

Background

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The Kampala Aftermath: The U.S. Should Remain Wary of the ICC

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Abstract: Overall, the U.S. effort at the International Criminal Court Review Conference in Kampala was a qualified success. The outcome could have been much worse. While the conference adopted the Belgian amendment, creating a precedent for criminalizing the use of additional weapons as war crimes under the Rome Statute, the U.S. did succeed in minimizing the immediate risks to U.S. interests and nationals. The conference also passed a resolution that, if confirmed by future action by the states parties, would grant the ICC jurisdiction over the crime of aggression. Critically, the U.S. was successful in persuading the states parties to restrict the ICC's jurisdiction over aggression in several significant ways that should help protect U.S. interests. However, the Obama Administration's modest success in Kampala did little to address ongoing U.S. concerns about politicization of the court and illegitimate claims of ICC jurisdiction over U.S. service members and officials charged with war crimes, crimes against humanity, and genocide. The U.S. should not consider ratifying the Rome Statute until all of its serious concerns about the ICC are completely resolved.

Until recently, U.S. policy toward the International Criminal Court (ICC) has been clear and consistent: The U.S. has refused to join the ICC because it lacks prudent safeguards against political manipulation, possesses sweeping authority without accountability to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of nonparty states in some circumstances. In a break with previous policy, the

Talking Points

- The Obama Administration views previous U.S. policy toward the International Criminal Court (ICC) as too hostile and has expressed the intent to increase U.S. cooperation with and support for the court.
- At the ICC Review Conference, ICC states parties granted the ICC jurisdiction over the crime of aggression, but the U.S. successfully included provisions that should help to protect U.S. interests and U.S. citizens from the ICC.
- The Administration's engagement with the ICC does little to resolve legitimate U.S. concerns. U.S. military and political officials could still be unfairly prosecuted by the ICC for war crimes, crimes against humanity, and genocide.
- Unless the serious flaws are addressed fully, the U.S. should not consider ratifying the Rome Statute to join the ICC.
- The U.S. should maintain its bilateral agreements protecting U.S. nationals from ICC jurisdiction, exercise great care when choosing to support the ICC's actions, and protect the procedural precedents established in Kampala.

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Obama Administration has stated that it views U.S. policy toward the ICC as too hostile and has expressed the intent to increase U.S. cooperation with and support for the court.¹

A key part of the Obama Administration's policy shift was the decision to participate in ICC meetings and conferences, such as the recent ICC Review Conference held in Kampala, Uganda, to try to influence the proceedings to address U.S. concerns. The U.S. delegation met with qualified success in Kampala. Although the ICC states parties adopted a flawed definition of the crime of aggression and paved the way for the ICC to exercise jurisdiction over the crime at a future date, the U.S. delegation successfully convinced the states parties to include a number of provisions that should help to protect U.S. interests and greatly diminish the likelihood of U.S. officials and service members being subjected to an ICC investigation into charges of aggression.

Regrettably, the Obama Administration's engagement with the ICC does little to address ongoing, legitimate U.S. concerns about how the ICC could threaten U.S. interests through its claims of jurisdiction over war crimes, crimes against humanity, and genocide. As Obama Administration officials have acknowledged, there remains a strong possibility that U.S. military and political officials could be unfairly prosecuted by the ICC because of the breadth of U.S. political and military interests. Indeed, the ICC has opened a preliminary investigation into alleged war crimes in Afghanistan that could involve American citizens and soldiers given America's leadership role in the military operations and the political transition.

These dangers underscore the need of the U.S. to be wary of cooperating with the ICC. Specifically, the U.S. should:

- Not ratify the Rome Statute, which established the ICC in 1998;
- Preserve and expand the network of bilateral Article 98 agreements in which countries agree

not to surrender U.S. persons to the ICC without U.S. permission;

- Exercise great care when deciding whether to support the court's actions and investigations;
- Press for the most advantageous interpretations of the language in the resolution on the crime of aggression that was adopted in Kampala;
- Argue that the practices established in Kampala are precedents for amending the statute; and
- Work to delay implementation of the crime of aggression beyond 2017.

Two Weeks in Kampala

The Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court held its first review conference from May 31 to June 11 in Kampala, Uganda, to assess the court's activities to date and to consider amendments to the Rome Statute. Although the U.S. is not a party to the Rome Statute and therefore could not vote at the review conference, the U.S. was able to attend and voice its opinions because it participated in the 1998 conference at which the Rome Statute was finalized and adopted. A number of issues on the agenda at the review conference were of concern to the U.S., particularly three proposed amendments to the Rome Statute that would:

1. Delete Article 124 of the Rome Statute;
2. Criminalize the use of additional types of weapons as war crimes under Article 8 of the Rome Statute (the Belgian amendment); and
3. Adopt a definition of the crime of aggression and permit the ICC to exercise jurisdiction over that crime.

