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published in
The 1998-2000 Eritrea-Ethiopia War and Its Aftermath in International Legal Perspective
2021

DOI (link to publisher)
10.1007/978-94-6265-439-6_13

document version
Publisher's PDF, also known as Version of record

Chapter 13
The Crime of Aggression and the Eritrea-Ethiopia Armed Conflict

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Contents

Abstract Within international law, the prohibition of aggression has the status of a peremptory norm that is of pivotal interest to the international community as a whole. The concept of aggression forms one of the bases for the exercise of the exceptional powers of the Security Council and since a few years the International Criminal Court has jurisdiction as to the crime of aggression. The importance attached to the prohibition of aggression, however, is not matched by a clear definition or by a frequent use of the concept by international political and judicial bodies. This infrequent use of the concept of aggression stands in sharp contrast to the willingness

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A. de Guttry et al. (eds.), *The 1998—2000 Eritrea-Ethiopia War and Its Aftermath in International Legal Perspective*, https://doi.org/10.1007/978-94-6265-439-6_13

of States to use the concept as a tool to discredit their political enemies. The Eritrea-Ethiopia conflict largely follows this pattern. While both States extensively accused each other of having committed acts of aggression, the Security Council refrained from using the concept at all. The Eritrea-Ethiopia Claims Commission dealt with the aggression complaints but construed the prohibition of aggression very narrowly and approached the responsibility for violations of the *jus ad bellum* as a purely bilateral question and not as an issue that concerns the international community as a whole.

Keywords Aggression · *Jus ad bellum* · International crime · Definition · Function · Eritrea-Ethiopia Claims Commission (EECC) · Silencing of aggression · Responsibility

13.1 Introduction

The introduction of the concept of 'aggression' is one of the starkest expressions of the transformation of international law that took place in the 20th century. In essence, the concept of 'aggression' aims at the transformation of the legal nature of 'war', from a state of hostilities between formally equal parties to the use of force in the name of community values or self-defence against a law-breaker. Thus, it not only contributes to the strengthening of feeling of the intense blameworthy character of the acts concerned but it fundamentally changes the traditional legal approach to war by making war a violation of fundamental legal norms by one party and by appointing the other party as the upholder of the legally and morally just position.

For some, the outlawing of war, together with the establishment of global structures of collective security, symbolises the unity of the world community as well as the reign of law in international affairs.[1] For, international law would be able to govern the most political of all decisions: the decision as to who counts as the public enemy and what means should be used to fight this enemy. Others however, have been less optimistic about the possibilities of putting the decision about the public enemy under the rule of international law. Rather than containing the use of armed force, they argued, the prohibition on 'aggression' would open up new possibilities to label and discredit the public enemy. As violators of peremptory norms of the international order, the enemy could now be easily defined as roguish, an outlaw or acting against the interests of humanity.[2]

In this chapter, we will examine the application of the concept of 'aggression' in the Eritrea-Ethiopia conflict. This application, we argue, reflects the debates

[1] See e.g. Hersch Lauterpacht's reading of the League of Nations in Lauterpacht 1936, p. 133. For overlapping arguments in relation to the United Nations system of collective security see, *inter alia*, Claude 1971, p. 245, Krisch 2012, p. 1243, Tsagourias and White 2013, pp. 3–19.

[2] The most radical critique was voiced already in the 1920s by Carl Schmitt. See, *inter alia*, Schmitt 1988 and Schmitt 1932/1996. See also Morgenthau 1982, Morgenthau and Thompson 1985.

mentioned above and provides a telling example of the role of 'aggression' in post-1945 international relations. In the first place, it shows how 'aggression' has been taken up in political struggles in order to identify, label and discredit the public enemy. In the second place, it demonstrates how reluctant the Security Council and judicial bodies have been to apply the concept in concrete circumstances. Thirdly, it shows that, in cases where the concept *is* applied, there is a tendency to downplay its importance—either by limiting its reach or by denying the application of a regime of aggravated responsibility for those who violate the prohibition of 'aggression'.

In order to substantiate our claims, we will proceed as follows. In Sect. 13.2 we will set out the basic tenets of the concept of 'aggression'. Section 13.3 then focuses on the application of the concept in the Eritrea-Ethiopia conflict. We argue that, while the concept has proven to be attractive for both States to discredit each other politically, its legal value has been extremely limited. Both the Security Council and the Eritrea-Ethiopia Claims Commission had a tendency to refrain from using the concept in the first place and when the Claims Commission finally applied the concept, it did so in a very limited sense. Section 13.4 explores the relation between 'aggression' and State responsibility. Here again, the gap between the political currency and the legal value of the concept of 'aggression' becomes apparent. Although the prohibition of 'aggression' seeks to protect values that transcend the interests of individual States, the Claims Commission chose to apply a traditional, inter-State regime of responsibility.

13.2 The Legal Concept of Aggression

At first sight, the concept of 'aggression' is a relatively well-established general concept of the international legal system.[3] It is mentioned in the UN Charter as one of the grounds on which the Security Council can take far-reaching measures, including the authorisation to use force.[4] In its 1974 Definition of Aggression, the General Assembly characterised 'aggression' as 'the most serious and dangerous form of the illegal use of force',[5] and stipulated that 'no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.'[6] Moreover, the constitutive principle of the concept—the prohibition

[3] See Dinstein 2005, p. 117.

[4] Charter of the United Nations, Article 39 in conjunction with Articles 41 and 42.

[5] UNGA Res 3314 (XXIX), 14 December 1974, A/RES/3314(XXIX), Annex, Definition of Aggression, Preamble.

