THE NEW AGREEMENT ON THE DEFINITION OF THE CRIME OF AGGRESSION

By Jennifer Trahan

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A significant event occurred recently in Kampala, Uganda: at a conference room on the shores of Lake Victoria, states that are parties to the Rome Statute of the International Criminal Court agreed to a definition of the crime of aggression. The U.S. and other non-state parties to the Rome Statute were not eligible to vote, but did participate in the negotiations. How significant will this development prove on the world stage in preventing the unauthorized use of aggressive armed force? Only time will tell.

The prohibition on aggressive war of course is an old concept, found both in the 1928 Kellogg-Briand Pact, and the 1945 U.N. Charter. The crime of aggression was prosecuted both at Nuremberg and Tokyo following World War II—efforts spear-headed by the U.S.—but has fallen into disuse at the international level since then. At Rome, Italy, when the International Criminal Court Statute was negotiated, states put in a "placeholder" as to the crime of aggression, stating that the court has jurisdiction over such a crime, but that it could not be used until the crime is defined as well as conditions for the exercise of jurisdiction (how a case would be "triggered").

Last week, such agreement on the definition and conditions for the exercise of jurisdiction was reached. However, the latter cannot go into effect until 2017, and will require an additional vote by the states parties to the Rome Statute, as well as thirty ratifications of the amendment. So, while we do now have a definition of the crime of aggression, it cannot be prosecuted by the International Criminal Court until at least 2017.

Is that an advance for the rule of law? Clearly the majority of states attending these negotiations think so. The definition of the crime has been the subject of negotiations over the last ten years or so, first as part of International Criminal Court Preparatory Commission meetings, and then meetings of the Special Working Group on the Crime of Aggression. The ultimate agreement on the definition consists of text taken from the U.N. Charter, the London Charter of the Nuremberg Tribunal, and General Assembly resolution 3314. Negotiations of the definition were complex because both the state's "act of aggression" as well as the individual's actions (the "crime of aggression") had to be defined. The definition covers only clear cases of aggression such as Iraq's invasion of Kuwait—but not humanitarian intervention (NATO's 1999 intervention in Kosovo),

actions undertaken in self-defense, or Security Council-authorized interventions (Gulf War I).

Many countries supported the definition of the crime. The U.S. negotiating team—including individuals from both the State Department and Department of Defense—was clearly wary of adopting the definition (or, indeed, any definition), arguing, both in Kampala and previously, that it contained numerous flaws. Momentum was not in their favor in Kampala. Many other states had been working on the definition for years and basically already agreed to it coming into the Review Conference. (The U.S., during the previous administration, could have attended and shaped the earlier negotiations on the definition—as China and Russia did—but, unwisely, chose not to participate.) Thus, the U.S. ultimately had to shift strategy away from opposing the definition to developing "understandings" as to how it would be interpreted. These understandings, in modified form, were ultimately adopted.

Negotiations on the conditions for the exercise of jurisdiction ("triggering" the case) were extremely contentious. The permanent members of the Security Council argued that only the Security Council should be able to refer a case, while most other states wanted the Pre-Trial Chamber of the International Criminal Court to be able to trigger a case if referred by the court's prosecutor or a state party.

The ultimate agreement on jurisdiction uses both methods—the Security Council may refer cases, but, if after 6 months of Security Council non-action, the ICC's pre-trial division may alternatively provide authorization after prosecutor or state referral, with certain caveats. These caveats are significant: (1) the nationals of non-states parties (such as the U.S.) may not be prosecuted, nor crimes committed in the territory of a non-state party; (2) even for states parties who ratify the aggression amendment, they may "opt out" of jurisdiction for the crime of aggression; and (3) the Security Council may stop an aggression case from proceeding under its Chapter VII powers, something already provided for in Article 16 of the Rome Statute. This compromise of a result (even if voted into effect in 2017 and ratified by thirty states parties) would create something of a hodge-podge of jurisdiction, but represented the consensus that could accommodate states' vastly divergent views as to jurisdiction.

Will such jurisdiction have practical effect? We shall have to see how many states parties ratify the amendment and do not opt out of aggression jurisdiction. Can these negotiations have impact even without jurisdiction existing? Yes. States around the globe (for good and bad) now have a definition of the crime, should they want to incorporate it into their national laws. Similarly, international actors now have an additional reference point for measuring aggressive use of force against to determine whether it constitutes the crime of aggression, a determination which could carry weight even absent jurisdiction. Could U.S. high level officials be prosecuted for aggression before the ICC after 2017? Not under the agreement just reached in Kampala (and ordinary soldiers were never covered by the definition).

The agreement reached at Kampala was clearly only step 1 of the process. Step 2 will now occur in 2017, and we shall have to wait to see how that plays out. The U.S., under the current administration, has wisely chosen to engage in this significant process.