Article 124. Article 124 allows a state upon ratifying or acceding to the treaty to declare for up to seven years that it "does not accept the jurisdiction of the Court with respect to [war crimes] when a crime is alleged to have been committed by its nationals or on its territory."² Although the U.S. del-

1. For example, see Hillary Rodham Clinton, quoted in John Kerry, "Questions for the Record: Nomination of Hillary Rodham Clinton," p. 66, at <http://www.foreignpolicy.com/files/KerryClintonQFRs.pdf> (July 30, 2010), and George Lerner, "Ambassador: U.S. Moving to Support International Court," CNN, March 24, 2010, at <http://www.cnn.com/2010/US/03/24/us.global.justice/index.html> (July 30, 2010).

egation played a minimal role, the proposal to delete Article 124 was defeated. Japan and other nations argued convincingly that deleting the article would make it less likely that new states would ratify the Rome Statute. A resolution retaining Article 124 was adopted, albeit with a provision to revisit the issue at the 14th session of the Assembly of States Parties to the Rome Statute in 2015.³ While the U.S. was not involved in this debate, this outcome was in American interests because Article 124 is one of the treaty's few provisions that protect individuals from ICC jurisdiction and recognize the difficult and complex political circumstances inherent in states' decisions to use force.

Amendment to Article 8 of the Rome Statute.

Regrettably, the review conference adopted the Belgian amendment,⁴ creating a troubling precedent for expanding the list of weapons, the use of which is considered a war crime under the Rome Statute. This precedent could facilitate efforts by nongovernmental organizations to include the use of other weapons, such as cluster munitions and landmines, as war crimes under the Rome Statute.

However, the immediate risks to the U.S. posed by the Belgian amendment were largely negated. For instance, the preamble clearly states that "employing bullets which expand or flatten easily in the human body" would be considered a crime only if "the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target"⁵ rather than to serve a legitimate purpose, such as improving accuracy of sniper ammunition or to protect civilians in a hostage situation.

The amendment also confirms in the preamble's second paragraph that the ICC "shall not exercise its

This precedent could facilitate efforts by non-governmental organizations to include the use of other weapons, such as cluster munitions and landmines, as war crimes under the Rome Statute.

jurisdiction regarding the crime covered by the amendment" when committed on the territory of or committed by the nationals of a non-ICC state party or an ICC state party that has not ratified the amendment. Thus, because the U.S. is not an ICC state party and would not use the weapons added by the Belgian amendment to "uselessly aggravate suffering or the wounding effect upon the target," U.S. officials and service members are very unlikely to be troubled by the Belgian amendment.

The Crime of Aggression. Going into the Kampala conference, the U.S. delegation's highest priority was to convince the states parties of the Rome Statute to reject the amendment granting the ICC jurisdiction over the crime of aggression or, at least, to limit the ICC's jurisdiction over aggression to instances in which the U.N. Security Council had determined that an act of aggression had been committed. As Ambassador Stephen J. Rapp stated to the 8th Assembly of States Parties in November 2009:

I would be remiss not to share with you my country's concerns about an issue pending before this body to which we attach particular importance: the definition of the crime of aggression, which is to be addressed at the Review Conference in Kampala next year. The United States has well-known views on the crime of aggression, which reflect the

2. Rome Statute of the International Criminal Court, July 17, 1998, Art. 124, at <http://untreaty.un.org/cod/icc/statute/romeofra.htm> (August 1, 2010).
3. Review Conference on the Rome Statute of the International Criminal Court, Resolution RC/Res.4, June 16, 2010, at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.4-ENG.pdf (July 30, 2010).
4. The Belgian amendment criminalizes the use of three categories of weapons in noninternational armed conflicts: poison or poisoned weapons; asphyxiating, poisonous, or other gases and all analogous liquids, materials, or devices; and bullets that expand or flatten easily in the human body, such as bullets with a hard envelope that does not entirely cover the core or is pierced with incisions.
5. Review Conference on the Rome Statute of the International Criminal Court, "Amendments to Article 8 of the Rome Statute," Resolution RC/Res.5, June 16, 2010, at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf (July 30, 2010).

specific role and responsibilities entrusted to the Security Council by the UN Charter in responding to aggression or its threat, as well as concerns about the way the draft definition itself has been framed. Our view has been and remains that, should the Rome Statute be amended to include a defined crime of aggression, jurisdiction should follow a Security Council determination that aggression has occurred.⁶

In subsequent statements, including at a conference hosted by the American Society for International Law a few weeks before the Kampala conference, Ambassador Rapp and Harold Hongju Koh, legal adviser to the Department of State, listed a number of their concerns about the proposed crime of aggression. Specifically, they expressed concerns about the feasibility of the proposed definition, who decides when the court should exercise its jurisdiction, whether the crime of aggression would weaken the court, and how it would affect the core mission of the court.⁷

The U.S. delegation reiterated its strong concerns about the proposed definition of the crime of aggression. Rapp⁸ and Koh made strong statements during the first week of the conference reiterating U.S. concerns over the crime of aggression. Koh's speech was particularly detailed, stating that:

- Even though the member states had agreed on the wording of the definition of the crime of aggression, there was considerable dispute about its meaning.
- Passing the crime of aggression by anything less than consensus would lead to inevitable challenges of the legitimacy of that crime if the ICC ever seeks to prosecute a case of aggression.

