Legal Effects of the Ratification by Italy of the Amendments to the ICC Statute on Aggression

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Abstract

Through the adoption of Law No. 202/2021 on the ratification of the amendments to the Statute of the International Criminal Court, among other things Italy accepted the ICC’s jurisdiction over the crime of aggression. This comment argues that with respect to proprio motu investigations and States Parties’ referrals, the scope of such jurisdiction depends on the interpretation of Articles 15bis(4) and 15bis(5) of the Statute. The ratification has two additional implications. First, conducts committed by Italian nationals in the context of international military operations may be scrutinized by the ICC. Second, the Italian legislator should enact domestic legislation criminalizing the crime of aggression in order not to incur the violation of an obligation to cooperate with the Court pursuant to Part 9 of the Statute.

Keywords

International Criminal Court – aggression – Italy – jurisdiction – humanitarian intervention – international military operations – obligation to criminalize

1 Introduction

On 4 November 2021, the Italian Parliament approved Law No. 202/2021 on the ratification and execution of the amendments to the Statute of the International

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Criminal Court, as adopted in Kampala on 10 and 11 June 2010.\textsuperscript{1} This law consists of only three articles, authorizing the President of the Republic to ratify the said amendments and including the so-called “ordine di esecuzione” (a “domestic legal measure that brings the treaty into effect in Italian law”).\textsuperscript{2}

Following the entry into force of the law, on 26 January 2022 the Permanent Representative of Italy to the United Nations (UN), Maurizio Massari, deposited the instrument of ratification of the amendments with the UN Secretary-General during a joint ceremony with the Permanent Representative of Sweden.\textsuperscript{3} In doing so, Italy and Sweden became the 42nd and 43rd States Parties to the Rome Statute of the International Criminal Court (ICC Statute, Statute) to accept/ratify the amendments to Article 8 of the Statute that have introduced Articles 8(2)(e)(xiii), 8(2)(e)(xiv), and 8(2)(e)(xv) and on the crime of aggression (deleting Article 5(2), amending Articles 9(1) and 20(3), and introducing Articles 8\textsuperscript{bis}, 15\textsuperscript{bis}, 15\textsuperscript{ter}, and 25(3\textsuperscript{bis})).

For the purpose of this comment, I will focus on the legal effects that the ratification of the amendments on the crime of aggression has on the relationship between Italy and the ICC system.

I will first examine what the ratification entails with respect to the exercise of the ICC’s jurisdiction over crimes of aggression committed by nationals or on the territory of Italy. I will focus on the impact of the ratification in light of the different trigger mechanisms, and particularly on the scope of the jurisdiction the ICC may exercise on the basis of Article 15\textsuperscript{bis}. In this respect, I will consider two equally plausible (and controversial) interpretative options concerning the jurisdictional regime for the crime of aggression.

I will then turn to the effects of the ratification vis-à-vis the obligations to cooperate with the ICC undertaken by Italy in accordance with Part 9 of the Statute. The fact that aggression has not been criminalized at the domestic level may in fact have substantial effects on the ability to execute such obligations on the part of Italian authorities. On the other hand, I will not focus on the question whether Italy was under a customary obligation to criminalize aggression for two reasons. First, neither State practice nor opinio juris seem to attest to the emergence of such an obligation, particularly concerning the crime of aggression.\textsuperscript{4} Second, even should one argue that the said obligation has indeed


\textsuperscript{3} See Reisinger Coracini, “Evaluating Domestic Legislation on the Customary Crime of Aggression Under the Rome Statute’s Complementarity Regime”, in Stahn and Sluiter
emerged, an additional problem would arise with respect to which definition of aggression domestic laws should incorporate: the definition agreed upon by States participating in the Review Conference of the Rome Statute in 2010 or one grounded in the statutes and judgments of the Nuremberg and Tokyo International Military Tribunals.\(^5\) Both matters fall beyond the scope of this research.

2 Legal Effects of the Ratification within the ICC System: the Exercise of the Court's Jurisdiction

According to Article 15\(^\text{bis}\) of the Statute, the Court may exercise its jurisdiction with respect to the crime of aggression one year after the ratification or acceptance of the amendments by thirty States Parties (Paragraph 2), and subject to a decision to be taken after 1 January 2017 by consensus or with a two-thirds majority of States Parties (Paragraph 3). Following the deposit of the 30th instrument of ratification by Palestine on 26 June 2016, on 14 December 2017 States Parties adopted a Resolution on the "Activation of the jurisdiction of the Court over the crime of aggression" (Resolution 5/2017).\(^6\) Paragraph 1 of this resolution established that the ICC would be allowed to exercise its jurisdiction over the crime of aggression from 17 June 2018 (the 20th anniversary of the adoption of the Rome Statute).

