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UNIVERSITY OF AMSTERDAM



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Kevin Jon Heller

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WHO IS AFRAID OF THE CRIME OF AGGRESSION?

KEVIN JON HELLER*

1 Introduction

Immediately after the historic adoption of the aggression amendments on 14 December 2017, a number of national representatives took to the floor of the Assembly of States Parties (ASP) and expressed their belief that activating the crime of aggression would help deter states from engaging in the illegal use of force. The Swiss delegate, for example, claimed that the crime would further “the preservation of peace and the prevention of the most serious crimes of concern to the international community as a whole.”¹ Similarly, the Bolivian delegate argued that the crime would contribute “to the prevention of the illegal use of force between States and to the prevention of wars.”² Their sunny emphasis on deterrence was neither new nor surprising. After all, the UN General Assembly had adopted Resolution 3314 four decades earlier precisely because it was “[c]onvinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor.”³

There is no question that deterring the illegal use of force is a noble goal. But will the newly-activated crime of aggression actually deter? According to Holtermann, “people will generally be deterred, at least to some degree, from engaging in behaviour that is criminalised if they are (aware that they are) threatened with punishment for so doing and if this threat is (perceived to be) credible, i.e. if there is some likelihood of detection.”⁴ Thus understood, two aspects of the crime of aggression suggest that the crime may, in fact, have some deterrent value. First, and most obviously, except for the most indirect forms of aggression where attribution might be difficult, aggressive acts take place in the open, making detection a non-issue. Second, the crime of aggression is limited to the highest-ranking political and military leaders, precisely the type of individuals who are capable of engaging in the kind of rational cost/benefit analysis that deterrence theory requires.⁵

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¹ ASP, Report on Activities and Programme Performance of the International Criminal Court for the Year 2016, ICC-ASP/16/2 (6 June 2017), at 88.

² *Ibid.*, at 89.

³ Definition of Aggression, G.A. Res. 3314 Annex (14 Dec. 1974).

⁴ J.H. Holtermann, ‘A “Slice of Cheese” – a Deterrence-Based Argument for the International Criminal Court’, 11 *Human Rights Review* (2010) 289-315, at 295; *see also* M. De Hoon, ‘The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC’s Legitimacy’, 17 *International Criminal Law Review (ICLR)* (2017) 591-614, at 601 (noting that “deterrence research has found that there is evidence of a link between the certainty of punishment and crime rates”).

⁵ J.H. Holtermann, ‘“Can I Be Brought Before the ICC?” Deterrence of Mass Atrocities Between *Jus in Bello* and *Jus ad Bellum*’, iCourts Working Paper Series No. 154 (Feb. 2019), at 16.

Those considerations, however, apply only to the crime of aggression *in abstracto*. Unfortunately, the actual crime adopted in New York is but a pale shadow of the kind of criminal prohibition capable of convincing would-aggressors that they “will be held accountable by an International Criminal Court acting in the name of all peace-loving nations.”⁶ Instead, as this article explains, the crime of aggression at the ICC is so jurisdictionally narrow, so substantively limited, and so unlikely to promote domestic prosecutions that its deterrent value is essentially nonexistent.

The article itself is divided into three sections. Section 2 focuses on the crime of aggression’s jurisdictional regime, explaining why that regime is so narrow that it is unlikely the ICC will ever prosecute anyone for aggression. Section 3 then identifies a number of aspects of the definition of the crime of aggression that limit the substantive reach of the crime, eviscerating its deterrent value. And finally, section 4 explains that although the activation of the crime of aggression may catalyze domestic criminalization, it is very unlikely to lead to national aggression prosecutions.

2 Jurisdiction

As noted above, a criminal prohibition will deter only if potential perpetrators believe that their actions might result in prosecution. Because of four interrelated limitations on the ICC’s jurisdiction over the crime of aggression, few would-be aggressors have anything to fear from the Court.

A *Non-State Parties*

The most obvious jurisdictional limitation is that the crime of aggression does not apply to non-state parties (NSPs). Art. 15*bis*(5) provides as follows:

In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.⁷

The categorical exclusion of non-state parties means that the Court’s jurisdiction over aggression is much more limited than its jurisdiction over the other *jus in bello* crimes.⁸ The Court is normally capable of exercising two different kinds of jurisdiction over crimes involving an NSP: territorial, when an NSP commits a crime on territory of a state party (SP)⁹; and nationality, when an SP commits a crime on the territory of an NSP.¹⁰ Because of Paragraph 5, however, the Court

⁶ B. Ferencz, ‘Enabling the International Criminal Court to Punish Aggression’, 6 *Washington University Global Studies Review* (2007) 551-566, at 566

⁷ Art. 15*bis*(5) ICCSt.

⁸ For clarity, and following Holtermann, I will collectively refer to war crimes, crimes against humanity, and genocide as “*jus in bello*” crimes, emphasizing their structural difference from the crime of aggression. See Holtermann, *Mass Atrocities*, *supra* note 5, at 5.

⁹ Art. 12(2)(a) ICCSt.

¹⁰ *Ibid.*, Art. 12(2)(b).

has no jurisdiction whatsoever over an act of aggression committed by an NSP against an SP or by an SP against an NSP.

Jus ad bellum and *jus in bello* crimes, of course, are not committed in isolation from each other. As the IMT pointed out 75 year ago, aggression is the “supreme international crime” precisely because “it contains within itself the accumulated evil of the whole.”¹¹ The ICC’s crime of aggression makes a mockery of that insight, creating a situation in which the Court is able to prosecute a war crime, crime against humanity, or act of genocide that results from an act of aggression but is prohibited from prosecuting the act of aggression itself.