- The elements of the crime of aggression, which are adopted by the ICC member states to assist the court in interpreting and applying the crime, were not well enough developed to be useful in trying a crime of aggression. Making the crime operational would need to be delayed until they could be developed.
- There was no consensus on the trigger for investigating the crime.
- The amendment could criminalize the use of military force in humanitarian operations that are intended to prevent crimes against humanity, war crimes, or genocide—the very crimes that are currently under the jurisdiction of the ICC.
- The proposed definition of the crime of aggression does not reflect customary international law, “i.e., widespread and consistent state practice followed out of a sense of legal obligation,” because “as yet, no authoritative definition of aggression exists under customary international law.”
- Because the ICC urges states to adopt domestic legislation implementing the Rome Statute, the crime of aggression would “ask the domestic courts of one country to sit in judgment upon the state acts of other countries in a manner highly unlikely to promote peace and security.”⁹

At times during the conference, the U.S. appeared to have created enough concern among the delegates to dissuade them from adopting the crime of aggression or, at least, to persuade them to limit the ICC's ability to investigate alleged crimes of aggression to situations referred by the Security Council to the ICC or situations in which the Security Council had determined that an act of aggression had been committed.

6. Stephen J. Rapp, “Address to Assembly of States Parties,” U.S. Department of State, November 19, 2009, at http://www.state.gov/s/wci/us_releases/remarks/133316.htm (July 30, 2010).

7. Stephen J. Rapp, Harold Hongju Koh, and Rosa Brooks, “U.S. Policy Toward the Upcoming International Criminal Court Review Conference,” American Society of International Law, May 14, 2010, at http://www.asil.org/files/Transcript_ICC_Koh_Rapp_Brooks.pdf (July 30, 2010).

8. Stephen J. Rapp, “Statement to the Review Conference of the International Criminal Court,” U.S. Department of State, June 1, 2010, at http://www.state.gov/s/wci/us_releases/remarks/142520.htm (July 30, 2010).

9. Harold Hongju Koh, “Statement at the Review Conference of the International Criminal Court,” U.S. Department of State, June 4, 2010, at <http://www.state.gov/s/l/releases/remarks/142665.htm> (July 30, 2010).

While the U.S. failed in its main objectives, the U.S. delegation was able to address many of its concerns about the crime of aggression during conference negotiations.

In the end, the U.S. achieved neither objective. The delegates adopted by consensus the resolution amending the Rome Statute to define the crime of aggression and to specify the parameters of when and how the court may exercise jurisdiction over that crime. They also granted the ICC prosecutor the ability to proceed with an investigation of an alleged crime of aggression without a Security Council finding or specific referral, albeit only with the approval of the ICC Pre-Trial Division. While the U.S. failed in its main objectives, the U.S. delegation was able to address many of its concerns about the crime of aggression during conference negotiations.

A Pyrrhic Victory on Aggression

The delegates in Kampala agreed to adopt by consensus a resolution amending the Rome Statute to define the crime of aggression and establish ICC jurisdiction over the crime.¹⁰ In the drive to achieve consensus, the delegates agreed to a number of provisions that they may not have agreed to without the pressure of the conference deadline. Ultimately, these provisions help clarify outstanding questions about the definition, restrict the scope of ICC jurisdiction over the crime of aggression, and establish precedents for future amendments to the Rome Statute.

Definition. Prior to Kampala, the ICC states parties had agreed to an expansive and vague definition of the crime of aggression.¹¹ As Ambassador Rapp noted,

[T]here is no lawyer that likes that language. It's language that reflects kind of a diplomatic compromise. It doesn't easily—it's very hard to take that language and turn it into a typical criminal Statute of the kind that I prosecuted as U.S. Attorney or as a prosecutor in the ad hoc tribunals of really coming down with the elements, and, as a result, you see that coming out of that process, there's elements that basically restate it and that don't really tell us what "character," "gravity," and "scale" mean, don't really define what a "manifest act" is.¹²

The U.S. was concerned that legitimate use of force could be inappropriately considered acts of aggression because of the vagueness of the definition. Rapp reiterated this point in Kampala, criticizing the willingness of some member states to adopt the proposed crime of aggression and let the ICC clarify any uncertainties through future cases. Pointedly, he observed that "a fundamental principle of legality is that individuals must know whether conduct crosses the line into that which is forbidden before they act and not learn the answer in the crucible of trial."¹³ Thus, a key U.S. objective was to clarify what exactly constitutes a crime of aggression.