As a result, the ratification of the amendments on the part of Italy does not bear any consequences in terms of enabling the Court to exercise jurisdiction over aggression. However, it may have substantial effects on one of the mechanisms that trigger the exercise of such jurisdiction.

Article 15ter of the Statute enables the UN Security Council ("UNSC" or "Security Council") to refer to the Prosecutor a situation in which one or more

\(^5\) See \textit{McDougall, The Crime of Aggression under the Rome Statute of the International Criminal Court, 2nd ed., Cambridge, 2021}, pp. 168–200, and particularly p. 199 ("[...] while a broader definition may emerge over time, at the time of writing, the customary definition of the crime of aggression is still best described as being limited to the idea of a war of aggression.").

\(^6\) Resolution ICC-ASP/16/Res.5 on the "Activation of the jurisdiction of the Court over the crime of aggression", ICC-ASP/16/20, adopted at the 13th plenary meeting, on 14 December 2017, by consensus.
crimes of aggression appear to have been committed – irrespective of whether such situation concerns State Parties that have ratified the amendments, State Parties that have not ratified the amendments, or non-party States. Therefore the ICC has been authorized to exercise its jurisdiction over aggression on the basis of a UNSC referral from 17 June 2018.

On the other hand, Paragraph 2 of Resolution 5/2017 prescribes that “in the case of a State referral or proprio motu investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments”. In fact, Articles 15bis(4) and 15bis(5) seem to establish an ad hoc regime in relation to proprio motu investigations and States Parties’ referrals. According to Article 15bis(5), the ICC cannot exercise its jurisdiction over crimes of aggression committed by nationals or on the territory of a non-party State. As to States Parties, the practical implications of this regime, and particularly of the ratification of the amendments, depend on how the Court will interpret Article 15bis(4) – including in light of the resolutions adopted by States Parties in 2010 and 2017.

2.1 The Exercise of the ICC’s Jurisdiction over Aggression Pursuant to Article 15bis(4): Legal Effects of the Ratification of the Amendments on the Part of Italy

Pursuant to Article 121(5) of the Statute, an amendment to Articles 5, 6, 7, or 8 will enter into force, for the State Party which has accepted/ratified it, one year after the deposit of the instrument of acceptance or ratification. Meaning that for Italy, the amendment on aggression would enter into force on 26 January 2023. However, the amendments on the crime of aggression may fall under a different jurisdictional regime.

In fact, Article 15bis(4) prescribes that 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”. An additional condition – that both the aggressor State and the victim State are Parties to the Statute – is required under Article 15bis(5). There is more to it. Pursuant to Paragraph 1 of the resolution on aggression adopted at the end of the 2010 Review Conference (Resolution 6/2010), the amendments on the crime of aggression “shall enter into force in accordance with article 121, paragraph 5”. That is to say, the ICC cannot exercise jurisdiction over

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7 Resolution RC/Res.6 on “The crime of aggression”, RC/11, adopted at the 13th plenary meeting, on 11 June 2010, by consensus.
a crime of aggression committed by a national or on the territory of a State Party which has not accepted the amendments on aggression or before one year has elapsed since such State deposited its instrument of acceptance or ratification of the amendments. This reading is compatible with what Paragraph 2 of Resolution 5/2017 provided.

The academic debate split over whether Articles 15bis(4) and (5) should be read in light of Resolutions 6/2010 and 5/2017.

According to some scholars, Article 15bis(4) would establish an ad hoc regime based on four conditions: (1) that the ICC’s jurisdiction has been triggered in accordance with Article 13, Paragraphs (a) and (c) of the Statute (State Party’s referral or exercise of proprio motu powers by the Prosecutor, respectively); (2) that the jurisdiction over the crime of aggression has been activated pursuant to Paragraphs 2 and 3 of Article 15bis (as described in Section 2 above); (3) that the crime has been allegedly committed by a national or on the territory of a State Party for which the amendments on the crime of aggression have entered into force; and (4) that the aggressor State has not lodged an opt-out declaration with the Registrar.8 Trahan recalled that this reading had been endorsed by the majority of States Parties that let their views be known before the December 2017 Assembly of States Parties (2017 ASP).9 I will thus refer to it as the “majority reading”.