[6] UNGA Res 3314 (XXIX) (above n 5) Annex, Article 5(1).

of aggression—is generally considered as a norm of international law with a *peremptory* and *erga omnes* character.[7] Whatever the exact meaning of these concepts is,[8] they imply, at least, that a violation of the prohibition of aggression has not only far-reaching implications for the bilateral relations between the States concerned but also for the international community as a whole. The idea that aggression affects the interests of the international community as a whole figured prominently in the deliberations of the International Law Commission on the Articles on State responsibility. Aggression, it was contended, should be regarded as an 'international crime' which would give rise to a specific set of secondary rules. While in the end the Commission decided to delete the whole concept of international crimes from its codification work on State responsibility, the underlying idea of a specific form of responsibility for violations of the most fundamental norms of the international legal order has not been totally banned from the legal regime of State responsibility.[9]

In addition, aggression is seen—and this is probably the most radical legal qualification attached to it—as an international crime for which *individuals* can be held responsible under international law: the 'crime of aggression' or—as it was called in days long past—one of the 'crimes against peace'.[10] The expression 'crimes against peace' was introduced just after the Second World War by the Charter of the Nuremberg Tribunal for the trial of the major war criminals. It was defined in this treaty as 'planning, preparation, initiation or waging of a war of aggression …'.[11] In its judgment, the Nuremberg Tribunal considered the crime against peace, 'the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'[12] and it was explicitly stated that the Charter on which its jurisdiction was based should be considered as 'the expression of international law existing at the time of its creation.'[13] The General Assembly rapidly endorsed the Nuremberg principles[14] and reaffirmed, in its resolution 'Peace through deeds',

[7] The International Law Commission gave as one of the examples of a peremptory norm the prohibition of aggression; see ILC Yearbook 1966, vol. II, p. 248. According to the International Court of Justice obligations *erga omnes* 'derive, for example, in contemporary international law, from the outlawing of acts of aggression …', see ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain),* Judgment (Second Phase), 5 February 1970, ICJ Rep 1970, p. 32, para 34.

[8] See de Hoogh 1996, pp. 114–136, Tams 2005, pp. 19–47, Orakhelashvilli 2006, pp. 7–82. See also Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, ILC Yearbook 2001, Vol. II, Part Two, pp. 110–116.

[9] See Abi-Saab 1999, and further below in Sect. 13.4.

[10] UNGA Res 3314 (XXIX) (above n 5) Annex, Preamble and Article 5(2).

[11] Charter of the International Military Tribunal for the European Axis (Nuremberg Tribunal), Article 6(a). See also the Charter of the International Military Tribunal for the Far East (IMTFE) (Tokyo Tribunal), Article 5(a).

[12] International Military Tribunal, Judgment, 1946, 1 *IMT* 171 (*Nuremberg Judgment*), p. 186.

[13] *Nuremberg Judgment* (above n 12) pp. 219–223. See in the same sense the Judgment of the International Military Tribunal for the Far East (*Tokyo Judgment*), as published in Röling and Rüter 1977, p. 28. See below in Sect. 13.4.1.

[14] See UNGA Res 95 (I), Principles of international law recognized by the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 11 December 1946, A/RES/95(I). A year later

'that, whatever weapons used, any aggression … is the gravest of all crimes against peace and security throughout the world'.[15] For a long time however, the further development of the crime of aggression remained the subject of lengthy discussions in the United Nations. The International Law Commission adopted in 1996 its Draft Code of Crimes against the Peace and Security of Mankind, including the crime of aggression.[16] The development ultimately culminated in the Rome Statute of 1998, establishing the International Criminal Court. This Statute provides that the Court has the power to exercise jurisdiction over the crime of aggression as one of the 'the most serious crimes of concern to the international community as a whole'.[17] However, at the same time the States Parties suspended the jurisdiction of the Court over the crime until they could agree on a definition of the crime and the conditions for the exercise of jurisdiction.[18] This agreement was reached by the Assembly of States Parties at a conference held in Kampala in 2010 but also then they decided to suspend the Court's jurisdiction of the crime for at least seven years.[19] In the end, the Court's jurisdiction over the crime of aggression was activated on 17 July 2018, exactly 20 years after the adoption of the Statute in Rome (and 18 years after the Algiers Peace Agreement between Eritrea and Ethiopia).[20]

The introduction of such morally loaded concepts in the international legal order is not without dangers. Aggression could turn out to be an explosive legal concept, in particular if its potentially extraordinary legal character—a combination of one of the triggers for the Chapter VII powers of the Security Council, an international crime, as well as the violation of a *jus cogens* and *erga omnes* obligation—cannot be made true in practice. As it reflects those forms of the use of armed force which are held by the international community as absolutely unacceptable it suggests that the international community can and will effectively deal with such situations. However, for several reasons this is quite questionable, to say the minimum. As we will see in the next two sections, in particular three reasons seem to play an important role in this respect, at least for the understanding of the (ir)relevance of the concept of aggression for

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the General Assembly of the United Nations asked the International Law Commission (ILC) to formulate these principles. During its second session, the ILC approved the formulation of these principles (ILC Yearbook 1950, vol. II, p. 376) but this document was never adopted by the General Assembly.

[15] UNGA Res 380 (V), 17 November 1950, A/RES/380(V), para 1.

[16] ILC Yearbook 1996, vol. II, Part Two, p. 42.

[17] Rome Statute of the International Criminal Court 1998, Preamble (para 4) and Article 5(1).

[18] Rome Statute (above n 17) former Article 5(2), which was deleted with the amendments on the crime of aggression (see the two following footnotes and accompanying text).

[19] See Resolution on the Crime of Aggression, adopted at the Review Conference of the Assembly of States Parties, held in Kampala, Uganda in 2010, 11 June 2010, ICC-ASP/RC/Res.6. It was decided to suspend the Court's jurisdiction until at least 30 States had ratified or accepted the amendments to the Statute and a separate decision of the Assembly of States Parties was to be taken to activate the Court's jurisdiction with that decision not to take place before 1 January 2017. See Akande 2010, Barriga and Grover 2011.

[20] See Resolution on the Activation of the Jurisdiction of the Court over the Crime of Aggression, 14 December 2017, ICC-ASP/16/Res.5. For an overview of the developments leading to the activation of the jurisdiction of the Court, see in particular Kress 2018.

the Eritrea-Ethiopia conflict. Firstly, there is still a profound difference of opinion on the definition of aggression. Secondly, there seems to be little willingness on the part of international bodies to determine in concrete circumstances whether an act of aggression has occurred or not. And thirdly, the issue of the specific legal consequences of aggression is, up till now, very controversial.

