Analysis: Activating the jurisdiction of the International Criminal Court over the Crime of Aggression

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As described in an earlier article, the Assembly of States Parties to the Rome Statute of the International Criminal Court activated the crime of aggression that had "lain dormant" since 1998. Though the activation consensus gave a narrow jurisdiction to the ICC as a compromise, this action gives the crime that one of the Nuremberg judges said was the supreme international crime, containing the accumulated evil of all of the other war crimes, a place to start to develop as a key element of global justice.

Introduction

At the 16th Assembly of States Party to the Rome Statute on December 14, 2017, the Assembly resolved by consensus to activate the crime of aggression conditionally agreed to in 1998 along with the three other most serious crimes of concern to the international community in art. 5 of the *Rome Statute of the International Criminal Court, 1998*. The activities at this recent ASP have been summarized in this Journal.[1]

Activating the crime was accomplished by a Resolution of the Assembly of States Parties that the crime should be activated as of July 17, 2018 with agreement on the amendments adopted at the Kampala Review Conference in 2010 along with a reaffirmation of the independence and judicial functioning of the International Criminal Court (ICC) and a call for other States Parties to ratify or accept the amendments.[2] However, the States Parties remained at loggerheads on the issue of the scope of the exercise of the jurisdiction of the ICC until the very end.

This is a brief rundown of this major issue.

The Rome Statute

In 1998, the Rome Statute enumerated the crime of aggression along with the crime of genocide, war crimes and crimes against humanity, but made it subject to art. 5(2) as follows:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Kampala Review Consensus

At the Review Conference held in Kampala in 2010, the Conference resolved[3] to activate the ICC's jurisdiction over the crime as soon as possible, and adopted amendments to meet the requirements of art. 5(2), including a definition of the crime,[4] amendments to the elements of the crime,[5] and conditions for exercise of the jurisdiction over the crime.[6] Article 15 *bis* governs prosecutions by State referral or those originating with the Prosecutor under art. 13 (a) and (c), while art. 15 *ter*governs prosecutions by referral by the Security Council under art. 13 (b) so it could refer a situation appearing to be a crime of aggression to the Prosecutor whether or not the State had accepted the ICC's jurisdiction over it under art. 13(b).[7]

The jurisdictional conditions that caused much contention from Kampala to New York involve interpreting art. 15 *bis* (4) with art. 121, the provision of the Rome Statute that governs amendments. Article 15 *bis* (2) provides that the ICC may exercise its jurisdiction over the crime one year after the ratification or acceptance of the amendments by 30 States Parties. But art. 15 *bis* (3) provides that the ICC "shall exercise" its jurisdiction in accordance with art. 15 *bis*, but subject to a "decision" to be taken after January 1, 2017 by the same majority of States Parties as required to amend the Rome Statute (under art. 121). Article 15 *bis* (4)[8] provides that the ICC may exercise its regular art. 12 jurisdiction over a crime, unless a State Party opts out of the jurisdiction within 3 years. Article 15 *bis* (5) provides that the ICC will not exercise its jurisdiction over a non-party to the Rome Statute when the crime is committed by its nationals or on its territory. The Kampala Review Conference consensus was that these amendments were adopted under art. 5(2) and were subject to ratification or acceptance and entry into force according to the terms of art. 121(5), which provides as follows (and it is important to note for the discussion that follows, that art. 121(5) is composed of 2 sentences):

121(5) Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

The Conference also "noted" that any State Party may lodge a declaration that it does not accept the general jurisdiction of the ICC over the crime of aggression prior to ratification or acceptance.[9]

It is interesting that Professor Dapo Akande noted in 2010 that art. 121(5) applies only to amendments to arts. 5, 6, 7, and 8 and that the Kampala amendments included amendments to more provisions than these. (The Kampala amendments also added art. 15 *bis* and art. 15 *ter* to the Rome Statute as well as amendments to arts. 9, 20 and 25.[10]) He argued though, that art. 121(5) was sufficient to bring into effect the whole of this "new" crime.[11]

The required 30 States had ratified or accepted the Kampala consensus by June 26, 2016. By November 7, 2017, 34 had bought in. The matter was ready to be considered at the December Assembly of States Parties in New York.

