The ICC Crime of Aggression and the Changing International Security Landscape

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The impending activation of the Kampala amendments to the Statute of the International Criminal Court on the crime of aggression was the subject of a session at this year’s Annual Meeting.  Chaired by Professor **Michael J. Matheson** of George Washington University Law School, the panel featured presentations by **Sarah Sewall**, Under-Secretary for Civilian Security, Democracy, and Human Rights, U.S. Department of State; Christine Hansen of the Danish Ministry of Foreign Affairs; **Mort Halperin** of the Open Society Foundations; and **Ambassador Kurt Volkner** of the McCain Institute for International Leadership and former United States Permanent Representative to NATO.

Professor Matheson as Chair provided an introduction to the crime of aggression, starting with its jurisprudential origins at Nuremberg and Tokyo as “crimes against the peace.”  He then traced the postwar efforts by the International Law Commission (ILC) to codify the crime for future application, a process that was eventually suspended for lack of consensus.  The U.N. General Assembly finally issued [Resolution 3314](http://www1.umn.edu/humanrts/instree/GAres3314.html), ostensibly to guide the Security Council in determining the existence of acts of aggression as part of its United Nations Charter mandate to uphold international peace and security.  That resolution added content but also some ambiguities to the basic prohibition of aggression within the Charter and did not contemplate anticipatory self-defense or humanitarian uses of force without Council authorization.  Matheson noted that the architects of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) briefly considered adding the crime to the subject matter jurisdiction of that Tribunal, but did not want to divert attention from the atrocity crimes (particularly given limited resources) or embroil the ICTY in political disputes over the lawfulness of a use of force in ways that would undermine its legitimacy.

Matheson recounted a bit about the way in which the drafters of the Statute of the International Criminal Court (ICC) revived the ILC’s project.  Although a consensus definition and jurisdictional regime ultimately eluded negotiators in Rome, participants did confirm that the Court would exercise jurisdiction over the crime of aggression when agreement on these issues could be reached at a later Review Conference to be convened for this purpose.  Twelve years later, the 2010 Kampala Conference produced [a set of amendments](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf), but delayed their activation another seven years.  To reach a consensus in Kampala, negotiators agreed to a number of restrictions on the exercise of jurisdiction, including the exclusion of nationals of non-party states—even if they commit the crime of aggression on the territory of a state party—and an “opt out.”  The definition of the crime is partially premised on Resolution 3314 as enhanced by some additional features, such as the requirements that any crime of aggression be a “manifest violation of the Charter” in light of its “character, gravity and scale” and that the defendant be in a position “effectively to exercise control over or to direct the political or military action” of the State.  The Kampala amendments do not, however, include the requirement that any assessment of a use of force “must be considered in light of all the circumstances of each particular case.”

The panelists each expressed reservations about the activation of the crime of aggression, but from different perspectives.  Some raised concerns about unintended consequences, such as the risk that enabling the Court to exercise jurisdiction over the crime of aggression would hinder coalition building around potential humanitarian crises.  Others noted the fragility of the Court and questioned whether it was prepared to take on a new, and highly controversial crime, particularly given the risk that some parties may endeavor to use the aggression amendments to politicize or manipulate the institution.  Several speakers made reference to a procedural question that continues to raise controversy: whether the aggression amendments become applicable to all States Parties once the requisite 30 ratifications are reached or whether it is necessary for a State Party to ratify the amendments before they can be asserted against a putative act of aggression committed on its territory or by its national(s) as indicated by Article 121(5) governing amendments to the Statute.  The most full-throated support for the aggression amendments came from an audience member, the indomitable Ben Ferencz, who has dedicated years to bringing what he sees as a key component of the Nuremberg legacy to fruition.

Notes from these debates follow, with reference to questions from the Chair and the audience.

**Undersecretary Sarah Sewell**’s remarks in full as delivered [are available here](http://www.state.gov/j/remarks/240579.htm).  Sewell began by making clear that her purpose was not to revisit many of the legal questions discussed in Kampala, but rather to offer a *policy* perspective on some important outstanding issues.  In particular, she noted that the U.S. government is concerned that without a concerted effort by States Parties and others to clarify critical aspects of the amendments, the activation of the ICC’s jurisdiction over the crime of aggression risks undermining the Court’s effectiveness in combatting atrocities, complicating efforts to resolve ongoing conflicts, and politicizing a judicial body that is meant to be above politics.