The net result is that, so far, the prohibition of aggression has been of little practical value in the legal settlement of disputes. This is not to say that the concept has been irrelevant in international practice. On the contrary: time and again, States have found it very convenient to mobilise aggression as a rhetorical tool to discredit their public enemies, both domestically and in international fora.[21] The fact that the concept of aggression is *both* a reflection of the most fundamental norms of the international order *and* radically undetermined makes it particularly vulnerable to such political uses. The conflict between Ethiopia and Eritrea constitutes another example of the eagerness of States to use the concept of aggression as a way of discrediting their enemy. Both parties were, as expressed in letters to the Security Council, of the opinion that in different stages of the conflict violations of international law, and in particular acts of aggression, had taken place. In its letter of 14 May 1998, Ethiopia informed the Council about 'the unprovoked and totally senseless violation of Ethiopian sovereignty carried out by the State of Eritrea on 12 May 1998', 'for which Eritrea would have to take full responsibility'.[22] Eritrea, on its part, informed the Council of several attacks by the Ethiopian army on Eritrean territory, called upon Ethiopia to withdraw its army from Eritrean areas and called on 'the international community to denounce Ethiopia's acts of aggression in contravention of the Charters of the United Nations and the Organization of African Unity …'.[23] Two years later, on the day Ethiopia launched a large-scale general offensive, Eritrea informed the Council that Ethiopia had 'resumed its war of aggression against Eritrea …' and called on the Council to 'Strongly condemn Ethiopia's resumption of its war of aggression on Eritrea' and 'Support Eritrea's legitimate right to self-defence'.[24] The day after the Council had adopted its resolution imposing the arms embargo on both parties, Ethiopia reacted in a furious way. It blamed the Council, and in particular the United States and the United Kingdom, for making a mockery of Ethiopia's appeal to the Council when 'Ethiopia became, over two years ago, a victim of aggression',

[21]For instance, both Iraq and Iran claimed to be victims of acts of aggression by the other party during the 1980–1988 Gulf War. See Dekker 1992, pp. 249–251.

[22]Letter dated 14 May 1998 from the Chargé d'affaires A.I. of the Permanent Mission of Ethiopia to the United Nations addressed to the President of the Security Council, 14 May 1998, S/1998/396.

[23]Letter dated 3 June 1998 from the Permanent Representative of Eritrea to the United Nations addressed to the President of the Security Council, 3 June 1998, S/1998/459. See also Letter dated 15 May 1998 from the Charge D'affaires A.I. of the Permanent Mission of Eritrea to the United Nations addressed to the President of the Security Council, 15 May 1998, S/1998/399.

[24]Letter dated 12 May 2000 from the Permanent Representative of Eritrea to the United Nations addressed to the President of the Security Council, 12 May 2000, S/2000/420.

'a situation which was not deemed by the Council a threat to regional peace and security when the aggression was committed …'.[25]

13.3 The Legal Definition of Aggression

13.3.1 General Aspects

As far as the content of the concept is concerned, it may be remembered that the question of when there is aggression formed the object of lengthy and difficult negotiations in several organs and other bodies of the United Nations for many years.[26] These negotiations finally resulted in the adoption—by consensus—of the Definition of Aggression, annexed to General Assembly Resolution 3314 (XXIX) of 14 December 1974, which contains the first and for a long time sole universally accepted—but much criticised—definition of aggression.[27] The Definition makes clear that 'aggression' is limited to the *use* (and not also the threat) of *armed* (and not other forms of) force in contravention to the Charter of the United Nations and as such 'gives rise to international responsibility'.[28] For the determination of aggression it uses a seemingly simple starting point by providing 'that the *first* use of armed force in contravention of the Charter [of the United Nations] shall constitute *prima facie* evidence of an act of aggression …'.[29] In this way aggression is defined primarily as a kind of technical-military concept—based on the 'first shot'-principle—trying to neutralise its highly legal and moral character. It equates aggression with 'the opening of hostilities', which may be a useful concept within the *jus in bello*, but within the context of the *jus ad bellum* such a test has a limited value. The question in this regard is not so much who is the first to transgress a *territorial* frontier but who is the first to transgress a frontier set by international law, without legally recognised justification.[30]

However, the Definition itself recognises to a certain extent the limited use of the 'first shot'-principle. The Definition stipulates that the Security Council may deviate from this principle in case the determination of an act of aggression 'would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.'[31] It further provides that the list of acts mentioned in the Definition which qualify as acts of aggression is

[25] Letter dated 18 May 2000 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the Security Council, 18 May 2000, S/2000/448.

[26] See Ferencz 1975.

[27] See Röling 1975, pp. 387–403; Stone 1977, pp. 123–152.

[28] UNGA Res 3314 (XXIX) (above n 5) Annex, Articles 1 and 5(2).

[29] UNGA Res 3314 (XXIX) (above n 5) Annex, Article 2.

[30] See Röling 1950.

[31] UNGA Res 3314 (XXIX) (above n 5) Annex, Article 2.

not exhaustive and that the Council may determine that other acts constitute aggression.[32] With this qualification the Definition left in fact the definition undecided concealing the profound difference of opinion regarding the scope of the concept. One such difference of opinion concerns the question whether the prohibition of aggression should be confined to the resort to armed force to achieve, for instance, extensive territorial ambitions or to obtain substantial economic advantages, thus excluding the use of armed force for 'just' reasons such as pre-emptive self-defence or the prevention of human catastrophes.[33]

As mentioned before, the drafters of the Rome Statute of the International Criminal Court could agree on having aggression as one of the crimes within the jurisdiction of the Court but postponed its applicability until the States Parties could agree—*inter alia*—on the definition of aggression.[34] The complex negotiations resulted in a set of new Articles on the crime of aggression, which entered into force on 17 July 2018.[35] Article 8 bis contains in its first paragraph the definition of the 'crime of aggression' meaning '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.'[36] For the definition of 'act of aggression', the second paragraph of Article 8 bis more or less copies texts from the 1974 Definition of Aggression, providing, first, that such an act is 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations' and, secondly, adding the same list of seven acts which qualify as an act of aggression.[37]

What the Rome Statute does not borrow from the 1974 Definition is its starting point: the 'first shot'-principle. But in the Understanding on the 'act of aggression', attached to the Resolution accepting the amendments to the Rome Statute, we again come across texts quite literally taken from the 1974 Definition, providing that 'aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all circumstances of each particular case, including the gravity of the acts concerned and their consequences, in according with the Charter of the United

[32] UNGA Res 3314 (XXIX) (above n 5) Annex, Article 4.

[33] See Stone 1977, pp. 40–45; Dinstein 2005, pp. 127–131.

[34] Rome Statute (above n 17) Article 5(2).

[35] Rome Statute (above n 17) Article 8 bis: Crime of aggression, Article 15 bis: Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*), Article 15 ter: Exercise of jurisdiction over the crime of aggression (Security Council referral). See for other amendments of the Rome Statute with regard to the crime of aggression, Article 9(1), Article 20(3) and Article 25(3 bis).

[36] Rome Statute (above n 17) Article 8 bis (1).

[37] Rome Statute (above n 17) Article 8 bis (2).