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Since few delegates were willing to revisit the hard-fought consensus on the definition of the crime of aggression regardless of its inexact and problematic nature, the U.S. sought to clarify the definition through the addition of several "understandings" to Annex III of the resolution. These

10. Review Conference on the Rome Statute of the International Criminal Court, "The Crime of Aggression," Resolution RC/Res.6, June 28, 2010, at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (July 30, 2010).

11. For more information, see Brett D. Schaefer and Steven Groves, "The ICC Review Conference: A Threat to U.S. Interests," Heritage Foundation *Background* No. 2416, May 28, 2010, at <http://www.heritage.org/Research/Reports/2010/05/The-ICC-Review-Conference-A-Threat-to-US-Interests>.

12. Rapp *et al.*, "U.S. Policy Toward the Upcoming International Criminal Court Review Conference."

13. Rapp, "Statement to the Review Conference of the International Criminal Court."

understandings affirm that the crime of aggression does not limit or prejudice existing or developing rules of international law for purposes other than the statute and that it “shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.”¹⁴ The understandings also emphasize that determination of an act of aggression must weigh “all of the circumstances of each particular case” including the gravity of the acts and their consequences. The character, gravity, and scale must all be sufficient to meet the standard of a “manifest” violation of the U.N. Charter.

Paragraph 3 of the resolution’s operative text specifically adopts the understandings as instructive in interpreting the definition and prescribing the ICC’s jurisdiction over the crime of aggression. Moreover, since the understandings were adopted by consensus as part of the resolution defining and establishing the court’s jurisdiction over the crime of aggression, it is difficult to envision a scenario in which the ICC prosecutor and judges could simply ignore or overrule them. As Koh stated,

I should say that one advantage that we have in the whole process here is that the whole package was adopted by consensus, the understandings, the various filters, the delay provisions, the preambular language, and since everything turned on everything else, it is very hard to say that something that was in there is meaningless. Every single piece of it was a critical part of what was decided. So I think that if we are looking for arguments that an understanding is meaning, the package wouldn’t have been adopted without the understandings.¹⁵

Clearly, Koh sees the understandings as the express, agreed intent of the states parties on how the definition of the crime of aggression should be interpreted. They instruct the court on the threshold and scale of actions that should constitute a criminal act of aggression. As such, these understandings should guide the court in dismissing lesser, frivolous, or politically motivated allegations

of aggression and protect military missions for self-defense, humanitarian intervention, or other legitimate purposes consistent with the U.N. Charter.

Restrictions on ICC Jurisdiction. Prior to the Kampala conference, the U.S. and a number of other delegations expressed concern that the proposal to grant the ICC independent authority to investigate, prosecute, and punish individuals for the crime of aggression is a direct assault on the prerogatives of the U.N. Security Council. The U.S. wished to limit the court’s ability to exercise jurisdiction over the crime of aggression to instances in which the Security Council had determined that a crime of aggression had been committed.

The U.S. delegation was unsuccessful in persuading ICC member states on this point. Instead, the conference adopted a resolution that provides two tracks or “triggers” for the ICC to investigate an alleged crime of aggression. First, the ICC prosecutor can proceed with an investigation if the Security

Giving the ICC independent jurisdiction over the crime of aggression usurps the Security Council’s authority under the U.N. Charter to determine whether an act of aggression has been committed.

Council has referred the situation to the court or has previously determined that a crime of aggression has been committed. Alternatively, the ICC prosecutor can proceed with an investigation if the Security Council has not made such a determination within six months of the prosecutor’s notification that he wishes to proceed with an investigation and if the ICC Pre-Trial Division authorizes the investigation.

Giving the ICC independent jurisdiction over the crime of aggression—i.e., creating a path for an ICC investigation into an alleged crime of aggression to proceed without previous action taken by the Security Council—usurps the Security Council’s authority under the U.N. Charter to determine whether an act of aggression has been committed. Koh reiterated the unacceptability of this usurpation in his concluding statement at the review conference.¹⁶

14. Review Conference, “The Crime of Aggression.”

15. Rapp *et al.*, “U.S. Policy Toward the Upcoming International Criminal Court Review Conference.”

The U.S. failure to persuade the delegations to limit ICC jurisdiction over the crime of aggression to instances in which the Security Council has determined that an act of aggression has been committed made the inclusion of other restrictions imperative. Thankfully, the U.S. was able to modify the resolution over the course of conference negotiations in several ways.

Renewable Deferral. As with other crimes under the jurisdiction of the ICC, the Security Council can defer an ICC investigation of an alleged crime of aggression for one year in accordance with Article 16 of the Rome Statute by adopting a resolution under Chapter VII of the U.N. Charter, and these deferrals are renewable. This provision was not in earlier drafts. Although passing such a Security Council resolution under Chapter VII may prove difficult, it is a potential check on the non-Security Council trigger.