Sewell welcomed some of the preliminary steps taken in Kampala to address concerns about the addition of the crime of aggression, including the decisions to exclude from the Court’s aggression jurisdiction the nationals of countries that are not party to the Rome Statute, to promulgate the Understandings to help clarify which acts will and will not be covered, and to defer until 2017, at the earliest, any decision to activate that jurisdiction.  She noted, however, that the international community should make productive use of the remainder of this reflection time to address the uncertainties that still surround some aspects of the amendments.

Sewell outlined three specific concerns raised by the potential activation of the Court’s jurisdiction over the crime of aggression:

* The aggression amendments could chill the willingness of states to cooperate in multilateral military action, such as to stop the commission of atrocities, when the legal basis may be contested.  In this regard, she reiterated President Obama’s commitment to broad-based collective action in the face of threats to humanity.
* The activation of the amendments may reduce the ability of the international community to manage and resolve conflicts.  While amnesties for atrocity crimes are illegitimate, it is not obvious that the international community should adopt the same approach for the crime of aggression—a crime of a fundamentally different character. She asked: is the international community ready to insist that these are crimes that must be prosecuted in every instance, even if it might derail a peace agreement between warring parties?
* The Court’s jurisdiction over aggression risks harming the Court’s ability to carry out its core mission: deterring and punishing genocide, crimes against humanity, and war crimes.  The United States has worked to promote the Court’s success in a wide range of contexts and has expressed its support for each of the situations in which ICC investigations and prosecutions are underway.  But the ICC has not yet amassed a record of effectiveness when it comes to its basic functions, such as apprehending defendants, protecting witnesses, and prosecuting cases already underway.  Adding a new and controversial crime, with deep political implications, could overburden the Court.

She conceded that some degree of uncertainty may be inevitable with a text of this complexity.  But she insisted that these open issues go to the heart of fundamental policy choices and should be addressed now rather than leaving them to the Court to deal with in the context of a case involving an actual defendant.  The Assembly of States Parties and other supporters of the Court have an obligation to resolve these outstanding questions now.  To this end, she suggested several risk mitigation measures that could be considered:

* States Parties could formally state their views on the questions raised in her remarks, either at the next meeting of the ASP or in written instruments communicating their decision whether or not to ratify.
* Any decision by the ASP to activate the amendments should contain clear guidance on these open issues.
* States Parties could explore ways in which the “opt-out” option could be tailored to address the concerns raised.
* States Parties could adopt additional Understandings to ensure that the amendments do not work at cross purposes with other efforts to prevent and respond to atrocity crimes.

U.S. concerns about persistent uncertainties have been exacerbated by the efforts of some supporters of the amendments to promote an interpretation of Article 121(5) that flies in the face of the plain language of the Rome Statute.  According to this interpretation, the Court’s aggression jurisdiction would extend even to the nationals of States Parties that do *not* ratify the amendments once the requisite 30 ratifications are reached.  To be sure, U.S. nationals will be explicitly excluded from the ICC’s aggression jurisdiction.  Nonetheless, she noted that the United States has a deep interest in the outcome of the States Parties’ deliberations on this issue as a state that shares the responsibilities and bears the risks of combating atrocities and underwriting global security.  She closed by signaling her willingness to work with other countries and members of civil society to help ensure full consideration of the risks she described and the mitigation measures she suggested.

**Christine Hansen** (speaking in her personal capacity) proffered a European and Danish perspective on the crime.  She noted that although [there is a common European Union (EU) position](http://eeas.europa.eu/human_rights/icc/index_en.htm) on the need to promote the ICC and protect the integrity of the Rome Statute, there is no formal EU position on ratification of the Kampala amendments.  To date, [23 states have ratified the amendments](http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/), 18 of which are European.  Other EU states are in an advanced stage and will likely ratify before 2017.