The Road to Activation

On December 14, 2017, the States Parties decided by consensus to activate the ICC's jurisdiction over the crime of aggression as of July 17, 2018.

The central issue was whether States Parties had to opt-in or opt-out of the new jurisdiction of the ICC. The main question was the ICC's jurisdiction over a crime of aggression committed by nationals of a State Party that had not ratified or accepted the Kampala amendments, targeting a Party that had ratified or accepted the amendments.[12] Some delegations said that they would not support activation without clarifying that the ICC's jurisdiction did not extend to nationals or territories of States Parties that had not ratified or accepted the amendments, but whose support was still needed for activation under art. 121.[13] Some wanted this clarification in the activation decision itself.[14] The stakes were high because the prosecution of heads of state were potentially involved. The issue was very contentious.

In the work leading up to the session, a facilitator was appointed after the November 2016 Assembly of States Parties, to discuss the issues and to prepare a report for the States Parties on the issue setting out the States Parties' different positions. The States Parties agreed that they would not reopen the Kampala amendments. The facilitator's Report summarized numerous variants on what the Kampala amendments meant in conjunction with art. 121(5) as argued by various delegations. The Report prepared for Working Group of the Assembly of States Parties on amendments established at the Hague[15] attached 3 position papers, arguing the 2 main points of view.[16] The Report stated that the divergence of views existed only about the exercise of jurisdiction over crimes of aggression committed by nationals or on the territory of States Parties that have not ratified or accepted the

amendments.[17]

Canada, Columbia, France, Japan, Norway and the United Kingdom

In one paper, Canada, Columbia, France, Japan, Norway and the United Kingdom took the position that the ICC cannot exercise jurisdiction over nationals or on the territory of a State Party unless that State ratifies or accepts the crime of aggression amendments. Canada et al. wanted to know before the decision to activate was made whether the crime of aggression could be applied to them. The ICC legal framework must be clear both for the ICC and for States who might wish to join the Rome Statute in the future. This interpretation of the scope of the amendments should not be left as a controversy to be settled by the ICC. The activation resolution should confirm the understanding of the States Parties' that the crime would not apply to nationals or on the territory of a non-accepting or non-ratifying State. Canada et al. argued that this interpretation was based on the requirement of consent in the Vienna Convention on the Law of Treaties, art. 121(5) itself and the Kampala Conference Resolution that invoked art. 121(5).

Canada et al. then dealt with the "rival interpretation", that a national of a non-ratifying or non-accepting State Party who committed the crime on the territory of a ratifying or accepting State Party could be charged in the same way as a ratifying or accepting State, despite its lack of consent. Canada et al. replied that this "rival interpretation" ignored the second sentence of art. 121(5) as well as its first sentence, which provides that an amendment enters into force for all States Parties accepting it. The "rival interpretation" would also alter the amendment process in the Rome Statute by allowing the required 30 States to amend it. Further, to the extent that this "rival interpretation" is based on the general acceptance of States Parties of the ICC's jurisdiction under art. 12 for the crimes enumerated in art. 5, Canada et al. argue that art. 5 is subject to art. 5(2) that refers to art. 121 without sub-division and that art. 12 applies to the Rome Statute before properly amended. The availability of an opt-out under art. 15 *bis* prior to ratification could not bind States Parties who have not yet ratified.

Liechtenstein

Liechtenstein argued that the debate about whether both the non-ratifying or accepting "aggressor" state and the "victim" State had to consent to ICC jurisdiction had been going on for years. It maintained that there had been 2 "camps" before Kampala. "Camp consent" wanted a complete opt-in regime so that there was ICC jurisdiction only over nationals of States Parties that ratified the amendments (and nationals of non-State Parties completely excluded). "Camp protection" wanted a no-consent regime the same as the other crimes under art. 12. The opt-out in art. 15 *bis* (4) was a compromise, allowing aggressor States to opt-out (with art. 15 *bis* (5) entirely excluding non-States Parties). The opt-out provision only made sense if the default position was "in".

