CHAPTER 23

The Crime of Aggression versus The Responsibility to Protect (L1)

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Summary (L3)

Recent activation of the ICC's responsibilities for the crime of aggression complicates prospects for the evolution of the emerging norm of the Responsibility to Protect (R2P). Yet, R2P's potential to prevent mass atrocities is a critical complement to the ICC's post-facto prosecution of such crimes. While the ICC cannot be expected to prioritize support for R2P above its own role, it has a responsibility to ensure that it does not deter action to prevent mass atrocities.

Humanitarian intervention, like aggression, is undertaken by states. There is as yet no humanitarian exception to the *UN Charter* prohibition on the states' uses of force that would parallel the *Charter*'s recognition of a state's right to self-defense. The norm of humanitarian intervention lacks conceptual clarity, operational maturity, and legal codification. Defining humanitarian intervention remains a fundamentally political exercise akin to defining aggression, which has long been the purview of the UN Security Council (UNSC). The ICC's responsibility for the crime of aggression therefore will concern those states that might consider future humanitarian interventions. Definitional uncertainties, coupled with the difficulties of creating a humanitarian carve-out within the crime of aggression, creates significant individual liabilities for state officials contemplating any decision to direct the state to assume risks and costs on behalf of suffering foreign civilians.

As the Office of the Prosecutor (OTP) develops its approach to prosecuting individuals for the crime of aggression, the office should weigh competing and distinct objectives such as institutional relevance, legal standards, practical impact, and the Court's broader normative purpose. A frank assessment suggests that the number and types of states currently adopting the Amendments regarding the crime of aggression will produce few opportunities for the OTP to investigate or prosecute crimes of aggression whose character, gravity, and scale could constitute a manifest violation of the *UN Charter*. Accordingly, the OTP would not compromise its likely contributions and could avoid unintended broader consequences by articulating a highly conservative approach to its mandate, one that privileged UNSC action and set Iraq's 1991 invasion of Kuwait as a standard. Particularly in its first decade, the Court can afford such a posture, which may also increase states' willingness to ratify the Amendments relating to aggression. Activation of the ICC's mandate in the political realm of state-conducted aggression should not impede the UN's imperfect but encouraging progress toward articulating human rights limitations upon the very state sovereignty it has so assiduously privileged.

Argument (L3)

With the December 2017 activation of the Amendments on the crime of aggression, the ICC theoretically is poised to realize the boldest ambitions of international law, addressing individual accountability for what the Nuremberg Trials deemed the "supreme" crime of aggression. Yet, the Court simultaneously finds itself at risk of undermining its mandate to protect individuals from genocide, war crimes, and crimes against humanity.

This comment explores this dilemma. It begins by tracing the gap that has emerged between international law and an evolving international norm regarding the use of force to protect civilians. It reviews the complexities of military operations that aim to protect civilians and the attendant difficulties of clearly distinguishing humanitarian intervention from other uses of force. The comment explains why the activation of ICC jurisdiction over the crime of aggression may deter states from using military forces for civilian protection. The comment then considers how the OTP should weigh competing and distinct objectives such as its institutional relevance, legal standards, and the Court's broader normative purpose as the Office develops an approach to its new responsibility for prosecuting individuals for the crime of aggression.

For both practical and idealistic reasons, this comment suggests that the OTP adopt a highly conservative approach to the crime of aggression.

The Court's apparent dilemma emerges from the rise of a global human rights culture—a development which largely tracks the evolution of the United Nations. Since the UN General Assembly's 1948 Universal Declaration of Human Rights to its 2005 endorsement of the R2P, states have acknowledged and gradually codified the expectation that persons, in addition to states, enjoy inalienable rights. The ICC, charged initially with establishing individual accountability for grave crimes against persons, itself was born of this dynamic.

