ICC Moot Court Competition 2019: Mooting Whether Humanitarian Intervention Comes Within the Frame of the Crime of Aggression

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By: Leah Cummings and Ariel Wheway

Introduction

Are all wars aggressive? Or are some just? What does it mean for a state to wage a just war, and how do we punish those who wage aggressive wars?

These are questions that the international community continues to wrestle with. On July 17, 2018, new light was shed on this distinction when the International Criminal Court (ICC) finally acquired jurisdiction over the crime of aggression. Both the Nuremberg and Tokyo Tribunals, created after

World War II, had jurisdiction to hold individuals criminally responsible for the aggressive military policies of the Japanese and German regimes. Nonetheless, international consensus on the definition of the crime of aggression has proven elusive for half a century. This disagreement over the crime of aggression was a major obstacle to the formation of the ICC in 2002. It took a further eight years before the *Kampala Amendments* to the *Rome Statute* were adopted, and an additional eight years before these amendments came into force, creating a definition of the crime of aggression for the *Rome Statute* of the ICC.

This year, law students from 55 countries around the world grappled with how the crime of aggression could be prosecuted during the International Round of the 15th annual ICC Moot Court Competition (ICC Moot Court). The University of Ottawa team competed at both the Regional Round for the Americas and Caribbean in New York and the International Round in The Hague. Team members won awards at the Regional Round for Best Defence Memorial and Top Overall Oralist. At the International Round, the team was recognized with the Best Government Counsel Team Award and Best Government Counsel Oralist Award. The Ottawa team made it on to the semi-finals of the Regional Round and the quarter-finals of the International Round, competing against teams from New Zealand, China, The Gambia, Iran, Bangladesh, and Russia to name a few.

In this 2019 edition of the ICC Moot Court, teams grappled with three challenging issues: (1) whether evidence seized unlawfully by domestic state authorities must be excluded under article 69(7) of the Rome Statute; (2) whether a self-declared act of humanitarian intervention would meet the "character, gravity, and scale" requirements to constitute a "manifest violation of the *Charter of the United Nations* " to be a crime of aggression; and (3) whether a lawyer who gives one-sided legal advice can meet the threshold under article 25(3)bis of the Rome Statute in order to be prosecuted for aiding and abetting the crime of aggression. While there is some limited jurisprudence on article 69(7), the issues regarding the crime of aggression were uncharted territory as the Prosecutor of the ICC has not yet charged anyone with this crime. Each of these three challenging issues are summarized below.

(1) Whether evidence illegally collected by domestic authorities can be admitted to the ICC

The ICC, as a treaty-based court, does not have its own police force or enforcement mechanism. It, therefore, relies on states to arrest and turn over suspects in their jurisdiction, as well as to obtain and submit crucial evidence. Issues arise when a state hands over evidence to the ICC that was seized by its domestic authorities through unlawful means.

When the admission of evidence to the ICC is in question, article 69(7) of the *Rome Statute* is considered. This article allows for the exclusion of evidence when two conditions are met: (1) either an internationally protected human right or the *Rome Statute* has been violated in collecting the evidence; and (2) either the evidence would be unreliable as a result of the manner in which it was obtained, or admitting the evidence would be antithetical to or would seriously damage the integrity of the proceedings.

The first part of this test is simple enough to determine—it must be shown that, through the collection of the evidence at issue, a human right that is protected by an international instrument or a protection found within the *Rome Statute* has been violated. This violation alone, however, does not result in the automatic exclusion of the evidence because article 69(7) sets out a dual test. This means that either the manner in which the evidence was collected, i.e. the human rights violation, would render the evidence unreliable, or admitting the evidence in light of the violation would be antithetical to or would seriously damage the integrity of the proceedings. To exclude the evidence, only one of these two conditions needs to be met.

This issue has been examined by the ICC but has resulted in only marginal clarity. The trial chamber in the *Bemba* decision regarding the admission of Western Union documents determined that evidence is only unreliable if the human rights violation changed or altered the content of the evidence. Therefore, if the content of the evidence would be the same had the violation not occurred, it cannot be considered unreliable.