Restrictions on Jurisdiction. The resolution also confirmed that the crime of aggression would be adopted in accordance to Article 121, paragraph 5 of the Rome Statute, which states that any amendment to Articles 5, 6, 7, and 8 (the articles listing and defining the crimes under the jurisdiction of the ICC) “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” and that the ICC cannot exercise jurisdiction over a state party that “has not accepted the amendment...when committed by that State Party’s nationals or on its territory.”¹⁷ In other words, the crime of aggression is applicable only to those ICC states parties that have ratified or otherwise accepted the amendment to the Rome Statute on aggression. The resolution permits the ICC to exercise jurisdiction over a crime of aggression allegedly

committed by the nationals or in the territory of an ICC state party under any one of two conditions:

- The aggressor state has ratified the amendment to the Rome Statute on the crime of aggression and committed the act against another ICC state party; or
- The Security Council has determined that an act of aggression had been committed or referred the situation to the ICC.

Thus, by not ratifying the amendment, a state party can effectively exclude its nationals from ICC jurisdiction for the crime of aggression and prevent the ICC from investigating alleged acts of aggression on its territory unless they are committed by an ICC party that has ratified the amendment on aggression.

Opt-Out Declarations. Moreover, a state party to the Rome Statute, even those that have ratified the amendment on the crime of aggression, can avoid an ICC investigation of an alleged crime of aggression simply by lodging a “declaration” with the ICC Registrar stating that it does not accept the court’s jurisdiction over aggression. Although a state party is required to reconsider the declaration within three years of lodging it, the declaration does not expire, and that state may lodge it before or after ratifying the amendment. The declaration would prevent the ICC from exercising its jurisdiction over an alleged crime “arising from an act of aggression committed by a State Party” as long as the declaration was made before the alleged act.¹⁸

The language is similar to the use of declarations in Article 12, paragraph 3 and Article 124,¹⁹ but is not focused on non-ICC state parties like Article 12, paragraph 3 and is not restricted to a specific duration or a single instance like Article 124. The open-

16. Harold Hongju Koh, “Closing Intervention at the Review Conference of the International Criminal Court,” U.S. Department of State, June 11, 2010, at <http://www.state.gov/s//releases/remarks/143218.htm> (July 30, 2010).

17. Rome Statute of the International Criminal Court, July 17, 1998, at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf (July 30, 2010).

18. Review Conference, “The Crime of Aggression.”

19. Article 12, paragraph 3 allows a non-ICC state party to accede to ICC jurisdiction for a particular crime. However, acceptance of ICC jurisdiction over the one case does not in any way validate ICC jurisdiction over any other situation that may involve crimes under the Rome Statute committed by the nationals of the non-ICC state party or committed on its territory. The declaration in Article 124, by contrast, permits an ICC party to deny the ICC jurisdiction over war crimes committed by its nationals or on its territory for up to seven years after the nation ratifies the Rome Statute.

ended and unrestricted nature of the declaration raises interesting possibilities. An ICC state party could ratify the amendment on the crime of aggression and declare before or after ratification that it does not accept ICC jurisdiction over the crime of aggression, thereby shielding its nationals from ICC jurisdiction over that crime.

Theoretically, an ICC state party could ratify the amendment and then make a declaration only when a situation arises that may lead the country to commit an act that the ICC prosecutor could consider aggression, such as participating in a NATO operation (e.g., the bombing of Yugoslavia in 1999). Based on the text of the amendment, a reasonable interpretation would allow a nation, after the operation was complete, to announce that it would accept ICC jurisdiction again, except for the duration of the recently completed operation. Moreover, nothing in the amendment seems to bar a nation from repeatedly checking in and out of ICC jurisdiction over aggression as necessary. Such a practice would be of immense value to the U.S. in forging coalitions to take collective military action with ICC states parties that wish to ratify the amendment on aggression.

Nonparty States Excluded from ICC Jurisdiction. Most important from the U.S. perspective, the resolution specifically bars the ICC from exercising jurisdiction over countries that are not party to the Rome Statute: “In respect of a state that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.”²⁰ In addition, the resolution delayed the entry into force for the crime of aggression until after January 2017 and established two additional hurdles for entry into force: an additional decision adopted after January 1, 2017, supported by at least a two-thirds majority of states parties and a requirement that at

least 30 states parties must have ratified the amendment on the crime of aggression for at least a year.²¹ This delays operationalization of ICC jurisdiction over alleged crimes of aggression at least until 2017 and perhaps longer.

Taken together, the exclusion of non-ICC member states and states parties that do not ratify the amendment from the court’s jurisdiction over the crime of aggression, the possibility of a Security Council deferral of a case, the opt-out declaration for ICC member states, and the delayed operationalization of jurisdiction address U.S. concerns about the crime of aggression to a significant degree.

Precedent. Since the review conference in Kampala was the first to consider and adopt amendments to the Rome Statute, its actions could be argued as setting precedents. Future U.S. Administrations should focus on two practices established in Kampala.