Such regime does not seem to square with Paragraph 2 of Resolution 5/2017, requiring that both the aggressor State and the State victim of aggression ratified or accepted the amendments on the crime of aggression at least one year before the conduct has been committed. In this regard, having conceded that “some creativity was employed”, McDougall noted that “no solution [...] could have escaped the charge of invention”.10 However, according to Trahan

“the judges might conclude the resolution is not in fact a ‘subsequent agreement’ [between the States Parties to the ICC Statute] at all but ‘disagreement’ regarding the interpretation of a treaty after a ‘subsequent agreement’ had been reached. Or, they might conclude there was not a ‘subsequent agreement’ at all [...]”.11

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8 See Barriga and Blokker, “Conditions for the Exercise of Jurisdiction Based on State Referrals and Proprio Motu Investigations”, in Kress and Barriga, cit. supra note 4, pp. 653–655. In the same spirit, see also McDougall, cit. supra note 5, pp. 310–323.
10 McDougall, cit. supra note 5, p. 314.
11 Trahan, cit. supra note 9, p. 235.
Conversely, other scholars have argued that the Court would be bound by Paragraph 2 of Resolution 5/2017, amounting to either “a subsequent agreement of the parties to the Rome Statute regarding its interpretation” or “subsequent practice that establishes the agreement of the parties to the treaty regarding its interpretation”. However, they conceded that “[e]ven if the resolution constituted a subsequent agreement or subsequent practice [...], it is unclear whether an interpreter is bound by such an interpretation”. In practice, these scholars suggested that three conditions should be fulfilled in order for the ICC to exercise its jurisdiction over the crime of aggression: (1) that both the aggressor State and the victim State are Parties to the Statute; (2) that both these States Parties ratified or accepted the amendments on the crime of aggression one year before the conduct has been committed; and (3) that the aggressor State has not opted out of this regime. The Court should only exercise its jurisdiction over aggression when both States have consented to it and the aggressor State has not opted out (so-called ‘opt-in-opt-out mechanism’). Therefore a State Party may legitimately consent to the exercise of the ICC’s jurisdiction only when it is the victim of aggression. Trahan recalled that only eight States Parties, including France and UK, had expressly supported this reading before the 2017 ASP. I will thus refer to it as the France/UK reading.

The France/UK reading has been met with three main objections – which I find convincing. First, the fact that the opt-in-opt-out regime had never been discussed, let alone agreed upon in Kampala. According to Barriga, the outcome of the negotiations was a compromise excluding non-party States and introducing an opt-out system for States Parties. Second, the fact that such
regime would conflict with Paragraph 1 of Resolution 6/2010, prescribing that a State Party may lodge an opt-out declaration prior to the ratification/acceptance of the amendment. In this regard, I agree with Trahan that this provision would only make sense where, under the default regime, the Court could exercise jurisdiction over a State Party that has not ratified/accepted the amendments unless such State has in the meantime lodged the opt-out declaration.19 Lastly, the fact that the France/UK reading would be based on the interplay between the amendments and Resolutions 6/2010 and 5/2017. In this respect, Trahan correctly argued that considering that these resolutions have “less interpretative weight than the actual amendment”, ICC judges might find the text of Article 15bis(4) “clear on its face” and thus – in accordance with the rules of interpretation enshrined in the Vienna Convention on the Law of Treaties – embrace the “majority reading”.20

All in all, both options seem plausible and may nevertheless draw criticism. As Grover posited: “[u]ntil the box is opened, Schrödinger’s cat is both alive and dead”.21

The issue whether a residual jurisdictional link can be invoked – besides those established through Articles 15bis and 15ter – seems less contentious. In my opinion, this is expressly excluded by the letter of Article 15bis(5), providing that the Court cannot exercise its jurisdiction over the crime of aggression when committed by nationals or on the territory of a State that is not a Party to the Statute. If the ICC cannot exercise its jurisdiction over nationals or the territory of non-party States, it follows that such States cannot accept the ICC’s jurisdiction over aggression by means of lodging an Article 12(3) declaration.22
2.2 *Implications of the Interpretation of Article 15bis(4): Scope of the ICC's Jurisdiction over Crimes of Aggression Committed by Nationals or on the Territory of Italy*

The answer to the question of whether and under which conditions the ratification of the amendments on the part of Italy enables the ICC to exercise jurisdiction over crimes of aggression committed by nationals or on the territory of Italy depends on which interpretation the ICC will favor.

