Tom Ruys, Ph.D., LL.M. Professor of international law Ghent Rolin-Jaequemyns International Law Institute (GRILI)

- Profile
- Contact

Office of the Prosecutor (OTP) investigations into crimes of aggression should not depend on a *green light* from the UN Security Council. The OTP should, however, be careful not to exercise its competence in such a way as to undermine the legal framework governing the use of force.

The implication of [the Kampala activation] compromise—disappointingly lacking in ambition and difficult to reconcile with the original promise of Article 5 of the *Rome Statute*—is that prosecutions will be possible only in respect of leaders of a small circle of countries.

Summary

I. Introduction

On December 14, 2017, the Assembly of States Parties to the *Rome Statute* decided by consensus to *activate* the ICC's jurisdiction over the crime of aggression as of July 17, 2018.[1] The historical decision finally makes true on the promise created by the original inclusion of the crime of aggression when the *Rome Statute* was adopted in 1998 (Article 5 (1) of the *Rome Statute*). What is more, the decision at long last revives the legacy of the post-War Nuremberg and Tokyo Tribunals, where military and political leaders were first (and—so far—last) criminally prosecuted for "crimes against the peace."

The consensus decision did come at a heavy price. While it was previously affirmed (at the time of the adoption of the 2010 Kampala amendments)[2] that the jurisdiction over the crime of aggression would not be exercised against nationals of non-States parties to the *Rome Statute*[3] or of States Parties making use of the *opt-out* mechanism,[4] jurisdiction was further curtailed by the activation decision. In particular, the decision stipulates that in the case of a State referral or *proprio motu* investigation, "the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted [the Kampala amendments]."[5]

The implication of this compromise—disappointingly lacking in ambition and difficult to reconcile with the original promise of Article 5 of the *Rome Statute*—is that prosecutions will be possible only in respect of leaders of a small circle of countries. More than seven years after their adoption, some thirty-five States have effectively ratified the Kampala amendments. It follows that investigations into crimes of aggression will in all likelihood remain exceptional and that it may take years for the first such investigation to materialize. On the other hand, inasmuch as every cross-border operation potentially raises questions as to its legality,[6] sooner or later the OTP will inevitably have to address allegations that a crime of aggression has been committed.[7]

When (rather than *if*) this happens, the OTP will be confronted with a range of challenges, some of which are ostensibly unique to the prosecution of aggressors. The present essay briefly focuses on two such challenges, specifically the relationship with the UN Security Council (UNSC), and the application of the primary rules on the use of force (the so-called *jus contra bellum*)[8].

Collapse

Argument

II. OTP investigations into crimes of aggression should not depend on a *green light* from the UNSC.[9]

In spite of the post-War trials, where individuals were first prosecuted for "crimes against the peace" (notably at the initiative of the United States), and in spite of its inclusion in the *Rome Statute*, some continue to resist the idea that the crime of aggression constitutes a justiciable crime. In the words of Koh and Buchwald:

Aggression determinations are fundamentally different in kind [from determinations of atrocity crimes]: they fundamentally require a political assessment and political management.[10]

Or as Rostow puts it: "[d]eterminations of aggression are political and rightly so."[11]

Attempts to conceive determinations of aggression as a purely political question are illustrative of the perverse and flawed tendency, still very much *en vogue* today, to surgically detach the political decision-making process leading up to the launch of a military intervention from the loss of life (among civilians and combatants) and destruction (e.g., in terms of damage to the economy or governmental institutions) that all too frequently follows. This tendency is also reflected in the dominant normative account which views the crime of aggression as a political crime, which "yields an abstract harm,"[12] rather than as a compound of wrongs against individuals (civilians and combatants), that entails "the slaughter of *human* life, the infliction of *human* suffering, and the erosion of *human* security."[13]

Furthermore, this approach ignores not only the legacy of the 1928 Pact of Paris—which first outlawed the recourse to war[14]—and the Nuremberg proceedings, it is also fundamentally at odds with the fact that the International Court of Justice has repeatedly pronounced (directly or indirectly) on the compatibility of State conduct with the rules governing the use of force[15]—as have a number of arbitral tribunals.[16] This case-law unequivocally confirms that, notwithstanding the politically sensitive nature of the charges, State responsibility for aggression is a justiciable matter that international courts and tribunals can rule upon independently (within the confines of their jurisdiction).