As a founding member of the Court, Denmark has full-heartedly supported the Court’s current cases.  Denmark joined the consensus in Kampala and is keeping track of the ratifications among EU governments.  As a general proposition, Denmark adheres to the tradition of allowing courts to undertake important decisions about their jurisdiction and other matters.  Moreover, Denmark supports the general proposition that the ICC should be empowered to judge cases involving the “supreme international crime” given that this was a matter decided in Rome.  But, she observed that activating this incipient jurisdiction raises interpretive questions about how concrete cases will play out and concerns about the way in which the ICC will affect the international security architecture.  While Denmark has given some initial thoughts to ratification of the amendments, no formal position has emerged, and Denmark’s analysis of the amendments remains underway.  It has determined, however, that Danish consent would be required for the amendments to come into play for acts of aggression undertaken on Danish territory or by Danish citizens in keeping with Article 121(5).  Moreover, she anticipated that if Denmark does ratify the amendments, it will likely enact domestic legislation criminalizing the crime.  So, ratification also runs the risk of domestic prosecution as well.

Hansen cautioned that as States Parties evaluate the amendments, they should consider the degree to which activating jurisdiction may produce desired and undesired chilling effects.  Obviously, it would be a welcome development if illegal uses of force are deterred by the aggression amendments, given that deterrence is a major objective of the ICC.  However, these “positive” chilling effects may be limited because ICC jurisdiction will only extend to those States Parties that ratify the amendments, and non-party states remain outside the aggression amendments altogether.

Denmark’s main goal is to avoid the chilling effect that the amendments may exert on potentially beneficial uses of force.  It would be suboptimal if the aggression amendments end up hindering the formation of coalitions in the face of threats or breaches of the peace.  The risk of prosecution will affect different political and military leaders differently and will necessitate legal advice on the reach of the amendments.  Policymakers and governmental lawyers within Denmark are committed to remaining within the contours of international law before deploying force.  The Understandings adopted in Kampala underscore the significance of the threshold inherent to the crime of aggression: that the underlying act of aggression must be a “manifest violation” of the Charter.  This threshold, plus the Understandings, will help ensure that the ICC will eschew unreasonable or frivolous decisions.

Hansen further argued that states should be transparent about the legal basis underlying any potential use of force.  Although the international law use-of-force rules are subject to varying interpretations—and it is inevitable that some states will contest the legality of any use of force—the underlying legal analysis should not remain in close circles or it will cause controversy and dissension within the international community.  Moreover, the issue of intent will be important, although it is unclear whose intent matters if two states resort to armed force in a coalition environment under different legal grounds.  She anticipates that EU members will not use a fear of unjustified prosecutions as a reason not to participate in a use of force that is already justified under international law.

She closed with the observation that when it comes to humanitarian intervention—which contemplates that a use of force might be appropriate and lawful under international law in certain circumstances, even without formal Security Council approval—international law remains somewhat unclear.  The development of the crime of aggression needs to go hand-in-hand with developments with respect to humanitarian intervention.  Although not express in the amendments, she noted that the element of “character” will be relevant to any evaluation of a use of force to respond to the commission of atrocity crimes.

**Kurt Volker**, speaking as a practitioner, endorsed the remarks of Undersecretary Sewell, but suggested he might phrase her concerns “more bluntly.”  He indicated his intention to explore potential practical implications and consequences of the aggression amendments entering into force.  In particular, he is interested in how the amendments might change the decision-making of government actors.

As a starting premise, he noted that he supports the work of the ICC monitoring and prosecuting crimes against humanity at the close of a conflict.  He noted, however, that the ICC has not necessarily exerted the deterrent effect to the degree that the international community might have hoped.  Indeed, the commission of international crimes goes unabated in places such as Syria, Libya, and around sub-Sahara Africa.  Because acts of aggression are already illegal, it is not clear that making these acts a *crime* will stop the commission of aggression.  He noted that it has also been argued that the ICC may cause leaders to fight to the death given that a quiet exile is no longer viable.  In this regard, the existence of the ICC may reinforce bad decision-making.

