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Aggression: A Response to Michael Glennon**

Ian Hurd

Department of Political Science, Northwestern University

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Ian Hurd
Dept. of Political Science
Northwestern University

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ABSTRACT

The International Criminal Court is considering adding ‘aggression’ to the crimes for which individuals can be prosecuted by the Court. Michael Glennon’s recent article on the subject criticizes this effort from many angles, but a close consideration of his objections shows that each of them misses its target. I use his argument to suggest that there are five important legal and political questions that the ICC must answer to defend its project. Glennon’s article helps raise these questions but does little to answer them.

Ian Hurd is associate professor of political science at Northwestern University. The title of this article draws on Alexander Wendt, “How Not to Argue Against State Personhood: A Reply to Lomas,” *Review of International Studies*, 2006. Hurd is the author of several books and articles on international law and organizations, most recently *International Organizations: Politics, Law, Practice* (Cambridge University Press, 2011).

Introduction

In building his case against making ‘aggression’ a crime under the International Criminal Court, Michael Glennon mobilizes a broad range of resources.¹ These all circle around the draft language under consideration at the ICC’s Special Working Group on the Crime of Aggression (SWGCA), but they are of such very different kinds that they ultimately do as much to cancel each other out as to support each other. He brings in historical cases of U.S. uses of force that may be aggression, textual complaints that the ICC’s attempt at defining aggression leaves out the self-defense exception, institutional objections to the relationship between the ICC and the UN Security Council, and philosophical criteria of clarity that he says ‘good law’ must meet. In the swell of argumentation that results, the only point that survives is his conclusion: that the SWGCA’s definition should not be allowed to survive. *Why* this is the case is increasingly unclear as the article unfolds. Is the SWGCA definition simply badly drafted, or does it fail because of deeper legal or institutional problems? Should aggression be a crime in international law or not? Should it be subject to individual criminal prosecution or not?

I clarify each of Glennon’s complaints against the definition of aggression and show that none is compelling. This does not necessarily lead one to conclude that the definition should be adopted, but it does help identify what is and is not at stake in the controversies at the ICC.

Five Questions for the Crime of Aggression

Glennon’s article engages five distinct questions, and any one of them would provide reason enough to sustain his conclusion against the definition of the crime of aggression. However, each also contains further implications whose impact on international law and politics need to be addressed and which are ignored by Glennon. His position on these broader issues is ambiguous, making it very difficult to assess his contribution to the field.

The five questions are:

1. Is ‘aggression’ a crime in international law?
2. Should aggression be made a matter of *individual* criminal responsibility?
3. Can aggression be defined in a way that is suitable for legal accountability?
4. Is the SWGCA’s definition suitable for use by international legal institutions?
5. Is the ICC an appropriate international legal institution to prosecute this crime?

¹ Michael J. Glennon “The Blank Prose Crime of Aggression,” *Yale Journal of International Law*, 2010.

To accept that the SWGCA's definition should be included in the upcoming Review Conference of the ICC, one must answer all five in the affirmative, and each involves a distinct legal and political discussion. Glennon raises negative points for all five, but it is not clear at which question in this sequence he reaches his conclusion. All five questions are open to controversy and are legitimate subjects for debate. To advance the discussion of whether or how to prosecute for aggression, we need to understand each link in this five-piece chain more clearly.

On the first question, we may well prefer a world in which the use of force is considered a political rather than legal matter, and where the consequences of its use are measured in the political and military responses of other states rather than in legal actions. We might therefore conclude that international law is the wrong instrument for managing inter-state war. These seem to be intellectually honest positions, though they raise their own complexities on both moral and legal grounds: on the former, it may be hard to sustain the argument that aggression or conquest may be immoral but that international law is not a relevant tool for condemning it; on the latter, the UN Charter would appear to already outlaw certain kinds of war under Articles 2(3), 2(4), and 51, and so it seems that the question is already settled.

On the second, we might accept that international war can be illegal without necessarily accepting that it can be reduced to the level of individual criminal responsibility. The popularity of individual responsibility in international law waxes and wanes across modern history and for a changing set of crimes, and it would seem that there is no necessary reason why at this point in time the crime of aggression should be constituted as part of this set. Perhaps we should conclude that states rather than individuals are responsible for aggression, although this too raises problems of law and philosophy regarding the nature of the state as a collective moral and legal person. It is not self-evident that international law should be revised to institutionalize leaders' individual responsibility for aggression, though neither it is evident that leaders should be immune from individual responsibility for the directions they give to their states. The relationship between individual and corporate responsibility is a subject of unsettled debate on which any legal system is forced to take a position from time to time, often with huge political costs.

Third, it may be that aggression is such a loaded and complex concept that it cannot be defined in a way that makes it suitable for individual criminal prosecution. While Glennon explicitly says that he does not think this is the case ("As a strictly legal matter, no reason exists why 'aggression,' or any other crime, cannot be defined with sufficient specificity to meet the requirements of the legality principle")², his objections to the SWGCA definition would seem to be plausibly relevant to any other definition as well. He therefore seems to be saying that *any* definition of aggression would be open to competing interpretations and to the influence of political power, and would fit uneasily into the existing legal-political structures between the ICC and the Security Council, and therefore that all definitions are naturally flawed. This may be conceptually true, but in the practical world of international law and politics it either argues too little or too

² Glennon, 109.

much: it either condemns all law for being made out of malleable linguistic resources or merely points out that this law is the same as all other law.