First, the two resolutions amending the Rome Statute (the Belgian amendment and the crime of aggression) were adopted by consensus. Prior to the conference, the U.S. repeatedly pointed out that the amendments were serious acts that rose above the typical business of the Assembly of States Parties meetings and, therefore, should be adopted by consensus to bolster their legitimacy.

From our perspective, the most important element is a matter of procedure. There is no crime in the International Criminal Court that has not been adopted by consensus. War crimes, crimes against humanity, and genocide were all adopted by consensus. We believe that this is also a crime that has the capacity to change the character of the Court. To finalize and operationalize the crime should also be done by consensus, and we should search with others to find that consensus.²²

20. Review Conference, “The Crime of Aggression.”

21. Article 3 of the resolution inserts the following text into the Rome Statute as Article 15 *bis*, paragraphs 2 and 3: “2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties. 3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.” *Ibid.*

22. Rapp *et al.*, “U.S. Policy Toward the Upcoming International Criminal Court Review Conference.”

As noted by Koh shortly after the conference concluded:

[W]e emphasized from day one the norm of consensus, and we emphasized from day one...that a Review Conference is a constitutional event, and it is a constitutional convention and should not be run through rules of ordinary politics, which means there must be overwhelming agreement that some organic change in the court is going to take place.²³

At the conclusion of the Kampala conference, numerous delegates reiterated the importance of achieving a consensus on the final resolutions. It is reasonable to assert that future amendments to the Rome Statute, particularly those involving the crimes, should similarly be adopted only through consensus. Insisting on this precedent would establish an opportunity for future U.S. Administrations working through ICC state party proxies to block adoption of objectionable amendments or at least to press for changes to address U.S. concerns.

A second practice established in Kampala was the affirmation that amendments to the Rome Statute dealing with crimes enter into force only for ICC states parties that have ratified the amendment.²⁴ Significantly, both of the resolutions equated ICC states parties that had not ratified the amendments with non-ICC states parties in that

they bar ICC jurisdiction over crimes amended through the resolutions. Specifically, the Belgian amendment stated:

[I]n respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and confirming its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute.²⁵

Similarly, the resolution on the crime of aggression stated:

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.

In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when

23. Harold Hongju Koh, Stephen J. Rapp, and John B. Bellinger III, "The U.S. and the International Criminal Court: Report From the Kampala Review Conference," American Society of International Law, June 16, 2010, at http://www.asil.org/files/Transcript_ICC_Koh_Rapp_Bellinger.pdf (July 30, 2010).

24. This was done by specifically stating that the amendments would be adopted pursuant to Article 121, paragraph 5, which states, "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." Some argued that the resolution on the crime of aggression should be adopted using Article 121, paragraph 4, which would have the amendment enter into force for all ICC parties once seven-eighths of the state parties had ratified the amendment, because it amended parts of the Rome Statute beyond Articles 5, 6, 7, or 8. Using Article 121, paragraph 4 would set a more difficult route to entry-into-force because seven-eighths of the states parties would have to ratify the amendment before it would become operational. However, many ICC proponents favored this route because, once it did enter into force, it would apply immediately for all states parties, even if they had not ratified the amendment. Thus, it was seen as a more effective means of broadening ICC jurisdiction over the crime of aggression. In the end, the member states chose to use Article 121, paragraph 5, in part because the amendments considered crimes already referenced by the Rome Statute. It has been argued that Article 121, paragraph 4 could be used to adopt new crimes, such as terrorism or piracy.

25. Review Conference, "Amendments to Article 8 of the Rome Statute."

committed by that State's nationals or on its territory.²⁶

This is a significant break in the ICC's past treatment of non-ICC states parties in regard to crimes under its jurisdiction. Under the Rome Statute, the ICC claims jurisdiction over genocide, crimes against humanity, and war crimes even if those acts are committed by individuals from countries that are not party to the Rome Statute, if the alleged crimes occur on the territory of an ICC party state, if the nonparty government invites ICC jurisdiction, or if the U.N. Security Council refers the case to the ICC. The two amendments adopted in Kampala essentially reject the first two tracks for ICC jurisdiction. The U.S. should insist that any future amendment of the Rome Statute similarly disavow ICC jurisdiction over crimes allegedly committed by nationals from non-ICC states parties or on the territory of non-ICC states parties.

What the U.S. Should Do

The U.S. effort to work with similarly concerned states, particularly the other permanent members of the Security Council, to place significant checks on the court's ability to exercise jurisdiction over aggression should be recognized as a hard-fought, albeit less than ideal, achievement. As it stands, the U.S. has less reason to be concerned about the crime of aggression and the potential for an unaccountable ICC prosecutor to claim jurisdiction over its service members or officials in the future.

However, the success in circumscribing the ICC's ability to exercise jurisdiction over the crime of aggression has not addressed or alleviated ongoing U.S. concerns about the ICC and its jurisdiction over genocide, crimes against humanity, and war crimes. Indeed, the ICC prosecutor announced in

2009 that he was conducting a preliminary investigation into war crimes and crimes against humanity allegedly committed in Afghanistan.²⁷ The prosecutor's office has indicated that the investigation could include crimes allegedly committed by U.S. and NATO forces.

