



Reflections on the Judicialization
of the Crime of Aggression[†]

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I propose to consider some of the challenges that the addition of jurisdiction over the crime of aggression will present to the International Criminal Court (ICC). Article 5 of the Rome Statute gave the Court jurisdiction over “the crime of aggression . . . once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.”¹ In the absence of adoption by consensus, adoption required a two-thirds majority.² But the amendment would enter into force for all States Parties after ratification or acceptance by seven-eighths of them.³

At the seven-year Review Conference in Kampala in 2010, the Assembly of States Parties amended the Statute by adding a new article, Article 8 *bis*,⁴ on the crime of aggression.⁵ The new provision incorporates the seven acts in the 1974 U.N. General Assembly’s “Definition of Aggression.”⁶

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1. Rome Statute of the International Criminal Court, art. 5(1)-(2), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

2. *Id.* art. 121(4).

3. *Id.* The exceptional arrangement for amendments to Article 5, establishing that they would not apply to the nationals or on the territory of a State which had not accepted that amendment, is not relevant to the activation of the crime of aggression, since crime of aggression is already included in Article 5.

4. Rome Statute, *supra* note 1, art. 8 *bis*.

5. Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31-June 11, 2010, *The Crime of Aggression*, RC/Res.6, Annex I (June 11, 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf.

6. Definition of Aggression, G.A. Res. 3314 (XXIX), Annex, U.N. Doc. A/RES/3314 (Dec. 14, 1974) [hereinafter Definition of Aggression].

Kampala deferred the activation of the Court's jurisdiction over the crime of aggression. In the meanwhile, only four tiny states have endorsed it,⁷ and others do not appear to be lining up. Moreover, Kampala added carve-outs to the Statute that insulate non-party and non-ratifying states from its application.⁸ Nonetheless, in Kampala, the ICC has moved a step closer to exercising jurisdiction over what the General Assembly in 1974 called "the most serious and dangerous form of the illegal use of force."⁹ So it is not entirely academic to begin to consider the implications of the prospective judicialization of the international community's response to the crime of aggression for, first, the international political system; second, the international legal system; and finally, the ICC itself. But that, as Dostoevsky often said, requires us to go back.

I.

International law has had a complicated, even love-hate relationship, with the use of force. Efforts to limit the unrestricted right of a state to resort to military force gained traction in the twentieth century; they began with the Porter Convention in 1907¹⁰ and culminated in the United Nations Charter in 1945. The Charter enjoined "[a]ll Members . . . in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹¹ Lawful military force was to be authorized by the Security Council under its plenary Chapter VII powers. In case a state suffered an armed attack, it could resort to individual or collective self-defense pending action by the Security Council.¹² The Council was the organ empowered to determine whether aggression had occurred and what to do about it.¹³

Whatever the intention of Charter Article 2(4) may have been, the international political system remained essentially co-archival; the Security Council, because of its voting procedures, was often unable to act and individual uses of force, without prior authorization by the Security Council, continued to occur. While all of them were, in terms of the black letter of the Charter, *illegal*, not all of them were considered by political and legal observers as *unlawful* in their context, though unanimity in appraisals of the lawfulness of unilateral actions (indeed, in the appraisal of anything in international law) has been rare. To mention only a few examples, wars of decolonization have not been deemed unlawful and the General Assembly's Declaration on Principles of International

7. Lichtenstein, Samoa, Trinidad and Tobago, and Luxembourg.

8. *The Crime of Aggression*, RC/Res.6, *supra* note 5, at ¶ 1 & Annex 1, art. 15 *bis*.

9. Definition of Aggression, *supra* note 6.

10. Porter Convention on the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241, 1 Bevans 607.

11. U.N. Charter, art. 2, para. 4.

12. *Id.* art. 51.

13. *Id.* art. 39.

Law¹⁴ went so far as to *entitle* peoples seeking self-determination to receive support from other states.¹⁵ Wars of national liberation have been deemed lawful. Overt and covert assistance in internal wars has rarely been sanctioned and often praised.¹⁶ Humanitarian interventions, protection of nationals abroad, blockades, military exercises as a means of conveying threats and so on, have all benefitted from a tolerance which the black letter of Article 2(4) would hardly support.¹⁷

Plainly, when it comes to unilateral uses of force, one can detect the outlines of an “operational code” of the lawfulness of certain types of unilateral uses of military force, but rather than text, purpose and context have been proven critical in such appraisals. For example, when Turkey periodically invades northern Iraq to destroy Kurdistan Workers’ Party (PKK) bases, from which attacks on Turkey had been emanating, there are few international condemnations, even though the Security Council has not authorized the actions. Yet, when the South African apartheid government conducted the same type of action against African National Congress (ANC) bases in Angola and Mozambique, or when Israel invaded Lebanon to suppress Hezbollah rocket attacks on its northern cities and towns, most political observers and many international lawyers condemned the actions as unlawful.¹⁸ When many of the NATO states mounted an aerial bombardment of Serbia over its actions in Kosovo, it was generally deemed lawful, even though the Security Council had not authorized the action. President Obama, in his Nobel Peace Prize acceptance speech, did not seem to have stunned his audience when he used the occasion to announce that “[t]here will be times when nations—acting individually or in concert—will find the use of force not only necessary but morally justified.”¹⁹

Force is not opposed to law but is an integral part of legal arrangements; when it cannot be provided by a central authority, Pareto assured us, other actors will provide it.²⁰ When it comes to making decisions about the crime of aggression, the question is how to judge or appraise the lawfulness of unauthorized uses of force in order to determine which are lawful and which are not, when the explicit law of the U.N. Charter prohibits all such uses. That “how” question is inextricably linked to the question of “who” decides. Let me explain.

14. Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 25/2625 (XXV), U.N. GAOR, 25th sess., Supp. No. 28, U.N. Doc. A/5217 (Oct. 24, 1970).

15. *Id.*

16. MICHAEL W. REISMAN, *THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT* 384 (2013).

17. *Id.* at 385.

18. *Id.* at 386-93.

19. President Barack H. Obama, Nobel Lecture (Dec. 10, 2009), in Barack H. Obama, *A Just and Lasting Peace*, NOBEL PRIZE, http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html.

20. 4 VILFREDO PARETO, *THE MIND AND SOCIETY* 1519 (Arthur Livingston ed., 1935).

II.

Consider a hypothetical:²¹ Colonel Smith, a legal officer in the Judge Advocate General Corps, currently has two major assignments. He chairs a court martial that has been convened to try an alleged violation of the law of war concerning cyberwar. He also leads a working group, which has been assembled by the Judge Advocate General, to appraise the adequacy of the Army's codification of the law of war in the light of the emerging practice of cyberwar. Should the Colonel's working group find the current codification ill-suited to deal with what it anticipates will be the future contours of cyberwar, it has been instructed to propose feasible recommendations for its amendment.

In his function as a judge in the court martial, Smith is expected to limit his focus to the text of the code of law, as it exists, in the light of prior judgments in which it was applied by higher courts, and to apply it in strict conformity to the great *nullum* maxims: *nullum crimen sine lege* and *nulla poena sine crimine*. By contrast, in his assignment to appraise the adequacy of the inherited law of war as it confronts the techniques of cyberwarfare in the twenty-first century, Smith and his working group will be looking through different lenses at a range of facts and political processes that go far beyond what he may properly address in his role as a member of a court-martial. In both of his roles, Smith will be functioning as a lawyer and discharging decision functions in a *principled* fashion. But in each, he will be expected to use a very different set of intellectual tools.

The point of this hypothetical is that persons performing different types of legal jobs may have to use one of two entirely distinct modes of making principled decisions: a textual-rule-based mode and a policy-context-based mode. The modes are equally legitimate and both are principled in the sense that, in distinct types of situations, it is expected and demanded by those applying the modes and those to whom they are applied that they are to be executed according to their respective prescribed principles and procedures. But the principles and procedures of each are very different and are not interchangeable. Different legal jobs use entirely distinct modes of making principled decisions. In each job, the mode of decision and the faithfulness with which it is executed are critical factors in the legitimacy of that decision and, even, more generally, the legitimacy of the institution making the decision.

In the most general terms, the textual-rule-based mode of decision-making requires the persons applying it to approach the issues before them through the prism of rules. In this mode, the central question is *which* rules apply. Great emphasis is placed on the origin and validity of the rules—whether they are properly derived from higher rules. The principles of interpretation of texts and other verbal formulations that lay claim to some authority are virtual articles of faith. A valid decision in this mode is “legal” to the extent that it identifies and

21. I elaborate this hypothetical in Chapter 6 of W. MICHAEL REISMAN, *THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT* (2013).

correctly applies the relevant rules and is consistent with prior decisions. Above all, the introduction of the decision-maker's personal political or policy preferences is deemed improper.

The policy-context-based mode of decision, by contrast, requires decision-makers to approach the issues before them through the prism of policy and context. Rather than the question of which rules to apply, the questions underlying the policy-context-based mode of decision-making are, first, what the relevant values of the community are; second, which practicable arrangements will most efficiently optimize those goal values; and third, how those arrangements can be installed. The legitimacy of the textual-rule-based mode depends on its manifest fidelity to its rules; the legitimacy of the policy-context-based mode depends on the extent to which its *consequences* approximate the relevant values.

As a criminal tribunal, the ICC is expected to use the textual-rule-based mode; the foundation of its legitimacy is the legality principle. The U.N. Security Council, heretofore the only international institution charged with determining whether aggression has been committed, is expected to use the policy-context-based mode of decisionmaking; its foundational principle and assignment is the restoration of minimum world order when it has been disrupted.

III.