Volker made the distinction between “bad” and “good” actors.  The former may be variously motivated by wealth, power, enmity toward a neighbor, or identity politics.  These issues may be more important to “bad” actors than the risk of facing prosecution before the ICC.  By way of example, he noted that the animosity between Cyprus and Turkey has prevented NATO (of which Turkey is a member) and the EU (of which Cyprus is a member) from working constructively together.  Strife over an island of 500K people is thus determining the face of a half billion people.  “Good” actors, by contrast, will be differentially deterred.  The aggression amendments will increase the risk to “good” actors of being in a coalition with other states.

Volker also raised other consequences related to the potential politicization of proceedings before the ICC.  He noted that there will always be groups and individuals who will use international institutions to lay criticism on Israel or the United States.  In so doing, they could change the focus of what the ICC is supposed to be.   As an example, he recounted the period of time when there was a risk that former Secretary of Defense, Donald Rumsfeld, would be precluded from ever attending another NATO meeting because some non-governmental organization had decided that the U.S. invasion of Iraq was illegal.  He noted that it took significant diplomatic work to unwind this potentiality.

Ultimately, he concluded that the aggression amendments might diminish the credibility of the ICC by taking it away from its high purpose and embroiling it in controversial political disputes.  He observed that these risks are even more acute given that the ICC will be overseeing the law on aggression without enjoying any real enforcement power.

**Mort Halperin** began with the observation that he is deeply committed to the ICC.  He is convinced that it has had a substantial, but difficult to measure, impact on international relations.  As an example, he suggested that the ICC has played a role in the decision of African political leaders to concede elections they lost.  It has also had an impact on the settlement of disputes; leaders have learned that they cannot assume that amnesties are on the table.  Obviously, evidence of the ICC’s impact is hard to find without ready counterfactuals, but it cannot be gainsaid that people are more careful about what they do now that the ICC around.

That said, Halperin noted that the institution is in a precarious position and is struggling to establish its legitimacy; this will likely be the case for some time.  Because of the ICC’s inability to execute its arrest warrants and fully protect its witnesses, cases have dissolved.  It now has had the Palestine issue thrust upon it, which will only complicate the position of the Court in the international community.

In light of the ICC’s continued fragility, it is not a closed question as to whether adding the crime of aggression to its subject matter jurisdiction is a good idea.  To be sure, the commitment to add jurisdiction over aggression is rooted in strong principles.  And yet, the compromises reached in Kampala took most of the teeth out of the aggression provisions.  Most countries that are likely to manifestly violate the Charter are not members of the Court.  And if they are, they will not likely ratify the amendments (or they will opt out).  As a result, activating the Court’s jurisdiction over the crime of aggression will mean going ahead with an empty shell that will only complicate the life of the Court.  The question of what constitutes aggression is more political than legal, particularly given evolving notions of when and under what circumstances a use of force is acceptable.  For example, such a determination may require an analysis of whether or not there was a reasonable fear that an attack was imminent.

In Halperin’s estimation, it would have been preferable had the negotiators in Kampala limited the crime of aggression to Security Council referrals, given that determining the existence of acts of aggression is one of the Council’s core Charter functions.  Going forward with an aggression prosecution without a Council determination, or without the support of the Council, will drop the Court into the middle of a political maelstrom.  Even if the Court makes a decision, it will be hard to execute it.  If a particular country can avoid a Security Council resolution declaring that it has committed an act of aggression, there is little chance responsible leaders can be brought to justice by the ICC.

Halperin next turned to the concept of humanitarian intervention, citing NATO’s involvement in Kosovo as the most important model.  He was deeply involved in the U.S. decision to stop Serbian atrocities.  At the time, it was very hard to persuade other NATO countries to participate; they were being told by their lawyers that the best that could be said is that while the intervention was not necessarily illegal, it was not clearly legal either.  The added element of little possibility of arrest or prosecution tipped the scale for many.  Although it is impossible to say whether the adoption of these provisions will make it less likely that states will participate in humanitarian uses of force, once the aggression amendments are activated, it will be hard for government lawyers to say that they can guarantee that their clients will not be indicted if they participate in a future humanitarian intervention.  If the international community wants to maintain humanitarian intervention as an option, we should be skeptical of any move that might reduce the number of countries willing to participate in coalition operations.