Nations.'[38] So, apart from the 'first shot'-principle of the 1974 Definition of Aggression—the significance of which is directly relativised in the same provision—, the definitions of (an act of) aggression in the 1974 Definition and the Rome Statute overlap to a great extent. That means also in their indeterminacy as to the question when the illegal use of force amounts to aggression.

However, the Rome Statute uses a kind of three-stage missile to the legal qualification of the illegal use of force by introducing the crime of aggression.[39] For, not all but only certain acts of aggression can qualify as the international *crime* of aggression, as not all but only certain forms of the illegal use of force can qualify as an act of aggression. That implies that the concept of aggression as an act of State will be wider in scope than the crime of aggression with its implications in terms of responsibility. Any illegal use of force—including any act of aggression—entails State responsibility. For an act of aggression which is also a crime of aggression not only the State that committed the act of aggression is responsible but, in the framework of the International Criminal Court, also the political and other leaders of that State who are in a position effectively to exercise control over or to direct the political or military planning, preparation, initiation or execution of an act of aggression.[40]

The acts of aggression that could lead to a crime of aggression should, according to the Rome Statute, be a 'manifest' violation of the United Nations Charter. As Article 8 bis (1) of the Statute states—and Understanding 7 of the amendments on the crime of aggression explains a bit more[41]—whether an act of aggression constitutes a manifest violation of the United Nations Charter is to be determined on the basis of the three components of character, gravity and scale. The components of gravity and scale are not very distinctive within the framework of an act of aggression. These qualifications seem to be more or less part of the definition of aggression itself by which, for instance, minor armed frontier incidents are excluded from the concept of aggression, and by which aggression is distinguished from other, less serious and dangerous illegal uses of armed force. So, for the intended more precise meaning of the crime of aggression, the requirement that the violation of the United Nations Charter has also to be manifest in 'character' seems to be crucial. On the basis of the *travaux preparatoires* it is said that the component of 'character' is added to exempt from the definition of the crime of aggression the so-called 'borderline cases'

[38] See Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, Annex III to Resolution RC/Res.6, 11 June 2010, Understanding 6. Compare UNGA Res 3314 (XXIX) (above n 5) Annex, Preamble para 5, and Article 2, second part.

[39] In different words, one could say that the same holds true for the 1974 Definition of Aggression. For, Article 5(2) provides that 'A war of aggression is a crime against international peace', implying that only a 'war of aggression' qualifies as an international crime. The second sentence of this Article adds 'Aggression gives rise to international responsibility', which in connection to the crime against international peace mentioned in the first sentence of this Article should probably be read as 'international *individual criminal* responsibility'. See Dinstein 2005, p. 125.

[40] See Rome Statute (above n 17) Article 8 bis (1). See further Sect. 13.4.

[41] Understandings regarding the amendments to the Rome Statute (above n 38): Understanding 7.

or 'grey areas' in the legal assessment of the use of force.[42] That would imply the exclusion of nearly all cases from the application of the crime of aggression because on nearly all legal issues connected to the use force opinions differ in State practice, jurisprudence and doctrine, and often quite fundamentally. If that would be true, the Rome Statute is even less precise than the 1974 Definition of Aggression as far as that document seems to limit the international criminal responsibility to a 'war of aggression',[43] generally understood as a direct and massive armed attack of a State with the object or result of a military occupation or annexation of the territory of another State.[44]

But, again, the major flaw here is not the crime or the act of aggression; the point is, as also clearly explained by De Hoon, that States with the prohibition of the use of force in international relations try to accomplish two goals that are not easy to combine: to protect States against the use of armed force by other States, and to maintain the freedom of States to use armed force if justified for some reason.[45] As it appears also from the negotiations on the Rome Statute's provisions on aggression, it seems that there is little agreement between States on what these justifications are or should be, and if a justification is acceptable for most States, its scope is often a very controversial issue. That applies, for instance, to questions such as:[46] what is an armed attack? Is there a right of pre-emptive self-defence? Is there a right of humanitarian intervention and, if so, for what goals? How to qualify a step-by-step escalation of armed incidents? Against this background, the openness of the legal definitions of (an act or a crime of) aggression in at least the two major international legal regulations at this moment should come as no surprise. But what does this situation imply in practice? Do international organisations and judges take the 'open space' in these regulations to develop their own interpretations and judgments? Or is there a great hesitation to apply the concept of aggression in practice? Let us take a look at the international legal practice with regard to the Eritrea-Ethiopia armed conflict.

13.3.2 The Eritrea-Ethiopia Armed Conflict

Thus the problem of the definition of aggression in international law—that is, which violations of the prohibition of the use of force constitute acts of aggression?—has not been solved up till now. However, it may be that the existing differences of opinion as to the scope of the concept of aggression are less relevant for the application of

[42] See Akande 2010, Ruys 2018, pp. 906–915, de Hoon 2018, pp. 922–925. See also Preparatory Commission for the International Criminal Court, Discussion paper proposed by the Coordinator, 11 July 2002, PCNICC/2002/WGCA/RT.1/Rev.2.

[43] See above n 39.

[44] Dinstein 2005, p. 125.

[45] See de Hoon 2018, p. 925.

[46] See on these issues, *inter alia*, Gray 2018, Orford 2003, Ruys 2010.

the concept to a relatively straightforward use of armed force, as established by the Eritrea-Ethiopia Claims Commission. In its Partial Award on the *jus ad bellum* claims by Ethiopia of 19 December 2005, the Commission decided that Eritrea violated the rules of international law on the use of force as laid down in the United Nations Charter. In particular it concluded that

> The Respondent [Eritrea] violated Article 2 para 4, of the Charter of the United Nations by resorting to armed force on May 12, 1998 and the immediately following days to attack and occupy the town of Badme, then under peaceful administration by the Claimant [Ethiopia], as well as other territory in the Claimant's Tahtay Adiabo and Laelay Adiabo Weredas.[47]

The remarkably short award of the Claims Commission on the *jus ad bellum* claims raises a lot of interesting and difficult questions as to the important and complex issue of the unlawful resort to the use of force.[48] In this chapter we will not go into the questions about the use of force as such and the—rejected—claim of self-defence but stick to some questions that may be relevant in relation to the concept of aggression. Two points will be made, a general one and a more specific one. Generally, it is clear that the Commission did not explicitly refer to the concept of aggression. It is submitted that the implication of this silence is that, in the opinion of the Commission, a difference exists between a 'regular' and a 'serious' violation of the prohibition of the use of force. This implication is explicitly affirmed by the Commission in its *Decision Number 7: Guidance Regarding* Jus ad Bellum *Liability*, of 27 July 2007. In this decision the Commission reports that it informed the parties in an informal meeting that it 'does not regard its *jus ad bellum* finding as a finding that Eritrea initiated an aggressive war …' and underlines at the end of the decision that its *jus ad bellum* finding did not include a finding that Eritrea had waged an aggressive war or had occupied large parts of Ethiopia or otherwise engaged in widespread lawlessness.