In 1974, when the U.N. General Assembly adopted the *soi-disant* "Definition of Aggression,"²² the title "definition" was something of a misnomer. The Definition's considerandum recited that the Assembly believed: "[A]lthough the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, it is nevertheless desirable to formulate basic *principles as guidance* for such determination"²³

Article 2 deferred to the Security Council's broad discretion in the matter:

The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression *although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed 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.*²⁴

Article 3 of the Resolution's Definition identified, in seven sub-paragraphs, the acts which "shall . . . qualify as an act of aggression."²⁵

22. Definition of Aggression, *supra* note 6.

23. *Id.* (emphasis added).

24. *Id.* art. 2. (emphasis added).

25. *Id.* art. 3.

- (a) 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;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The 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 above, or its substantial involvement therein.²⁶

However, the opening sentence of Article 3 makes the determination of those acts “subject to and in accordance with the provisions of Article 2,”²⁷ which affirmed the case-by-case discretion of the Security Council. Article 4 concedes the authority of the Security Council to “determine that other acts constitute aggression.”²⁸

Article 5(1) states that “[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.”²⁹ But Article 7 carves a big exception to the exclusion of justifications for aggression:

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as

26. *Id.* art. 3.

27. *Id.* art. 3.

28. *Id.* art. 4.

29. *Id.* art. 5(1).

derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.³⁰

In sum, the 1974 Definition, if read in its entirety, was far from a “definition.” To borrow the timeless words of Captain Barbossa, quondam commander of the Black Pearl, it was “more what you’d call Guidelines than actual rules.”³¹ Guidelines, moreover, which were subject to the Security Council’s contextual appreciation of each action in the light of its own institutional mission.

IV.

Annex I of the Kampala resolution in 2010 added Article 8 *bis* to the Rome Statute as the “Crime of Aggression.” Paragraph 1 limits the potential perpetrators of the crime to “a person in a position effectively to exercise control over or to direct the political or military action of a State.”³² Paragraph 2 incorporates the definitional language of Article 1 of the 1974 Definition and copies the specific acts in Article 3 of the Definition in accordance with the Assembly’s resolution.³³ That is the only part of the General Assembly’s Definition that is incorporated into the ICC Statute.

Two material changes have taken place here. First, the nuanced and highly qualified “guideline” character of the 1974 Definition has been discarded, and in its place, only one provision—the Definition’s Article 3—has been carried over to the Statute. What had been a set of guidelines, which it was repeatedly confirmed the Security Council had discretion in applying, has become a code. Second, the agency for which the 1974 Definition had been drafted, the Security Council—a political body which deploys the policy-contextual-mode of decisionmaking to execute its mandate “to maintain or restore international peace and security”—has been replaced by a criminal court, whose *modus operandi* is the textual-rule-based mode of decision. The relation between the two changes is not accidental, for a criminal court condemning persons in its docket will by its nature rely on codified law. So even though the words in Article 8 *bis* of the ICC Statute are the same as those in Article 3 of the 1974 Definition, the result is quite different.

30. *Id.* art. 7.

31. *PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL* (Walt Disney Pictures 2003).

32. Rome Statute, *supra* note 1, art. 8 *bis*(1); *The Crime of Aggression*, RC/Res.6, *supra* note 5.

33. Rome Statute, *supra* note 1, art. 8 *bis*(2).

V.

I began by asking whether the judicialization of the crime of aggression is good for the international political system, good for international law, and good for the ICC. If the amendment ever comes into force (which is uncertain), much will depend on how the ICC's judges manage the prosecution of the crime. However, in general, I doubt that the amendment will contribute to bringing about and preserving the level of minimum order that is prerequisite to the enhancement of human dignity.

I believe that some unilateral threats and uses of force will episodically continue to be fundamental to the maintenance of minimum world order. The prospective *judicial* characterization of such uses as aggression—one thinks of NATO's action against Serbia—could chill the willingness of states to engage in it, even when, as President Obama said, such actions might be “not only necessary but morally justified.”³⁴ Conversely, I find it fanciful to believe that the existence of the Statute and the Court will act as a deterrent to those contemplating wicked actions.

As for its effect on international law, the *jus ad bellum*, in my view, has become much more complex than a simple reading of Articles 2(4) and 51 of the Charter, so ignoring that complexity and transforming the 1974 Definition's guideline-character into something more like a code, that is less connected to political reality, could undermine belief in the relevance of international law.

Nor do I think that the judicialization of aggression is likely to enhance the stature of the ICC. If the Court is faithful to the textual-rule-based mode of decisionmaking, it will be compelled to hold as criminal actions that are consistent with expectations of lawfulness. If it does not do so, it will undermine its image of legitimacy by appearing only to follow the legality principle when the results suit it. Even if one assumes that the entire, nuanced and discretionary 1974 definition has been incorporated by reference into the Rome Statute, Article 8 *bis* will require the Court to function as a mini-Security Council and allow it to apply the same political judgments as the Council. If the Court takes this route, it could infect the Court's whole judicial culture with respect to its judgments for many of the other crimes in its bailiwick.

Of course, judges are, as they must be, resourceful jurists, and the Bench of the ICC may surprise us. Let us hope that it does.

34. Obama, *supra* note 19.