

# Rethinking the Crime of Aggression

Stefanie Bock · Eckart Conze  
Editors

# Rethinking the Crime of Aggression

International and Interdisciplinary  
Perspectives



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# Preface

We as editors are honoured to present in this volume a selection of contributions that originated as papers presented in September 2018 at the International Conference *Rethinking the Crime of Aggression: International and Interdisciplinary Perspectives* in Marburg, Germany and which we have subsequently revised and updated. The opening of the conference took place in Marburg University's Great Hall (Aula der Alten Universität), which was inaugurated in 1903, when Marburg had become one of the leading universities of Prussia and Germany. The Great Hall's wall paintings by Peter Janssen (1844–1908) show scenes related to the history of Marburg and its university (which was founded in 1527 as a Protestant university by Philipp the Magnanimous—Philipp der Großmütige –, Landgrave of Hesse), among them a battle scene—the battle of Laufen in 1534—between Protestant troops under the command of Landgrave Philipp and Catholic Austrian troops. This painting in a way epitomises the topic of our conference and of this volume: war and aggression, in this case war and mass violence induced by religious tensions. Naturally, we need not to go back to the 16th century to find other examples of inter-state wars or inter-state conflicts related to religion, as well as examples of the politicisation of religion and of religious dimensions or legitimations of war or aggression.

Aggression, of course, is not only a historical issue. On the contrary, its current significance is beyond any doubt. A few days before the conference's opening in September 2018, the perspective of an imminent attack of Syrian troops on the region of Idlib, including the possible use of chemical weapons, triggered a controversial debate in Germany about the participation of German troops in Allied military measures against the Assad regime. Against this background, the German Federal Parliament's Research Service (*Wissenschaftlicher Dienst des Deutschen Bundestages*) provided a report including an assessment of relevant questions of international criminal law and the potential criminal nature of such measures and of German participation under the German International Criminal Code (*Völkerstrafgesetzbuch*). The report concluded that a parliamentary decision on a German military mandate would have to consider the implications of international criminal law and the criminal liability for acts of aggression.

But even without these—at the time of the conference—recent developments, the topicality of the question of aggression in international politics and especially in

international criminal law can hardly be ignored. In December 2017, the Assembly of State Parties of the International Criminal Court (ICC) decided to activate the Court's jurisdiction over the crime of aggression and give effect to the Statute's aggression provisions, which were agreed on the first ICC review conference in 2010 in Kampala. Since 17 July 2018, the ICC has the right to prosecute 'the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'. A highly controversial debate about the ICC's competence has, thus, found at least temporary end.

This reinforcement that the crime of aggression is—like genocide, crimes against humanity and war crimes—a core crime under international law and that the use of force by States is subject to international regulation constituted a starting point of our conference. However, discussions about the crime of aggression are not limited to the present or to the very recent past. Instead, they are part and the continuation of complex historical and political dynamics going back at least to the beginning of the 20th century and, in particular, the years of the First World War. And yet, today these dynamics of more than one hundred years ago are not only of historical importance and interest, they are not a faraway past, these dynamics continue to cast their shadow on more recent and even current developments and debates. Against this background, it was the aim of the conference to bring together international experts from various disciplines and to start a dialogue regarding aggressive war and the crime of aggression: a dialogue not only addressing the historical genesis of the current situation, the content of the new aggression provisions, their implementation in practice and their possible regulatory effects, but also instigating perspectives for future developments and problems.

Aggressive war is a crime against world peace, the core element of the international community. At the same time, it certainly is the root of multiple violations of individual rights under conditions of armed conflicts. The Nuremberg International Military Tribunal (IMT) in 1945 regarded aggression as the gravest international crime, the 'crime of crimes', as Chief Prosecutor Robert H. Jackson once called it, integrating and accumulating the horrors of all other international crimes. In this perspective, it seemed consistent to prosecute the violation of the prohibition of force under international law as an international crime. Still, compared to other international crimes (war crimes and crimes against humanity above all), the crime of aggression has a special character making its legal definition and application extremely complicated. More than other international crimes, aggression has a highly political nature. Today, it seems to be widely accepted that a right of sovereign states to wage war (*ius ad bellum*) does not exist—or does not exist any longer—and that the use of armed force is not a legitimate means to solve international disputes. The exact limits of the prohibition of force are, however, disputed. Self-defence is part of the UN Charter, but what about 'preventive self-defence'? Human rights discourse further complicates the question: Can humanitarian objectives or considerations legitimise military interventions (by, for example, applying the concept of

R2P—‘Responsibility to Protect’)? There is obviously a large grey zone which needs discussion—politically, legally and academically.

Questions of individual responsibility and individual guilt add another dimension to the debate. How can one relate the principle of individual guilt to state crimes and collective decision-making structures? How can one identify individual responsibilities and contributions in state action contexts? And is—in the case of aggression—criminal responsibility limited to the top political or military leaders? These burning questions go back to the very beginnings of international criminal law and to the revolution it meant for both international and penal law. They indicate the complexity of the matter, historically and politically, and underline the need for a thorough academic—disciplinary and interdisciplinary—discourse.

The programme of the conference was—and this volume is—shaped by its interdisciplinary approach. After an overview on the emergence of the ICC’s aggression provisions, it starts with the general and basic question what aggression means in various social circumstances and how our understanding of social aggression or aggressiveness is influencing the perception of aggression in an international context. Part II directs the attention to States as aggressors and to the relation between the use of force and the emergence and development of the modern state or of modern statehood. Part III is dedicated to attempts—historically and politically—to regulate aggression and to the rise of the idea to prosecute individuals for aggressive state behaviour and to develop corresponding legal norms. It also treats the problem of civil war, of state-internal war, and whether aggression in this context can be regarded as an international crime. The next part (IV) addresses strategies or attempts to legitimise military interventions and the use of force, from the idea of ‘humanitarian intervention’ to the concept of R2P. The last two parts (V and VI) have their focus, first, on the criminal prosecution of aggression, the problem of individualising responsibility and guilt, the role of the Security Council in aggression trials, and the risks and difficulties of prosecuting individuals for state conduct.

The conference’s programme was broad and demanding. We are grateful that so many colleagues accepted our invitation and contributed to our understanding of this complex and challenging matter—challenging politically and academically. Moreover, we warmly thank the Team of the International Research and Documentation Centre for War Crimes Trials (Marburg), in particular Alexander Benz, for their constant and dedicated support in organising the conference and during the whole editing process. We hope that this volume with its interdisciplinary approach can contribute to the discussion on the crime of aggression and to the understanding of the roots, dynamics and regulation of aggressive wars.

Marburg, Germany  
March 2021

Stefanie Bock  
Eckart Conze

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