

THE CRIME OF AGGRESSION AMENDMENT ADOPTED AT THE ICC REVIEW CONFERENCE IN KAMPALA, UGANDA

In the early hours of June 12, 2010, at the conclusion of the Review Conference in Kampala, Uganda, the States Parties to the Rome Statute of International Criminal Court (ICC) approved a package of amendments to the Statute concerning the crime of aggression. Specifically, they adopted a definition, understandings on certain concepts, the elements of the crime, and conditions for the exercise of jurisdiction. The adoption of these amendments is an historic achievement for those who advocated for including the crime of aggression in the Rome Statute.

Background: From Nuremberg to Kampala

In 1950, the Nuremberg Tribunal defined crimes against peace as the planning, preparation, initiation or waging of a war of aggression. During the trial, the chief American prosecutor, Robert H. Jackson, stated, “To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” Crimes against peace were the precedent to the current crime of aggression. According to the Rome Statute, the ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Including the crime of aggression in the Rome Statute in 1998 was an effort by the international community to prevent atrocities like the ones committed during the World War II from happening again. However, the Court was unable to exercise jurisdiction over the crime of aggression since the Rome Statute called for further negotiations to define the crime and establish jurisdictional conditions.

To conduct these negotiations, the Assembly of States Parties (ASP) established the Special Working Group on the Crime of Aggression (SWGCA) which functioned from 2003 until 2009. The SWGCA was open to all UN member states on an equal footing. The SWGCA met at ASP sessions and at informal inter-sessional meetings (known as the Princeton Process) to continue efforts to reach an agreement on the definition of the crime and the conditions for the exercise of the Court’s jurisdiction. The US did not attend those negotiations. In 2009 the SWGCA proposed an amendment to be considered by the 2010 Review Conference which contained a definition, elements of crimes, and conditions for the exercise of jurisdiction over the crime of aggression. Following the conclusion of the SWGCA, the ASP leadership convened several informal meetings which set the stage for the negotiations at the Review Conference.

The Review Conference focused on the crime of aggression during its second week. The conference worked through several proposals which attempted to bridge the gap between those countries seeking to limit the ways in which aggression could be brought before the Court and those seeking a more expansive approach to the Court’s jurisdiction over the crime. The amendments on the crime of aggression were adopted by consensus on the last day of the conference. Despite of the adoption of the amendments, the ICC cannot exercise its jurisdiction on the crime of aggression, yet.

Entry into force and Exercise of Jurisdiction

The amendment on the crime of aggression will enter into force according to Article 121(5), which applies to amendments that deal with the crimes under the Court’s jurisdiction and how these amendments would enter



into force regarding the States Parties. However, the new articles delay the exercise of the ICC's jurisdiction over the crime of aggression by introducing two additional conditions. First, the ICC can not exercise jurisdiction over this crime until one year after thirty states have ratified the amendment. Second, the States Parties need to authorize the exercise of jurisdiction over the crime of aggression at some point after January 1, 2017, even if the number of ratifications is achieved before that day. There will be a review of the aggression amendments seven years after the beginning the Court's exercise of the jurisdiction.

No country, including the US, would be affected by the exercise of the Court's jurisdiction on the crime of aggression before January 2017. Even then, only if thirty States Parties ratified the amendment and the States Parties decided by consensus or vote, would the Court be able to begin exercising its jurisdiction over the crime of aggression. In addition, as explained below, the Court's jurisdiction will only reach those states that have not opted out of the provision. Nationals of non-states parties, including the US, could not be investigated for crimes of aggression absent a referral by the Security Council.

The Definition

Article 8bis defines the crime of aggression and the act of aggression for the purpose of the ICC. The crime of aggression is the planning, preparation, initiation or execution of an act of aggression by a person in a position effectively to exercise control over or to direct the political or military action of a State. This act, by its character, gravity and scale, must constitute a manifest violation of the Charter of the United Nations. The act of aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter. It also provides a detailed non-exhaustive seven-paragraph enumeration of acts that qualify as acts of aggression based on the UN General Assembly Resolution 3314.

Understandings

Despite the fact that the US had been absent from the Princeton Process, it made contributions at the Review Conference on the definition of the crime of aggression. The US delegation proposed and negotiated some understandings that are included in an annex of the resolution of the conference which adopted the amendment. These understandings will help the judges to interpret the provisions on the crime of aggression. While they did not resolve all of the US concerns about the definition, they are seen as a major contribution.

