

ACTIVATION OF THE CRIME OF AGGRESSION

The Kampala Amendments to the ICC Statute on the Crime of Aggression are a carefully crafted compromise. Between 1998 and 2010, ICC States Parties, with the active participation of observer states, negotiated a consensus jurisdictional regime and activation process for the crime of aggression.

Jurisdiction

ICC jurisdiction over the crime aggression is more limited than the other ICC crimes. This was a major concession by many ICC Member States who warned against disrupting the uniformity of the ICC regime, but a necessary one to ensure that a number of militarily powerful states and their closest allies did not break consensus at the 2010 Review Conference:

- Nationals of non-ICC States who allegedly commit genocide, crimes against humanity, or war crimes on the territory of a member states are subject to ICC jurisdiction. Nationals of non-ICC States who allegedly commit the crime of aggression are excluded (unless the UN Security Council refers the situation).
- There is no opt-out available for ICC Member States for genocide, crimes against humanity, or war crimes. Nationals of ICC Member States can opt-out of ICC jurisdiction for the crime of aggression (except in the case of UN Security Council referral).

Activation: The Exercise of ICC Jurisdiction

At the Rome Conference in 1998, some states would not sign the ICC Treaty if the crime of aggression was excluded. Others would not sign if it was included. In the final compromise, the ICC was granted jurisdiction over the crime of aggression (article 5.1), but activation was delayed (article 5.2). Article 5.2 left States Parties leeway to negotiate a definition and jurisdictional conditions and decide upon the process whereby ICC jurisdiction would be activated.

In the lead-up to the review conference, there were three views on how activation should take place:

- Since the crime of aggression was already within the jurisdiction of the ICC, a definition and jurisdictional conditions just needed to be “adopted” by a 2/3^{rds} vote of the ASP at any regularly scheduled meeting (articles 5 and 12).
- Once 7/8^{ths} of ICC States ratified the aggression amendment, the ICC would have active jurisdiction over all ICC Member States and non-ICC states that attacked an ICC State (article 121.4).
- ICC crime of aggression jurisdiction would be activated only for ICC States that accepted the amendments, one by one (article 121.5).

The 2010 Kampala Review conference was divided over these positions and delegations sought a compromise. ICC States who wanted a uniform jurisdictional regime for aggression and the other crimes made the most significant compromise: excluding non-ICC States that attacked ICC states from aggression jurisdiction at the ICC. This was meant to placate a number of militarily powerful states and their closest allies so that a consensus could be achieved. The final Kampala compromise required other concessions as well:

- A seven-year delay before activation.
- 30 ratifications required (to trigger a one-year countdown to the activation vote).
- 2/3rds of the ASP must vote to activate.
- ICC Member States could opt-out.

With these concessions, the Review Conference adopted the Kampala amendments by consensus. The Japanese delegation expressed concern that the entry into force regime was not consistent with the ICC Treaty’s amendment clauses, but Japan did not stand in the way of consensus.

The Current Discussion Over Activation

Canada, Colombia, France, Japan, Norway and the U.K. argue in a position paper, “the Court cannot exercise jurisdiction over nationals of a State or on the territory of a State unless that State accepts or ratifies the Aggression amendments.” (16 March 2017 Position Paper, para. 2). They maintain that the Kampala amendments are unclear about whether the nationals of ICC Member States that have not ratified can be prosecuted for aggression at the ICC (absent a Security Council

referral). It is not the amendments that are unclear, but this understanding of them. Nationals of ICC States that have not ratified the Kampala amendments can indeed be prosecuted if they attack an ICC State that has ratified the Kampala amendments, unless they opt-out:

- The plain language of the amended ICC Treaty explicitly allows the ICC to exercise jurisdiction over all ICC States (with a state referral or *proprio motu* authorization), “unless that State Party has previously declared that it does not accept such jurisdiction.” (15 *bis*, paragraph 4)
- The *travaux préparatoires* demonstrate, step-by-step, how the Kampala compromise was reached.¹ Essential to the compromise was the exclusion of non-ICC States from ICC jurisdiction and an optional opt-out for ICC States (absent a Security Council referral). The article 121(4) or 121(5) amendment alternatives were deleted from the Chair’s working paper and replaced by the opt-out compromise, which garnered consensus.