In the 1980s, the International Court of Justice (ICJ) did not shy away from assessing the legality of the US military intervention in the famous *Nicaragua v. U.S.* case—notwithstanding US' objections that the case involved an inherently political problem and notwithstanding warnings that the ICJ's bold approach would destroy its legitimacy and result in an empty docket (which has certainly not been the case). By analogy, the OTP should not shy away from actively seeking to investigate and prosecute the crime of aggression. Only by acting in such manner will it be possible to undo the myth that high-level decisions to deploy

armed forces abroad are beyond the reach of judicial scrutiny, and hold political and military leaders to account for the harm caused. This is all the more so since the (remote) prospect of the *State* being held internationally responsible for ignoring the *jus contra bellum* is unlikely to play a *determining* role in decisions over the use of armed force. By contrast, the risk of facing individual criminal responsibility may weigh heavier in the minds of the decision-makers concerned. As Dinstein puts it:

Only if it dawns on the actual decision-makers that—when they carry their country along the path of war in contravention of international law—they expose themselves to individual criminal accountability, are they likely to hesitate before taking the fateful step.17

The OTP should not let itself be shackled by making investigations into the crime of aggression dependent on a *green light* from the UNSC. No such legal requirement follows from the Charter of the United Nations, [hereinafter UN Charter]. Article 39 of the *UN Charter*, which decrees that the UNSC can take enforcement action in case of a "threat to the peace," a "breach of the peace" or an "act of aggression," is merely an institutional provision, which defines the situations in which the UNSC may use its Chapter VII powers. Such enforcement action is not limited to situations where there has been a prior breach of international law: a "threat to the peace," for instance, does not necessarily presuppose the commission of an internationally wrongful act by any State. Article 39 of the *UN Charter* was never intended to have the UNSC act as a judicial body, asserting legal responsibility for wrongful conduct.

It has moreover amply been affirmed that the UNSC's competence to determine an *act of aggression* is not exclusive. Thus, the absence of a prior finding of *aggression* by the UNSC has not stopped the ICJ or arbitral tribunals from pronouncing on the legality of the use of force by States.18 Nor has it stopped the UN General Assembly from pronouncing on the legality of military interventions.19 Suggestions that there is a legal requirement under international law which makes ICC investigations into the crime of aggression dependent upon prior approval by the UNSC are all the more absurd in light of the (extremely) narrow jurisdiction *ratione personae* in respect of this crime. Indeed, inasmuch as jurisdiction is limited to political and military leaders of countries that have ratified the Kampala amendments (without having used the *opt out*), this dispels any lingering doubts that the exercise of jurisdiction would somehow contravene the so-called *Monetary Gold* principle.20

Making OTP investigations contingent on a *green light* from the UNSC is not only not legally required, it would also be detrimental to the Court's legitimacy and nullify the potential of the Kampala amendments. It would make OTP investigations hostage to political interests and create a perception of victor's justice and double standards. Investigations into the conduct of any P-5 ally would be all but excluded. More generally, the prospect of any investigations into crimes of aggression would be extremely remote: Security Council resolutions referring to "(acts of) aggression" indeed remain rare—not a single such resolution has been adopted since the end of the Cold War.21 By voluntarily subjecting itself to the whims and vagaries of the UNSC, the OTP would undo the main achievement of the Kampala negotiations, where it was indeed decided to essentially decouple the jurisdiction of the Court, as an independent judicial organ, from the UNSC decision-making process.22

In conclusion, the OTP should make full use of its competence under the Kampala amendments—including in respect of military operations by coalitions that encompass both States that have ratified the amendments and States that have not.23 At the same time, the

preferred approach must be for investigations to be started pursuant to a State referral, rather than on a *proprio motu* basis. Indeed, to the extent that a crime of aggression presupposes an act of aggression which, in light of its scale, effects and character, qualifies as a manifest breach of the *UN Charter*, it can normally be assumed that the victim of such aggression will declare itself as such and will raise the matter before the ICC.24 When the "victim State" refrains from so acting, this raises doubts as to whether there indeed exists a manifest breach of the *UN Charter*. Admittedly, there may be situations where a State referral is *de facto* unlikely or impossible and which call for a *proprio motu* investigation, e.g., where an aggressor overruns another country and installs a puppet regime. It is also conceivable that a victim State uses the threat of a State referral as leverage in negotiations with the aggressor (e.g., to arrive at a peace agreement). Such situations may call for restraint from the OTP and must be assessed on a case-by-case basis.

