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The Crime of Aggression and the International Criminal Court

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Introduction

When the Rome Statute entered into force in 2002, it marked an historic moment of consensus in international criminal law.[1] It established the first permanent International Criminal Court [*'ICC'*] with the purposes of ending impunity, ensuring judicial independence, and reaffirming the position of the United Nations Charter [*'UNC'*].[2] The adoption of the crime of aggression and its associated jurisdictional regime at the Kampala Review Conference this year [*'RC/Res.6'*] has been hailed as a vital step towards achieving these purposes.[3] However, others have criticised RC/Res.6 as weakening the foundations of the ICC. This paper analyses three criticisms of the ICC:

(i) the United Nations' Security Council's role in the exercise of the ICC's jurisdiction;
(ii) the effect of Article 121(5) of the Rome Statute [*'opt- in'*] and Article 15 (4) of the Rome Statute [*'opt-out'*]; and
(iii) the definition of aggression.

The role of the Security Council

Under RC/Res.6, the increased capacity of the Security Council to impede the Prosecutor's investigation into the crime of aggression may allow its members, particularly the permanent five who retain the power of veto, to shield their citizens or the citizens of their allies from prosecution. In addition, the political dimension of the Security Council and any determination it makes with respect to aggression adds a political context to the ICC's jurisdiction which undermines its role as an independent court.

The Security Council has always played a role in the ICC's exercise of jurisdiction through the ability to refer matters to the Court and to defer any investigation or prosecution of crimes for a renewable period of 12 months.[4] With the adoption of RC/Res.6, the Prosecutor is now required to notify the Security Council of any potential investigation, which arises *proprio motu* or by State referral, before proceeding with the investigation for the crime of aggression.[5]

If the Security Council determines that an act of aggression has not occurred, or remains silent for six months from the date of notification, the Prosecutor can only proceed with the investigation if authorised to do so by the Pre-Trial Division.[6] Such conduct by the Security Council results in a delayed prosecution. Further, the entire Pre-Trial Division is required to sit instead of an individual Chamber. This means the Prosecutor must satisfy a larger bench than for the other crimes listed in Article 5 of the Rome Statute. By implication, it is argued that this creates a higher threshold for the Prosecutor to meet.[7] Although the Prosecutor may ultimately be authorised by the Pre-Trial Division to continue an investigation, such investigation may still be deferred at the behest of the Security Council.[8]

Prevailing diplomatic and political circumstances within the Security Council may cause the higher threshold to be applied selectively.[9] For example, if any member of the permanent five vetoes a determination of aggression, it may be 'tantamount to giving immunity to the [permanent five] and their allies'.[10]

Subjecting the Prosecutor to the Security Council's power subordinates the ICC to an inherently political organisation affecting the independence of the Court.[11] At the very least, this will add a political dimension to any determination of the crime of aggression, as the politics of the Security Council will always play a part in the ICC's jurisdiction.[12]

The use of the Security Council as a quasi-jurisdictional filter raises questions of whether the crime of aggression is merely 'policy in disguise of the law'.[13] Some argue that few cases of aggression will ever reach the ICC because the Security Council is historically reluctant to determine acts of aggression, which will result in constant application of the higher threshold.[14] Although it has been suggested that the Security Council may be more likely to determine an act of aggression now that the ICC provides an avenue for prosecution,[15] it has been argued that it may not be prepared to compromise its power.[16]

Not all commentators perceive expansion of the Security Council's role as weakening the Court. It has been postulated that the ICC currently makes political determinations in the context of other international crimes and this has not proven inconsistent with its judicial function.[17] The Security Council's intervention also arguably prevents the Prosecutor from abusing the investigative power.[18] However, the involvement of the Pre-Trial Chamber already takes 'away some heat from the battered argument of a politicized and overzealous prosecutor'.[19]

While RC/Res.6 was an important landmark in the development of international criminal law, the role of the Security Council has highlighted the risks of a political body interfering in judicial proceedings.

The effect of opt-in and opt-out provisions

The ability to opt-in and opt-out of RC/Res.6 may allow State Parties to take an *à la carte* approach to the crime of aggression.[20] Such an approach may reduce the ICC's chances of ending impunity and reinforcing the UNC's prohibition on the use of force.