The protection, and *de facto* elevation, of human rights creates friction with sovereignty, the basic building block of international politics. R2P lies at the center of this friction. The nascent doctrine of military intervention as an international responsibility when states cannot or will not protect their citizens offers a proactive, pragmatic response to the recurring scourge of state-committed mass atrocities. It is a signal triumph in the evolution of world governance, suggesting that global rules may protect persons as much as states. Yet, in its immaturity (and perhaps its audacity), R2P challenges the current legal and political order. The *UN Charter* does not yet accommodate the emerging norm; there is no "humanitarian intervention" exception for the use of force such as exists for self-defense. Only the UNSC can legally authorize a military operation to protect civilians in another state without its consent. Thus, the Court has been cast into a normative and political conundrum which it is ill-suited to navigate.

At this point in history, the UN General Assembly's unanimous endorsement of R2P cannot guarantee UNSC support for military operations undertaken for humanitarian reasons. NATO's 1999 air campaign to protect Kosovars illustrates the gap between norms and law. Security Council members had political allegiances and sensitivities about protecting sovereignty, making it impossible to obtain legal authorization for Operation Allied Force. Supporters of Allied Force were left defending it as "legitimate," if not legal, and appealing to a higher morality than the *UN Charter*.

Even the UN's subsequent authorization of follow-on peacekeeping efforts in Kosovo was insufficient to remove from coalition members the political taint of having acted illegally.

Global support for R2P was then gravely wounded by the evolution of the 2011 French, American, and British air campaign in Libya. Critics charged these governments with deception, arguing that bombing portrayed as civilian protection became dedicated to regime change as the campaign progressed. Critics also condemned the civilian casualties resulting from Western bombing. When the mission in due course left Libya effectively ungoverned, unstable, and violent, buyers' remorse set in. Brazil's stinging rebuke, which found wide resonance, called for modifying the R2P doctrine to "responsibility while protecting."

If the UNSC authorization made the operation legal, critics nonetheless deemed it illegitimate either because it was not a true or an effective humanitarian intervention. This raises interesting questions about how to judge an R2P operation. Must state leaders' intentions be pure, devoid of self-interest or other motivation? If personal or national ego or fealty to an ally reinforced desires to stop Gaddafi's troops from massacring inhabitants of Benghazi, does that undermine humanitarian purpose? The initiators of the air campaign did not launch the attack for revenge, punishment or conquest. Yet, it toppled the government and led to Gaddafi's death. Was it deceit, ineptitude or unavoidable?

I believe the campaign's evolution reflected lack of clarity about initial objectives and the operational implications of the civilian protection mission, which was then assigned to military organizations whose standard operating procedures enabled a slippery slide into alignment with an armed party in a civil war. Whether inexcusable or understandable, the Libya intervention revealed ignorance and institutional autopilot, not mendacity or conspiracy. But, the ongoing public disputes suggest how malleable and imperfect humanitarian intervention can be.

Three widely cited early examples of humanitarian interventions reinforce this point: Vietnam's 1979 invasion of Cambodia, Tanzania's intervention in Uganda in 1978, and India's 1971 entry into the Pakistani civil war. These were not tailored, defensive operations designed primarily to save lives. Each facilitated a form of regime change. Each is properly understood as an effort to advance the intervening state's interests as much as advance humanitarian goals. Does that make them crimes of aggression? Should they have not occurred? Would the world nonetheless desperately plead for military intervention to end the next auto-genocide?

The 1994 French intervention in Rwanda offers yet another twist on the theme of complexity in humanitarian action. With UN authorization, France created a "safe zone" after the peak of 1994 genocide. French actions by design largely served to protect not the Tutsi victims, but the very French-supported Hutu who had prosecuted the Rwandan genocide. It was protection, but with a macabre twist. Did the evil that Operation Turquoise shielded from retribution normatively disqualify the French intervention as humanitarian?

The tensions among operational realities, motives and outcomes, and legal status become more complex the closer one looks at humanitarian intervention. Should we prefer an "illegal" humanitarian intervention regarded as nonetheless legitimate, or a

legal military operation that masks other objectives or has negative humanitarian effects? How should the ICC consider the legality of humanitarian intervention, knowing that the UNSC cannot be relied upon to authorize the use of force when vulnerable citizens are most in need? Could the OTP countenance prosecution of officials for seeking to fulfill the same mandate that the ICC itself has pursued for fifteen years?