III. The OTP should be careful not to exercise its competence in such a way as to erode the legal framework governing the use of force25

A specific challenge resulting from the—now activated—ICC jurisdiction over the crime of aggression is that it will force the Court to tackle a new domain of international law, which it has hitherto not had to explore. As is well-known, the *jus contra bellum* is one of the oldest branches of international law—and also one of the most hotly debated. In spite of the somewhat utopian assertion in the *Nicaragua v. U.S.* case that there exists "general agreement" on what amounts to an "armed attack" in the context of the right of self-defence,26 the truth is that the "law on the use of force" is rife with controversies. In particular, there has been strong pressure in recent years to loosen some of the traditional legal restrictions on the recourse to force. To some extent, this tendency is understandable, given the evolving nature of threats to State security (chiefly the advance of trans-national terrorist groups, such as ISIL/Daesh). At the same time, calls for a more flexible regime on the recourse to force tend to create a slippery slope, opening room for abuse and threatening to erode the fundamental prohibition of Article 2 (4) of the *UN Charter*.

One implication of the activation of the ICC's jurisdiction over the crime of aggression is that the ICC (and the OTP in particular) will henceforth play a key role in the interpretation of the *jus contra bellum*. Just as the case-law of the ICC (and the ICTY and ICTR before it) has left, and continues to leave, its mark on the interpretation of the law of armed conflict, the same will become true in the realm of the *jus contra bellum*. It is imperative in this context that the ICC build on the existing *acquis* in this domain, as reflected in the case-law of the ICJ, legal doctrine and State practice, and, moreover, that it be aware of the implications that its approach may have for this legal regime.

The *Rome Statute* provides for a variety of tools that can potentially be used to justify a refusal to investigate, or prosecute, alleged crimes of aggression. Possible *escape routes* include the presumption of innocence and the requirement to construe the definition of crimes strictly (Articles 66 and 22 of the *Rome Statute*); the notion of *mistake of fact* (Article 32 of the *Rome Statute*),27 and; duress and defence of others (Article 31 (c)–(d) of the *Rome Statute*). By contrast, a leader's alleged lack of an *aggressive intent* or an alleged mistake of law will not normally shield him or her from prosecution.28 An additional route results from the substantive threshold introduced at Kampala. Indeed, pursuant to the Kampala definition, not any recourse to force can give rise to a crime of aggression: only uses of force that, by their "character, gravity and scale," constitute a "manifest" violation of the *UN Charter* can qualify as such. Thus, an isolated and relatively small-scale drone strike or a minor border

skirmish would not possess the gravity and scale required under Article 8 *bis* (1) of the *Rome Statute*. Although the ICC has been given "very little guidance as to where to draw the line in the sand,"29 the Court should use the above tools *when appropriate*. At the same time, it should do so cautiously, without turning the crime of aggression into a dead letter and signing off on a climate of impunity.

The most controversial of the above-mentioned tools concerns the requirement pertaining to the "manifest character" of the breach. This criterion was introduced specifically to exclude prosecutions in respect of military interventions falling in the *grey zone* of the *jus contra bellum*, that is, interventions that are not manifestly unlawful but which are nonetheless of ambiguous legality. The archetypical example of such intervention is that of a *bona fide* unilateral humanitarian intervention (such as NATO's Kosovo intervention in 1999), where one or more third States intervene militarily to protect foreign nationals from ethnic cleansing or massive human rights violations in a third State, yet absent proper authorization from the UNSC. Even if the majority view—to which the present author subscribes—holds that unilateral humanitarian interventions remain unlawful *de lege lata* and require the imprimatur of the UNSC, there is a strong, and legitimate, feeling that the authors of such intervention should not be put on par with the Nazi leaders put on trial in Nuremberg, and should not become the subject of criminal prosecution. Apart from the much-debated humanitarian intervention doctrine, several other borderline cases have been put forward. Possible candidates include action in self-defence against an allegedly imminent threat of an armed attack, action in self-defence against a non-State armed group conducting cross-border attacks (without substantial involvement of a third State), or so-called "protection of nationals" operations abroad. Two observations are nonetheless in order.