The Rome Statute is based on the ICC's jurisdiction in art. 12 over genocide, crimes against humanity and war crimes committed on a State Party's territory, even where these crimes were committed by nationals of non-States Parties. Liechtenstein drew a distinction between exercise of jurisdiction and entry into force and argued that while the Kampala amendments did not legally bind non-ratifying

States Parties, this alone did not prevent the ICC from exercising jurisdiction over their nationals.[18]

The amendments include other non-consensual elements where the second sentence of art. 121(5) does not apply: art. 15 *ter* provides the Security Council's power to refer a matter to the Prosecutor is not a matter of consent. This exception to the consent requirement argued for by "Camp consent" shows that the context of the issue is important as well as the text. The second sentence of art. 121(5) does not apply here because it conflicts with the general acceptance of ICC jurisdiction in art. 12(1) and the discretion given in art. 5(2) to design conditions for activation. Article 15 bis (4) refers to art.12, where art. 12(2) gives jurisdiction to the ICC where the "victim" is a State Party. The acceptance of the opt-out option in the Kampala Resolution suggests the ICC can exercise jurisdiction even where a State Party has not ratified. The usual middle-ground for this kind of a dichotomy is an opt-out. This is an easy way for a State Party to ensure the amendments do not apply to them, with the same effect as the second sentence of art. 121(5). Why give an aggressor state the opportunity to refuse to ratify and then lodge a declaration that they are not bound?

Argentina, Botswana, Samoa, Slovenia and Switzerland

Argentina, Botswana, Samoa, Slovenia and Switzerland focused on the importance of activating the crime of aggression. Their take on the Kampala amendments was that the ICC would have jurisdiction over States Parties where at least one State Party had ratified the amendments, while States Parties can opt-out if they wish to be excluded from the ICC's jurisdiction.[19] Argentina et al. took the position that the activation of the crime of aggression creates an incentive for universal acceptance of ICC jurisdiction. At the same time, they say that a State is also free to ratify the 1998 version of the Rome Statute and on top of that, to file an opt-out declaration.[20]

Argentina et al. go on to say that both the aggressor and victim States Party must have given their consent to jurisdiction, but "crucially" only one must have ratified the crime of aggression and the other State Party simply refrained from declaring an opt-out.[21] The Kampala amendments creates a special regime for the crime of aggression where the ICC will be able to exercise jurisdiction over nationals of non-ratifying States Parties committing the crime of aggression on the territory of States Parties and not to nationals of any State like the other art. 5 crimes.[22] Argentina et al. took the position that these amendments made sense only if the default position for States Parties were that they were "in" unless they opted out. Uncertainty about what the amendments apply to a State Party could be resolved simply by declaring an opt-out. Argentina et al. argued that the opt-out declaration was central to the Kampala compromise between conferring jurisdiction over the crime of aggression based on the consent of victim states alone and those who believed that the consent of the aggressor state should be required. They maintained that no State at Kampala sought a "double-dip" of the option of ratification and an additional further optional opt-out. Rather, jurisdiction was similar to that of domestic crimes where the State can exercise jurisdiction over crimes committed on their territory, whether or not the perpetrator was a national. Their final point was that art. 5(2) created a power to activate the crime of aggression by adopting a definition and conditions for the ICC's jurisdiction, freeing the Kampala Conference from the second sentence of art. 121(5), but a freedom that was not used to

undermine its basic theory that States should be bound only by consent. Argentina et al. took the position that an opt-out was equivalent to consent.[23]

Academic discussion

A vigorous discussion of the proper position that should be taken engaged academic commentators. There was academic argument for both the opt-in and the opt-out positions.

