VOLUME 58, ONLINE JOURNAL, SPRING 2017

Non-State Accessories Will Not Be Immune from Prosecution for Aggression

Juan P. Calderon-Meza*

The prosecution of non-state actors accused of aggression was possible in the Nuremberg Trials under the special prosecutorial counsel of Benjamin Ferencz.[1] The Prosecution in the *Krupp Case* accused defendants who "held high positions in the political, financial, industrial, and economic life of Germany and committed crimes against peace in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations and groups, including Krupp, connected with the commission of crimes against peace."[2] As the international community considers activation of the International Criminal Court's (ICC or Court) jurisdiction over the crime of aggression, it is worth recalling that non-state actors who contribute to atrocity crimes, such as some private military and security companies (PMSCs), should also be brought to justice.

While the crime of aggression's leadership clause may result in liability for only a narrow scope of principals, such as heads of state, it should not limit the scope of liability for accessories. Indeed, article 8 *bis*(1) of the Rome Statute provides for an umbrella definition of the crime of aggression where the *actus reus* of the principals is restricted to "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*."[3] This limitation was also added to article 25(3) of the Rome statute.[4] This provision, however, does not specifically mention whether the accessories have to be state actors.

* At the time of writing of this article, Juan was a Clinical Advocacy Fellow of the Harvard Law School's International Human Rights Clinic. To honor his mother, Doris Meza's memory, Juan's work has been inspired by her teachings to *speak truth to power*. You can contact him at jpcalderonmeza@gmail.com. The views expressed herein are those of the author alone and do not reflect the views of any of the institutions with which he is affiliated.

[1] Proceedings, United States v. Alfried Krupp et al., 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUERNBERG 5 (1950) (noting Benjamin Ferencz as Special Prosecution Counsel) [hereinafter Krupp Case Proceedings]. *See also id.* at 1185–87 (Benjamin Ferencz's cross examination of a Krupp officer).

[2] *Id.* at 10.

[3] *See* International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Doc. RC/Res. 6 (June 11, 2010); Rome Statute of the International Criminal Court art. 8 *bis*(3), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 (emphasis added) [hereinafter Rome Statute].

[4] Rome Statute, *supra* note 3, art. 25(3) *bis* ("In 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.").

What does the silence of articles 8 *bis* and 15(3) *bis* with respect to accessories mean? In light of article 21(a) of the Rome Statute, once the Court has subject-matter jurisdiction over the crime of aggression, the law to be applied to cases addressing this crime would primarily be the "[Rome] Statute, Elements of Crimes and its Rules of Procedure and Evidence."[5] In the alternative, relevant treaties, principles, and rules of international law, in the first place, as well as consistent principles of domestic law, in the second place, would apply as "subsidiary sources of law under article 21(1)(b) and 21(1)(c) of the Statute only where [the Trial Chamber] identifies a lacuna in the provisions of the Statute, the Elements of Crimes and the Rules."[6]

The silence of the Kampala amendments must thus be systematically read in harmony with other provisions in the Rome Statute, the Elements of the Crimes and the Rules of Procedure and Evidence. In cases where the ICC judges have found lacunas, other provisions of the Rome Statute have served as the basis for concluding that "silence on a particular procedural issue does not necessarily imply that it is forbidden."[7] Although procedural, these cases offer a basis for reading this substantial silence in the definition of the crime of aggression.[8] This article purports for a reading in tune with the core principle of complementarity as well as the plethora of modes of liability under article 25(3)(c) and 25(3)(d) of the Rome Statute.

This reading of the crime of aggression is in keeping with the core principle of complementarity enshrined in the Rome Statute and its framework. Crimes should be prosecuted and tried domestically, and the Court should complement these domestic efforts only when the domestic systems are unable or unwilling to bring

---

[5] *See* Rome Statute, *supra* note 3, art. 21(a).

[6] Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, ¶ 39 (Trial Chamber II, Mar. 7, 2014) (citing several cases), https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/07-3436-tENG.

[7] Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Decision on Witness Preparation ¶ 31 (Trial Chamber V, Jan. 2, 2013), https://www.icc-cpi.int/pages/record.aspx?uri=1533653.