First, the OTP should be cognizant that any finding that a recourse to force is not of such *character* as to qualify as a "manifest" violation of the *UN Charter* will reinforce the perception that interventions of the type concerned are not "unambiguously unlawful." This will be the case even if the Prosecutor (or the Court) would refrain from taking an express position on the application of the *jus contra bellum* (and simply find there to is no "manifest" breach of the *UN Charter*). As Murphy aptly observes:

[A] distinction of this type will likely be lost in the public domain; when the ICC determines that the leaders of an intervention will not be investigated or indicted for aggression, the natural perception is that the ICC believes the intervention to be legal. Arguing that an intervention might still be a violation of Article 2 (4) but just is not within the scope of the ICC's jurisdiction is the type of position that will likely gain little traction in the realm of political and popular discourse, which tends to approach such issues in more a black/white (legal/illegal) fashion.30

Thus, a decision of this type would probably leave its mark on State practice and *opinio juris*, possibly leading a growing number of States to (more) explicitly embrace the legality of the category of interventions concerned, e.g. in national military doctrines, and potentially leading to a shift in the justificatory discourse at the international level, from which the legal regime on the use of force derives much (if not most) of its compliance pull. It follows that, in order to avoid undue damage to the primary rules of the *jus contra bellum* framework, the ICC should exercise the necessary restraint in applying the "manifest character" criterion. In particular, it may be preferable to use other approaches to close an investigation into alleged crimes of aggression, for instance, by holding that a relatively minor intervention is not

sufficiently manifest in terms of scale or gravity, rather than by playing the card of the "borderline case."

Second, in examining alleged crimes of aggression, the ICC should not stop at verifying the existence of an initial *casus fœderis* or "just cause" (in the olden "just war" terminology), but should also verify whether other *jus contra bellum* parameters are duly complied with. By way of illustration, in respect of unilateral humanitarian intervention, the ICC should arguably first verify whether the operation constituted a reaction to a grave and large-scale humanitarian crisis (produced either by State action, State neglect or a failed State situation), and whether other options were reasonably exhausted. In this context, relevant indications (rather than autonomous requirements) may include, among other things, the *collective* nature of an operation carried out by multiple States, or the fact that an attempt was made to secure prior UNSC approval. Yet, beyond this, the Court should also pay heed to the proportionality question. In particular, the Court should verify, having regard to the planning and implementation, that the operation did not manifestly exceed the aim of ending the humanitarian catastrophe that triggered it. Similar considerations apply *mutatis mutandis* in respect of protection of nationals operations.

In a similar vein, in respect of the generally established exceptions to the prohibition on the use of force, the ICC should not content itself with ascertaining that a military operation constitutes a reaction to a prior "armed attack" (in case of self-defence) or was undertaken pursuant to a formal authorization of the UNSC. Rather, the Court should additionally verify that the State did not deliberately engage in a manifestly disproportionate response in the aftermath of an armed attack, or that it did not manifestly overstep the boundaries of the UNSC mandate. By the same token, with respect to so-called "interventions by invitation," in addition to verifying the existence of a valid request to intervene, the Court must ascertain that the intervening State did not manifestly exceed the scope of the invitation. Whether the ICC should feel called upon to tackle the permissibility of intervention by invitation in situations of civil war[31] is a different matter altogether. One possible answer could be that, in such scenario, what is at stake is not so much a breach of the prohibition on the use of force, but rather a possible breach of the non-intervention principle and especially the right of self-determination, implying that no crime of aggression could be said to arise.

