

The Crime of Aggression under the Rome Statute and Implications for Corporate Accountability

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The former prosecutor of the International Criminal Court (ICC), Luis Moreno-Ocampo, observed in 2003 that “investigation of the financial aspects of the alleged atrocities will be crucial to prevent future crimes and for the prosecution of crimes already committed. If the alleged business practices continue to fuel atrocities, these would not be stopped even if current perpetrators were arrested and prosecuted.”¹

Despite the acknowledged role of corporations in atrocity crimes, since 2003, and indeed since the Nuremberg trials in the mid-20th century, no corporate actors have been prosecuted for their roles in atrocity crimes.² The 2010 amendments to the Rome Statute, defining the crime of aggression, do nothing to change this reality. If anything, they have made it more difficult to prosecute corporate actors by treating the newly defined crime of aggression as a “special case when it comes to the criminal responsibility of transnational business corporations.”³

As defined in the Rome Statute amendments, criminal liability for direct and indirect perpetration of the crime of aggression appears to be limited to those individuals who exercise control over a state. This limitation on criminal liability is an indication of the overriding concern states have about protecting their sovereignty from interference by other states. However, if the Rome Statute is to be a legal regime whose purpose is primarily to protect victims from atrocious crimes, liability should be extended to all those who participate in fueling conflict,

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¹ Press Release, International Criminal Court, Communications Received by the Office of the Prosecutor of the ICC (July 16, 2003), https://www.icc-cpi.int/NR/rdonlyres/B080A3DD-7C69-4BC9-AE25-0D2C271A9A63/277502/16_july__english.pdf (noting that atrocities taking place within the Democratic Republic of the Congo appear to be linked to money laundering by various corporations through international banking organizations).

² Although the ICC has yet to prosecute any corporate actors for playing a role in atrocity crimes, the ICC has taken steps to improve its ability to conduct financial investigations. For example, in October 2015, the ICC hosted a workshop on financial investigations, particularly, on tracing, seizing, freezing, and forfeiting the financial assets of a suspect. Press Release, International Criminal Court, ICC Hosts Workshop on Cooperation and Financial Investigations (Oct. 28, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1161>.

³ Volker Nerlich, *Core Crimes and Transnational Business Corporations*, 8 J. INT’L CRIM. JUST. 895, 906 (2010).

not just those actors in leadership positions.

The crime of aggression. Renowned scholar Benjamin Ferencz observed that “[t]he most important accomplishment of the Nuremberg trials was the condemnation of illegal war-making as the supreme international crime. . . . Nuremberg was a triumph of Reason over Power. Allowing aggression to remain unpunishable would be a triumph of Power over Reason.”⁴

The international community finally adopted article 8 *bis* to amend the Rome Statute to criminalize acts of aggression in 2010,⁵ thanks in large part to the efforts of Ferencz.⁶ This is an important step forward to criminalizing and preventing war. But more needs to be done to ensure full accountability for the crime of aggression and other instances of illegal use of force.

Article 8 *bis* of the Rome Statute defines the crime of aggression as “the planning, preparation, initiation or execution, *by a person in a position effectively to exercise control over or to direct the political or military action of a State*, of an act of aggression which . . . constitutes a manifest violation of the Charter of the United Nations.”⁷

The crime of aggression, as defined by article 8 *bis*, must be committed by a person in a position to direct or control the actions of the state or military.⁸ Article 25(3) *bis* additionally seems to extend this actor limitation to accessory modes of liability, providing 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.*”⁹

In essence, the crime of aggression as defined in the Rome Statute is a crime committed against the sovereignty of a state. But in today’s world, war cannot be simplified to fighting between states. Non-state actors, including non-state armed groups and corporations, are increasingly entangled in armed conflicts around the

⁴ Benjamin B. Ferencz, *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT’L L. 281, 290 (2009).

⁵ International Criminal Court, Assembly of States Parties, Review Conference, *The Crime of Aggression*, ICC Doc. RC/Res. 6 (June 11, 2010).

⁶ Beth Van Schaack, *ASIL Cables: the ICC Crime of Aggression and the Changing International Security Landscape*, AMERICAN SOCIETY OF INTERNATIONAL LAW (Apr. 16, 2015), <https://www.asil.org/blogs/icc-crime-aggression-and-changing-international-security-landscape>.