For example, Professor Akande argued that the Kampala reference to art. 121(5) meant that States Parties had to ratify to fall under the jurisdiction of the ICC for crimes of aggression. The seemingly redundant additional opt-out in art. 15(4) *bis*allowed States to ratify the amendments to bring into effect the art. 13(b) Security Council referral to prosecution in art. 15 *ter*, while avoiding other prosecutions of their nationals or aggression on their territory by declaring they were opting out. Another possibility was that a State might ratify the amendments because it wished to be protected from aggression itself, while opting out of prosecution for aggression that their nationals commit or for aggression committed on their territory.[24]

Stefan Barriga argued that art. 121(5) contains two sentences, as set out above, the first referring to entry into force of amendments for States that have accepted an amendment and the second dealing with the non-exercise of the ICC's jurisdiction in situations where the State had not accepted an amendment conferring jurisdiction. His main point was that all States Parties had already accepted the crime of aggression in art. 5 and art. 12 and so the second sentence did not apply in the case of the crime of aggression.[25]

However, this author thinks that the distinction between entry into force and exercise of jurisdiction as a distinction in the operation of the two sentences in art. 121(5) seems to miss the point. Article 121(5) is about ratification of amendments, not their substance. Much of the debate seems to be premised on the issue of whether art.5(2)'s requirement of a definition and conditions for exercise of jurisdiction for the crime of aggression is an amendment or not. Article 5(2) itself refers to art. 121 which concerns amendments. The Kampala Conference resolutions and the Resolution activating the crime of aggression refer to amendments. It is hard to understand the argument that art. 121(5) does not apply in full for amendments that are conditions for the entry into force and the exercise of jurisdiction over amendments to arts. 5, 6, 7 and 8 in the first sentence, or a "crime covered by the amendment" in the second sentence.

The Decision on the Opt-in/opt-out issue

The final decision on this issue was:

…that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or *proprio motu* investigation [art. 13(a) and (c)] the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national

or on the territory of a State Party that has not ratified or accepted these amendments…

The States Parties also resolved to reaffirm art. 40(1), which provides for the independence of the judges of the ICC and art. Art. 119(1) which provides that the ICC shall settle any dispute concerning its judicial functions. Professor Akande suggests that these references were intended by the States Parties that sought them to give the judges of the ICC room to interpret the new provisions more in line with the States seeking broader jurisdiction over non-ratifying States Parties who had not opted-out. But in the end, he argues that the final States Parties' decision on the opt-in/opt-out theories binds the ICC in interpreting the Rome Statute and the Kampala Amendments because it amounts to an agreement of the States Parties to the proper interpretation of art. 121(5) under the VCLT and customary international law.[26]

The Crime of Aggression as a Domestic Crime

The importance of the consent approach to jurisdiction to some States can be understood in light of developments more or less contemporaneous with the Assembly of States Parties. The High Court of Justice's Divisional Court of the Administrative Court recently rejected a private prosecution of Tony Blair on charges of crimes of aggression for his part in the 2003 invasion of Iraq.[27] The High Court applied a decision of the House of Lords in *R v. Jones*[28] deciding that there was no domestic crime of aggression in the UK. Their Lordships reasoned first, that the creation of new crimes was for Parliament and second, that it would be constitutionally improper for the courts to judge the state's actions.

Interestingly, their Lordships did not think that the elements of the crime of aggression needed further elaboration to permit a lawful trial, as its core elements have been known since 1945.[29]

Conclusion

The ICC will have jurisdiction over the crime of aggression July 17, 2018. It seems likely that its jurisdiction over the crime will extend only to the nationals and territory of States Party that ratify or accept the amendments necessary to activate it. It will be interesting to see what the ICC makes of the "new" crime and the process by which it was activated.

It will also be interesting to see if it has any long-term effects on humanitarian interventions where States intervene against governments that attack their own citizens where the Security Council does not authorize military intervention under R2P. The Blair prosecution suggests that some of the major powers will be unlikely to want to ratify the amendments for fear of the prosecution of their leaders and former leaders.