Early in the Review Conference and at previous ICC meetings, US delegates stated that while the Special Working Group had produced a definition of the crime of aggression, key aspects of the definition were still ambiguous. The US argued that understandings about these aspects would be essential to minimize three undesirable risks: the risk of criminalizing lawful uses of force, the risk that the definition of the crime of aggression would not truly reflect customary international law, and the risk of unjustified aggression prosecutions of nationals of one country in other countries that have incorporated the definition into domestic law. In order to address these issues the US suggested a few interpretative understandings which would make the definition more acceptable. The US, in proposing this understandings, recognized that it had been absent from the negotiations on aggression for eight years and must therefore live with the practical consequences of that failure to participate. This relieved anxiety that the US would try to reopen the agreement on the definition.



The Conference eventually accepted versions of the American understandings. The first understanding aimed to make it clear that the amendments that address the definition of the act and crime of aggression apply only to the Statute. It says that the amendments did not create the right or obligation to exercise domestic jurisdiction in one States with respect to an act of aggression committed by another State. The second understanding was derived from UN General Assembly Resolution 3314 and deals with some concerns about the definition of act of aggression and restates that aggression is the most serious and dangerous form of the illegal use of force. The third understanding sought to clarify the use of the word “manifest.” The conference agreed that no one component (character, gravity and scale) of the act of aggression would be significant enough to satisfy the manifest standard by itself.

Triggering to the Court’s Jurisdiction

The conditions for the exercise of jurisdiction over the crime of aggression have long been the most difficult aspect of concluding negotiations on the crime. It was long foreseen as the most controversial and contentious question before the conference. At the center of the debate was the extent of the role of the UN Security Council.

The role of the Security Council in the exercise of the ICC’s jurisdiction over the crime of aggression had been one of the most critical issues before the SWGCA. A large number of states arrived at Kampala strongly determined to deny the Council any role whatever in the Court’s jurisdiction. They believed that role would politicize the Court and compromise its independence and legitimacy. Other countries, such as, but by no means only, the Council’s permanent members (including the US) began the conference equally dug in on the insistence that all situations about aggression should come to the Court only through the Council. They said that the question of an act of aggression is indeed political and that the Council is the right place in the international system to deal with it.

Probably the most important influence on the debate was the intense and almost universal determination of the participants at the Review Conference to reach a final outcome there after eight years of negotiations in preparations. This was very clear in speeches by governments and in their side comments. Some of the proposals intended to ease a complete outcome showed their sponsors moving sharply away from their previously declared positions such as those presented by Argentina, Brazil and Switzerland, Canada and Slovenia.

According to the final version of the amendments, there are two possible scenarios under which the ICC could exercise jurisdiction over the crime of aggression. Articles *15bis* and *15ter* contain the triggers to the ICC jurisdiction over the crime of aggression.

First, the ICC could exercise jurisdiction over a crime of aggression when a State Party refers a situation or the Prosecutor acts on his or her own initiative. In this case, the Prosecutor must first ascertain whether the Security Council has made a determination of an act of aggression. Where the Security Council has made such determination, the Prosecutor can proceed with the investigation. Where no such declaration is made in six months, the Prosecutor could only proceed with an investigation if it is authorized by the Pre-Trial Division of the Court. When a State Party refers a situation or the Prosecutor acts on his or her own initiative, the ICC’s





jurisdiction over the crime of aggression has some peculiarities. The Court could not try nationals of non-States Parties for aggression. The Court could exercise jurisdiction over an act of aggression committed by a State Party unless it has previously declared that it did not accept such jurisdiction. States Parties may opt out of the crime of aggression by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time. The amendment suggests that opting-out States Parties “consider” the opt-out within three years.

Secondly, the Court could exercise jurisdiction over the crime of aggression when the Security Council refers a situation. In this case, it would not be necessary for the country concerned to have accepted the Court’s jurisdiction over the crime of aggression. In the case of a Security Council referral, the Court could try nationals of non-States Parties.

It should be noted that these two triggers may be activated by the ASP separately which means that, after January 1, 2017, the States Parties could decide to activate both triggers or only one of them.

Implications for the US

Regarding the US, the amendments on the crime of aggression have a minimum effect. If a State Party refers a situation or the Prosecutor acts on his or her own initiative, the ICC could not exercise its jurisdiction over a crime of aggression committed by an American citizen because the US is not a state party. It would also be very unlikely that the Security Council refers a situation where the US is involved since the US has veto power at the Security Council and can block any referral to the ICC. In addition, even if the US eventually decides to join the ICC, it would be able to avoid the Court’s jurisdiction over the crime of aggression by lodging a declaration opting out of the amendment.

Conclusion

The Second World War horrified the international community. The atrocities committed during the war brought about major developments of international criminal law. Completing the process initiated at Nuremberg, the Review Conference of Rome Statute adopted by consensus a comprehensive package of amendments on the crime of aggression. This was a major achievement for States Parties. The complexity of the compromise reflects the diverse interests about this crime. Although many questions still need to be addressed, some aspects are already clear. For example, under the agreed amendments, the Court will not be able to exercise jurisdiction over a US national in any way for the crime of aggression without prior American consent.

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