[8] In *Prosecutor v. Uhuru Muigai Kenyatta et al.*, Trial Chamber V was seized with the interesting issue of whether witnesses may be prepared by the calling party before trial. While the Chamber found no specific provision applicable to this matter, that silence was not construed as a prohibition. The Chamber relied on article 64 of the Rome Statute and other international tribunals' jurisprudence to say that its discretion is ample in relation to silent procedural issues. *See id.*, ¶¶ 31, 33 ("Article 64 of the Statute grants the Chamber flexibility in managing the trial. Its formulation makes clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters such as witness preparation, and that silence on a particular procedural issue does not necessarily imply that it is forbidden. Article 64 is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims. . . . [T]he fact that the *ad hoc* tribunals interpreted silence in their statutory provisions to confer flexibility regarding witness preparation is meaningful when evaluating the silence in this Court's analogous statutory provisions."). *See also* Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, ICC Trial Chamber III, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial ¶ 10 (Trial Chamber III, Nov. 24, 2010, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/05-01/08-1039.

prosecutions.[9] In other words, domestic courts should be able to try accessories to the crime of aggression, and only when this is not politically possible could the ICC try the individuals who would otherwise enjoy *im(m/p)unity*, whether they are state actors, under theories of direct and indirect liability, or non-state actors under a theory of accessory liability, including individuals in the private military and security industry, as well as other corporate actors who often facilitate Rome Statute crimes.

Otherwise, what would complementarity mean for the crime of aggression? One could already anticipate political obstacles to be faced by domestic prosecutors trying to investigate foreign heads of state. Authoritative commentary on the Kampala amendments supports domestic criminalization of foreigners who may be liable for aggression but at the same time foresees political obstacles:

> Depending on the jurisdictional regime chosen by the implementing State, its domestic laws may criminalize aggression by foreign leaders, in particular when the act of aggression was committed against the prosecuting State (which could assert its own territorial jurisdiction). The implementing State should however bear in mind that the leadership clause of the crime of aggression will result in very low number of potential suspects, and that certain immunities may apply . . . Such an assertion of jurisdiction over foreign nationals could therefore turn out to be difficult to implement in a concrete case. States which limit jurisdiction solely to their own nationals may well avoid significant cross-border political and legal complexities related to prosecutions of foreign nationals.[10]

The immunity of incumbent heads of state may, indeed, be invoked as a principle under international law.[11] States Parties of the Rome Statute, on the

---

[9] *See* Rome Statute, *supra* note 3, arts. 1, 17.

[10] HANDBOOK: RATIFICATION AND IMPLEMENTATION OF THE KAMPALA AMENDMENTS TO THE ROME STATUTE OF THE ICC 15 (Princeton University's Liechtenstein Institute on Self-Determination, ed., 2015), http://crimeofaggression.info/documents/1/handbook.pdf.

[11] *See* Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. 3, ¶ 70 ("[G]iven the nature and purpose of the warrant, its mere issue violated the immunity which Mr. Yerodia enjoyed as the Congo's incumbent Minister for Foreign Affairs. The Court accordingly concludes that the issue of the warrant constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of that Minister and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law."); *id.*, ¶ 71 ("[T]he Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law."); *id.*, ¶ 75 ("The Court has already concluded . . . that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the

other hand, have already waived this immunity.[12] As noted by the Court, however, "when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a *non-State party*, the question of personal immunities might validly arise."[13] Although the Court may seek cooperation from non-state parties to waive the immunity of their heads of state,[14] this article considers an additional solution for difficult cases, such as aggression, where the liability of non-state parties might make the immunity waiver politically unrealistic.

This is not the case, however, for private individuals who are accessories to the crime of aggression. In difficult cases where aggression is likely to be committed by heads of powerful states that are not parties to the Rome Statute, the Court has an alternative. It could prosecute accessories who do not hold any state immunity for acts of aggression perpetrated within the territorial and temporal jurisdiction of the Court. In other words, the Court could adjudicate the liability of private individuals who acted as accessories.

Often, foreign private individuals lead corporations with the aim of facilitating or making significant contributions to the work of state actors who perpetrate atrocity crimes, including crimes of aggression. Take the case of PMSCs. "Such entrepreneurs have played a role in wars past and present, from ancient times to the conflicts of our day. But historians apparently considered them no more than

---

immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium's international responsibility.").

[12] *See* Rome Statute, *supra* note 3, art. 27. *See, e.g.,* Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, ¶ 66 (June 18, 2013), https://www.icc-cpi.int/pages/record.aspx?uri=1605793 (noting that there is a "contemporary norm of international law according to which public officials are no longer entitled to immunity for violation of international criminal law."); Prosecutor v. Omar Hassan Ahmad Al Bashir*,* Case No. ICC-02/05-01/09, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court, ¶ 25 (Apr. 9, 2014), https://www.icc-cpi.int/pages/record.aspx?uri=1759849 ("[I]t is not disputed that under international law a sitting Head of State enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court. Such personal immunities are ensured under international law for the purpose of the effective performance of the functions of sitting Heads of States.").