To protect U.S. military personnel and other U.S. persons and to encourage other member states to support reforms to the Rome Statute that would address U.S. concerns, the Obama Administration and Congress should:

- **Refuse to consider ratification of the Rome Statute.** Although the U.S. has historically supported the goal of holding perpetrators of serious human rights violations to account, the U.S. was one of seven countries to vote against the adoption of the Rome Statute in 1998²⁸ because many of its concerns were ignored or opposed outright. Although the Clinton Administration signed the Rome Statute, President Bill Clinton urged President George W. Bush not to submit the Rome Statute to the Senate for the advice and consent necessary for ratification because "it will not only exercise authority over personnel of states that have ratified the treaty but also claim jurisdiction over personnel of states that have not."²⁹ President Bush similarly refused to join the ICC because it lacks safeguards against political manipulation, possesses authority without accountability to the U.N. Security Council, and violates national sovereignty by claiming jurisdiction over the nationals and military personnel of nonparty states in some circumstances. Obama Administration officials have repeatedly stated that they would not seek ratification of the Rome Statute. This is the correct policy. Unless all U.S. concerns about the ICC are addressed—

26. Review Conference, "The Crime of Aggression."

27. Brett D. Schaefer and Steven Groves, "The ICC Investigation in Afghanistan Vindicates U.S. Policy Toward the ICC," Heritage Foundation *WebMemo* No. 2611, September 14, 2009, at <http://www.heritage.org/Research/Reports/2009/09/The-ICC-Investigation-in-Afghanistan-Vindicates-US-Policy-Toward-the-ICC>.

28. Press release, "UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court," U.N. Department of Public Information, July 17, 1998, at <http://www.un.org/icc/pressrel/lrom22.htm> (July 30, 2010).

29. Bill Clinton, "Statement on the Rome Treaty on the International Criminal Court," BNET, December 31, 2000, at http://findarticles.com/p/articles/mi_m2889/is_1_37/ai_71360100 (July 30, 2010).

an unlikely prospect considering the difficulty of amending the existing treaty and the prohibition on reservations to the Rome Statute—the U.S. should not consider ratifying the Rome Statute.

- **Maintain existing Article 98 agreements.** Because the ICC could under certain circumstances claim jurisdiction over the nationals of nonparties to the Rome Statute—an assertion unprecedented in international legal jurisdiction—the Bush Administration sought legal protections to preclude nations from surrendering, extraditing, or transferring U.S. persons to the ICC or third countries for that purpose without U.S. consent. Under an Article 98 agreement—named after the article in the Rome Statute that permits such agreements—a country agrees not to turn U.S. persons over to the ICC without U.S. consent. Reportedly, 104 countries have signed Article 98 agreements with the U.S., of which 97 agreements remain in effect.³⁰ Until the Rome Statute is reformed to address all of the U.S. concerns, the Obama Administration should confirm and endorse all existing Article 98 agreements still in force. The U.S. is militarily engaged in Iraq and Afghanistan and has troops stationed and in transit around the globe. The U.S. will likely be involved in anti-terrorist activities around the world for many years. Now is not the time to terminate the legal protections enjoyed by U.S. military personnel and officials deployed in foreign nations. Even if the U.S. joins the ICC at some future date, the U.S. should not terminate the Article 98 agreements because they are consistent with the Rome Statute and would serve as a useful protection if the court overreaches.
- **Approach Security Council recommendations to the ICC on their merits and oppose those deemed detrimental to U.S. interests.** The U.S. abstentions on Security Council resolutions on Darfur indicate only that it is not U.S. policy to block all mentions of the ICC. However, accepting the reality of the ICC does not mean that the U.S. should acquiesce on substantive issues that

may directly or indirectly affect U.S. interests, U.S. troops, U.S. officials, or other U.S. nationals. Many concerns about the Rome Statute have not yet been adequately addressed. The U.S. should not support resolutions that mention the ICC, but it should consider abstaining if the resolution addresses issues critical to U.S. interests and would not directly or indirectly undermine the U.S. policy of opposing ICC claims of jurisdiction over U.S. military personnel and its nationals. Moreover, the U.S. should insist that all resolutions include language protecting military and civilian officials from non-ICC states participating in U.N. peacekeeping operations.

