. Aggression is a key component of war, but it is not its defining structural feature. That structural basis is more likely to be found in the unique military buildups and territorial exclusivism that the nation state makes possible, combined with the

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<sup>1</sup> Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 [hereinafter Rome Statute].

<sup>2</sup> Rome Statute, *supra* note 1, art. 8 *bis*.

<sup>3</sup> See Larry Cata Backer, *The Fuhrer Principle of International Law: Individual Responsibility and Collective Punishment*, 21 PENN STATE INT'L LAW REV. 509 (2002).

particular anarchy of the international system. Aggression, moreover, will often only occur against the background of significant injustices, unresolved territorial disputes, power imbalances and politics, colonial legacies, support of despotic regimes, militarism, the arms trade, etc. We should be mindful, in fact, that oftentimes both states will be happy to go to war with each other, and that the “technically” self-defending state may welcome the opportunity to fight. The criminalization of individuals committing aggression, in short, can blind us to the structural dimensions of aggression.<sup>4</sup> It is hardly a comprehensive answer to the problem of war and peace, even if it may be part of the solution to first uses of force as a particular trigger of war.

How, then, might one think about complementing and improving on individual criminal responsibility for aggression? State responsibility is a fundamental pillar of international law. State responsibility for aggression is an attractive option, especially in cases where there may be something arbitrary about focusing on a small coterie of individuals. For example, state responsibility seems to have a better ability to tackle the problem of reparations. As it stands, the ICC reparations regime focuses on the responsibility of the convicted and some indeterminate source of external funding channeled by the Victims Trust Fund.<sup>5</sup> But although an individual may be entirely responsible for a crime, he cannot, in most cases, be responsible for the totality of the harm caused. That is particularly the case with a collective crime, such as aggression. Even if it is justifiable for individuals to bear full *criminal* responsibility for aggression, it does not follow that they should shoulder the totality of the blame for the harm—and at any rate, they could not compensate for it in the way that a state might.<sup>6</sup>

Thinking of responsibility for aggression as state responsibility may also help deal with the broader consequences of aggression by allowing us to develop what might be described as a human rights approach to aggression.<sup>7</sup> Under a regime that punishes individuals for aggression, it is not always clear what the actual gravity of having launched an unprovoked war is. In international criminal law, aggression is a fairly “flat” accusation: An act of aggression that leads to a world war, causing many deaths, or an act of aggression that ends in a minor conflict, with few deaths, may be understood politically and morally as being separated by orders of magnitude. Legally, however, these two acts will be treated the same as constituting aggression. This may be because aggression is traditionally, first and foremost, conceived of as a crime against another *state*, irrespective of its consequences for human beings.<sup>8</sup> As a result, individuals who commit aggression

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<sup>4</sup> Johan Galtung, *A Structural Theory of Aggression*, 1 J. PEACE RES. 95–119 (1964).

<sup>5</sup> See Frédéric Mégret, *Justifying Compensation by the International Criminal Court’s Victims’ Trust Fund: Lessons from Domestic Compensation Schemes*, 36 BROOK. J. INT’L L. 123, 124–25 (2010).

<sup>6</sup> *Id.* at 149–50.

<sup>7</sup> Some of the themes discussed here have been explored in more detail in Frédéric Mégret, *What is the Specific Evil of Aggression?*, in *THE CRIME OF AGGRESSION: A COMMENTARY* (Claus Kreß & Stefan Barriga eds., 2017).

<sup>8</sup> Mégret, *supra* note 7.

typically are not understood as being conceivably responsible for at least four things that seem crucial to our understanding of the gravity of aggression.

First, because of the distinction between the *jus ad bellum* and the *jus in bello*, war crimes committed in war are not per se attributable to the individuals who engaged in aggression. Some individual “aggressors” might, of course, be liable under a separate heading as commanders or instigators of war crimes, but the act of engaging in aggression is a distinct offense and is separate from its consequences. This is so even though, per hypothesis, the war crimes would never have been committed had aggression not occurred, triggering the chain of events that led to the conditions under which the war crimes occurred.

Second, those responsible for aggression are not criminally responsible for the deaths of enemy combatants who are lawfully killed and the other side’s civilians who are killed collaterally in ways that conform to the laws of war.<sup>9</sup> This is because under the *jus in bello*, which applies to both parties, including the aggressing side, such deaths are considered to be legal. This is true irrespective of the fact that, were it not for the initial act of aggression and the resulting operation of the laws of war, it almost certainly would have been unlawful to kill these individuals from a default human rights perspective.