Halperin closed with the observation that any fair reading of the terms of Article 121(5) indicates that a State Party’s nationals cannot be tried for aggression absent ratification of the amendments by that state.

The distinct slant of the panel generated some criticism within the audience.  A legal advisor to Guatemala endorsed Ferencz’s comments and characterized the panel’s remarks as “alarmist.”  She noted that former State Department Legal Adviser Harold Koh and Ambassador-at-Large for War Crimes Issues Stephen J. Rapp stated during a joint press conference that the outcome of the Kampala Conference protected U.S. vital interests.  She also predicted that in prosecuting the crime of aggression, the Court would ensure the prosecution of other Rome Statute crimes.  In her estimation, activating the aggression amendments would complete the original goals of the Rome Statute and protect small states from aggressive states given that international law is often all small states have in their defense.  She also noted that the aggression amendments will protect the lives of soldiers from illegal war-making.  Engaging Volcker’s dichotomy, she noted that it is not about bad versus good actors: “if good actors do bad things, they should be punished.”

In response, Professor Koh clarified that at the press conference just mentioned, the United States’ main concern was not protecting vital U.S. interests, although this was a concern.  Rather, it was ensuring the viability of the international security architecture.  He urged participants to think about what how to deal with a world where there are Rwandas and Kosovos?  Does the international community want to deter these atrocities or does it want to leave the world to *post-hoc* prosecutions *after* the gross violations have occurred.  The point of the press conference was that the international community had 7 years to solve the issue.  At this point, he noted, the most constructive approach is to focus on the last part of Sewell’s talk by instituting a collective carve out for humanitarian interventions of the Kosovo kind.  He called on those who want the Court to succeed to work collectively to preserve space for preventing future Rwandas.  Koh then shifted to a second key aspect of Kampala: do the aggression amendments entail an opt out or an opt in process?  He noted that there has been very little focus on this fundamental jurisdictional question as we approach 2017.

Don Ferencz, Ben Ferencz’s son, took off from this point and argued that the Article 121(5) concerns are a “red herring.”  With anything short of a Security Council referral, every member state can affirmatively opt out of the aggression jurisdiction.  To this, Halperin answered that there are well-meaning European states that will not want to be seen opting out of a provision that would hold them accountable, but in a moment of truth in a Rwanda situation, their lawyers might put the fear of God in them about participating in a humanitarian intervention.

David Scheffer, the former Ambassador-at-Large for War Crimes Issues who led the U.S. delegation in Rome, reminded participants that many of these points were raised in the 1990s when the Statute was being negotiated.  Hence, the gridlock in 1998.  In Kampala, negotiators tried to inject a sense of realism into the exercise, but the U.S. delegation was handicapped by the fact that the United States had not been in the room during the Bush administration.  Had the United States engaged earlier in this process, it could have offered a more reasonable construct for the crime of aggression in situations of humanitarian intervention and self-defense.  In a forthcoming book on the crime of aggression, edited by Claus Kress of Germany & Stefan Barriga of Liechtenstein, Scheffer has a chapter arguing that when the ASP reviews this crime again, it should amend the provisions to include the realities of how force gets used to prevent atrocities.  Until then, Article 121(5) should be interpreted according to its plain text.  States parties should not have to undertake an excruciating opt out; rather, they should stand for their rights under Article 121(5), full stop.  Under this regime, States Parties are entitled to ratify the Statute before they are covered by them rather than ratify and opt out.

In closing remarks, Sewell noted that there are many countries of conscience that believe in humanitarian intervention and that are willing to do the right thing if they can join with others who share their views.  It is already a high bar to move the international community in any constellation; it would be ironic if the Kampala amendments added to this burden.  Halperin noted that President Obama has gone far in moving the United States from a position of hostility toward a constructive relationship with the ICC.  This evolution is at risk because of Palestine, the crime of aggression, and other challenges.  Whatever one thinks about the merits of the aggression amendments, their activation could jeopardize the ability of the United States to cooperate with the Court.  Anyone who cares about the Court should care deeply about this potentiality.