

## A Plea to Reinforce Peace

*Calling for Activation of the International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression*

By Jutta F. Bertram-Nothnagel

September 2017

The long-awaited decision by the Assembly of States Parties to enable the International Criminal Court's exercise of jurisdiction over the crime of aggression is urgently needed and cannot happen soon enough.<sup>1</sup> As spelled out with more detail by article 8 *bis* of the Rome Statute, the crime is committed by a person in a position effectively to control or to direct the political or military action of a State and requires the planning, preparation, initiation or execution of a State act of aggression which, by its gravity, character and scale, amounts to a manifest violation of the Charter of the United Nations: The armed force of a State is unleashed upon another State *with no justification in sight*.

Not at all in the *defense* of a country, not at all in the *defense* of a people, but in the service of a crime that cries to heaven, soldiers are ordered to shoot and bomb a made-up 'enemy'. Without good cause under the law of nations, they are misused as tools of the crime and turned into its cannon fodder. Heroism and comradeship are exploited for hypocrisy and the expansion of power. The victim State is trampled, its territorial integrity, sovereignty and political independence smashed into conceptual smithereens. Lives are ruined and families decimated. The human right to peace must not be recognized! Freedom is the freedom of the aggressor. Nightmares keep morphing into relentless reality, -

---

*"Nightmares keep  
morphing into relentless  
reality, - combatants  
returning in wheel  
chairs or body bags,  
sailors sunk in the  
oceans, pilots ripped  
from the skies, and  
civilians sacrificed and  
euphemized as  
'collateral damage'."*

---

<sup>1</sup> See [Rome Statute of the International Criminal Court \(last amended 2010\)](#), art. 15 *bis* (3), 15 *ter* (3); see also [Resolution RC/Res.6](#) of the Review Conference of the Rome Statute, pp 6.

combatants returning in wheel chairs or body bags, sailors sunk in the oceans, pilots ripped from the skies, and civilians sacrificed and euphemized as ‘collateral damage’. Instead of laughter from fields and gardens, last prayers from ditches and rubble. All ‘normal’ war, - no war crimes necessary! The degradation and slaughter of body and soul violate human dignity to its very core.

The urgency for activating the Court’s authority over the crime can scarcely be exaggerated. Everything possible must be done, and must be done *now*, to prevent crimes of aggression. First, the world is faced with catastrophic threats to its environmental, social and economic sustainability, requiring global cooperation to address them. Each armed conflict disrupts such cooperation. Second, we are sitting on the most horrific powder keg of all times. Since the dawn of the age of nuclear weapons, the numbers of civilian deaths argued to be proportionate to military objectives and thus acceptable ‘collateral damage’ have crept up into the unfathomable. We are talking crimes against humanity that make the devil blush. Most disastrously, starting a war risks the annihilation of all life on Earth. Nature and future generations, no more! With thousands of nuclear weapons in play, it is too late for wars! The resolution of international political conflict by force is no longer a rational option, - if it ever was. The crime of aggression has never been more criminal.

---

***“The urgency for activating the Court’s authority over the crime can scarcely be exaggerated. Everything possible must be done, and must be done now, to prevent crimes of aggression.”***

---

Relying on the nuclear weapons themselves to deter war is not a substitute for the activation of the Court’s authority over the crime of aggression. Quite the opposite. Nuclear deterrence, like other forms of deterrence, may very well steer State leaders away from crimes of aggression, yet it does so at horrendous and unacceptable risk. The threat of the use of nuclear weapons discourages, yet likewise provokes the use of armed force, including the use of the weapons themselves.

Accident or miscalculation, irrationality or rationalization, recklessness or ruthlessness are all among the fuses for a cataclysm. For a safer barrier against crimes of aggression, - and against the use of nuclear weapons -, many building blocks of a fundamentally different kind have to be assembled and have to be assembled as rapidly as possible. From the moment it was born, the knowledge how to build nuclear weapons has signaled not only unprecedented danger but the dire necessity to think anew about ways to attain and maintain peace. Threats to meet attack with worse attack have truly reached a dead end.

While the activation of the International Criminal Court's authority to prosecute crimes of aggression is not the only building block required for the maintenance of peace, it is crucial for backing up the United

---

***"With thousands of nuclear weapons in play, it is too late for wars! The resolution of international political conflict by force is no longer a rational option, - if it ever was. The crime of aggression has never been more criminal."***

---

Nations Charter. Article 2 paragraph 4 of the Charter commands that "[*all*] Members shall refrain ... 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."<sup>2</sup> How long can the world afford to belittle this command by acting as if it does not exist, by treating it only as a second thought or by arguing it away? The norm has been firmly agreed upon after the Armageddon of World War II, consented to by all