The ICC has been less clear, however, on its interpretation of 'antithetical to or seriously damage the integrity of the proceedings.' The ICC has put forward multiple factors in different cases that could be considered but has neither established a set test nor identified any factors that must be considered. In Bemba, the Court stated that it had the discretion to decide what factors to consider in each case, with no one factor being determinative. This suggests that the Court has no intention of establishing a determinative test or list of factors to consider and will rather make determinations on a case-by-case basis. Factors that have been considered include: the gravity of the rights violation, whether it was the defendant's right that was violated or a third party's, whether the prosecution was directly involved in the violation, whether the evidence is protected by privilege, and whether steps were taken to minimize prejudice once the evidence was handed over to the Office of the Prosecutor. The Court has also emphasized the need to balance competing interests when weighing these factors: the rights of the defendant to a fair trial, the protection of victims and witnesses, respecting state sovereignty, and the effective punishment of those accused of grave crimes.

Given the Court's statements, particularly in *Bemba*, it is unclear under what circumstances evidence would be excluded beyond clear unreliability. There are numerous competing interests in each case, beyond the direct circumstances surrounding the evidence collection. This is something the ICC will have to continue to grapple with in its quest to prosecute the gravest crimes.

(2) Whether acts of humanitarian intervention constitute the crime of aggression under the Rome Statute

A use of force amounts to a crime of aggression where: (1) it meets the definition of an act of aggression; and (2) it amounts to a manifest violation of the *UN Charter* by its character, gravity, and scale. The first element is relatively straightforward because article *8bis*(2) of the *Rome Statute* lists examples of acts that qualify as an act of aggression. The second part, however, is less clear because the *Rome Statute* does not define 'character,' 'gravity,' 'scale,' or 'manifest.' Nor is it clear whether the

character, gravity, and scale of the act of aggression must all be aggressive to be 'manifest' or if the presence of only two is sufficient. *The Understandings annexed to the Kampala Amendments* only state that the existence of one factor alone is insufficient to meet the manifest threshold, that 'manifest' is an objective standard, and that this threshold is meant to separate acts that are only technically unlawful from those that are gravely unlawful.

The 'character' element brings up the question of whether humanitarian intervention is excluded from this definition. Humanitarian intervention, by its very nature, is non-aggressive because the purpose of such intervention is to alleviate human rights abuses perpetrated by the home state, not to attack that state. The difficulty lies in how to determine whether an act, that otherwise would likely be aggressive, is humanitarian in nature. The international community has tried on several occasions to create a framework for distinguishing humanitarian intervention from aggressive action (for example the International Commission for Intervention and State Sovereignty and the Report of the High-level Panel on Threats, Challenges and Change). Most recently, the UK created a three-prong test that it relied on to justify its airstrikes in Syria: an act is considered humanitarian intervention when (1) there is convincing evidence that there is a humanitarian disaster that requires urgent relief; (2) there is no alternative to relieve the disaster besides the use of force; and (3) the proposed use of force is necessary and proportionate to the aim of relieving the humanitarian suffering. No other state has accepted this test, and it is therefore unclear whether the ICC would consider it in determining whether an allegedly aggressive act was actually humanitarian intervention and not the crime of aggression.

The legality of humanitarian intervention is itself in doubt because neither the *UN Charter* nor the *Rome Statute* recognizes it as an exception to the prohibition on the use of force. An act of aggression is inherently an illegal use of force, and any use of force, even for a humanitarian purpose, is presumptively unlawful. However, illegal uses of force may not amount to the crime of aggression if the requisite character, gravity and scale are not met. Therefore, even if humanitarian intervention is considered an illegal use of force, it need not always amount to the crime of aggression if it is not a manifest violation of the *UN Charter*.

Adopting a clear test for when an act is humanitarian in character is particularly important today since states have increasingly used humanitarian motives as a pretext to justify intervention in another state for nefarious motives. The ICC must, therefore, not only address the gaps in the crime of aggression's definition but also how and where humanitarian intervention fits in.

(3) Whether lawyers giving one-sided legal advice could be convicted of aiding and abetting the crime of aggression

Waging war is essentially an act of state. Drawing the line between who is and who is not sufficiently high-up in the political or military hierarchy of the state to be responsible for this act of state is a notable challenge in prosecuting the crime of aggression.