More specifically, on the basis of the reasoning laid down in the award, one could argue that the Commission—again: implicitly—used the concept of aggression, in particular in rejecting some aspects of the Ethiopian claim. In the first place, Ethiopia stated that, between 12 May and 3 June 1998, Eritrea launched a 'full scale invasion' of Ethiopia,[49] a wording that points in the direction of an act of aggression. The Definition of Aggression mentions as an act which qualifies as an *act of aggression* the 'classical' international war: 'the invasion or attack by the armed forces of a state of the territory of another state ….'[50] The Commission did not meet the Ethiopian claim in this respect. The wording used by the Commission to conclude that Eritrea

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[47] Eritrea-Ethiopia Claims Commission, *Partial Award:* Jus Ad Bellum*, Ethiopia's Claims 1–8*, 19 December 2005, PCA Case No. 2001-02, Chapter IV, para. B.1.

[48] See further Weeramantry, Chap. 12. See also Gray 2006.

[49] *Jus Ad Bellum* 2005 (above n 47) Chapter III, para 8.

[50] The complete text reads as follows: 'The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof'. UNGA Res 3314 (XXIX) (above n 5) Annex, Article 3(a).

has violated the prohibition of the use of force is far more neutral and stripped of any possible reference to an act of aggression.

In the second place, Ethiopia contended that Eritrea's unlawful armed attack on Badme (located in the Western Front) was followed, within a month, by a programme of pre-planned and coordinated unlawful armed attacks along other parts of the border between the two States (the Central and Eastern Front).[51] This claim could also be interpreted as pointing in the direction of an act of aggression because its objective is to underline that the Eritrean attack was not an unintended accident but the first action of a well-prepared plan. According to the Commission, Ethiopia's contention could not be proven. In its opinion the question whether or not the attacks in the Central and Eastern Front were pre-planned attacks *or* were determined by developing military demands could not been answered on the basis of the available evidence. The fact that Eritrea's armed forces were more fully mobilised than those of Ethiopia and thus had the initiative in the first several months of the war does not prove, according to the Commission, that Eritrea's actions were predetermined.[52] What is clear, the Commission stated, 'is that, once the armed attack in the Badme area occurred and Ethiopia decided to act in self-defence, a war resulted that proved impossible to restrict to areas where that initial attack was made.'[53] In this last observation, the Commission is in fact arguing that a full-scale war which is the result of a gradually, step-by-step escalation of armed activities between conflicting parties can indeed lead to a finding that one of the parties on the basis of the first shot-principle has violated the prohibition on the use of force but that the application of the concept of aggression to such a war is not appropriate.

Although the award, on first sight, seems to apply implicitly a straightforward concept of aggression, it does so at the cost of reducing the scope of the concept to an absolute minimum. Since in the opinion of the Commission, the Eritrean attack cannot be qualified as an act of aggression, the Commission makes a distinction within the legal regime of self-defence between an armed attack that is also an act of aggression and an armed attack that is not such an act. In the *Nicaragua* case, the International Court of Justice considered that not every illegal use of force amounts to an armed attack in the sense of Article 51 of the Charter of the United Nations, only 'the most grave forms of the use of force' do.[54] According to the analysis of the Eritrea-Ethiopia Claims Commission the picture is more complex. Apparently, not every instance of 'the most grave forms of the use of force', which justify the exercise of the right of self-defence, is an act of aggression. As the Commission suggests, the determination of an act of aggression requires that the illegal use of armed force has, at least, the *objective* of occupying foreign territory.[55] In any event,

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[51] *Jus Ad Bellum* 2005 (above n 47) Chapter III, para 18.

[52] *Jus Ad Bellum* 2005 (above n 47) Chapter III, para 19.

[53] *Jus Ad Bellum* 2005 (above n 47) Chapter III, para 19.

[54] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment (Merits), 27 June 1986, ICJ Rep 1986, p. 14, para 191.

[55] In this regard it is indeed ironic, as Christine Gray explains in her critical article, that, on the basis of the Decision on Delimitation of the Eritrea-Ethiopia Boundary Commission of 13 April

in the opinion of the Commission, the concept of aggression does not necessarily apply to a situation in which armed attacks through a process of escalation result in a full-scale war. This conclusion would have far-reaching consequences for the relevance of the concept of aggression because such a situation is characteristic of many contemporary inter-State wars.

13.4 Silencing Aggression and Issues of Responsibility

13.4.1 General Aspects

As mentioned before, after years of fierce discussion within and outside the International Law Commission, it was in the end decided to delete any reference to the concept of 'international crimes'—including the crime of aggression—from the Draft Articles on the Responsibility of States. This occurred mainly because one was unable to formulate the legal consequences of such crimes, other than those already existing for the illegal use of armed force under the rules of State responsibility in general and the Charter of the United Nations in particular.[56] However, to a certain extent the underlying idea is not totally abandoned in the legal regime of State responsibility, as appears from the chapter on 'Serious breaches of obligations under peremptory norms of general international law'.[57] This regime is (still) based on the distinction between State responsibility for 'ordinary' breaches of international law and the particular legal consequences for gross or systematic breaches by a State of obligations *erga omnes* and of peremptory norms, such as the violations of the prohibition of aggression.[58] The core of the difference between the two situations is that the consequences of 'ordinary' breaches create a 'bilateral' relation between the responsible State and the injured State whereas the 'aggravated' responsibility moreover results in a relationship between the responsible State and any other State in order to protect the community interests reflected in the obligations *erga omnes* and peremptory norms. These other States are, according to the Draft Articles, under a duty to co-operate to bring to an end, through lawful means, the serious breach of the specific obligation and do not recognise as lawful any situation created by such a serious breach.[59] Besides these minimum obligations of States, the international

2002, Ethiopia was illegally occupying Eritrean territory and thus could be accused of committing an illegal use of armed force; see Gray 2006, pp. 710–712. One may add that in terms of the Claims Commission such a use of force could be qualified as an act of aggression.

