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The Aggression Amendments: Points of Consensus and Dissension

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The Aggression Amendments: Points of Consensus and Dissension

Beth Van Schaack

When delegates representing the nations of the world finalized the Statute of the International Criminal Court (ICC) in 1998, the definition of the crime of aggression and its jurisdictional regime eluded consensus. Delegates thus left for posterity a cryptic reference in Article 5 stating that any provisions governing the crime were to be consistent with the U.N. Charter. In 2010, in Kampala, Uganda, the Assembly of States Parties (ASP)—along with a number of observer states and NGOs—finalized the task that was left to them and adopted a consensus package of amendments adding the crime of aggression to the Court’s subject matter jurisdiction. So long as thirty States Parties ratify the new provisions, and the ASP decides to activate them, the Court may be empowered to prosecute the crime of aggression as early as 2017.

In the negotiations, the definition of the crime and the operative jurisdictional regime proved contentious, both individually and in their interaction. Delegates always conceived of the crime of aggression as having two components: state action and individual conduct. The state act of aggression serves as a predicate to a finding that a particular individual committed the crime of aggression. The formulation of the state action element—which implicates classical rules governing the legality of the use of force and the province of the Security Council within the U.N. system—drew criticism because it seems to imply that every breach of the prohibition of the use of force constitutes an act of aggression. Yet, both the U.N. Charter and G.A. Resolution 3314—the inspiration for the ICC Statute’s definition of aggression—envision a continuum of unlawful uses of force, only some of which rise to the level of aggression *per se*. According to the final treaty amendments, only those acts of aggression that constitute a “manifest” violation of the U.N. Charter are potentially prosecutable as the crime of aggression. This qualifier establishes two thresholds: one of gravity, ensuring that only the most egregious or willful violations of the U.N. Charter will be prosecuted, and one of legal certainty, ensuring that there is some global consensus as to the unlawfulness of the state’s act.

As has been done in prior treaty drafting exercises, states with lingering concerns about the particulars of the crime’s definition sought interpretive Understandings to guide the Court in adjudicating the new crime. An important element of the United States’ agenda in this process was to sponsor language that would bar, or at least discourage, the prosecution of a use of force deployed to prevent the further commission of atrocity crimes within the ICC’s jurisdiction. Although a specific proposal in this regard was not adopted, the final Understandings do introduce a gravity threshold for finding the predicate state act of aggression. The Understandings also reinforce the idea that aggression is the most serious and dangerous form of the illegal use of force and mandate a consideration of the “character” and “consequences” of a state’s conduct in determining whether an act of aggression has been committed. The Kampala Understandings proved to be critical in forging the final consensus on the substantive portion of the aggression amendments. Notwithstanding these Understandings, it remains to be seen whether the new provisions will over-deter uses of force deployed in defense of others or result in more unilateral uses of force by hindering coalition-building.

Because the full reach of the definition of aggression seemed destined to remain indeterminate, the necessity of a jurisdictional filter for the crime took on great importance in the negotiations. The debate centered on which body would be empowered to make the

determination that a state committed an act of aggression. Contenders included the oligarchic Security Council, the arguably more democratic but nonetheless politicized General Assembly, the leisurely International Court of Justice, or the ICC itself.

Ultimately, the principle of judicial independence prevailed. Following a State Party referral or the initiation of an investigation by the Prosecutor acting *proprio motu*, the Security Council and Pre-Trial Division will operate in tandem. The Council will have the first opportunity to make the predicate determination; in the event that this determination is not forthcoming, the Pre-Trial Division—sitting *en banc*—may then consider the matter. In the event that the Security Council refers a situation to the Court, as it did in Darfur and now Libya, there is no filter. Although this was touted as a more streamlined process, the lack of a filter for any potential aggression charges may discourage the Council from referring situations to the Court if it has concerns about potential aggression charges. It remains to be seen whether the Council will use its referral power surgically, as it did in the Darfur situation, or its Article 16 deferral power as a line item veto of particular charges.