The OTP must consider the impact of its approach to the crime of aggression upon the future prospects for R2P. States do not undertake humanitarian intervention lightly. By definition, the military protection of foreign civilians involves sacrifice that cannot be justified purely on *realpolitik* grounds. This is why humanitarian intervention is rare, and why it is often carried out by coalitions that spread political, economic and military risks which might overwhelm a single nation. This is also why these operations tend to be economical—and sometimes miserly—in their scope, time, size, and exposure of forces, which in turn shapes their outcomes. Arguably the single biggest impediment to effective humanitarian action, though, is weak "political will" to take any risk at all on behalf of a non-citizen.

This gives rise to concern that the ICC's new role will narrow the aperture for R2P. Why would political leaders risk possible prosecution to take what they regard as optional and selfless action? This is the reality now facing officials in states that have ratified or acceded to the amendments on the crime of aggression to the Rome Statute of the ICC. At the moment, that group includes few countries that historically have participated in humanitarian operations, but the total number of nations willing to invest their blood and treasure on behalf of humanitarian interests is itself small.

One possible route to protect government leaders from the uncertainties of the ICC's response to humanitarian action would be state notification of intent to opt out of the ICC's jurisdiction over the crime of aggression, as the amendments adopted by the parties specifically permit.

Despite uncertainties regarding how this could occur, "opting out" offers a creative solution to the dilemma—and by voting with their feet, states could create a *de facto* humanitarian exception in the ICC's mandate. But, encouraging the opting out also normalizes an a la carte justice model. This workaround would be unhealthy for the ICC institutionally and for global justice generally.

The ICC's new role also may affect states that are not party to the Rome Statute and States Parties that have not yet adopted Amendments regarding the crime of aggression. This includes a majority of states with a record of participating in humanitarian interventions—both the most militarily powerful and a larger number of states of more modest capability such as members of ECOWAS.

One possible effect is political turbulence created by a court whose very existence now suggests that humanitarian action might be considered a crime. For states that have led humanitarian interventions, the possibility that the ICC theoretically might investigate such an effort weakens government arguments to justify saving foreigners from mass atrocities. Further, the ICC is sure to become a highly visible magnet for politically-motivated requests for action—even where the Court lacks jurisdiction to do so. Already NATO has faced what it considers a spurious investigation by an international tribunal; the International Criminal Tribunal for the Former Yugoslavia's investigation of potential

war crimes during the Kosovo conflict left a toxic legacy long after the Tribunal declined to proceed further.

Because humanitarian action will fail to obtain UNSC authorization when Council members are divided, an absence of legal authorization virtually guarantees high-profile political charges of illegality. Those protests likely will invoke the ICC, regardless of whether the Court has jurisdiction over the state leaders involved. The Court provides a platform for questioning the legitimacy of those seeking to do the right thing. It may also have potential ripple effects if states attempt to mirror the ICC by adopting national legislation or invoke claims of universal jurisdiction to investigate or indict state leaders for humanitarian intervention.

Given the ICC's status as an international body, any investigation or commentary on a military operation would be seen as highly detrimental to the nations involved—to their global reputations, by association to their friends and allies, and to their domestic constituencies. Even allegations made to the Court may be politically costly. The ICC predictably will be exploited by political enemies to discredit humanitarian intervention they oppose on other grounds. For states considering leading or joining military action to protect civilians abroad, this could be a critical straw tipping the balance against saving foreign lives.

A different unintended consequence for the Court could be sustained reluctance to accept the crime of aggression Amendments on the part of states that might otherwise do so until such time as it is clear that the ICC would not consider humanitarian intervention a crime of aggression.

How might the OTP achieve this goal? Some countries, including the United States, have urged the Court to create a humanitarian intervention carve-out. The OTP might issue a policy paper that articulated its general intention to exempt humanitarian intervention from consideration as a potential crime of aggression. It could take the position that there is sufficient uncertainty about whether military action intended primarily to protect civilians consistent with the doctrine of R2P is "manifestly" unlawful, thereby signaling its intention to preserve space for states to act on humanitarian grounds. This might over time assist with "normalizing" R2P as a matter of international law, assuming that subsequent OTP action regarding investigation or prosecution remained consistent with the policy statement.