To be sure, many states resisted Art. 15*bis*(5) precisely because of how it bifurcates the Court’s jurisdiction over *jus ad bellum* and *jus in bello* crimes. At Kampala for example, Japan protested (what became) Paragraph 5’s “blanket and automatic impunity of nationals of non-States Parties,” describing that impunity – correctly – as “a clear departure from the basic tenet of article 12.”¹² It seems likely, however, that categorically excluding NSPs from the crime of aggression was the price of consensus both at Kampala and in New York.¹³ Regardless, the upshot of Paragraph 5 is that the ICC’s crime of aggression has zero deterrent value either for an NSP contemplating an attack on an SP or for an SP contemplating an attack on an NSP.

B Aggressor State-Parties

The jurisdictional regime for the crime of aggression is limited in a second important way: the Court has no jurisdiction over an aggressive act committed by an SP that has not ratified the aggression amendments –not even when the victim is a SP and has itself ratified the amendments.

Whether the Court should have jurisdiction over non-ratifying SPs was the most disputed issue during the drafting of the aggression amendments. The controversy focused on the interpretation of Art. 121(5) of the Rome Statute, which governs amendments to the substantive provisions of Art. 5:

Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

¹¹ IMT, Judgment of 1 October 1946, in 22 *The Trial of German Major War Criminals* (1946), at 13.

¹² A. Zimmermann, ‘Amending the Amendment Provisions of the Rome Statute’, 10 *Journal of International Criminal Justice (JICJ)* (2012) 209-227, at 221.

¹³ See, e.g., M. Politi, ‘The ICC and the Crime of Aggression: A Dream that Came Through and the Reality Ahead’, 10 *JICJ* (2012) 267-288, at 277.

States were bitterly divided both at Kampala and in New York over how Art. 121(5) applied to crime of aggression. One camp, led by the UK and France, believed that both sentences in the provision applied to the aggression amendments. This was the “negative understanding” of Art. 121(5).¹⁴ The other camp, led by Liechtenstein and Switzerland, believed that only the first sentence in the provision applied. This was the “positive understanding.”¹⁵

The debate was anything but academic, because the answer determined whether SPs that did not ratify the aggression amendments had to file the opt-out declaration mentioned in Art. 15*bis*(4) in order to divest the Court of jurisdiction over their acts of aggression. Here is the text of the provision:

The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar.

All states agreed that a SP that ratified the aggression amendments and then filed an opt-out declaration would be in the same position as an NSP – completely outside of the Court’s aggression jurisdiction. The issue was whether a SP could ensure that it was in the same position as an NSP simply by refusing to ratify the aggression amendments. According to the negative understanding, which emphasized the second sentence in Art. 121(5), filing an Art. 12 declaration was unnecessary. According to the positive understanding, which insisted that the second sentence did not apply to the aggression amendments, opting out was the only way a non-ratifying SP could avoid the Court’s territorial jurisdiction over aggression.

In the end, the Negative Understanding prevailed. In the final hour of the negotiations in New York, the ASP adopted a Resolution by consensus that contained the following Operative Paragraph 2:

[T]he 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 these amendments.¹⁶

Operative Paragraph 2 means that, in terms of acts of their own acts of aggression, there is no difference between an NSP, an SP that ratifies the aggression amendments and files an Art. 12 declaration, and a SP that does not ratify the aggression amendments. None are subject to the Court’s territorial jurisdiction, even where the victim of an act of aggression is a SP that has ratified

¹⁴ See J. Trahan, ‘From Kampala to New York – The Final Negotiations to Activate the Jurisdiction of the International Criminal Court over the Crime of Aggression’, 18 *ICLR* (2018) 197-243, at 205.

¹⁵ See *ibid.*, at 207-08.

¹⁶ ASP, Res. RC/Res.6* (11 June 2010), para. 2.

the aggression amendments.¹⁷ This is yet another deviation from the jurisdictional regime that applies to *jus in bello* crimes¹⁸ – and, of course, it means that the crime of aggression has zero deterrent value for states in all three categories.

C *Victim State-Parties*

The third jurisdictional limitation reducing the deterrent value of the crime of aggression concerns victim SPs. Even if an SP has ratified the aggression amendments and not filed an Art. 12 declaration, the Court will have jurisdiction over that SP's act of aggression only if the victim SP has also ratified the aggression amendments. That follows from the second sentence of Art. 121(5):

In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals *or on its territory*.

This is an important limitation. Consider, for example, the very real threat of a US-led coalition invading Venezuela to remove Nicolas Maduro from power. A number of Latin American states that might participate in such an invasion – most notably Argentina, Chile, and Panama – have ratified the aggression amendments and not filed an Art. 12 declaration. The crime of aggression nevertheless has no deterrent value for such states, because Venezuela has not ratified the amendments.

Barring a Security Council referral, in short, there is only one situation in which the Court will ever have jurisdiction over an act of aggression: namely, where (1) the aggressor is an SP, has ratified the aggression amendments, and has not filed an Art. 12 declaration; and (2) the victim is an SP that has ratified the aggression amendments. Even a cursory glance at the list of 38 states that have ratified the amendments to date¹⁹ makes clear that the Court is very unlikely to actually

¹⁷ It is worth noting that Operative Paragraph 3 in the Resolution “reaffirms... the judicial independence of the judges of the Court.” A number of states expressed the hope in New York – some openly, others behind closed doors – that the judges will rely on Operative Paragraph 3 to re-inscribe the Positive Understanding in Art. 15*bis*. See C. McDougall, ‘Introductory Note to Report on the Facilitation on the Activation of the Jurisdiction of the International Criminal Court over the Crime of Aggression’, 57 *International Legal Materials* (2018) 513-515, at 515. McDougall is almost certainly correct, though, that “it is difficult to see OP 2 being disregarded, given that it falls squarely within the definition of a ‘subsequent agreement’ to be taken into account in the interpretation of a treaty under Article 31(3)(a) of the VLCT.” *Ibid.*, at 514.