Canada, Colombia, France, Japan, Norway and the U.K. maintain that the activation process agreed upon in Kampala is not permitted under the amendment provisions of the ICC Treaty, nor under the Vienna Convention on the Law of Treaties. They should not be concerned:

- In order to reach agreement in Rome in 1998, ICC States included a special activation regime for aggression. Unable to reach an agreement on specifics, the Plenipotentiaries in Rome granted ICC Member States broad discretion to negotiate a compromise (article 5.2). The amendment procedure in articles 121.4 and 121.5 were never intended to prevent a *sui generis* activation compromise for aggression.
- Canada, Colombia, France, Japan, Norway and the U.K.’s concern that Vienna Convention (article 40.4) prohibits an opt-out is also unwarranted. The Vienna Convention requires an opt-in procedure for new amendments, “unless the treaty otherwise provides.” (articles 39 and 40.1) The ICC Treaty provides its own amendments procedures (articles 5.2, 121, 122

¹ S. Barriga and C. Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012). For a detailed account with pin cites to the *travaux préparatoires*, See Stefan Barriga and Niels Blokker, “Conditions for the Exercise of Jurisdiction Based on State Referrals and *Proprio Motu* Investigations,” *The Crime of Aggression: A Commentary*, Claus Kress and Stefan Barriga, eds. 652 (2017).

and 123). The ICC Treaty's amendment procedures can bind non-ratifying states. Article 121.4, for example, binds all ICC States once 7/8^{ths} of States Parties Ratify.

- Canada, Colombia, France, Japan, Norway and the U.K's concern that the Kampala amendments violate the Vienna Convention (article 34) by binding third states without their consent is unwarranted. Third states do not need to be bound by the Rome Treaty for the ICC to exercise jurisdiction over their nationals. The nationals of third states can be prosecuted for the crime of aggression because they have committed crimes on the territory of foreign states. The same is true for ICC prosecutions of the nationals of non-ICC States for genocide, crimes against humanity, and war crimes (ICC Treaty, article 12.2).

Conclusion

States face a crucial decision in December 2017. Given authoritarian predilections and the looming risk of a nuclear accident, existent checks on the illegal use of force may not suffice. Once activated, the crime of aggression has the potential to curb authoritarian power. Even in non-ICC States and ICC Member States that opt-out, an activated crime of aggression will provide opponents of authoritarian leaders with legal leverage to curtail impulsive wars. Once ICC jurisdiction over the crime of aggression is activated and the Kampala amendments are incorporated into domestic law, lawyers from justice, foreign affairs, and defense departments will have a framework within which to check leaders tempted to reflexively support their allies' aggressive wars. It is time to strengthen the international rule of law, not weaken it.

The Crime of Aggression: Activating ICC Jurisdiction

A Briefing for States Parties

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Evolution of the Crime of Aggression

1. Pre-World War I

[World War I]

2. League of Nations and Interwar Non-Aggression Agreements

[World War II]

3. UN Charter and Nuremberg/Tokyo Precedents

[Cold War]

4. Nuremberg Renaissance: Proliferation of International Criminal Laws, Institutions, Jurisprudence

[War on Terror]

5. Aggression Amendments

[Future Wars]

Evolution of the Kampala Compromise

1998: Deadlock in Rome and Rome Compromise on Aggression

1999-2002: PrepCom Aggression Negotiations (Silvia Fernández de Gurmendi, Coordinator)

2003-2009: Special Working Group on the Crime of Aggression

- a) Jurisdictional Regime for Genocide, Crimes Against Humanity, War Crimes
- b) Jurisdictional Filter for Aggression?
- c) Arts. 5(2) v. 121(4) v. 121(5)

2009-2010: U.S. Criticisms of the Special Working Group's Draft

Number 6: The Use of Armed Force by States is a Political Issue, Not a Legal One

Number 5: The Crime of Aggression is Too Vague

Number 4: The Crime of Aggression Violates the ICC Statute's Amendment Procedures