[13] Prosecutor v. Omar Hassan Ahmad Al Bashir*, supra* note 12, ¶ 27 (emphasis added).

[14] Article 98 of the Rome Statute recognizes the State Parties' international obligations not to surrender a head of state to the Court, in which case it will try to obtain cooperation of the third or surrender state. *See* Rome Statute, *supra* note 3, art. 98(1); Prosecutor v. Omar Hassan Ahmad Al Bashir*, supra* note 12, ¶ 27. ("It follows that when the exercise of jurisdiction by the Court entails the prosecution of a Head of State of a non-State Party, the question of personal immunities might validly arise. The solution provided for in the Statute to resolve such a conflict is found in article 98(1) of the Statute. This provision directs the Court to secure the cooperation of the third State for the waiver or lifting the immunity of its Head of State. This course of action envisaged by article 98(1) of the Statute aims at preventing the requested State from acting inconsistently with its international obligations towards the non-State Party with respect to the immunities attached to the latter's Head of State.").

an ancillary aspect of military affairs, their status and significance warranting no particular scrutiny."[15]

Yair Klein's leading role in Colombia's armed conflict is a lamentable example of leading private individuals absconding from domestic justice. Klein is an Israeli national who retired the military and founded the PMSC Spearhead.[16] He was convicted *in absentia* by a Colombian court for "instruction in and teaching of military and terrorist tactics, techniques and methods, committed with mercenaries and accomplices."[17] Klein personally gave Colombian villagers mercenary training in the midst of Colombian armed conflict.[18] As recently noted by authoritative reporters, Colombian mercenaries have been hired by Global Enterprises, another PMSC, to fight for the United Arab Emirates in Yemen's ongoing war.[19]

Domestic judicial systems, however, have been unable to bring Klein to justice. The European Court of Human Rights refused to extradite Klein to Colombia on the basis "that the evidence before it demonstrates that problems still persist in Colombia in connection with the ill-treatment of detainees."[20] It is worth noting that Klein has also been accused of "smuggling arms to rebels from the Revolutionary United Front (RUF)" in Sierra Leone.[21] Furthermore, he admitted in an interview that he was hired to overthrow former Panama's president Noriega.[22]

It is time to reflect on the teachings from Nuremberg. The Nuremberg Tribunal was empowered to prosecute "[a]ny person without regard to nationality or the capacity in which he acted . . . deemed to have committed a crime . . . [against peace], if he . . . (b) was an accessory to the commission of any such

---

[15] FED. DEPT. OF FOREIGN AFF. OF SWITZERLAND (FDFA) AND INT'L COMM. OF THE RED CROSS (ICRC), THE MONTREUX DOCUMENT: ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT 5 (2008), https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf ("The presence of private military and security companies (PMSCs) in armed conflicts has traditionally drawn scant attention. In some ways this is surprising; as such, reliance on private entrepreneurs during war is nothing new.").

[16] *See, e.g.,* Jeff Grett, *Report Says Mercenaries Aided Colombian Cartels*, N.Y. TIMES (Feb. 28, 1991), http://www.nytimes.com/1991/02/28/world/report-says-mercenaries-aided-colombian-cartels.html.

[17] Klein v. Russia, App. No. 24268/08, ¶ 8, Eur. Ct. H.R. (Apr. 1, 2010), http://hudoc.echr.coe.int/eng?i=001-98010.

[18] *Mercenario Condenado*, SEMANA (Mar. 18, 2002), http://www.semana.com/nacion/articulo/mercenario-condenado/49999-3.

[19] *See, e.g.,* Emily Hager & Mark Mazzetti, *Emirates Secretly Sends Colombian Mercenaries to Yemen Fight*, N.Y. TIMES (Nov. 25, 2015), http://www.nytimes.com/2015/11/26/world/middleeast/emirates-secretly-sends-colombian-mercenaries-to-fight-in-yemen.html?_r=0.

[20] Klein v. Russia, *supra* note 17, ¶ 53.

[21] *See, e.g., Who Is Israel's Yair Klein and What Was He Doing in Colombia and Sierra Leone?*, DEMOCRACY NOW (June 1, 2000), https://www.democracynow.org/2000/6/1/who_is_israels_yair_klein_and.