¹⁸ As Zimmermann notes, “[i]t is similarly obvious, and almost a banality, that a ‘negative understanding’ of Article 121(5) ICC Statute constitutes an exception to the jurisdictional system underlying Article 12 ICC Statute.” Zimmermann, *Amending*, *supra* note 12, at 218.

¹⁹ For the current list of ratifying states, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&lang=en.

prosecute someone for aggression anytime soon.²⁰ The most powerful state to ratify as is clearly Germany – perhaps the powerful state *least* likely to ever commit an act of aggression.

This exceptionally narrow jurisdictional regime, of course, does not apply to Security Council referrals.²¹ The Council can refer any situation involving an act of aggression to the Court – even one committed by an NSP or by an SP that has either not ratified the aggression amendments or ratified and filed an Art. 12 declaration. In principle, the existence of Security Council referrals should increase the deterrent value of the crime of aggression. In practice, however, the effect will be *de minimis* at best: the existence of the permanent veto essentially forecloses the possibility that the Council will ever refer an act of aggression committed by the P5 or by one of their allies.²² Any actual Security Council referral for aggression will thus undoubtedly involve a weak, friendless state in the Global South that invades one of its even weaker but more popular neighbours – a serious and perhaps criminal act, but not exactly the kind of situation champions of the crime of aggression had in mind.²³

Even worse, because the jurisdictional limits in Art. 15*bis* do not apply to Security Council referrals, the activation of the crime of aggression may actually make it less likely that the Security Council will refer situations to the Court involving war crimes, crimes against humanity, or genocide – thereby reducing the deterrent effect of the Rome Statute generally. Art. 13(b) refers to situations and not to individual crimes,²⁴ which means that the Security Council almost certainly cannot refer a situation to the Court involving *jus in bello* crimes without leaving open the possibility that the Prosecutor will also investigate and prosecute acts of aggression.²⁵ That possibility, as Zimmermann perceptively notes, creates an unenviable dilemma for a member of the P5 that generally supports a referral but is concerned about the legality of its own use of force: the state can either support the referral in the hope that the Prosecutor will not prosecute its leaders for aggression or veto the referral out of an abundance of caution. Faced with such a choice, it is reasonable to assume that the latter option will often – if not usually – appear more desirable.

Consider, for example, atrocities in Syria. In 2014, the US explicitly supported a motion referring the Syrian situation to the ICC.²⁶ That was a “costless” decision

²⁰ Zimmermann agrees. See A. Zimmermann, ‘A Victory for International Rule of Law? Or: All’s Well that Ends Well? The 2017 ASP Decision to Amend the Kampala Amendment on the Crime of Aggression’, 16 *JICJ* (2018) 19-29, at 27-28.

²¹ T. Lavers, ‘The New Crime of Aggression: A Triumph for Powerful States’, 18 *Journal of Conflict & Security Law* (2013) 499-522, at 501-02.

²² Trahan, *supra* note 14, at 206.

²³ See Ferencz, *supra* note 6, at 566.

²⁴ Art. 13(b) provides that “[t]he Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if... [a] *situation* in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council” (emphasis added).

²⁵ Zimmermann, Victory, *supra* note 20, at 29.

²⁶ See <https://www.un.org/press/en/2014/sc11407.doc.htm>.

on the US's part, because the Court did not yet have jurisdiction over the crime of aggression. Now that it does, would the US still support a Syria referral despite the questionable legality of its "defensive" attacks on Syrian targets in 2017 and 2018? Zimmermann is skeptical²⁷ – and understandably so, given the US's infamously hostile response to the Afghanistan investigation.

D *The Perverse Incentive to Ratify and Opt-Out*

Finally, it is worth noting that the aggression amendments actually provide SPs with a perverse incentive to ratify the amendments and then file an Art. 12 declaration opting-out of the crime. If a SP does not ratify the aggression amendments, it cannot be prosecuted for committing aggression but is also not protected against other SPs committing aggression against it. If the SP ratifies the aggression amendments but does not file an Art. 12 declaration, it will be protected against aggression but will also be subject to being prosecuted for its own aggressive acts. The most rational choice, therefore, is for the SP to ratify the aggression amendments and then file an Art. 12 declaration. Opting-out deprives the Court of jurisdiction over any aggressive act that it commits against another SP that has ratified the aggression amendments. But it does *not* deprive the Court of jurisdiction over aggressive acts other (ratifying) SPs commit against it, as Art. 15*bis*(4) makes clear:

The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from *an act of aggression committed by a State Party*, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar.

Notice that Paragraph 4 does not exclude from the Court's jurisdiction acts of aggression committed *on the territory* of a SP that has ratified the aggression amendments and filed an Art. 12 declaration. The declaration only applies to acts of aggression committed by the SP's nationals.