Member States of the United Nations and recognized as cogent. Members of the United Nations are, moreover, explicitly obligated to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered (article 2 paragraph 3). How long can the world afford to dismiss peaceful approaches as *futile*? Are the claims of futility closely enough scrutinized? Did past efforts towards the peaceful resolution of a festering conflict maybe fail to come to fruition because they suffered from half-hearted diplomacy, from martial plotting in the background, or from unfulfilled promises on both sides? Were the rules, recommendations and options for the pacific settlement of disputes

---

<sup>2</sup> See also United Nation Charter, arts. [1](#) and [51](#).

under Chapter VI of the United Nations Charter fully considered and followed? Has everything been tried? Really? How long must we fall for the selling points of State leaders bent on war? As long as room exists for peaceful approaches to forestall attack, a ‘war to prevent war’ is a war that maintains war. Reassurances of ‘containment’ will be at best delusional. Deemed ‘necessary’ by a corrupted conscience, war reigns supreme. The activation of the Court’s exercise of jurisdiction will say it again loud and clear: To weigh the use of force against another State is not a mere matter of political discretion, but the reckoning with a peremptory norm. In contrast, procrastination about the activating decision only keeps fueling addiction to the use of force and encourages those who seek to hollow out and disregard the norm. By tasking the Court with the prosecution of the crime of aggression, the States Parties to the Rome Statute will take a stand against criminal ruthlessness *and* reaffirm the United Nations Charter. The Court supports States in the fulfillment of their obligations under the Charter and helps to protect them not only from becoming victim States but also from being turned into aggressor States by their own leaders.

Why would the International Criminal Court deter State leaders more strongly than history’s warnings of possible execution, exile or imprisonment even without trial? After all, such warnings have flickered since time immemorial, yet proved ineffective when leaders believed in victory and untouchable might. The answers arise from the Court’s stature and the principled conceptions expressed in its Statute. The Court’s authority underlines the criminality of aggression and makes it much more visible. Social deterrence, such as by protest or economic counter measures, intensifies and matters independently of the outcome of the armed conflict. Cooperation by States Parties with the Court lowers the likelihood of impunity and heightens the threat of prosecution. Most significantly, at least in the long term, the Court’s distinct focus on the victims of the crime sharpens ‘inner’ deterrence, the voice of conscience and compassion. The very way the Court proceeds, namely *with* the participation of the victims, fosters a closer listening to and deeper understanding about their agony, and promises to strengthen the determination of State leaders never to inflict the pain of war.

At the same time, and highly relevant for the activating decision as well, the provisions for the crime of aggression take special care to assure due process for the accused. The jurisdictional conditions do spell it out for all three mechanisms triggering proceedings under the Rome Statute: The determination of a State act of aggression arrived at by an organ outside the Court shall be without prejudice to the Court's own findings. The other organ may not have used the definition under the Statute, nor been obligated to use it. New evidence may have become available, different evidentiary standards may apply, and the accused must be heard. As obvious as the rule against prejudice should be even without stating it, it is easily forgotten in the wake of a war. The extra safeguard in the Statute for a fair trial of crimes of aggression upholds the presumption of innocence and may have a positive influence too in the proceedings of other courts and tribunals, including national, regional and ad hoc courts. Victims are not helped by show trials but by trials searching for truth. Adherence to due process has in addition a strong potential to decrease the political tension that may linger after armed conflict.

The hurdles against politicized prosecutions of crimes of aggression have been hiked up not just by the rule against prejudice alone. An authorization is required for investigations initiated by the Prosecutor *and* for those triggered by a State referral. The authorization has to be given by the whole Pre-Trial Division rather than by a Pre-Trial Chamber. Moreover, the rules on admissibility apply, like for the other three core crimes. Even where a reasonable basis exists for investigations, a State with primary jurisdiction can forestall prosecutions by the International Criminal Court. Genuine national investigations that are held in good faith have priority. Under the principle of complementarity, such investigations hinder the International Criminal Court from stepping in, *independently of their outcome*. It is important to highlight here again the State's own obligation under the United Nations Charter against the illegal use of force. Especially since the State act brought under way by a crime of aggression concerns the most serious and dangerous form of the illegal use of force, the State itself has a vivid interest to investigate. For States committed to international law, the interest to investigate may already arise at a threshold lower than the one for the International Criminal Court.

The risk of failure of prosecutorial deterrence requires close attention, just like the risk of failure of other forms of deterrence. Would the worry about possible prosecution for a crime of aggression push leaders, guilty or innocent, to prolong a war? Various considerations indicate reassuring answers. First, the question does not arise when the leader is faced with a defeat that is already impossible to drag out. Second, in other circumstances, the risk of prolongation is controllable. The trigger mechanisms for the Court's proceedings do not operate automatically. Neither the Security Council, nor a State *has to* refer a situation to the Court. The Security Council may also suspend Court proceedings. The Prosecutor has much leeway as well, especially with regard to the timing of investigation and prosecution. He or she must weigh the gravity of the crime, the interests of the victims and the interests of justice. The Prosecutor does not *have to* move forward when to do so might still increase the suffering of the victims of that crime. Nor would it be in the interests of justice to increase the number of the victims of the crime. Third, prolongation of the war is not a promising way to prevent prosecution altogether. Decisions for or against Court proceedings are only partly up to the opponents or peace negotiators. Fourth, keeping a war shorter rather than longer, can serve to lessen the gravity and scale of the use of force and lower not only the risk of prosecution but increase the likelihood of acquittal or milder sentences. Fifth, a leader faced with foregone conclusions and already presumed guilty may even welcome a Court process based on the presumption of innocence and the rule against prejudice regarding the State act.