⁷ Rome Statute of the International Criminal Court art. 8 *bis*, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 (emphasis added) [hereinafter Rome Statute].

⁸ See, e.g., Nerlich, *supra* note 2, at 906.

⁹ Rome Statute, *supra* note 7, art. 25(3) *bis* (emphasis added). Although the language is not explicit, “the provisions of this article” appears to reference article 25 as a whole, and particularly article 25(3). This appears to be the case from the naming of this new provision as article 25(3) *bis*, but also from the travaux préparatoires to the amended Rome Statute. See Marie Aronsson-Storrier, *Article 25(3) bis*, *Commentary on the Law of the International Criminal Court*, CASE MATRIX NETWORK (June 30, 2016), <https://www.casematrixnetwork.org/cm-n-knowledge-hub/icc-commentary-elicc/commentary-rome-statute/commentary-rome-statute-part-3/#c3063> (observing that “[t]he purpose of this paragraph [25(3) *bis*] is to clarify that the leadership requirement, discussed under Article 8 *bis*(1), applies also when making assessments under [Article 25\(3\)](#).”).

globe.¹⁰ In light of the complexity of contemporary warfare and the involvement of non-state actors in armed conflicts, the limited nature of liability for the crime of aggression is regrettably inadequate.¹¹

The Extraordinary Nature of Article 25(3) bis. Article 25(3) *bis*, on its face, limits the individual responsibility for crimes of aggression in an extraordinary way, excluding the possibility of accessory liability except for those individuals who are in a position “effectively to exercise control or to direct” state and military action.¹² This language seems to evoke the “effective control” standard from the international law of state responsibility, which requires a state either to have issued directions to or to have enforced the specific operations of an armed group or another state in order to be held liable for the actions of that other state.¹³ The “effective control” standard is a high one and makes a finding of state responsibility an exceedingly difficult task. Interpreting article 25(3) *bis* analogously would make it extremely difficult to prosecute non-state and non-military officials for acting as accessories to the crime of aggression, because it would be difficult to find that such non-officials were in a position to issue directions to state organs or to the military, or to enforce the carrying out of operations.

An interpretation of article 25(3) *bis* in such a stringent way would thus run counter to the drafting history of the Rome Statute amendments and the legacy of the Nuremberg trials and would weaken other provisions within the Rome Statute itself. The drafting history of the Rome Statute suggests that the drafters did not

¹⁰ Examples of how corporations contribute to and fuel conflict include weapons manufacturing, private security contractors, and general corporate action in conflict zones partnering with states or acting independently. *See, e.g.*, Mireille Delmas-Marty, *Ambiguities and Lacunae: The International Criminal Court Ten Years On*, 11 J. INT'L CRIM. JUST. 553, 558–59 (2013) (“The relationship between mass atrocities and economic activities was already a live issue at Nuremberg . . . Corporate criminal involvement in international crimes did not end with the Second World War. To the contrary, new developments in the available means of communication in a globalized and more interconnected world create new opportunities, particularly as some transnational corporations wield greater economic power than some states. These corporations have become major players, which have complex relationships with national governments and the local population. . . . throughout the world corporations are involved in the commission of serious crimes, either directly or as part of a larger group.”); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Power*, 45 B.C. L. REV. 993, 996 (2005). *Cf.* Shane Reeves, *The Viability of the Law of Armed Conflict in the Age of Hybrid Warfare*, LAWFARE (Dec. 5, 2016), <https://www.lawfareblog.com/viability-law-armed-conflict-age-hybrid-warfare>.

¹¹ *See, e.g.*, Anouk T. Boas, *The Definition of Aggression and Its Relevance for Contemporary Armed Conflict* 1 (International Crimes Database Brief 1, June 2013), <http://www.internationalcrimesdatabase.org/upload/documents/20141020T170547-ICD%20Brief%201%20-%20Boas.pdf>.

¹² *See, e.g.*, Nerlich, *supra* note 2, at 906.