Every SP has this incentive to ratify the aggression amendments and file an Art. 12 declaration. If all SPs are rational, therefore, we will eventually reach the point where every SP is protected against aggression but cannot be prosecuted for committing it. The deterrent value of the crime of aggression in that situation would, of course, be precisely zero. And even if not all SPs act rationally, whatever number of SP do ratify and opt out will reduce aggression's deterrent value accordingly.

3 Substantive Definition

The exceptionally restrictive jurisdictional regime described above is enough to consign the crime of aggression to irrelevance. It is nevertheless important to discuss four aspects of the substantive definition of aggression – Art. 8*bis* of the Rome Statute – that exclude large numbers of perpetrators and aggressive acts

²⁷ Zimmermann, Victory, *supra* note 20, at 29.

from the crime, thereby further reducing whatever deterrent value it might still have.

A Limited to Conflict Between States

To begin with, as Art. 8bis(2) makes clear, the crime of aggression can only be committed between two states:

For the purpose of paragraph 1, “act of aggression” means 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.

The state-centric definition of the crime of aggression categorically excludes aggression-like acts committed in non-international armed conflict – whether by government forces or by a non-state actors (NSA).²⁸ That exclusion is not surprising, given that aggression has always been understood – from the UN Charter to Res. 3314 – in inter-state terms. As Ambos rightly points out, however, “international criminal law’s human-oriented approach, focusing on individual criminal responsibility, strongly suggests the inclusion of non-State actors” within aggression’s purview.²⁹ Moreover, and more importantly for this article, the overwhelming majority of armed conflicts in the world are now non-international, not international.³⁰ Whatever deterrent value the crime of aggression might have is thus limited to the kind of conflict that has become, in the words of the RAND corporation, an “increasingly rare” event.³¹

To be sure, because it based on Res. 3314, the crime does include *indirect* aggression – “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed [in the Resolution], or its substantial involvement therein.”³² In a different jurisdictional world, ICC prosecutions of indirect aggression might help deter states from supporting the actions of NSAs. Unfortunately, “sending” an NSA is a largely obsolete category, requiring a state to be directly responsible for the NSA’s actions,³³ and “substantial involvement” is a very restrictive standard.³⁴ Indeed, in the

²⁸ K. Ambos, ‘The Crime of Aggression after Kampala’, 53 *German Yearbook of International Law* (2010) 463-509, at 488. Acts by NSAs would also be excluded by the leadership requirement, which limits aggression to individuals “in a position effectively to exercise control over or to direct the political or military action of a State” (emphasis added). Politi has bemoaned that “gap” in the definition of aggression. See Politi, *supra* note 13, at 286.

²⁹ *Ibid.*

³⁰ See PRIO, Trends in Armed Conflict: 1946-2018 (2018), at 3, available at <https://www.prio.org/utility/DownloadFile.ashx?id=1830&type=publicationfile>

³¹ RAND Corporation, *What Are the Trends in Armed Conflicts, and What Do They Mean for U.S. Defense Policy?* (2017), at 3, available at https://www.rand.org/pubs/research_reports/RR1904.html.

³² Res. 3314, Art. 3(g).

³³ T. Ruys, *‘Armed Attack’ and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press, 2010), at 388.

³⁴ *Ibid.*, at 389,

Nicaragua case, the ICJ held (controversially³⁵) that “substantial involvement” is akin to “effective control,” thus requiring more than the mere “provision of weapons or logistical or other support.”³⁶ It is thus unlikely that even legally problematic relationships such as Iranian support for the Houthi in Yemen or American support for the Free Syrian Army in Syria qualify as indirect aggression.

B Limited to Leaders

Art. 8*bis*(1) also greatly circumscribes the potential perpetrators of aggression, limiting the crime to individuals “in a position effectively to exercise control over or to direct the political or military action of a State.” From a deterrence perspective, the leadership requirement is problematic in a number of respects. Most obviously, it means that the crime of aggression has no deterrent value for anyone who cannot be said to “control or direct” a state’s political or military action – by definition a much larger group of individuals than the group that satisfies the leadership requirement.

The leadership requirement in Art. 8*bis*(1) is also much more restrictive than the leadership requirement adopted by the Nuremberg Military Tribunals (NMTs) in the wake of WW II – the tribunals that first held that only leaders can be held criminally responsible for aggression.³⁷ The most specific elaboration of the leadership requirement came in the *High Command* case, where the tribunal held that “[i]t is not the person’s rank or status, but his power to *shape or influence* the policy of his State, which is the relevant issue for determining his criminality under the charge of crimes against peace.”³⁸ The *Ministries* tribunal agreed, convicting Paul Koerner, Goering’s Deputy and Plenipotentiary for the Four Year Plan, of planning and preparing aggressive wars because “the wide scope of his authority and discretion in the positions he held... enabled him to shape policy and influence plans and preparations of aggression.”³⁹ In fact, the *Ministries* tribunal specifically rejected the higher “control” standard urged by counsel for Ernst von Weizsäcker, the State Secretary of the German Foreign Office, when it convicted him for his role in the invasion of Bohemia and Moravia. According to the tribunal, von Weizsäcker’s role in shaping the invasion justified his conviction even though he “did not originate this invasion, and... his part was not a controlling one.”⁴⁰

³⁵ L. Moir, ‘Action Against Host States of Terrorist Groups’, in M. Weller et al. (ed.), *The Oxford Handbook on the Use of Force in International Law* (Oxford University Press, 2015) 720-736, at 722.

³⁶ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgment of 26 November 1984, [1984] I.C.J. Rep. 392, para. 195.