The consensus activation of the crime of aggression does seem to fall short of Justice Robert Jackson's view at Nuremberg that the crime of aggression was the supreme international crime, containing the accumulated evil of all of the other war crimes. Commentators have already predicted that there will likely be few referrals by the Office of the Prosecutor in the next few years.[30] Professor Jennifer Trahan believes that the States Parties made the right decision, despite the disappointment

about the narrow jurisdiction given the ICC. She takes comfort in the fact that States Parties came to a consensus that aggression is a crime and that international law moves forward in imperfect ways. Aside from Security Council referrals to the Prosecutor, it is now up to the ICC, civil society and States Parties to press for a more expansive jurisdiction over the crime of aggression.[31]

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1. Amanda Ghahremani, Leah Gardner & Isabelle Jacovella Rémillard, “First Week of the Assembly of States Parties to the ICC” (2017) 1 PKI Global Just J 18, Amanda Ghahremani, Leah Gardner & Isabelle Jacovella Rémillard, “Second Week of the Assembly of States Parties to the ICC” (2017) 1 PKI Global Just J 20.
2. Resolution ICC-ASP/16/Res.5 at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-R…
3. Resolution RC/Res.6 at https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf.
4. Id. Appendix I, art. 8 *bis*.
5. Id. Appendix II, art. 8 *bis*
6. Id. Appendix I, arts. 15 *bis* and 15 *ter*.
7. Id. Appendix III, art. 2.
8. Article 15 *bis* (4) provides: The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

9. Resolution RC/Res.6, para. 1 and Appendix I, art. 15 *bis* (4).
10. Resolution RC/Res.6, Appendix 1.
11. Professor Dapo Akande, “What Exactly was Agreed in Kampala on the Crime of Aggression?” at https://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crim….
12. “Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression”, ICC-ASP/16/24 at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-24-ENG.pdf, IV, para. 13.
13. Id. para. 14.
14. Id.
15. Established at the 8th Plenary Meeting in by ICC-ASP/8/Res.6, para. 4.
16. Id. para. 14.
17. Id. V, para. 31(d).
18. Id. Annex II, B, para. 6.
19. Id. Annex II, C, section 1, para. 4(b).
20. Id. section 1, para. 7.
21. Id. section 2, para. 2(b).
22. Id. section 2, para. 3.
23. Id. section 3, para. 16.
24. Professor Dapo Akande, “The ICC Assembly of States Parties Prepares to Activate the ICC’s Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction?” at https://www.ejiltalk.org/the-icc-assembly-of-states-parties-prepares-to….
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27. *R (on the application of General Abdulwaheed Shannan Al Rabbat) v. Blair and Straw, Lord Goldsmith and HM AG*, [2017] EWHC 1969 (Admin.) See https://www.judiciary.gov.uk/judgments/r-al-rabbat-v-westminster-magistrates-court-and-others/. This decision provoked considerable media coverage. See eg.http://www.bbc.com/news/uk-40775725.
28. 2006 UKHL 16, [2007] 1 AC 136.
29. Id. para. 19 per Lord Bingham, para. 59 per Lord Hoffman, concurred in by Lord Rodger and Lord Carswell.

30. Jennifer Trahan, “One Step Forward for International Criminal Law; One Step Backwards for Jurisdiction”, Opinio Juris, at http://opiniojuris.org/2017/12/16/one-step-forward-for-international-criminal-law-one-step-backwards-for-jurisdiction-the-perspective-of-someone-present-at-the-un-during-negotiations/ and Alex Whiting, “Crime of Aggression Activated at the ICC: Does it Matter?”, Just Security, at https://www.justsecurity.org/49859/crime-aggression-activated-icc-matter/ both referred to in note 1, “Second Week of the Assembly of States Parties to the ICC.

31. Jennifer Trahan, id.