The issue of state consent presented another contentious element of the jurisdictional regime. Some states contended that the Court's default jurisdictional preconditions should govern such that a prosecution could proceed so long as either the territorial state or nationality state was a state party to the ICC Statute. Other states argued that the states involved should be entitled to provide some more overt manifestation of consent before a prosecution for the crime of aggression could proceed. In the end, more universalist ideals were abandoned as states backed a regime that excludes non-states parties from the aggression amendments altogether (by barring the prosecution of crimes of aggression committed on their territories and by their nationals) and grants states parties an opt-out option that will shield their acts of aggression from scrutiny. These provisions served to placate members of the Security Council, who favored an exclusive Security Council aggression filter, but also to satisfy states that wanted to limit the Court's ability to exercise jurisdiction over the crime of aggression without forsaking aggression prosecutions entirely to power politics.

Although delegations left Kampala with the impression that a consensus compromise on the crime of aggression had been reached, it now appears that dissention remains over a crucial technical issue: namely, when are states parties "bound" by the amendments in the absence of a Security Council referral? At stake are two open questions: (1) whether the nationals of states parties that do not ratify the amendments may be prosecuted if such individuals commit the crime of aggression on the territory of any state and (2) whether a prosecution for the crime of aggression may go forward when the crime is committed on the territory of a state party that has not ratified the aggression amendments.

Two approaches have emerged to resolve this lingering uncertainty. One approach relies on the plain language of Article 121(5) of the ICC Statute, which all states now agree governs the aggression amendments. Reflecting the regime set forth in Article 40(4) of the Vienna Convention on the Law of Treaties, this provision asserts that the Court cannot apply statutory amendments to a state party's nationals or territory if that state party has not ratified them. The second approach—articulated for the first time post-Kampala—is based on the argument that the adoption of the opt-out provision has over-ridden the amendment regime set forth in Article 121(5). This revisionist position is not supported by the text of the treaty or the amendments; rather, it depends upon the piecing together of snippets of text and the drawing of subtle assumptions from preambular references. The plain language reading of 121(5), by contrast, not only finds clear textual support, but it also reflects sound policy by enabling states parties to

remain out of the aggression amendments altogether, both from the perspective of the possible prosecution of their nationals for the commission of aggression elsewhere *and* from the perspective of potential acts of aggression that may be committed on their own territories.

Lodging an opt-out declaration is no substitute for remaining outside the aggression provisions altogether. Such a declaration will only insulate the nationals of the putative aggressor state from prosecution; it will not prevent the Court from asserting jurisdiction over acts of aggression committed on the territory of states parties. There are a number of reasons why a victim state may not want the crime of aggression to be prosecuted before the ICC, not the least of which would be in circumstances in which an investigation or prosecution might antagonize the conditions on the ground. In addition, a victim state may oppose an aggression prosecution before the ICC when the dispute has already been satisfactorily resolved through diplomatic channels or when the process might risk the production of sensitive national security information.

These open issues reflect enduring confusion over how the treaty's amendment provisions should apply to the codification of the crime of aggression. This confusion, in turn, threatens the very legality of the amendment package. It is important to gain precision on this point so that the world's legislative bodies can make informed policy choices about the propriety of ratification. Fortunately, additional post-Kampala discussions involving interested states are proceeding in informal settings in an effort to resolve this open issue in advance of 2017. This will ensure that the aggression amendments enjoy a genuine consensus—rather than just the illusion of consensus—before the first prosecutions commence. Otherwise, the entire aggression package will be subject to challenge in the first contentious aggression cases that appear before the Court. In such event, the interpretive slights of hands necessary to sustain the revisionist interpretation should not fool the judges when confronted with the plain language of 121(5), the clear intent of the ICC Statute's founders, and the principle of lenity.

It remains to be seen, of course, whether the addition of the crime will enhance the work of the Court or whether it will undermine the Court's ability to prosecute atrocity crimes. The ICC is on the eve of a dramatic personnel overhaul that includes six of the Court's eighteen judges, the Chief Prosecutor, and the President and Vice Presidents of the Court. This choice of professional staff has become all the more crucial, because it is these individuals who will be entrusted with adjudicating this new and controversial crime.