³⁷ See Opinion and Judgment, *United States v. Krauch et al. (Farben)*, 8 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1952), at 1126 (“Individuals who plan and lead a nation into and in an aggressive war should be held guilty of crimes against peace, but not those who merely follow the leaders.”).

³⁸ *United States v. von Leeb et al. (High Command)*, 11 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1950), at 489 (emphasis added).

³⁹ *United States v. von Weizsäcker et al. (Ministries)*, 14 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (1949), at 425.

⁴⁰ *Ibid.*, at 354. Von Weizsäcker’s aggression conviction was later overturned on other grounds.

In terms of deterrence, the difference between the “control or direct” standard and the “shape or influence” standard is very significant. By definition, more individuals within government or the military are able to shape or influence state policy than are able to control or direct it. Moreover, as I have explained in detail elsewhere,⁴¹ the “control or direct” standard excludes two important categories of perpetrators from the crime of aggression that the “shape or influence” standard does not. The first includes private economic actors, such as industrialists and bankers. Economic actors can clearly shape or influence an act of aggression, but it is difficult to imagine a modern situation in which they can “control or direct the political or military action of a state,” given the ILC’s insistence that control “refers to cases of domination over the commission of wrongful conduct and not simply the exercise of oversight, still less mere influence or concern,” while directs “does not encompass mere incitement or suggestion but rather connotes actual direction of an operative kind.”⁴²

The exclusion of private economic actors would not be problematic if individuals who do not satisfy the leadership requirement could be convicted of aiding and abetting or otherwise contributing to a criminal act of aggression. Unfortunately, such secondary liability is prohibited by Art. 25(3)*bis*, which specifically provides that “[i]n respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.” Art. 25(3)*bis* thus permits secondary liability *among* leaders, but excludes it for everyone else.⁴³

The second category of excluded perpetrators includes political or military leaders of “third” states who facilitate another state’s act of aggression. Third-state leaders can satisfy the “shape or influence” standard – obvious historical examples include the US’s authorization of Indonesia’s invasion of East Timor⁴⁴ and South Africa’s collusion in Southern Rhodesia’s repeated acts of aggression toward Zambia.⁴⁵ But it will be the rare situation indeed in which such leaders can be said to “control or direct the political or military action” of the state that actually commits the aggressive act. That kind of dominion is likely to exist only when a superpower uses a client state to fight a proxy war – a situation that certainly existed during the Cold War, but is extremely uncommon now.⁴⁶

To be sure, it is possible that third-state leaders could be convicted as accessories to a criminal act of aggression, given that Art. 25(3)*bis* textually limits secondary liability to leaders of “a state” – not to the leaders of the state that commits the act of aggression. I disagree with that interpretation of Art.

⁴¹ See K.J. Heller, ‘Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression’, 18 *European Journal of International Law (EJIL)* (2007) 477–497.

⁴² ILC, Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art. 17, para. 7

⁴³ See Ambos, *supra* note 28, at 491.

⁴⁴ See W. Schabas, ‘The Unfinished Work of Defining Aggression: How Many Times Must the Cannonballs Fly, Before They Are Forever Banned?’, in D. McGoldrick et al. (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 123-142, at 137.

⁴⁵ See SC Res. 455 (1979), para. 2.

⁴⁶ See Heller, *supra* note 41, at 492-93.

25(3)*bis*, for reasons explained elsewhere.⁴⁷ But even if I'm wrong, the mere existence of ambiguity is enough to limit Art. 25(3)*bis*'s deterrent value: a third-state leader thinking about facilitating another state's act of aggression would not only have to fear being selected for prosecution, he or she would also have to be convinced that the Court would find conviction legally possible. The unlikelihood of the former, combined with the uncertainty of the latter, means that the leader would almost certainly not be deterred by the mere existence of the crime of aggression.

A number of states recognized the limits of the "control or direct" standard and advocated for a more expansive leadership requirement during the drafting of (what became) Art. 8*bis*.⁴⁸ Some specifically endorsed the "shape or influence" standard, while others wanted to change the requirement's wording. Cuba, for example, introduced a proposal that would have extended the definition of leader to include all persons "in the position of effectively controlling or directing the political, *economic*, or military actions of a State."⁴⁹ Any of those proposals would have increased the deterrent value of the crime of aggression, making the adoption of the "control or direct" standard another example of an opportunity missed.

C Limited to "Armed Force"

Art. 8*bis*(2) further limits acts of aggression to those that involve "the use of armed force," thus excluding from the crime any seemingly aggressive act that does not involve the use of arms. That may seem like an obvious exclusion, given that the Cold War debate over whether economic coercion can violate Art. 2(4) of the UN Charter has long since been resolved in the negative. As Ophardt points out, however, the "armed force" requirement almost certainly means that no act of cyberwarfare can qualify as an act of aggression.⁵⁰ That is a puzzling restriction not only because such acts are capable of causing "catastrophic damage well beyond that resulting from a threshold traditional weapons attack,"⁵¹ but also because it is easy to imagine a situation in which a classic kinetic act of aggression – such as an invasion – begins with a series of cyberattacks. Why should political and military leaders evade criminal responsibility simply because they can show that their participation in the aggressive act was limited to the virtual world? After all, it is precisely preparatory acts that the crime of aggression seeks to deter.

D Limited to "Manifest" Violations

Finally, Art. 8*bis*(1) criminalizes an act of aggression only if, "by its character, gravity and scale," it "constitutes a manifest violation of the Charter of the United

⁴⁷ *Ibid.*, at 495-96.

⁴⁸ *Ibid.*, at 489.