On the basis of the "majority reading", the ICC would be allowed to exercise its jurisdiction over crimes of aggression: 1) from 17 June 2018, either when committed by nationals of Italy on the territory of one of the 34 States Parties that have ratified the amendments before 17 June 2017 or by nationals of one of those 34 States on the territory of Italy; 2) from a date comprised between 6 December 2018 and 18 January 2022, either when committed on the territory of Italy by nationals of one of the 7 States Parties that have ratified the amendments between 6 December 2017 and 18 January 2021 or by nationals of Italy on the territory of one of those 7 States; 3) after 26 January 2023, either when committed by nationals of Italy on the territory of Italy, of Sweden or of one of the 80 States Parties that have not ratified the amendments on aggression, or by nationals of Sweden or of the 78 other States Parties that have not filed an opt-out declaration on the territory of Italy.

Conversely, according to the France/UK reading the ICC would be allowed to exercise its jurisdiction over crimes of aggression committed after 26 January 2023: 1) by nationals of Italy, either on the territory of Italy or of one of the other 42 States Parties that have ratified the amendments before or on 26 January 2022; 2) by nationals of one of such 42 States Parties on the territory of Italy.

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23 Namely: Andorra, Argentina, Austria, Belgium, Botswana, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, El Salvador, Estonia, Finland, Georgia, Germany, Iceland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, The Netherlands, North Macedonia, Poland, Portugal, Samoa, San Marino, Slovakia, Slovenia, Spain, State of Palestine, Switzerland, Trinidad and Tobago, Uruguay.

24 As of 1 April 2022, none of those 34 countries has filed an Article 15bis(4) declaration.

25 Depending on when the State Party involved ratified the amendments (e.g. Panama ratified them on 6 December 2017, Mongolia on 18 January 2021).

26 Namely: Panama, Guyana, Ireland, Ecuador, Paraguay, Bolivia, Mongolia.

27 As of 1 June 2022, only two States – Guatemala and Kenya – have filed such declaration with the ICC Registrar ("Declarations lodged under Article 15bis(4)", available at: <https://www.icc-cpi.int/resource-library#>).

28 Namely: those listed in notes 23 and 26 *supra* plus Sweden.
2.3  **The Material Scope of the ICC’s Jurisdiction Over Crimes of Aggression: Revisiting the Participation of Italy in International Military Operations**

Although the analysis of the definition of aggression enshrined in Article 8bis falls outside the scope of this article,\(^\text{29}\) I would like to draw the attention on the implications of the ratification of the amendments on aggression for the participation of Italy in military operations launched by international organizations it is a member of. In particular, the question would be whether the ICC might qualify conducts committed in the context of such military operations as crimes of aggression.

Pursuant to Article 8bis(1), acts of aggression enumerated at Article 8bis(2) may amount to a crime of aggression if by their character, gravity and scale they constitute “a manifest violation of the Charter of the United Nations”. Considering that “acts of aggression” have indeed been committed in the context of international military operations – such as the bombardment by NATO forces against the territory of the Federal Republic of Yugoslavia (“FRY”) in 1999 –, the problem lies in whether in the concrete circumstances of the case those acts may amount to aggression. This is not at all a hypothetical. The debate as to whether humanitarian interventions, such as the above-mentioned operation by Member States of NATO (including Italy) against the FRY, might amount to crimes of aggression has been particularly lively.\(^\text{30}\) For the purpose of this Section, I will limit myself to referring to two opposing views in this respect.

According to Trahan, interventions that fell within a “grey area” of legality would not be covered by Article 8bis.\(^\text{31}\) In fact, “any time there is legitimate ambiguity about the legality of a State intervention, it should be deemed to fall...

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\(^{30}\) In its report on the 1999 NATO bombing campaign, an independent committee established by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") noted that the legal basis of such campaign, namely "humanitarian intervention without prior Security Council authorization", was “hotly debated” (ICTY, “Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia", 8 June 2000, available at: <https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal->, para. 30).

within the ‘grey area’ of legality and not create individual exposure under the crime of aggression”.32 This grey area would comprise “minimal” violations of the UN Charter not meeting the gravity and scale thresholds as well as violations that do not meet the character threshold because they are not unambiguously illegal – such as “genuine” (or “bona fide”) humanitarian interventions.33