Number 3: The Crime of Aggression Will Interfere With Conflict Resolution

Number 2: The Crime of Aggression Will Deter Humanitarian Action

Number 1: The Crime of Aggression Will Undermine or Topple the ICC

2010: ICC Review Conference in Kampala

- a) Kampala Camps: Camp Protection v. Camp Consent (see charts on next two slides)
- b) Argentina, Brazil, Switzerland (ABS) Breakthrough
- c) Canadian Breakthrough
- d) Joint Argentina, Brazil, Switzerland, Canada Proposal
- e) Kampala Compromise:
 - Seven-year delay
 - 30 ratifications (triggers one year countdown to activation vote)
 - 2/3rds of ASP must vote to activate ICC jurisdiction
 - Non-ICC states excluded (unless Security Council Referral)
 - ICC States can opt-out
 - Japanese concerns
 - Consensus
- f) Winners and losers

CAMP CONSENT			CAMP PROTECTION
Jurisdiction over States Parties only, provided they OPT-IN	Automatic jurisdiction over States Parties only, but they may OPT-OUT	Automatic jurisdiction over States Parties only, NO CONSENT required	Automatic jurisdiction over States Parties and Non-States Parties , NO CONSENT required

Chart by Stefan Barriga

CAMP-CONSENT			CAMP-PROTECTION
Jurisdiction over States Parties only, provided they OPT-IN	Automatic jurisdiction over States Parties only, but they may OPT-OUT	Automatic jurisdiction over States Parties only, NO CONSENT required	Automatic jurisdiction over States Parties and Non-States Parties , NO CONSENT required

Chart by Stefan Barriga

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. **The Court has jurisdiction in accordance with this Statute with respect to the following crimes:**
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) **The crime of aggression.**

2. 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.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute **thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5** [genocide, crimes against humanity, war crimes, **the crime of aggression**].
2. [Absent a Security Council referral, the ICC can exercise jurisdiction over genocide, crimes against humanity, war crimes, and aggression if the crimes were committed: a) on the territory of a State Party or; b) by a national]

Article 121 (4)

Amendments

Except as provided in paragraph 5, an amendment **shall enter into force for all States Parties** one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by **seven-eighths** of them.

Article 121 (5)

Amendments

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.**

Rome Statute Art. 121(5): Some Context

1. Drafting History in Rome, 1998 (recall Roger Clark presentation)
2. *Lex Generalis* and *Lex Specialis*
3. Half-in/Half-out: Aggression's Special Place in Rome Statute
4. If Read Literally, Produces a Regime that States Never Agreed To
5. If Read Literally, Creates Illogical Results (Don Ferencz's observations)
 - a) ICC could not exercise jurisdiction over nationals of non-ratifying states parties for the crime of aggression, even when the Security Council refers the situation
 - b) ICC could not exercise jurisdiction over nationals of non-ratifying states parties for the any other amended ICC crime, even when the Security Council refers the situation
 - c) ICC could, bizarrely, exercise jurisdiction over nationals of non-party states
 - d) D. Ferencz: "Can such an overly broad interpretation of Article 121(5) possibly be construed as reasonable?"

Vienna Convention on the Law of Treaties

Article 31: General rule of interpretation

- Ordinary meaning, context, object and purpose.
- Subsequent agreement, subsequent practice.

Article 34: General rule regarding third states

- A treaty does not create rights or obligations for third states.
- But Rome Treaty does not do this. Nor do the Kampala amendments.

Article 39: General rule regarding the amendment of treaties

- Except insofar as the treaty may otherwise provide...

Article 40: Amendment of multilateral treaties

- Unless the treaty otherwise provides.
- An amendment does not bind any state already a party to the treaty which does not become a party to the amendment.
- But what about Rome Treaty Art. 121(4)? Amendments bind all ICC states parties if 7/8^{ths} agree.

Take Away: The ICC Treaty provides its own amendment procedures

The Shape of History

- Slow march of progress?
- Stage theory?
- Pendulum?
- Cyclical?
- Eternal Themes?

Where does the December 2017 activation decision fit in?