⁴⁹ Proposal Submitted by Cuba, ICC-ASP/2/SWGCA/DP.1 (4 Sept. 2003).

⁵⁰ J.A. Ophardt, 'Cyber Warfare and the Crime of Aggression: The Need for Individual Accountability on Tomorrow's Battlefield', 2010 *Duke Law & Technology Review* (2010) i-xxvii, at para. 35.

⁵¹ *Ibid.*

Nations.” Although the manifest-violation requirement indicates that not every violation of Art. 2(4) should be considered criminal, what distinguishes a “manifest” violation from a “non-manifest” one is notoriously uncertain. Paulus, for example, says that the requirement “seems to have little meaning of its own” – and adds that although the “gravity and scale” criteria help explain the requirement, because they “point to the extent of an armed attack and thus exclude mere border incursions of the type frequent in anti-terrorist warfare beyond borders,” the critical “character” criterion “is so indeterminate that it is almost meaningless.”⁵² Indeed, it is not even clear whether an aggressive act must satisfy all three criteria to qualify as a “manifest violation” of Art. 2(4); two of the three may be enough.⁵³

As Kress has pointed out, the drafting history of Art. 8bis(1) indicates that the manifest-violation requirement was designed to ensure that the crime of aggression excludes “legally controversial” uses of force.⁵⁴ That intention, however, simply begs the critical question: which aggressive uses of force are so legally controversial that they should not be considered criminal?

Examining the relevant scholarship leaves the impression that the manifest-violation requirement serves as little more than a Rorschach inkblot, allowing scholars to exclude from the crime of aggression whatever specific uses of force they happen to personally approve of. The most popular exception is unilateral humanitarian intervention (UHI). For example, Van Schaack insists that “a military operation that may have violated Article 2(4) of the U.N. Charter as a technical matter might not be deemed to constitute an act of aggression by virtue of the fact that it ultimately improved the situation on the ground by protecting civilians,”⁵⁵ even though she openly acknowledges that the ASP rebuffed multiple US attempts to specifically exclude UHI from the crime of aggression.⁵⁶ Kress agrees, arguing that is precisely the existence of “genuine debate” over the legality of UHI that means it cannot be considered criminal.⁵⁷

UHI is not the only controversial use of force that scholars believe should be excluded from the crime of aggression on the ground that it does not “manifestly” violate the UN Charter. Additional nominees include anticipatory self-defense (against attacks that are not imminent)⁵⁸; self-defense against NSAs pursuant to the “unwilling or unable” standard⁵⁹; and even the use of force to

⁵² A. Paulus, ‘Second Thoughts on Aggression’, 20 *EJIL* (2009) 1117–1128, at 1121.

⁵³ See R. Heinsch, ‘The Crime of Aggression After Kampala: Success or Burden for the Future?’, 2 *Goettingen Journal of International Law* (2010) 713–743, at 728–29.

⁵⁴ See C. Kress, ‘Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus’, 20 *EJIL* (2009) 1129–1146, at 1138; Heinsch, *supra* note 53, at 730.

⁵⁵ B. Van Schaack, ‘The Crime of Aggression and Humanitarian Intervention on Behalf of Women’, 11 *ICLR* (2011) 477–493, at 484–85.

⁵⁶ *Ibid.*, at 482.

⁵⁷ Kress, Response, *supra* note 54, at 1140.

⁵⁸ See, e.g., E. Creegan, ‘Justified Uses of Force and the Crime of Aggression’, 10 *JICJ* (2012) 59–82, at 73.

⁵⁹ See, e.g., *ibid.*, at 74.

restore a democratically-elected government to power following a military coup.⁶⁰

None of the scholars who focus on “excluded” uses of force has articulated a workable standard for distinguishing between manifest and non-manifest violations of Art. 2(4). Indeed, only one has even tried: Kress, who argues that a controversial use of force cannot be considered criminal “as long as a reasonable international lawyer may hold the opposite view.”⁶¹ But not only is reasonableness in the eye of the beholder,⁶² it is unclear why the criminality of a particular use of force should be determined by the views of international lawyers instead of by the views of states. The latter, not the former, make international law. So while Kress may believe that the legality of UHI is open to “genuine debate,” state practice indicates otherwise: only two states (the UK and Denmark) have ever affirmed the legality of UHI, while more than 120 (including the entire Non-Aligned Movement) have just as consistently insisted that it is unlawful.⁶³ Moreover, UHI cannot even *plausibly* be described as self-defense – unlike anticipatory uses of force and the use of force in unwilling or unable situations. UHI thus seems to be the most manifest violation of the UN Charter imaginable.

For purposes of this article, it is not necessary to precisely identify what distinguishes a manifest violation from a non-manifest one. The point is that the manifest-violation requirement itself reduces the deterrent value of the crime of aggression. Most obviously, the crime will not deter any use of force that is a non-manifest violation.⁶⁴ That may be a good or bad thing, depending on your view of the use of force in question, but the effect of exclusion is undeniable. And

⁶⁰ See, e.g., *ibid.*, at 80.

⁶¹ Kress, Response, *supra* note 54, at 1141.

⁶² It is always possible to find a “reasonable” international lawyer who defends a particular use of force. Consider Israel’s proposed “defensive annexation” of the Golan Heights: although the illegality of any kind of annexation would seem to be one of the best established prohibitions in international law, a respected (if controversial) international law-scholar, Eugene Kontorovich, has argued that defensive annexation is lawful. See R. Ahren, ‘Did Netanyahu Just Endorse the Acquisition of Territory by Force?’, *Times of Israel* (28 Mar. 2019), available at <https://www.timesofisrael.com/did-netanyahu-just-endorse-the-acquisition-of-territory-by-force/>. Does Kontorovich’s willingness to take that position mean that the ICC could not prosecute an act of defensive annexation? Kress’s standard suggests an affirmative answer to that question – indicating that, taken seriously, the “reasonable international lawyer” standard would essentially denude the crime of aggression of all content.