On the other hand, Heller has argued that “if two of the three components of the manifest-violation test are sufficient, [humanitarian intervention] likely qualifies as a manifest violation simply due to its gravity and scale”.34 Even if one took the position that under Article 8bis(1) a use of force must have “the ‘character’ of a manifest violation of the UN Charter”, according to Heller the illegality of humanitarian interventions is “unambiguous” and is “enough to deem it a manifest violation of the UN Charter for purposes of the crime of aggression”.35

Therefore, as of today the only possible inference is that it is not unambiguous whether, following the entry into force of the amendments on aggression, nationals of Italy (who are in a position effectively to exercise control over or to direct its political or military action, pursuant to Paragraph 1 of Article 8bis) might be held criminally responsible for crimes of aggression associated with the participation of Italy in military operations launched by international organizations it is a member of – including “humanitarian interventions”. In the same spirit, it is worth noting that pursuant to Articles 15bis(6) and 15bis(8) of the Statute, the Court may find that such interventions amount to crimes of aggression even in cases where the UN Security Council has not made such a determination.

3 The Consequences of the Missed Criminalization of Aggression at the Domestic Level

Following the adoption of Law No. 202/2021, the Italian legislator did not proceed to criminalize aggression at the domestic level. Two consequences may arise from this decision. In particular, Italy may have violated an obligation to criminalize such conduct at the domestic level, and/or may not be able to comply with the obligations to cooperate with the ICC as enshrined in Part 9 of the Statute.

32 Ibid., p. 68.
33 Ibid., pp. 59–62.
35 Ibid., p. 634.
As to the first issue, I agree with those who argued that by ratifying the Statute, States Parties do not undertake an obligation to enact domestic criminal legislation in relation to the crimes proscribed under Article 5 of the Statute. The only consequence of the missed incorporation of such crimes into the domestic legal system is “that the resulting lack of domestic prosecution may trigger the exercise of the Court’s jurisdiction under the principle of complementarity”. With respect to the crime of aggression, this option seems to have been endorsed by States Parties. In fact, pursuant to Understanding 5 adopted at the Review Conference “the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression by another State”.

Conversely, the failure to enact domestic legislation criminalizing aggression may result in the violation of obligations to cooperate with the ICC. As I argued in a recent article, such obligations imply “that all the necessary measures must have been taken at the national level in order to ensure the State’s cooperation”. In particular, two problems may arise in relation to a request to (arrest and) transfer to the ICC, on the basis of an arrest warrant issued by the Court, a person suspected of having committed aggression. First, pursuant to Article 13 of Law No. 237/2012, if the underlying conduct did not fall within the scope of any existing domestic offence, the competent judge might reject such a request on the basis of a violation of the fundamental principle of double jeopardy. Additionally, domestic authorities might be unable to cooperate with the Court due to the expiration of the statute of limitations in relation to the “corresponding” ordinary offence.

In conclusion, the Italian legislator should pass a law criminalizing aggression at the domestic level in order not to risk incurring in a violation of an obligation to cooperate with the ICC.

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37 Ibid., p. 637.
40 Ibid., pp. 708–714.
4 Conclusions

In this short comment, I provided an overview of the main legal effects of the ratification, on the part of Italy, of the amendments to the ICC Statute on the crime of aggression.

Following the activation of the Court’s jurisdiction over aggression, in December 2017 States Parties enabled the Security Council to trigger such jurisdiction over conducts committed after 17 June 2018. Conversely, the ratification of the amendments by States Parties bears consequences in terms of the exercise of the Court’s jurisdiction based on *proprio motu* powers of the Prosecutor or States Parties’ referrals. However, the exercise of such jurisdiction in practice depends on the interpretation of Articles 15bis(4) and (5). Therefore in Sections 2.1 and 2.2 I focused on the practical implications of two equally plausible interpretations offered by States and scholars, in terms of both the temporal and territorial scope of the jurisdiction that the ICC may exercise over crimes of aggression committed by nationals or on the territory of Italy.

The ratification of the amendments also has consequences in terms of subjecting Italy to the scrutiny of the ICC. In particular, in Section 2.3 I argued that conducts committed in the context of international military operations Italy may participate in – including the so-called “humanitarian interventions” – might amount to crimes of aggression under Article 8bis(1) of the Statute.

Lastly, in Section 3 I argued that the decision not to criminalize aggression at the domestic level, following the ratification of the amendments, may result in a violation of an obligation to cooperate with the Court arising from Part 9 of the Statute. In particular, Italian authorities may be unable to execute a request to transfer to the ICC a person suspected of having committed aggression due to the absence of a domestic offence or to the expiration of the statute of limitations concerning the “corresponding” ordinary offence.