- **Press for the most advantageous interpretations of the language in the resolution on the crime of aggression.** The U.S. delegation was unsuccessful in persuading the ICC member states to agree to grant the Security Council the sole authority to determine if a crime of aggression had been committed for the purposes of ICC jurisdiction over the crime of aggression. This decision by the ICC states parties usurps the U.N. Security Council's authority under the U.N. Charter to determine whether an act of aggression had been committed. The U.S. should not concede this vital issue. Specifically, the U.S. should frequently and consistently assert that, without a referral by the U.N. Security Council, the ICC has no jurisdiction over the alleged crimes committed by the nationals of non-ICC states parties or committed in their territories. The U.S. should also highlight the fundamental nature of the understandings in interpreting when an act of aggression has been committed and argue that ICC states parties should make use of the declaration provision to deny the ICC jurisdiction over aggression under the text of the resolution adopted in Kampala.
- **Maintain that the practices established in Kampala are precedents.** A number of significant practices were arguably established in Kampala that could be advantageous to the U.S., and future U.S. Administrations should insist that

30. Nicholas Kravov, "U.S. Warms to Global Court," *The Washington Times*, April 30, 2009, at <http://www.washingtontimes.com/news/2009/apr/30/us-warms-to-global-panel> (July 30, 2010).

they are precedents that should guide future attempts to amend the Rome Statute. First, because the first two amendments to the Rome Statute were adopted by consensus, it is reasonable to assert that future amendments to the Rome Statute, particularly those involving the crimes, should be adopted only through consensus. Insisting on this precedent would establish an opportunity for future U.S. Administrations working through ICC state party proxies to block adoption of objectionable amendments or at least to press for changes to address U.S. concerns. Second, the two amendments adopted in Kampala excluded non-ICC state parties from jurisdiction and the U.S. should insist that future amendments to the Rome Statute regarding crimes similarly disavow ICC jurisdiction over acts committed by nationals of non-ICC states parties or on the territory of non-ICC states parties. The benefits to non-ICC state parties, such as the U.S., are obvious.

- **Convince the ICC states parties to delay the implementation of the crime of aggression beyond 2017.** Just because the U.S. successfully addressed some of its most overt concerns about the crime of aggression by convincing ICC member state delegations to modify the text of the resolution in Kampala does not mean that ICC jurisdiction over aggression will not affect U.S. interests. Specifically, the U.S. should be concerned about whether potential ICC investigations into alleged crimes of aggression could dissuade potential allies from joining the U.S. in joint military operations. Before ICC jurisdiction over aggression becomes operational, at least 30 ICC states parties must have ratified the amendment on the crime of aggression for at least a year and the ICC states parties must adopt a decision after January 1, 2017, “by the same majority of States Parties as is required for the adoption of an amendment to the statute” to affirm the court’s jurisdiction over aggression. In anticipation of 2017, the U.S. should seek to raise the threshold for adopting the decision. Although a two-thirds majority of ICC states parties can technically adopt an amendment, the U.S. should argue that the decision should similarly require consensus

because the review conference adopted the original resolution on aggression and the Belgian amendment by consensus. Meanwhile, the U.S. should seek to raise awareness among ICC parties about the possible ramifications of operationalizing the court’s jurisdiction over aggression.

Conclusion

Overall, the U.S. effort in Kampala was a qualified success. Article 124 was maintained, although the U.S. played a small role in that outcome. The Belgian amendment was adopted, creating a regrettable precedent for expanding the list of weapons, the use of which is considered war crimes under the Rome Statute, but the immediate risks to the U.S. were minimized. The outcome on these two amendments could have been worse.

On aggression, the U.S. failed to achieve its two highest priorities—to block adoption of a resolution granting the ICC jurisdiction over the crime of aggression or, at least, to allow the ICC to investigate an alleged crime of aggression only after the Security Council had determined that an act of aggression had been committed. The end result is that the member states adopted a flawed definition of aggression, the ICC in all likelihood will exercise jurisdiction over acts of aggression committed by the nationals of most ICC parties or in their territories, and the court is permitted to initiate an investigation without prior Security Council action.

The U.S. was able to address some of its concerns about the crime of aggression through textual changes to the resolution and understandings regarding the definition of aggression. Taken together, these efforts address U.S. concerns about the crime of aggression to a significant degree. However, the potential for the ICC to investigate legitimate acts as potential crimes of aggression will inevitably influence decisions by the U.S. and its allies to use force and will likely make it more difficult for the U.S. to act jointly with its allies to protect mutual interests when use of force is required. Furthermore, by adopting the amendment defining the crime of aggression, the conference failed to recognize the Security Council’s primary responsibility over acts of aggression as granted to it in the U.N. Charter.

Moreover, the modest success in Kampala does not negate pre-existing concerns about the ICC. Its broad autonomy and jurisdiction invite politically motivated indictments. The issues that led President Clinton and President Bush to refuse to join the ICC remain unresolved and continue to pose serious challenges to U.S. sovereignty and national interests. Unless these serious flaws are addressed fully, President Obama should similarly hold the ICC at arm's length. To protect U.S. interests the U.S. should not consider ratifying the Rome Statute, should maintain its Article 98 bilateral agreements

to protect U.S. nationals from ICC claims of jurisdiction, should exercise great care when deciding to support the court's actions, and should argue for continuing the procedural precedents established in Kampala.

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