It goes without saying that the activation of the ICC's jurisdiction over the crime of aggression presents the Court with daunting challenges. It forces the ICC to assume the role of key interpreter in one of the most sensitive domains of international law. Depending on how it implements this role, the ICC may well contribute to a certain *erosion* of the legal framework governing the use of force, indirectly lending credence to some more "expansionist" claims in legal doctrine. Conversely, if the ICC manages to strike the right balance, it may well contribute to bringing greater legal certainty in the *jus contra bellum* and provoking a *rapprochement* between competing interpretations of the outer limits of the legal framework governing the use of force.

Given its unprecedented nature, the prosecutions of individual leaders of "crimes against the peace" proved to be one of the most controversial aspects of the Nuremberg proceedings,[32] yet it was undoubtedly also one of its main achievements. The time is ripe for the ICC to pick up the legacy of Nuremberg, reminiscent of its hard-learnt lesson that:

To initiate a war of aggression… is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[33]

Endnotes — (click the footnote reference number, or ↩ symbol, to return to location in text).

1. 1.

   Assembly of State Parties, Activation of the Jurisdiction of the Court Over the Crime of Aggression, ICC-ASP/16/Res.5 (Dec. 14, 2017), [hereinafter Activation of Jurisdiction], available online (advance version). ↩

2. 2.

   Assembly of State Parties, The Crime of Aggression, RC/Res.6 (Jun. 11, 2010), available online. ↩

3. 3.

   Rome Statute of the International Criminal Court, Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Jul. 17, 1998, UN Doc. A/CONF.183/9, as amended [hereinafter *Rome Statute*], Article 15 *bis* (5), available online. ↩

4. 4.

   Rome Statute, Article 15 *bis* (4). ↩

5. 5.

   Activation of Jurisdiction, *supra* note 1, ¶ 2. ↩

6. 6.

   Even if the ICC's jurisdiction does not operate retroactively, it is worth observing that several of the ratifying States, e.g. Spain, Belgium, or the Netherlands, have previously been involved in controversial military operations abroad, e.g., in Serbia, 1999, or Iraq, 2003. ↩

7. 7.

   Especially if the number of ratifications of the Kampala amendments were to further augment. ↩

8. 8.

   Or *jus ad bellum*. ↩

9. 9.

   This section draws, in part, on Tom Ruys, Justiciability, Complementarity and Immunity: Reflections on the Crime of Aggression, 13 Utrecht L. Rev. 18 (2017), available online. ↩

10. 10.

    Harold Hongju Koh & Todd F. Buchwald, The Crime of Agression: The United States Perspective, 109 Am. J. Int'l L. 257, 263 (2015), available online. ↩

11. 11.

    Nicholas Rostow, The International Criminal Court, Aggression and Other Matters: A Response to Koh and Buchwald, 109 Am. J. Int'l L. Unbound 230, 232 (Mar. 2, 2016), available online. ↩

12. 12.

    Erin Creegan, Justified Uses of Force and the Crime of Aggression, 10 J. Int'l Crim. Just. 59 (Mar. 1, 2012), paywall. ↩

13. 13.

    Tom Dannenbaum, Why Have We Criminalized Aggressive War?, 126 Yale L.J., 1242, 1270 (2016), available online. ↩

14. 14.

    For an excellent work on the origins and impact of the *Pact of Paris* (officially *General Treaty for Renunciation of War as an Instrument of National Policy*, 94 League of Nations Treaty Series 57 (Aug. 27, 1928), available online), see Oona A. Hathaway & Scott J. Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World (2017). ↩

15. 15.

    See, in particular, The Corfu Channel Case (*United Kingdom v. Albania*), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9, 1949), available online; Case Concerning Military and Paramilitary Activities In and Against Nicaragua (*Nicaragua v. U.S.*), Merits, Judgment, 1986 I.C.J. Rep. 14 (Jun. 27, 1986) [hereinafter *Nicaragua v. U.S.*], available online; Case concerning Oil Platforms (*Islamic Republic of Iran v. United States of America*), Judgment, 2003 I.C.J. Rep. 161 (Nov. 6, 2003), available online; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 163 (Jul. 9, 2004), available online; Case Concerning Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*), Judgment, 2005 I.C.J. Rep. 116 (Dec. 19, 2005), available online. ↩

16. 16.