Only State Parties who ratify amendments to Articles 5-8 of the Rome Statute (by opting-in) are bound by the amendments.[21] It is argued that Article 121(5) of the Rome Statute is a 'loop hole', as it allows States to decide whether

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they wish to be subject to the ICC's jurisdiction over aggression.[22] If States do not accept RC/Res.6, the ICC will not have jurisdiction over that State Party's nationals as perpetrators, or where aggression is waged upon it.[23]

Furthermore, RC/Res.6 allows State Parties to make a declaration refusing to accept the ICC's jurisdiction with respect to the amendments (opting-out).[24] The effect of allowing States to opt-out is that the ICC will have jurisdiction over that State as a victim of aggression, but not over that State's nationals as perpetrators.[25]

As such, there are only two possible circumstances over which the ICC will have jurisdiction.[26] First, where a State Party who has opted-in aggresses against another State Party who has opted-in.[27] Second, where a State Party who has opted-in aggresses against a State Party who has opted-in and subsequently opted-out.[28] The second scenario results in States being covered as victims but not as aggressors.[29] The ICC's ability to apply the rules of international criminal law independently and equally to all State Parties is weakened, if not 'utterly destroyed'.[30]

In addition to the inequality of the second scenario, circumstances may arise in which the Court does not have jurisdiction over a potential crime of aggression because one of the State Parties has not opted-in, but would have jurisdiction over other crimes in relation to the same conflict.[31] Jurisdiction over war crimes, crimes against humanity and genocide can be established through the nationality of the perpetrator or by virtue of the territory upon which the crimes are committed. If one of these two States has ratified the Rome Statute, the Court has jurisdiction. However, the jurisdiction over the crime of aggression requires both perpetrator and victim States to have opted-in to the amendments. The alternative means of determining jurisdiction through the opt-in and opt-out provisions undermine the ICC's attempt to address all of the relevant crimes with equality. The circumstances which flow from these provisions have been labelled 'hypocritical',[32] 'discreditable' and having no legal basis.[33]

It is recognised that 'an opt-out declaration… provided an incentive for States to reflect on the amendment and to come to a decision as to whether they could live with the amendment or not'.[34] Further, in deciding whether to opt-out of RC/Res.6, States would take into account the diplomatic consequences of withdrawing their original support.[35] However, the effect of the shame factor is difficult to predict in an unknown future political environment.

The ability of a State to selectively submit to the jurisdiction for the crime of aggression may assist in encouraging further ratification, yet it undermines the purpose of the Court to apply the law consistently.

The definition of Aggression

The definition of act of aggression provided in RC/Res.6 adds a further political element to the ICC, which undermines its independence and fails to reaffirm the UNC prohibition on the use of force. This definition is based on General Assembly Resolution 3314 [*'Res. 3314'*] which was designed as a political guide in determinations of State responsibility for aggression.[36] RC/Res.6 also introduces an element of gravity, not otherwise recognised by the UNC.

Although the definition was the least controversial aspect of the compromise at Kampala,[37] it is still subject to criticisms because of its political origins.[38] Res. 3314 allowed for the liberty of political judgment in order to assess State policy and address State responsibility.[39] Necessity to take into account political motivations moves the definition away from that which is legally recognisable.[40] The Resolution did not foresee its application to individual liability.[41] This leads to a lack of legal certainty that is inappropriate for an independent and impartial court.[42]

These criticisms however are refuted. It has been said that 'even if Resolution 3314 was not intended to be used in a judicial setting…it does phrase its determinative criteria in legal language.'[43] Regardless of whether the definition holds legal weight, it is still heavily influenced by the political undertones, thus undermining the independence of the Court.

An additional contentious part of RC/Res.6 is the manifest threshold. The most commonly accepted interpretation is that the character, gravity and scale of the act of aggression must amount to a manifest violation of the UNC.[44] It has been determined that 'mere planning does not cross the threshold of manifest'.[45] The manifest violation qualifier can also be seen to undermine the UNC's prohibition of force by restricting it from hearing all but the most severe cases of aggression.[46] This threshold prevents the ICC from prosecuting acts that, while amounting to aggression and violating the UNC, do not amount to manifest violations. Similarly, common scenarios such as attempted or threatened acts of aggression are left out of the ICC's definition of the crime of aggression; however form part of the UNC.[47]