Fourth, we might believe that some definition is in principle available but that the SWGCA has not reached it. Further work would therefore be recommended. Glennon leans in this direction when he suggests that the SWGCA made a mistake in how it included self-defense and Chapter VII uses of force. At these points, he seems to be making constructive suggestions for improving the SWGCA definition and appears to be a sympathetic observer of the process. Such a position, however, rests on the assumption that the previous three objections have been overcome.

Finally, if all four preceding issues aligned well, and we have decided that aggression is indeed a matter of individual criminal responsibility and we have a legally sound definition of the crime, a final question would still remain: is the ICC the appropriate institution for prosecuting cases of violation? The answer in favor of the ICC is not a foregone conclusion. We might, for instance, decide that the Security Council is a better place for this work, on the twin grounds that i) it is today the primary international instrument for identifying threats to international peace and security (which presumably have some necessary connection to the idea of aggression), and ii) it has already authorized the prosecution of individuals through its ad hoc criminal tribunals. It combines the legal and political powers whose separation in the ICC Glennon identifies as a reason not to give aggression to the ICC. The Security Council has exhibited both the legal and practical capacity to prosecute individuals for violating international laws, and there is nothing stopping it from creating a similar tribunal to prosecute an individual accused of aggression; it makes the political judgement about the source of a threat to international peace and security and then constitutes a legal institution to prosecute him or her. An argument for the Council is not an argument against the ICC, and so the issue remains open for debate about whether the ICC should have this power.

These five questions are implicated in the SWGCA's work as well as in the work of its critics. It is not obvious that they must be answered in the ways that I have presented, nor in such a way as to support the mission of the SWGCA, but they must certainly be addressed directly and clearly for the debate to be coherent.

Three Red Herrings for the Crime of Aggression

In addition to skipping inconsistently across these questions, Glennon makes matters further opaque by spending a good deal of time on three red herrings. These are retroactivity, vagueness, and US foreign policy.

His discussion of *nullem crimen sine lege* provides an excellent documentation of that rule's ubiquity in international and domestic law. It is, however, irrelevant to the larger theme regarding the crime of aggression since no one is suggesting that the ICC should claim retroactive jurisdiction over aggression. This is expressly forbidden anyway by the Rome Statute, as Glennon notes, and there is no effort to overturn this rule. The

underlying argument in this section seems to be in fact about vagueness: Glennon suggests that the vagueness of ‘aggression’ means that no leader could possibly know in advance whether their conduct qualifies or not and so any prosecution would be akin to the retroactive application of a newly invented law.

The complaint of vagueness against the draft rule is either far too broad or far too narrow to sustain Glennon’s conclusion since it could apply equally to many other important pieces of international law, including for instance the Genocide Convention. Again, this is either irrelevant to the discussion of aggression or a decisive critique of international law in its entirety. The law against genocide is equally vague and yet it has been successfully prosecuted by international tribunals. The Genocide Convention relies on a shared understanding of tricky concepts such as ‘a national, ethnical, religious, or racial group,’ as well as the vague criminal concepts of ‘conspiracy’ and ‘intent to destroy.’ These cannot be known in advance in the way that Glennon demands for aggression, and so by Glennon’s standard the Convention should also fail as law. The Convention does not tell us how many people must be killed from a group in order to qualify as genocide, nor how to know if they are indeed members of a group in the first place, nor what degree of harassment of a group counts as ‘conditions of life calculated to bring about its physical destruction in whole or in part.’ It has been unevenly applied in practice, with obvious exemptions for Great Powers and their clients, and so may be in danger of desuetude. These are similar issues to those raised by Glennon in relation to aggression, and they are no more likely to be an objective and universal resolution with respect to genocide than they are with respect to aggression. And yet genocide has been successfully prosecuted by international tribunals nonetheless (and by ‘successful’ here, I mean in a way that has produced legally decisive outcomes, be they acquittal or conviction).

Finally, it is not clear what to make of his cases of US foreign policy. He presents these as plausibly falling under the definition of ‘aggression’ but he does not say what implication should be drawn from that. The key unanswered question is whether Glennon’s goal here is to say something about American foreign policy or about the construction of the rule. If we assume from the start that US foreign policy by definition cannot possibly be aggressive, then these cases would indeed suggest that the rule is badly written. Without such an assumption, however, is Glennon trying to point out that US leaders have at times used force aggressively or in violation of Article 2(4) of the UN Charter? If he is showing that Americans are at times the perpetrators of aggression but that they do not deserve to be prosecuted, then the issue should be argued on the grounds of Questions 1 or 2 above. Perhaps his point is to show that states are likely to disagree about how to interpret their behavior, and that this will make the application of the aggression rule difficult in practice. This last suggestion is the most charitable, but it undermines Glennon’s conclusion since it reminds us that the aggression rule is no different than any other rule of international or domestic law in that its application to specific cases is controversial, and the importance of a judicial institution is that it provides a definitive interpretation which settles the matter (at least in law).

Conclusion

Glennon's article serves the very useful purpose of showing some of the difficulties that attach to the effort to define aggression as a crime in international law. These difficulties include technical issues (such as how to inscribe the idea of self-defense as a legal use of force), institutional issues (ie. how does the ICC's authority relate to that of the Security Council?), and deep philosophical questions (how do we deal with self-serving interpretations by states seeking to justify their wars?). Glennon concludes from them that the SWGCA is on the wrong track, but none of the difficulties that he raises provides a defensible argument against the project of criminalizing aggression. The five questions above provide many possibilities for why this project might be misguided (or not), and arguing them clearly is necessary for a productive dialogue about aggression in international law and politics.