Of course, the OTP would face difficulties—either privately or in a public policy statement—in doing so. How would the OTP surely distinguish a *true* humanitarian intervention from an act or crime of aggression? The OTP might parse an act of aggression from a crime of aggression, but this begs the question of the respective elements of each. In a real world of mixed motives and unintended consequences, should one rely upon stated or implied intentions? Operational conduct? Humanitarian effect? At what point in time does one evaluate the action?

Moreover, if the OTP dared to make such a distinction, declaring that that intervention in the name of humanitarian protection would not be equated with the crime of aggression, different consequences would follow. States would more boldly mask or rationalize all manner of force abroad as protection missions. Already we have countless historical examples of incursions and occupations conducted in the name of protecting

abused minorities in other states. More recent Russian actions in Crimea and Eastern Ukraine can be defended in the same vein. A humanitarian carve-out protecting individuals from prosecution for the crime of aggression might simply make R2P a flag of convenience.

International aggression is action undertaken by states, and the UNSC alone has been responsible for determining whether states have committed aggression under the *UN Charter*. As many have observed, such determinations are fundamentally political, a reality that underlies many nations' unease with the ICC's venture into this territory. If the UNSC's determination of aggression is fundamentally political, so too is its willingness to authorize (or not) actions taken to fulfill R2P. The UNSC remains the institution positioned to reconcile the normative vision of R2P and the *UN Charter*. The ICC has been tasked with a taut legalism that threatens its broader purpose.

Even if the risks of deterring humanitarian action should not be the ICC's primary concern, the risks are real. The OTP's most direct means of protecting the ICC from this dilemma is to rely primarily upon the UNSC as the threshold for action. Of course, setting the bar so high for taking investigatory or prosecutorial action has its own costs, primarily in disappointing expectations for an independent body that would apply more consistent and objective criteria than the UNSC has been willing to countenance. Still, the practical question must be asked—what would the OTP be giving up if it were to adopt such a posture at least in its initial phase? Or, if preserving scope for R2P suggests that the OTP should follow a conservative posture, might it also serve the Court to do so for very different reasons?

The ICC faces formidable barriers to action against individuals for the crime of aggression in all but a small minority of cases. It can act only in cases where both the victim and aggressor have ratified the relevant amendments. Most of the militarily powerful and active states appear unlikely in the short term to accept the vulnerabilities of external jurisdiction over matters of politics and international security that have belonged to the UNSC. These "outsider" states beyond the OTP's reach include the P5 members and many that historically have been engaged in territorial disputes. Certainly, the amendment-ratifying states' governments will change over time, and leaders and circumstances can surprise. Thus, some of the small number of states currently within reach of the Court might become subjects of OTP concern. The current list of signatories, though, suggests that the OTP is unlikely to face near term choices regarding the crime of aggression.

Furthermore, as much as the Court will want to demonstrate its relevance, it must not trivialize itself. With a mandate to examine action in cases whose character, gravity, and scale could constitute a manifest violation of the *UN Charter*, Iraq's 1991 invasion and occupation of Kuwait provides a useful standard. The ICC cannot afford to pursue the small-bore cases of occasional shooting or skirmish across national lines. To do so would evince an overweening ambition that would validate skeptic's fears and undermine the Court. Given the number and the character of states accepting the ICC's new role thus far, the OTP has little hope of fulfilling high expectations of independent action outside of UNSC action.

Why not turn this into a virtue by adopting a conservative approach, linking ICC investigations and prosecutions to the UNSC determinations? The Court may find further advantage in this approach. The "outsider" states remain an important audience for the OTP if the Court aims to become a truly universal instrument. Their questions and concerns regarding definitions, subjects, and scope for action will take time to address in practice, if the Court can do so at all. While a conservative approach theoretically relinquishes scope for independent action by the OTP, it offers hope of becoming a more universal Court. And, in turn, it would preserve room for military actions protecting individuals from mass atrocities.

The ICC was created to prosecute crimes of genocide, war crimes, and crimes against humanity. Humanitarian intervention seeks to prevent these acts from occurring. The ICC must not, in the name of prosecuting the crime of aggression, dissuade states from acting to protect individuals from mass atrocity crimes.