Conclusion

As a young court the ICC is still very fragile and dependent on international support.[48] If State Parties are unwilling to accept the ICC's jurisdiction over aggression because of its perceived lack of independence or any other concerns discussed previously, this will reduce support for the ICC and undermine its efforts in international justice. State Parties may have attempted to overcome these concerns to reach a definition of the crime of aggression that alleviates these weaknesses as much as possible, however the special jurisdictional requirements adopted at Kampala compared with other crimes under the Rome Statute demonstrates the 'fundamental unwillingness' of States to accept too much judicial intervention and may indicate a lack of support.[49]

RC/Res.6 undermines the fundamental purposes of the ICC. The jurisdictional regime's reliance upon the Security Council erodes the independence of the Prosecutor and the judiciary and consequently leads to impunity. Allowing States to arbitrarily determine whether the ICC can exercise jurisdiction for the crime of aggression in relation to their nationals results in continued impunity and a failure to reaffirm the UNC. Deriving the definition of an act of aggression from Res. 3314 subjects determinations of criminal liability to political motivations, reducing judicial independence. In addition the incorporation of the manifest threshold RC/Res.6 does not reaffirm the UNC, it restricts its application. While there is no such thing as a magical formula to which all parties will agree without compromise it is important to recognise the potential shortcomings of RC/Res.6 that may weaken the Court.[50]

References

1 The 'Rome Statute' refers to the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF.183/9* ('Rome Statute'). William

Schabas, 'International Criminal Court: The Secret of its Success' (2001) 12 Crim. L. F. 415, 415.

2 Rome Statute, Preamble: 'determined to put an end to *impunity* for the perpetrators of these crimes and thus to contribute for the prevention of these crimes…, *reaffirming the Purposes and Principles of the Charter of the United Nations* and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State…, determined to these ends and for the sake of present and future generations, to *establish* an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole…'.

3 Claus Kreß, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus' (2010) 20(4) EJIL 1129.

4 Rome Statute, art 13(b): provides the ability for the Security Council to make referrals to the Prosecutor. Rome Statute, art 16: allows the Security Council to defer investigations or prosecutions.

5 RC/Res.6, art 15*bis*.

6 RC/Res.6, art 15*bis*(8).

7 Robert Manson, 'Identifying the Rough Edges of the Kampala Compromise' (2010) Crim.L.F 1, 3.

8 In accordance with Rome Statute, art 16.

9 Vimalen Reddi, 'The ICC and the Crime of Aggression: A Need to Reconcile the Prerogatives of the SC, the ICC and the ICJ' (2008) 8 Int'l C.L.R. 655, 665; see also Jane Verbitsky, 'What Should be the Relationship Between the International Criminal Court and the United Nations Security Council in the Crime of Aggression' (2008) 4 Rev. Int'l L. & Pol. 141, 144; Justin Gruenberg, 'An Analysis of United Nations Security Council Resolutions: Are All Countries Treated Equally?' (2009) 41 Case W Res J Int'l L 469.

10 Robert Schaeffer, 'The Audacity of Compromise: The UN Security Council and the Pre-conditions to the Exercise of Jurisdiction by the ICC with Regard to the Crime of Aggression' (2009) 9 Int'l C.L.R. 411, 419.

11 Kari Fletcher, 'Defining the Crime of Aggression: Is There an Answer to the International Criminal Court's Dilemma?' (2010) 65 A.F.L. Rev. 229, 253.

12 Kreß (n 3) 1143-4.

13 Kreß (n 3) 1143; Fletcher (n 11).

14 Carrie McDougall, 'When Law and Reality Clash – The Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court's Jurisdiction Over the Crime of Aggression' (2007) 7 Int. Crim. L. F. 277, 310; Schaeffer (n 10) 413-4; Gerhard Kemp, *Individual Criminal Liability for the International Crime of Aggression* (Intersentia, Antwerp 2010) 54; Fletcher (n 11) 250-1; Noah Weisbord, 'Prosecuting Aggression' (2008) 49(1) Harv Int'l L J 161, 169; Kenneth Grieb, 'Aggression' in John Moore and Jerry Pubantz (eds), *Encyclopedia of the United Nations Volume 2* (Facts on File, 2nd ed, Facts on File Inc., New York, 2008) 11, 11.

15 Schaeffer (n 10) 414.

16 Reddi (n 9) 664.

17 Kreß (n 3) 1144.

18 Dov Jacobs, 'The Sheep In the Box: The Definition of the Crime of Aggression at the ICC' in Christoph Burchard, Otto Triffterer and Joachim Vogel (eds), *The Review Conference and the Future of the International Criminal Court* (Wolters Kluwer, The Netherlands, 2010) 131, 135-136. It may also be said that it avoids the Prosecutor transcending the role of the Security Council as arbiter of international peace and security.