Third, individuals who commit aggression are emphatically not responsible for any loss of life caused by the acts of the state exercising self-defense. Individuals clearly do not exercise responsibility or control over soldiers on the other side that could, under ordinary principles of criminal law, be imputable to them. This is true even though the defending state would never have had to kill combatants or non-combatants collaterally (those of the aggression state), and perhaps never have committed war crimes, had it not been “forced” to respond to an aggression in the first place.

Fourth, those involved in aggression are typically not guilty for the loss of life of their own troops.<sup>10</sup> As individuals, they do not owe particular human rights obligations to such individuals. Again, this is true even though none of those troops would have died had the aggressing state not engaged in aggression in the first place.

One might argue, therefore, that individual responsibility for aggression is either very indeterminate about what is being punished, or reflects a quite limited view of the actions for which individuals are being punished when found guilty of

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<sup>9</sup> Jens David Ohlin, *The Crime of Bootstrapping*, in *THE CRIME OF AGGRESSION: A COMMENTARY* (Claus Krefß & Stefan Barriga eds., 2017).

<sup>10</sup> I say typically, because attempts have been made in the UK to at least sue the British state for failures to protect the right to life as a result of having insufficiently sought advice before sending British troops to Iraq. See *House of Lords, Judgments - R (on the application of Gentle (FC) and another (FC)) (Appellants) v. the Prime Minister and others (Respondents)*, [2008] UKHL 20. After the Chilcot inquiry’s findings that the 2003 invasion of Iraq was illegal, there have also been suggestions that this could be changing and that former Prime Minister Tony Blair could be sued essentially for engaging in an act of aggression. Caroline Mortimer, *Tony Blair Could Be Sued for “Every Penny” by Families of Soldiers Killed in Iraq*, *THE INDEPENDENT* (July 8, 2016), <http://www.independent.co.uk/news/uk/politics/chilcot-tony-blair-iraq-war-soldiers-families-sue-every-penny-prosecution-a7126386.html> (last visited Mar 16, 2017).

aggression. Looking at the problem from the point of view of state responsibility and of human rights might allow us, by contrast, to contemplate more readily the overarching gravity of aggression.<sup>11</sup> State responsibility for aggression is a moral responsibility, one could argue, for the totality of the consequences that flow from aggression. These consequences would include, at the very least, war crimes committed by a state's own troops, regardless of whether the state actually condoned them. The question of whether the aggressing state bears any responsibility for the war crimes committed by the other side is more complex, and there may be strategic reasons to deny that possibility, in addition to the fact that the defending state acts as a sort of *novus causus interveniens*. Nonetheless, if responsibility for war crimes committed by the other state is not seen as the exclusive responsibility of that state or its agents, then on the basis of a "would never have been committed in the first place" criterion, one might say that the aggressing state bears at least some responsibility for the war crimes committed by others.

As to the killing of enemy combatants and, collaterally, enemy civilians, it is lawful only because of and under the peculiar logic of the laws of war. Even if the laws of war grant individuals a privilege of belligerency in such cases, the aggressing state should arguably be held liable for wrongfully creating the conditions under which that privilege of belligerency becomes effective. Of course, positive international human rights law is typically understood to defer to the *lex specialis* of the laws of war following the ICJ's Advisory Opinion when it comes to the conduct of hostilities.<sup>12</sup> One can wonder, however, what might be the deeper rationale for this position from a human rights point of view. Why should the aggressor be rewarded through its own wrongdoing by a quasi-immunity for killing? From a human rights angle, the state has unlawfully, to use Jens Ohlin's felicitous phrase, "bootstrapped" itself into a position where it can claim the benefit of the laws of war's "license to kill."<sup>13</sup>

Finally, a human rights approach to aggression would focus on the extent to which the aggressing state violates the rights of persons within its own jurisdiction whom it endangers by entering a war that no human rights consideration can justify. The persons affected would include the state's own civilians, even when killed by enemy fire that the aggressing state has "brought upon itself" without any just cause. Moreover, these persons arguably would also include the state's own combatants, whose lives and integrity the state is expending in ways that cannot be shown, under human rights principles and contrary to the situation of the defending state, to be justified under some democratic imperative.

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<sup>11</sup> Mégret, *supra* note 7.

<sup>12</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Request for Advisory Opinion, Order, 2003 I.C.J. 428 (Dec. 19).

<sup>13</sup> Ohlin, *supra* note 9.