⁶³ See K.J. Heller, ‘Koh, Trump, Obama – and Jean Baudrillard (Part 2)’, *Opinio Juris* (22 Feb. 2018), available at <http://opiniojuris.org/2018/02/22/symposium-koh-trump-obama-and-jean-baudrillard-part-1/>.

⁶⁴ Oddly, Kress seems to believe this is a selling point of the crime of aggression. In his view, “[o]nce states can be confident that the Court will not exercise its jurisdiction over the crime of aggression in these grey legal areas, it may be hoped that the number of ratifications will increase significantly.” C. Kress, ‘On the Activation of ICC Jurisdiction over the Crime of Aggression’, 16 *JICJ* (2018) 1-17, at 16-17. If Kress is correct, that simply means willingness to ratify the aggression amendments is positively correlated with the general impotence of the crime – hardly cause for celebration.

of course, the greater the number of non-manifest uses of force, the lower the deterrent value of the crime.⁶⁵

Equally importantly, the very uncertainty concerning the meaning of the manifest-violation requirement undermines the crime of aggression's deterrent effect. De Hoon has argued that leaders responsible for a state's aggressive act normally perceive that act as "legal or at least legitimate, because it responded to a violated right or was necessary for one or another essential value."⁶⁶ If she is right, no crime of aggression – not even one whose definition is perfectly clear – may be able to deter. At a minimum, though, the tendency of leaders to see their cause as just indicates that they will not be deterred by any prohibition of aggression that does not clearly and unequivocally criminalize their actions. If it is at all possible for them to rationalize a potentially aggressive act as legal, they will – and will thus commit the aggressive act.

To be sure, jurisprudence could eliminate, or at least reduce, ambiguity in this and other areas. A number of scholars have emphasized the need for the ICC's judges to weigh in on issues such as the meaning of the manifest-violation requirement.⁶⁷ The problem is that they are unlikely to get the opportunity to do so: as discussed above, the jurisdictional regime is so narrow that it is reasonable to assume the Court will never actually prosecute a case involving the crime of aggression. Ambiguities will thus stay ambiguous for the foreseeable future – and will continue to depress the crime's deterrent value.

4 Complementarity and National Prosecutions

In theory, the failure of the ICC to provide a credible deterrent could be compensated for by national prosecution of aggression.⁶⁸ It is also possible that the activation of the Court's jurisdiction over the crime of aggression could, via the principle of complementarity, catalyze national efforts at accountability. Unfortunately, there is reason to be skeptical on both counts.

Prior to the first Review Conference in Kampala, states demonstrated little interest in the crime of aggression. There have been no national prosecutions for aggression since the period immediately following WW II.⁶⁹ Moreover, as of 2010, only two dozen states had even criminalized some version of aggression

⁶⁵ As Paulus notes, "the definition would allow the Court not to prosecute any of these cases, thus limiting 'manifest' violations to the most egregious cases, such as Saddam Hussein's attack against Kuwait in 1990. But this would almost certainly leave the definition a dead letter." Paulus, *supra* note 52, at 1124.

⁶⁶ De Hoon, *supra* note 4, at 601-02.

⁶⁷ See, e.g., Van Schaack, Women, *supra* note 55, at 847; Heinsch, *supra* note 53, at 728.

⁶⁸ See J. Veroff, 'Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward', 125 *Yale Law Journal* (2015) 730-772, at 755 (noting that "[w]ithout domestic prosecutions, many acts of aggression could go unpunished, undercutting the deterrent effect that originally motivated the ASP to include aggression in the Rome Statute").

⁶⁹ B. Van Schaack, 'Par in Parem Imperium Non Habet: Complementarity and the Crime of Aggression', 10 *JICJ* (2012) 133-164, at 144.

domestically – and most of those were states in Eastern Europe and Central Asia who had experienced Nazi aggression first-hand.⁷⁰

The ICC's negotiations over the crime of aggression seem to have had some catalytic effect on domestic criminalization. Sayapin estimates that 42 states have now incorporated some version of aggression into their penal codes⁷¹ – which means that almost as many states have criminalized aggression in the past eight years (18) as did so in the first six decades after Nuremberg (24). That is a notable development, because the international community has always been ambivalent about the desirability of national aggression prosecutions. For example, although Art. 8 of the 1996 Draft Code of Offences Against the Peace and Security of Mankind called upon states to domestically criminalize the *jus in bello* crimes, it encouraged states to avoid claiming jurisdiction over aggression unless they were prosecuting their own nationals.⁷² Similarly, two of the Understandings adopted in Kampala seem to discourage states from criminalizing and prosecuting aggression domestically.⁷³ Here is the text of Understandings 4 and 5:

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

These Understandings might not have been necessary, because even increased criminalization is unlikely to lead to a resurgence of national aggression prosecutions. The various obstacles to successfully prosecuting another state's leader are simply too daunting for the (overall) threat of national prosecution to serve as an effective deterrent to aggression.