[22] *Mercenario Condenado, supra* note 18.

crime or ordered or abetted the same."[23] Crimes against peace, indeed, included "wars of aggression in violation of international laws and treaties."[24]

In the *Krupp Case*, the prosecution charged industrialists with crimes against peace as well as with conspiracy to commit crimes against peace.[25] While the evidence did not support the liability of the defendants for these counts beyond a reasonable doubt, the panel did "not hold that industrialists as such, could not under any circumstances be found guilty upon such charges."[26] In a concurring opinion, one of the judges explained:

> To establish the requisite participation there 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 that the military power would be used in a manner which, in the words of the Kellogg [Briand] Pact, includes war as an "instrument of policy."[27]

Once the crime of aggression is activated, article 25(3) of the Rome Statute allows prosecution of private accessories who made a significant contribution. The Pre-Trial Chamber has found "the level of contribution under article 25(3)(d) of the Statute cannot be as high as . . . an essential contribution."[28] As the Chamber noted, "a person must make a significant contribution to the crimes committed or attempted."[29]

As we reflect now on the Court's jurisdiction over the crime of aggression,[30] we should pause to revisit lessons from the past. Adopted just after the Second World War, the Universal Declaration of Human Rights imposes duties on "every individual and every organ of society . . . to promote respect for these rights and freedoms and . . . to secure their universal and effective recognition and observance."[31] Genocide, the crime of crimes, was collectively outlawed by the

---

[23] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes Against Peace and Against Humanity art. II(2), Dec. 20, 1945, 3 Official Gazette of the Control Council for Germany 50–55 (1946).

[24] *Id*., art. II(1)(a).

[25] Krupp Case Proceedings, *supra* note 1, at 391.

[26] *Id*. at 393. *See also id.* at 400.

[27] *Id.* at 455–56 (brackets in original).

[28] Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 283 (Pre-Trial Chamber I, Dec. 16, 2011) (finding "that the contribution to the commission of a crime under article 25(3)(d) of the Statute cannot be just any contribution and that there is a threshold of significance below which responsibility under this provision does not arise"); *id.*, ¶ 279 (noting that it "has already found that the level of contribution under article 25(3)(d) of the Statute cannot be as high as . . . an essential contribution").

[29] *Id.*, ¶ 285.

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

[31] *See* Universal Declaration of Human Rights, Preamble, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

international community, which agreed that "[p]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or *private individuals*."[32] Today there is an "emerging international consensus" on the corporate role played with regards to human rights, and a number of treaties have recognized and outlawed the role of non-state actors in wars.[33] With regard to the crime of aggression, experts who have reflected on the teachings from Nuremberg say:

> In line with the *dicta* in *Krupp*, the door is left ajar—albeit in limited circumstances—for principal or accessorial liability of non-state actors, including business leaders and, therefore, business corporations.[34]

It is time to recall these teachings when jurisdiction over the crime of aggression is activated. In the words of a Master, whom we honor today, "never give up, never give up, never give up!"

---

[32] Convention on the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

[33] *See* Special Tribunal for Lebanon, Appeals Panel, Case No. STL-14-05/PT/AP/AR126.1, Case against New TV S.A.L. and Karma Mohamed Tahsin al Khayat, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 46 (Special Tribunal for Lebanon, Oct. 2, 2014), https://www.stl-tsl.org/en/decision-on-interlocutory-appeal-concerning-personal-jurisdiction-in-contempt-proceedings (finding "evidence of an emerging international consensus regarding what is expected in business activity, where legal persons feature predominantly, in relation to the respect for human rights."). *See also* African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art. 14 *adding* art. 28A, art. 22 *adding* art. 46C(1) (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.

Although not yet in force, these amendments would allow the African Court of Justice and Human Rights to entertain "jurisdiction over legal persons" for genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and aggression. *See also* OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 1438 U.N.T.S. 191; Convention of the OAU for the Elimination of Mercenarism in Africa, O.A.U. Doc. CM/433/Rev. L. Annex 1 (1972), entered into force Apr. 22, 1985; International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, G.A. Res. 34, U.N. GAOR, 44th Sess., Supp. No. 43, at 590, U.N. Doc. A/44/43 (1989), 29 I.L.M. 91; International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999), S. Treaty Doc. No. 106-49 (2000), 39 I.L.M. 270 (2000), adopted Dec. 9, 1999, entered into force Apr. 10, 2002; Inter-American Convention Against Terrorism, AG/RES. 1840 (XXXII-O/02) (2002).

[34] Volker Nerlich, *Core Crimes and Transnational Business Corporations*, 8 J. INT'L CRIM. JUST. 895, 908 (2010).