[56] See Draft Articles on Responsibility of States, with commentaries (above n 8) Part Two, pp. 110–116.

[57] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, Part Two, Chapter Three.

[58] See Draft Articles on Responsibility of States (above n 57) Article 40.

[59] See Draft Articles on Responsibility of States (above n 57) Article 41.

legal regime in relation to aggression encompasses a lot more powers, in particular those of the Security Council of the United Nations.

The Security Council has, on the basis of the Charter of the United Nations, the competence to determine an act of aggression as one of the grounds for imposing enforcement measures.[60] In this matter the Council has complete discretion in determining the existence of an act of aggression and in taking coercive measures not involving or involving the use of force.[61] In practice, only in a small number of cases the Security Council explicitly identified an act of aggression but it is interesting to note that most of these instances tended to be serious armed *incidents* rather than serious armed *conflicts*.[62] Moreover, in none of these cases the Security Council referred to the Definition of Aggression, although this instrument was primarily intended to be a useful guideline for the Council, in particular in the framework of its powers under Chapters VII and VIII of the Charter of the United Nations.[63] The Council did not apply the concept in relatively straightforward situations, as for instance in the first and second Gulf War: the Iraqi attacks on Iran (1980)[64] and Kuwait (1990).[65] In its resolutions the Council seems careful to avoid any reference to acts of aggression, let alone to a war or a crime of aggression. However, it is quite generally held that the second Gulf War is the exception to the rule for one could argue that the Council, although it did not use the expression, implicitly applied the concept of aggression in this case. This plausible contention is based *inter alia* on the wording used to condemn the illegal use of armed force by Iraq against Kuwait—namely, as an 'invasion' and 'illegal occupation'—and the set of the most far-reaching enforcement and other measures taken in relation to Iraq.[66]

For the International Court of Justice it is less self-evident to judge over disputes of situations involving the use of armed force, because for its jurisdiction the Court is

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[60] Charter of the United Nations, Article 39 in conjunction with Articles 41 and 42. As far as the General Assembly is concerned, see, in general the resolution Uniting for Peace (UNGA Res 377 (V), 3 November 1950, A/RES/377(V)). The Assembly determined in quite a few cases the existence of (an act of) aggression, for instance in relation to the situation in Bosnia and Herzegovina (see UNGA Res 46/242, 25 August 1992, A/RES/46/242, and UNGA Res 47/121, 18 December 1992, A/RES/47/121). See 'Historical review of the developments relating to aggression', Report prepared by the Secretariat of the Preparatory Commission for the International Criminal Court, 24 January 2002, PCNICC/2002/WGC.A/L.1, pp. 123–128.

[61] The proposals made during the negotiations on the Charter of the United Nations to include a definition of aggression in this treaty, as well as an automatic obligation for the Council to take coercive measures in such cases, were expressly rejected at that time; see United Nations Conference on International Organisation, Vol. 12, pp. 296, 348, 381, 445 and 507. This line was reaffirmed in UNGA Res 3314 (XXIX) (above n 5) Annex, Articles 2 and 4.

[62] See 'Historical review of the developments relating to aggression' (above n 60) pp. 115–121.

[63] See UNGA Res 3314 (XXIX) (above n 5) Preamble.

[64] See Dekker and Post 1992.

[65] See Ruys et al 2018.

[66] See in particular UNSC Res 660 (1990), 2 August 1990, S/RES/660(1990); UNSC Res 678 (1990), 29 November 1990, S/RES/678(1990); and UNSC Res 687 (1991), 3 April 1991, S/RES/687(1991). In its Res 667 (1990), 16 September 1990, S/RES/667(1990), the Council strongly condemned 'aggressive acts perpetrated by Iraq against diplomatic premises and personnel in Kuwait ….'

dependent on the consent of the parties or a question of an organ of an international organisation.[67] In the cases in which it had jurisdiction—such as the *Nicaragua* case[68] and the more recent *Democratic Republic of Congo (DRC) v. Uganda* case[69]—the Court judged on the basis of the general ban on the use of force as a rule of customary law and/or of treaty law. It did not as such apply the concept of aggression, although for instance the DRC had filed its application in 1999 alleging that 'acts of aggression' were carried out by Uganda.[70] The Court referred in these cases to certain provisions of the Definition of Aggression—as they, in its opinion, reflect customary international law—in order to identify whether or not an armed attack had occurred which could justify the use of armed force.[71] In the *DRC v. Uganda* case, the International Court of Justice made such a strong finding as to the use of force by Uganda[72] that even some of its own judges were amazed that in this case the Court did not determine an act of aggression.[73] Judge Simma speaks in this regard of a 'deliberate omission': 'If there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC. Compared to its scale and impact, the military adventures the Court had to deal with in earlier cases … border on the insignificant.'[74] The relevant findings of the Court were, however, formulated by the Court strictly in terms of the violation of the principle of the non-use of force in international relations and were certainly *not* qualified as an act of aggression.[75]

As far as the individual responsibility for the crime of aggression is concerned, a complaint about this crime can now be submitted to the International Criminal Court through different procedures. First, the Prosecutor of the Court—via a referral by a State or on its own initiative—may start proceedings for investigations with regard to this crime.[76] However, there are certain, often complicated, limitations that make this route not easy to pass. For example, political and other leaders of States which are not parties to the Rome Statute need not fear the jurisdiction of the Court for the crime of aggression. But also States parties to the Statute may exclude the jurisdiction of the Court over the crime of aggression for their nationals. They can do that by lodging a declaration to that end (the opt-out provision) or—but still controversial[77]—by

[67] See for the International Court of Justice and the use of force in general Gray 2013.

[68] *Nicaragua v. USA* 1986 (above n 54).

[69] ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, 19 December 2005, ICJ Rep 2005, p. 168.

[70] *DRC v. Uganda* 2005 (above n 69) para 23.

[71] See *Nicaragua v. USA* 1986 (above n 54) para 195; *DRC v. Uganda* 2005 (above n 69) para 146.

[72] 'The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition of the use of force expressed in Article 2, para 4, of the Charter', *DRC v. Uganda* 2005 (above n 69) para 165.

[73] See *DRC v. Uganda* 2005 (above n 69) Separate Opinion of Judge Simma, para 2 and Separate Opinion of Judge Elaraby, para 8.

[74] *DRC v. Uganda* 2005 (above n 69) Separate Opinion of Judge Simma, para 2.