19 Schaeffer (n 10) 423.

20 Kevin Heller, 'The Sadly Neutered Crime of Aggression', Opinio Juris, <http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression/>, 2010 (accessed 21 November 2010).

21 Rome Statute, art 121(5). See Kevin Heller, 'Opt-Ins and Opt-Outs', *Opinio Juris*, <http://opiniojuris.org/2010/06/21/opt-ins-and-opt-outs/>, 2010 (accessed 21 November 2010).

22 Jelena Pejic, 'The United States and the International Criminal Court: One Loophole Too Many' (2000-2001) 78 U. Det. Mercy L. Rev. 267, 270.

23 Rome Statute, art 121(5).

24 Rome Statute, art 15bis(4).

25 Heller (n 20).

26 Heller (n 20): Heller states that there are nine combinations of State actors committing acts of aggression.

27 Ibid.

28 Ibid.

29 Ibid.

30 Manson (n 7) 16.

31 Manson (n 7) 12: outlines circumstances in which this may occur.

32 Heller (n 20).

33 Manson (n 7) 15.

34 *Informal inter-sessional meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination*, UN Doc ICC-ASP/8/INF.2 (18-26 November 2009).

35 Greg Gordon, 'A View of the Aggression Amendments from Kampala' in *Opinio Juris*, <http://opiniojuris.org/2010/06/15/greg-gordon-on-the-review-conference-and-aggression/>, 2010, (accessed 21 November 2010) refers to this diplomatic consequence as a 'shame factor'.

36 Adopted by the General Assembly in 1974 Definition of Aggression, GA Res 3314 (XXIX), 29 UN GAOR Supp No 31, 142 UN Doc A/9631 (1974); see overt references to Resolution 3314 in Article 8*bis*(2) of RC/Res 6. See the argument in Weisbord (n 18).

37 Manson (n 7) 1, 2.

38 Weisbord (n 14); Sergey Sayapin, 'A Great Unknown: The Definition of Aggression Revisited' (2008-2009) 17 Mich St J Int'l L 377; Oscar Solera 'The Definition of Aggression: Lessons not-learned' (2009-2010) 42 Case W. Res. J. Int'l L. 801, 812.

39 Sayapin (n 38) 383.

40 Weisbord (n 14).

41 Grant Dawson, 'Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression?' (1999-2000) 19 N.Y.L. Sch. J. Int'l & Comp. L. 413; Devyani Kacker, 'Coming Full Circle: The Rome Statute and the Crime of Aggression' (2010) 33 Suff. Trans. L. Rev. 257; Michael Glennon, 'The Blank-Prose Crime of Aggression' (2010) Yale J Int'l L 71; note one of the most important issues which divide State responsibility from criminal responsibility with respect to the crime of aggression is arguably the mental element (*mens rea*), which Resolution 3314 does not include: see discussion of this issue in Solera (n 38) 811, 815-9; Fletcher (n 11) 239.

42 For relevant discussions of the *nullum crimen, nulla peona, sine previa lege penale* concept, see Solera (n 38) 806; Fletcher (n 11) 254.

43 David Rupiny, 'ICC States Strike Deal on Aggression' (2010) 108 Int'l Just. Tri 1.

44 The exact determination of manifest has not been ascertained; all three (character, gravity and scale) may be required to meet this threshold. Also gravity (which is determined as a part of manifest) is applicable to all other crimes.

45 Kacker (n 41).

46 Kreß (n 3).

47 Sayapin (n 38).

48 All international courts and organizations rely on the support of State parties, which makes international courts fundamentally less independent than domestic courts since international courts cannot afford to isolate themselves in a 'political vacuum': Schaeffer (n 10) 420.

49 Jacobs (n 18) 150; the consensus at Kampala is a positive sign but until State parties ratify the amendments adopted, it is almost impossible to assess how many states will subject themselves to the crime of aggression under the ICC.

50 Kreß (n 3) 1144; Solera (n 38) 812.

Things to think about...

- *Research the history of the International Criminal Court.*
- *Do you think there should be an International Criminal Court? Should it have more power, less power or do you think that the powers and jurisdiction that it has are suitable?*
- *Explain proprio motu and its application in International Criminal Law.*

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