Five obstacles are worth briefly mentioning. The first is jurisdiction: of the 42 states that criminalize aggression, only one (Romania) provides for universal jurisdiction over the crime; the others can only prosecute acts of aggression committed on their territory (territorial jurisdiction), by their nationals (active nationality jurisdiction), and/or that affect their national security (protective jurisdiction).⁷⁴ 42 states protecting themselves against aggression is not nothing

⁷⁰ See *ibid.*, at 137.

⁷¹ S. Sayapin, *The Crime of Aggression in International Law* (Asser Press, 2014), at 202.

⁷² See Report of the International Law Commission on the Work of its Forty-Eighth Session, GAOR 51st Sess., Suppl. No. 10, UN Doc. A/51/10, at 27.

⁷³ Van Schaack, *Complementarity*, *supra* note 69, at 135.

⁷⁴ *Ibid.*, at 142-43.

from a deterrence standpoint, but the fact remains that barely 20% of the world's states are even *capable* of bringing an aggression prosecution – and only one of those can prosecute aggression in which it is neither victim nor perpetrator.

Second, when they involve foreign government officials, national aggression prosecutions raise significant issues of immunity. Most obviously, at least some of the leaders potentially responsible for an act of aggression – at a minimum, the Head of State or Government and the Minister of Foreign Affairs – will enjoy immunity *ratione personae* and be immune from prosecution as long as they remain in office.⁷⁵ It is also possible that *all* of the leaders will be immune from prosecution because of immunity *ratione materiae*. A complete analysis of whether aggression falls into the traditional international-crime exception to functional immunity is beyond the scope of this article. Suffice it to note here that, in her Fifth Report, the ILC's Special Rapporteur on the immunity of state officials took the position that customary international law has not yet excluded the crime of aggression from functional immunity.⁷⁶ If she is correct, aggression can only be prosecuted domestically when the defendant is a former official of the prosecuting state – a highly unlikely situation.

Third, a number of states define aggression far more narrowly than the Rome Statute, restricting the number of aggressive acts they can prosecute (and thus potentially deter). Sayapin's research, for example, indicates that at least 12 of the 42 states whose penal codes include aggression adopt what he calls the "Nuremberg and Tokyo model" – criminalizing only "wars" of aggression and thereby excluding all of the lesser uses of force in Res. 3314.⁷⁷

Fourth, states will find it very difficult to obtain suspects and evidence when they attempt to prosecute foreign government officials for aggression. An aggressor state is highly unlikely to extradite one of its nationals to face aggression charges, which will normally be fatal to the victim state's prosecution.⁷⁸ Moreover, even if the aggressor state is willing to cooperate with the victim state, it will almost certainly refuse to produce any evidence that is classified or covered by executive privilege⁷⁹ – precisely the kind of evidence that is particularly critical in an aggression prosecution, given that the crime focuses on a government's internal decision-making processes.

Fifth, and perhaps most obviously at all, even if legally possible, very few states will have the political will to prosecute foreign government officials for the crime of aggression:

⁷⁵ See, e.g., ILC, Special Rapporteur Concepcion Escobar Hernandez, Fifth Report on the Immunity of State Officials from Foreign Criminal Jurisdiction, UN Doc. A/CN.4/701 (14 June 2016), Annex 1, Draft Art. 3, at 96.

⁷⁶ *Ibid.*, at 87-88, para. 222.

⁷⁷ See Sayapin, *supra* note 71, at 203-05.

⁷⁸ Veroff, *supra* note 68, at 757.

⁷⁹ Van Schaack, Complementarity, *supra* note 69, at 153.

While the domestic prosecution of all international crimes may strain international relations, prosecuting the crime of aggression domestically in situations other than following a change of regime will inevitably generate intense charges of politicization from within and outside the prosecuting state. Domestic aggression cases will no doubt exacerbate relations between states involved in situations already disrupted by a putative act of aggression. Third states will inevitably take sides, and retaliatory charges in the nature of “lawfare” may be levelled against the officials of the charging state.⁸⁰

To be sure, powerful states will be better able to resist these pressures than weak states. Powerful states, however, tend to be the *authors* of aggression, not its victims – which means that, when an act of aggression has occurred, it will almost always be a weak state that wants to prosecute government officials from a powerful state. Very few weak states will be willing and able to act on that desire.

5 Conclusion

If certainty of punishment is the key to deterrence, it is impossible to avoid the depressing conclusion that the ICC’s newly-activated crime of aggression has no deterrent value at all. As this article has explained, because of the crime’s jurisdictional and substantive limitations, it is very unlikely that the Court will ever prosecute someone for aggression. And although the principle of complementarity has seemingly encouraged domestic criminalization of aggression, national aggression prosecutions face so many obstacles – legal and political – that the likelihood we will ever witness one is vanishingly small.

That does not mean, of course, that the Rome Statute would be better off without Art. 8*bis*. As Ruys has noted, “[a]t least symbolically, the full activation of the ICC jurisdiction over the crime of aggression [is] a defining moment in the development of the international legal order, completing a process that was started in Versailles at the end of the First World War and which reached its point of no return at the 2010 Kampala Review Conference.”⁸¹ Nevertheless, danger abounds – particularly the danger that the activation of aggression will lead victims (state and individual) to assume that the era of impunity for aggression is coming to an end.⁸² Nothing could be further from the truth, because there is only one possible answer to the question “who is afraid of the crime of aggression?” *No one*.

⁸⁰ *Ibid.*, at 150.

⁸¹ T. Ruys, ‘Justiciability, Complementarity and Immunity: Reflections on the Crime of Aggression’, 13 *Utrecht Law Review* (2017) 18-33, at 32.

⁸² See Zimmermann, Victory, *supra* note 20, at 28.