[75] *DRC v. Uganda* 2005 (above n 69) para 345.

[76] Rome Statute (above n 17) Article 15 bis. See Barriga and Blokker 2017.

[77] See Akande and Tzanakopoulos 2018.

not ratifying the amendments on the crime of aggression. So, the jurisdiction of the Court seems to be limited to the (nearly) 40 State parties which have ratified the amendments on the crime of aggression, without opting out of this procedure.

The other hot debated issue in this procedure was the position of the Security Council and in particular whether the Council should have the competence, one way or another, to stop the investigations and prosecutions of the Court. Is the Court allowed to exercise its jurisdiction in relation to the crime of aggression only with or also without a preceding determination by the Security Council of an act of aggression in the case concerned? The views of the States on this matter were sharply divided between, on the one hand, the five permanent members of the Security Council requiring the exclusive role of the Council in determining an act of aggression and, on the other hand, a lot of other countries which rejected any interference of the Council in an independent judicial procedure on individual criminal responsibility. The outcome is a compromise which obliges the Court during the procedure and at different times to take the role of the Security Council into account but in the end safeguards its independence in relation to the Council. In particular, if the Prosecutor believes that there is a reasonable basis for an investigation in respect of the crime, he or she must enable the Security Council to make a determination of an act of aggression committed by the State under investigation (if it has not already done so).[78] If the Security Council takes no action within six months, the Prosecutor may proceed under the approval of the Court's Pre-trial Division.[79] However, at any time, the Security Council can order the Court to suspend the investigation or prosecution for a year.[80]

In the second procedure, the Security Council itself can bring a situation regarding an alleged crime of aggression to the attention of the International Criminal Court.[81] In such proceedings the jurisdiction of the Court extends to political and other leaders of all States, whether they are nationals of a State party to the Statute or not. The Council refers the situation to the Court by a resolution under Chapter VII of the United Nations Charter, and thus the referral to the Court is subject to the veto power of the permanent members of the Council. It is not needed that the Council makes a determination of an act of aggression in the case concerned; and if it does, that determination is 'without prejudice to the Court's own findings'.[82] Given this situation, it is highly questionable whether in the near future political and other leaders of States will be prosecuted for the crime of aggression, as was done by the International Military Tribunals of Nuremberg and Tokyo. But, suppose, the Security Council would refer a situation to the International Criminal Court—or to an ad hoc tribunal for that matter[83]—for the trial of a dictator of a military middle-sized country

[78] Rome Statute (above n 17) Article 15 bis (6)(7).

[79] Rome Statute (above n 17) Article 15 bis (8).

[80] Rome Statute (above n 17) Article 16.

[81] Rome Statute (above n 17) Article 15 ter. See Blokker and Barriga 2017.

[82] Rome Statute (above n 17) Article 15 ter (4).

[83] The ad hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda did not have jurisdiction with regard to the crime of aggression.

for a large-scale armed attack on a neighbouring country for its annexation. Is the legal regime for such a case different from that after World War II? Certainly. As will be remembered, the Nuremberg and Tokyo Tribunals ruled that the Charters on which their jurisdiction was based should be considered as 'the expression of international law existing at the time of its creation'.[84] This contention has been heavily criticised, in particular with regard to the crime of aggression.[85] A contemporary court or tribunal would likewise be confronted with the question to what extent, according to current international law, aggression is a crime that can be attributed to individual persons. However, such a court or tribunal would be able to answer this question in the affirmative with greater justification than its illustrious predecessors. In contrast with the period preceding World War II a prohibition of the resort to armed force is now recognised as a fundamental norm of international law and the individual criminal responsibility for at least wars of aggression is repeatedly reaffirmed in resolutions of the General Assembly, in codes and reports of the International Law Commission, and ultimately in the Rome Statute of the International Criminal Court. Nevertheless, the judges will be faced—beside the interpretation and application of the concept of aggression—with a lot of difficult issues, including the determination of the circle of persons who can be held responsible for the crime of aggression, certain temporal jurisdictional issues, the requirements in relation to general and specific criminal 'intent', and justifications for the alleged criminal acts. And although the judges would stand on more solid legal ground, the objective assessment of the crime of aggression immediately after a war will be always 'an almost superhuman task', as Röling, judge in the Tokyo Tribunal, stated just after the task was completed.[86]

13.4.2 The Eritrea-Ethiopia Armed Conflict

As was set out previously,[87] Ethiopia and Eritrea both argued to be the victim of acts of aggression. Despite all these serious allegations, however, the Security Council never qualified the use of armed force by one of the parties as an act of aggression. That is, of course, not a great surprise in the light of the long practice of the Council. As is set out extensively in other contributions to this volume,[88] the Security Council adopted first a very cautious approach to the conflict between Eritrea and Ethiopia. Moreover, when it started to condemn the fighting between the parties and demanded an immediate cessation of all military activities it made sure that in

[84] *Nuremberg Judgement* (above n 12) p. 219; *Tokyo Judgment* (above n 13), p. 28.

[85] See, e.g., Schick 1947, pp. 783–784; Röling 1950, p. 3; David 1988, p. 89 ff. For an overview of the arguments, see Dinstein 2005, pp. 119–121.

[86] Röling 1950, p. 4.

[87] See above Sect. 13.2.

[88] See Greppi and Poli, Chap. 4, and de Guttry, Chap. 5.

these demands both parties to the conflict were addressed.[89] In its resolution of 17 May 2000, the Council qualified the situation for the first time as 'a threat to regional peace and security' and decided to impose an arms embargo on both parties.[90] Meanwhile the conflict escalated into a large-scale war, but the Council did not impose further enforcement measures upon the parties or take other measures in relation to the conflict, which could be seen as the application of the concept of 'aggravated responsibility'.