The crime of aggression under the *Rome Statute*, like other crimes within the ICC's jurisdiction,

recognizes both principal and accessorial liability. However, this crime has the unique added element that the accused must have been in a position to effectively "exercise control over or to direct the political or military action of a state." The exact scope of this leadership element is unclear. The 2019 ICC Moot Court teams tackled the question of whether lawyers who provide opinions, not directions, could meet this threshold.

Case law from post-WWII prosecutions of crimes against peace (the predecessor name for crimes of aggression) do not prove particularly helpful in determining the limits of this leadership threshold. No lawyers were ever convicted for crimes against peace at any of these tribunals for their roles as legal advisors. Rather, those convicted were prosecutors or judges in the Nazi regime. Additionally, any convictions of lawyers for other international crimes (i.e. war crimes or crimes against humanity) are unhelpful since these crimes are not subject to the leadership threshold. Nonetheless, the Nuremberg and Tokyo judgements did articulate that the leadership threshold was never meant to exclude private economic actors or legal advisors who had significantly contributed to the aggressive war.

Given this lack of precedent, the ICC will have to turn to the intent behind the leadership threshold in article 25(3)*bis*. Turning to the question of intent, there is a discussion to be had about what meaning, if any, should be drawn from the fact that the leadership element at Nuremberg was "the ability to shape or influence the state's aggressive policy," while the *Kamapala Amendments* chose the words "control or direct" instead. Some have argued that the words "control or direct" narrow the intended scope of the leadership element and would exclude private economic actors or legal advisors. Others maintain that the Kampala Amendments were neither intended to widen nor narrow the scope of the definition of crimes against peace. Rather, the words "control or direct" were adopted because those are the terms found in the definitions of other international crimes in the *Rome Statute*.

In that vein, looking to command responsibility under article 28 of the *Rome Statute* could prove helpful in determining the scope of the leadership threshold. Both the terms "control" and "direct" are found in article 28. Article 28 jurisprudence would suggest that these terms would likely require that an accused have been able to issue orders, ensure that they are followed, or punish those who do not follow them. A lawyer providing legal advice would be unlikely to meet these definitions. Nonetheless, an argument could be made that command responsibility jurisprudence would only be helpful in the context of military leadership and not political leadership.

Even if an accused is found to meet the leadership threshold under article 25(3)*bis*, they must still meet the elements of principal or accessorial liability. In this year's competition, the mode of liability was aiding and abetting under article 25(3)(c) of the *Rome Statute*. The prosecution must satisfy the Court that the accused meets both the *actus reus* and *mens rea* elements of aiding and abetting on a standard of beyond a reasonable doubt. Most recently, the Appeals Chamber of the ICC in *Bemba et al* set out the *actus reus* for this mode of liability. The accused must have either aided or abetted the principal perpetrator such that their assistance furthered, advanced, or facilitated the commission of the offence. Aiding means the provision of material assistance. Abetting means moral or psychological assistance. This *actus reus* threshold is therefore a very low standard to meet.

The *mens rea* standard, however, is more difficult to satisfy. The basic *mens rea* of intent and knowledge under article 30 of the Rome Statute must be satisfied. The accused must have intentionally engaged in the conduct and intended the consequences. In addition, the accused must have acted with the specific purpose of facilitating the crime. This means that the accused must have intended to bring about the principal offence and intended their own conduct.

This two-step process of meeting both the leadership threshold and the specific mode of liability in question will make prosecution for the crime of aggression particularly difficult.

Conclusion

The ICC Moot Court allows law students to delve into emerging legal issues that are of great interest to the international community. Students have the chance to craft creative legal arguments to address novel issues that may very well become a reality. This year's round proved particularly challenging and enlightening. The moot also proved that the road ahead for the ICC's jurisdiction over the crime of aggression is far from clear. Nevertheless, the enthusiasm and academic rigour of the young lawyers from across the world who competed in the ICC Moot Court is a promising sign for the ICC's future.

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Image: The Judges of the International Criminal Court and eminent guests of the opening of the ICC judicial year 2019 held on 18 January 2019 at the seat of the Court in The Hague ©ICC-CPI