¹³ *See* Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 Eur. J. Int'l. L. 649, 652–653 (2007) (discussing International Court of Justice, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), judgment of 27 June 1986).

want to exclude entirely liability for non-officials. While amendments related to the crime of aggression were being drafted, “[t]he view was also expressed that the language of this provision was sufficiently broad to include persons . . . who are not formally part of the relevant government, such as industrialists.”¹⁴

Similarly, the Nuremberg tribunals explicitly contemplated the possibility that non-government officials, including industrialists, could be liable for the crime of aggression. One Nuremberg judge in *Krupp et al.* stated there were two essential elements to establishing criminal liability for aggression: “[T]here must be not merely nominal, but substantial participation in and responsibility for activities vital to building up the power of a country to wage war. To establish the requisite criminal intent, it seems necessary to show knowledge.”¹⁵

Like the Nuremberg tribunals, article 25(3)(d)(ii) requires an *actus reus* of significant contribution¹⁶ and a *mens rea* of knowledge for accessory liability.¹⁷ Article 25(3) *bis*, however, requires, in addition to the *mens rea* and *actus reus*, that the individual be in a position effectively to exercise control over or to direct the state’s political and military actions.¹⁸ This additional requirement, that the suspect be a member of a particular class of individuals, guts the power of article 25(3) to hold all responsible accessories liable for the crimes of aggression to which they contribute.

Normally, under article 25(3)(d) an individual is liable for any Rome Statute crime if she “contributes to the commission or attempted commission of such a

¹⁴ Nerlich, *supra* note 2, at 908.

¹⁵ Special Concurring Opinion of Judge Wilkins on the Dismissal of Charges of Aggressive War, the *Krupp Case*, 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUERNBERG 455–56 (1950). *See also* the *Farben Case*, 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUERNBERG 1113 (1952) (noting that “participation in the rearmament of Germany was not a crime . . . unless that rearmament was carried out, or participated in, with knowledge that it was a part of a plan or was intended to be used in waging aggressive war”) (emphasis added).

¹⁶ Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 277 (ICC Pre-Trial Chamber I, Dec. 16, 2011), <https://www.icc-cpi.int/pages/record.aspx?uri=1286409>

¹⁷ Rome Statute, *supra* note 7, art. 25(3)(d)(ii).

¹⁸ The standard set by article 25(3) *bis* has been justified by some scholars, who observe that lower-ranking officials also cannot be prosecuted for crimes of aggression because they cannot effectuate a waging of aggressive war against another state. *See* SERGEY SAYAPIN, THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW 253, 284–87 (2014). But this is not any different from other crimes under the Rome Statute. Those who make the ultimate decision to carry out the crime can still be criminally liable, even if they could not have effectuated the crime on their own. For example, the OTP charged Joshua Arap Sang with contributing to crimes against humanity in Kenya by merely, “(i) placing his show Lee Nee Eme at the disposal of the organisation; (ii) advertising the organisation’s meetings; (iii) fanning violence by spreading hate messages and explicitly revealing a desire to expel the Kikuyus; and (iv) broadcasting false news regarding alleged murder(s) of Kalenjin people in order to inflame the violent atmosphere.” Prosecutor v. William Samoei Ruto and Joseph Arap Sang, Alleged Crimes (non-exhaustive list), Int’l Crim. Cr., <https://www.icc-cpi.int/kenya/rutosang/pages/alleged-crimes.aspx>.

The crime of aggression is no different. Individuals other than high-ranking State officials can be liable for contributing to the actions of officials who make the actual decision to wage aggressive war.

crime” and the contribution is both “intentional” and either “made with the aim of furthering the criminal activity or criminal purpose of the group . . . or made *in the knowledge* of the intention of the group to commit the crime.”¹⁹ Nuremberg precedent is analogous to this form of accessory liability.

With respect to other crimes, the ICC has already explained how contribution liability for corporate actors would work in practice:

“[A] well intentioned arms dealer may decide to sell arms to State C instead of warring States A and B, since the arms dealer knows that both States A and B are committing war crimes. However, if State C is merely funneling all of the arms to State A unbeknownst to the arms dealer, then the arms dealer may meet all of the elements for 25(3)(d) liability for uncontroversial non-criminal conduct in the absence of some requirement that he at least be aware that his contribution is going to, in this example, State A.”²⁰

The ICC’s analysis of contribution liability for corporate actors does not depend on the underlying crime. In fact, the analysis would not change if State A, in this example, were committing crimes against humanity or genocide instead of war crimes. Neither does the analysis need to change if State A were committing the crime of aggression. Article 25(3) *bis* does change this analysis, though, by requiring that the arms dealer be in a position effectively to control or direct State A’s government or military actions. In most situations, this arms dealer would very likely not be in such a position.