As explained above,[91] the Eritrea-Ethiopia Claims Commission implicitly applied the concept of aggression but concluded that Eritrea, although it had violated Article 2(4) of the Charter of the United Nations, had not committed an act of aggression. In its *Decision Number 7: Guidance Regarding* Jus ad Bellum *Liability* of 27 July 2007, the Claims Commission underlined that it did not conclude that Eritrea had initiated an aggressive war or had committed any other act of aggression.[92] For that reason the Commission decided that the 'ordinary' rules on State responsibility should be applicable to this conflict. It rejects both Ethiopia's claim that Eritrea 'bore very extensive liability' and Eritrea's contention that it was not financially liable at all. The Commission formulates some considerations and guidelines with regard to the scope of Eritrea's financial liability for violating the principle of the non-use of force and on the standard to be applied with regard to the causal connection between the compensable damages and the conduct violating international law.[93] It underlines that the post-war practice of States and international organisations is only in some limited aspects relevant to the present case. That includes, according to the Commission, the rather recent precedent—at that time—of the claims and compensation process established in response to Iraq's invasion and occupation of Kuwait. The relevance of the practice of the United Nations Compensation Commission, established by the Security Council via its Resolution 687 (1991), is, according to the Claims Commission, 'to Ethiopia's claims for compensation less clear, given the unusual and compelling circumstances leading to the UNCC's creation'[94] and given the central role played by the Security Council in that respect.[95]

It is submitted that the Eritrea-Ethiopia Claims Commission approaches the legal regime with regard to the consequences of its finding on the *jus ad bellum* claims as a regular and bilateral—not to say 'private law'—matter. In its *Decision Number 7*, the Commission took great care to explain the differences between the situation of the second Gulf War and the Eritrea-Ethiopia conflict and the consequences thereof

[89] UNSC Res 1177 (1998), 26 June 1998, S/RES/1177(1998); UNSC Res 1226 (1999), 29 January 1999, S/RES/1226(1999); UNSC Res 1227 (1999), 10 February 1999, S/RES/1227(1999); UNSC Res 1297 (2000), 12 May 2000, S/RES/1297(2000).

[90] UNSC Res 1298 (2000), 17 May 2000, S/RES/1298(2000).

[91] See above Sect. 13.3.2.

[92] Eritrea-Ethiopia Claims Commission, *Decision Number 7: Guidance Regarding* Jus ad Bellum *Liability*, 27 July 2007, PCA Case No. 2001-02, para 5.

[93] *Decision Number 7* 2007 (above n 92).

[94] *Decision Number 7* 2007 (above n 92) para 28.

[95] *Decision Number 7* 2007 (above n 92) para 29.

with regard to the liability questions.[96] It is not farfetched to assume that the Claims Commission is of the opinion that the Security Council assessed the second Gulf War situation in terms of the concept of aggression, including *inter alia* the financial settlement of that conflict. In its Final Award on Ethiopia's damages claims, issued in 2009,[97] the Commission underlines that a 'substantial resort to force is a serious and hazardous matter'[98] and repeats that Eritrea's violation of the *jus ad bellum* in May 1998 'as found by the Commission was serious and had serious consequences.'[99] A breach of the *jus ad bellum* 'does not create liability for all that comes after. Instead, there must be a sufficient causal connection.'[100] But the Commission is rushing to add that Eritrea's breach of the *jus ad bellum* is different in magnitude and character from 'the aggressive uses of force marking the onset of the Second World War, the invasion of South Korea in 1950, or Iraq's 1990 invasion and occupation of Kuwait.'[101] And for that reason the Commission considers that the award of damages is not designed to serve the exceptional purpose of helping to deter future violations of Article 2(4) United Nations Charter but, instead, serves 'the more conventional purpose of providing appropriate compensation within the framework of the law of State responsibility.'[102] For addressing and deterring violations of the prohibition of the use of force, the Commission refers to 'the primary responsibility of the Security Council' and the right of individual and collective self-defence. The Commission considers—quite interestingly, from a crime of aggression perspective—also a deterrent factor 'the risk of criminal punishment of government officials responsible for deciding upon the unlawful resort to force.'[103]

It is probably of no surprise that the ultimate difference between the compensations awarded to both parties is relatively small. The Claims Commission awarded Eritrea $161 million (plus $2 million for claims by individual Eritrean nationals)[104] and Ethiopia $174 million.[105] However, half of $174 million awarded to Ethiopia is connected to the damages caused by Eritrea's armed invasion of Ethiopia in May 1998. Although this invasion was in the opinion of the Claims Commission not 'an aggressive war', it was, indeed, not only serious but had also serious consequences.

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[96] *Decision Number 7* 2007 (above n 92) paras 29–32.

[97] Eritrea-Ethiopia Claims Commission, *Final Award: Ethiopia's Damages Claims*, 17 August 2009, PCA Case No. 2001-02.

[98] *Ethiopia's Damages* 2009 (above n 97) para 290.

[99] *Ethiopia's Damages* 2009 (above n 97) para 312.

[100] *Ethiopia's Damages* 2009 (above n 97) para 289.

[101] *Ethiopia's Damages* 2009 (above n 97) para 312.

[102] *Ethiopia's Damages* 2009 (above n 97) para 308.

[103] *Ethiopia's Damages* 2009 (above n 97) para 308.

[104] *Ethiopia's Damages* 2009 (above n 97) para IX.

[105] *Ethiopia's Damages* 2009 (above n 97) para XII.

13.5 Conclusion

The conflict between Eritrea and Ethiopia provides a telling example of the role of the concept of aggression in post-1945 international relations. Within international law, the prohibition of aggression was lifted to the status of a peremptory norm that is of pivotal interest to the international community as a whole. Moreover, the concept of aggression figures prominently in the UN Charter, and forms one of the bases for the exercise of the exceptional powers of the Security Council. Finally, several attempts have been made to establish individual criminal responsibility for acts of aggression, which resulted in a legal regime on the crime of aggression in the Rome Statute of the International Criminal Court. The importance attached to the prohibition of aggression, however, is not matched by a clear definition or by a frequent use of the concept by international bodies such as the Security Council or the International Court of Justice. Neither have States been willing to set up a radically different set of rules governing the responsibility for acts of aggression. Its legal value, in other words, has been limited so far. The infrequent use of the concept of aggression by judicial bodies and the Security Council is in sharp contrast to the willingness of States to use the concept as a tool to discredit their political enemies. In many conflicts, States have recognised the rhetorical value of a concept that is both considered to be of fundamental value and still rather underdetermined.

The Eritrea-Ethiopia conflict largely follows the pattern described above. While both States extensively accused each other of having committed acts of aggression, the Security Council refrained from using the concept at all. Instead, it took a rather cautious approach, making sure that its demands were addressed to both parties to the conflict. By contrast to the Security Council, the Claims Commission did refer to the prohibition of aggression. The Commission, however, construed the prohibition of aggression very narrowly as to exclude situations that gradually escalate into full-scale war. Moreover, the Commission approached questions regarding the responsibility for violations of the *jus ad bellum* in a rather traditional, contractual and bilateral way, thus downplaying the notion that the use of force by States is an issue for the international community as a whole.

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