It would be more than ironic to drag out activation based on concerns that the crime of aggression 'overburdens' the Court. Strengthening deterrence against this crime means less breeding ground for the other crimes under the Court's jurisdiction and thus a *lessening* of the burden for the Court. Still more pertinently, without the activating decision, the Court remains overburdened by the unfairness of a blatant hole in the list of crimes it may touch, overburdened by the injustice of its absolute paralysis vis-à-vis a crime that is not only sickening by itself but the source and inspiration for other crimes of violence. How long may the Court prosecute the war crimes of the victim State but never the war-making of the aggressor State? How long does *humankind* have to be overburdened by the commission of crimes of aggression?

The provisions on the crime of aggression do not go as far as they should and as they hopefully will one day. The jurisdictional conditions are harder than for the other three core crimes, thus the activating decision will not yet grant the Court a completely equal reach for the crime of aggression. The definition is narrow: It takes account of the fluid state of international law, of its grey areas and ongoing evolution, and excludes all uses of force whose violation of the United Nations Charter is not manifestly clear. Thus, the crime is not easy to prove: With regard to both the legal and factual existence of grounds for the exclusion of criminal responsibility, the benefit of doubt goes to the accused. Yet, the relative narrowness of the provisions is not a sufficient reason to go backwards, it is in itself a reason to move forward. With the activating decision, the count starts towards the review conference for the crime of aggression, to be held seven years later, as already resolved by the Assembly of States Parties in Kampala.

Importantly too, the activation, lessening the worry about the commission of crimes of aggression, opens up fresh political space for further development of *public international law* concerning the use of force and the pacific settlement of disputes between States.

Activation of the Court's authority is about more than the actual exercise of jurisdiction. The preventive effect against crimes of aggression extends globally, even if the Court is not yet able, at least in the near future, to reach all State leaders equally. Blindness about the physical carnage and psychological trauma of the crime, - and about the human rights violations inherent in its commission -, is at least partly explainable by a widely shared perception of war as inevitable. The more uncontrollable a disaster seems, the more tempting it is to close one's eyes. Building on Nuremberg, Rome and Kampala, the activation of the Court's authority challenges the assumption of inevitability for good and lifts again the repression of 'seeing': Wars are not just a matter of fate! There is choice involved. The international community can dare to look more closely, *exactly because* something *can* be done to prevent the crime. Simultaneously, resistance against committing the crime will grow, *exactly because* the suffering of its victims becomes more deeply acknowledged. In essence, the activation prompts fuller comprehension about the hurt to the victims *and* about the roots of the crime of

aggression. The insights gained point to further building blocks for the maintenance of peace.

For the breadth of the Court's effect, - despite narrow jurisdictional conditions -, it matters as well that the International Criminal Court serves as a catalyst not only for global research but also for global self-reflection. The impact of criminal proceedings reaches beyond the establishment of the guilt or innocence of the accused. Each trial amounts to an inquiry into human nature and speaks to the accountability of human beings in general. Especially when the crimes are of international concern and prosecution and adjudication take place on the international level, the whole world is asked to dig deeper into questions of personal responsibility. Ultimately, the Court's process is a process of common accounting, a confrontation with the choices for or against evil, and with the factors that influence such choices. In cases concerning the crime of aggression, a crime that mobilizes the collective of a whole State, the inquiry goes deep. Moral responsibility to prevent crimes of aggression extends far below the level of the leadership.

This is *us*.

The world *can* get out of its pattern of war after war after war.

---

**Jutta F. Bertram-Nothnagel**

*Past Director of Relations with Intergovernmental Organizations for the Union Internationale des Avocats, continuing to serve as its Permanent Representative to the United Nations and to the International Criminal Court (ICC) Assembly of States Parties, Jutta F. Bertram-Nothnagel led the Coalition for the International Criminal Court (CICC) Team on the Crime of Aggression (2001-2010); attended the negotiating processes for the ICC since 1995; led the CICC Team on General Principles at the Rome Conference; has represented non-governmental organizations at the United Nations since 1992, especially in the areas of sustainable development and human rights.*

**Related reading**

J.F. Bertram-Nothnagel, "A Seed for World Peace Growing in Africa: The Kampala Amendments on the Crime of Aggression and the Monsoon of Malabo", in "THE INTERNATIONAL CRIMINAL COURT AND AFRICA – One Decade On", E.A. Ankumah (ed. 2016), 347-399.