It is unnecessary to limit the modes of liability for the crime of aggression to those who have power to *control* or *direct* state action. The Protocol on the Statute of the African Court of Justice and Human Rights, although not yet in force,²¹ provides a good example—it limits the *direct perpetration* of the crime of aggression to those who direct or control the military or political action of a state, while allowing for general modes of liability, including contribution liability, for

¹⁹ Rome Statute, *supra* note 7, art. 25(3)(d) (emphasis added).

²⁰ Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10, Decision on the Confirmation of Charges, n. 681 (Pre-Trial Chamber I, Dec. 16, 2011), <https://www.icc-cpi.int/pages/record.aspx?uri=1286409>. The International Criminal Tribunal for Rwanda similarly acknowledged the role that corporate actors such as weapons manufacturers can have in contributing to genocide. “The ICTR trial chamber explicitly linked weapons to genocide, by stating that one may be complicit in genocide ‘by procuring means, such as weapons, instruments or any other means, use to commit genocide, with the accomplice knowing that such means would be used for such purpose.’ Thus a person who knowingly provides weapons to a group that he or she was aware was carrying out a genocidal campaign could in principle be tried as an accomplice to acts of genocide.” Lisa Misol, *Weapons and War Crimes: The Complicity of Arms Suppliers* 9, HUMAN RIGHTS WATCH (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶533–37 (Sept. 2, 1998)).

²¹ The Protocol is not yet in force because the requisite number of states have not signed and ratified the treaty. See Status List: Protocol on the Statute of the African Court of Justice and Human Rights, AFRICAN UNION, <https://www.au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights> (last visited Mar. 31, 2017). Nevertheless, the Protocol provides a comparative example to demonstrate that it is unnecessary to limit liability for the crime of aggression to those in leadership positions.

“any of the crimes.”²² These general modes of liability are not limited to those in leadership positions. Additionally, the African Court paid particular attention to the issue of corporate accountability, giving itself jurisdiction over all “legal persons.”²³

Using the article 25(3)(d) standard for individual liability for aggression would not suddenly put all corporate actors at risk for liability. The level of liability has its own internal standards protecting defendants from unnecessary and unreasonable criminal prosecution, namely, proving the requisite *mens rea* of knowledge of the intent to commit the crime and a sufficiently “significant contribution” to the crime.

The crime of aggression should not be a “special case” in which accessory modes of liability otherwise available under article 25 are inapplicable.

The purposes of the Rome Statute include ensuring “that the most serious crimes of concern to the international community as a whole [do] not go unpunished” and “put[ting] an end to impunity for the perpetrators of these crimes and thus [contributing] to the prevention of such crimes.”²⁴ If the Rome Statute aims to do more than simply protect the sovereignty of states, then the crime of aggression must also be defined to implicate more than just those individuals in positions to control or direct state or military action.²⁵

The evolution of modern combat has seen non-state actors and corporations becoming increasingly involved in armed conflict. Without addressing the role that private actors can have in aggression, a vast accountability gap will continue to exist. The exception to accessory liability in article 25(3) *bis* is thus

²² African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 14 *adding* arts. 28M & 28N (June 27, 2014), https://au.int/en2/sites/default/files/treaties/7804-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf [hereinafter African Court of Justice Statute Protocol Amendments]. The Protocol defines the crime of aggression as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state or organization, whether connected to the state or not of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union and with regard to the territorial integrity and human security of the population of a State Party.”

²³ “Legal persons” does not include states. African Court of Justice Statute Protocol Amendments, *supra* note 25, art. 22 *adding* art. 46C. *See also*, Chang-ho Chung, *The Emerging Asia-Pacific Court of Human Rights in the Context of State and Non-State Liability*, 57, HARV. INT’L L. J. (July 7, 2016), <http://www.harvardilj.org/2016/07/the-emerging-asian-pacific-court-of-human-rights-in-the-context-of-state-and-non-state-liability/>. It is also interesting to note that corporate liability does not exclude liability for individual corporate actors. Article 46C states that “[t]he criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.”

²⁴ Rome Statute, *supra* note 7, preamble.

²⁵ A statute is to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

unsatisfactory. The bar for liability for corporate actors is already set high. It should not be made even higher.