    Eritrea-Ethiopia Claims Commission, Partial Award—Jus ad Bellum—Ethiopia's Claims 1-8, Decision, 26 Rep. Int'l Arbitral Awards 457 (Dec. 19, 2005), available online; Arbitral Tribunal, Award in the Arbitration Regarding the Delimitation of the Maritime Boundary Between Guyana and Suriname, 30 Rep. Int'l Arbitral Awards 1 (Sep. 17, 2007), available online. ↩

17. 17.

    Yoram Dinstein, War, Aggression and Self-Defence 132 (6th ed. 2017). ↩

18. 18.

    See Hathaway & Shapiro, *supra* note 14; also see generally, *supra* note 15. ↩

19. 19.

    See e.g., The Situation in Grenada, G.A. Res. 38/7, Nov. 2, 1983, available online (concerning the US intervention in Grenada); see further Dapo Akande, Prosecuting Aggression: The Consent Problem and the Role of the Security Council, Oxford L. Res. Paper S., Paper No. 10/2011, nt. 26 (May 2010), available online. ↩

20. 20.

    Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment, 1954 I.C.J. Rep. 19, 33 (Jun. 15, 1954), available online.

    (According to the *Monetary Gold* principle, international courts must abstain from deciding a case where the rights and obligations of the non-consenting third State form "the very subject-matter" of the case).

    Also see e.g., Akande, *supra* note 19, 17 *et seq.*

    (On the application of the principle to ICC prosecution of aggressors). ↩

21. 21.

    See Nicolaos Strapatsas, The Practice of the Security Council Regarding the Concept of Aggression, *in* The Crime of Aggression: A Commentary 178, 180-182, 201-202 (Claus Kreß & Stefan Barriga eds., 2017). ↩

22. 22.

    Save for the six month cooling period envisaged under Article 15 *bis* (7)–(8) of the *Rome Statute*. ↩

23. 23.

    As long as actual prosecutions are limited to nationals of states that have ratified the amendments. ↩

24. 24.

    That is, if both victim and aggressor have ratified the Kampala amendments. ↩

25. 25.

This sections draws, *inter alia*, from Tom Ruys, Criminalizing Aggression: How the Future of the Law on the Use of Force Rests in the Hands of the ICC, EJIL (Forthcoming 2017), available online. ↩

26. 26.

Nicaragua v. U.S., *supra* note 15, ¶ 195. ↩

27. 27.

Consider, e.g., an accidental incursion of a state's territory or airspace by troops or aircraft from a neighboring state. ↩

28. 28.

See International Criminal Court, Elements of Crimes, RC/11 as adopted Kampala (Jun. 11, 2010) [hereinafter *Elements of Crimes*], available online.

(In particular, see where it is stressed that in the context of the crime of aggression, "there is no requirement to prove that the perpetrator has made a legal evaluation as to the 'manifest' nature of the violation of the *Charter of the United Nations*." *Elements of Crimes* 43. Instead the *Elements of Crimes* require that the perpetrator "was aware of the factual circumstances that established that such a use of armed force was inconsistent with the *Charter of the United Nations*."). ↩

29. 29.

Carrie McDougall, The Crime of Aggression Under the Rome Statute of the International Criminal Court 132 (2013). ↩

30. 30.

Sean D. Murphy, Criminalizing Humanitarian Intervention, 41 Case W. Res. J. Int'l L. 341, 369 (2009), available online. ↩

31. 31.

See further Erika de Wet, The Modern Practice of Intervention by Invitation in Africa and Its Implications for the Prohibition of the Use of Force, 26 EJIL 979 (Nov. 1, 2015), available online. ↩

32. 32.

Controversy at the time focused not so much on the allegedly *political* nature of the offense, but primarily on the compliance with the non-retroactivity principle in criminal law. ↩

33. 33.

The International Military Tribunal for Germany, Judgment, 22 Nuremberg Trial Proceedings 410, 426 (Sep. 30, 1946), available online. ↩