Of War-Councils and War-Mongering: Considering the Viability of Incitement to Aggression

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1 Introduction

In representing Samoa as part of the Preparatory Commission for the International Criminal Court in reference to the crime of aggression, Roger Clark took an expansive view of the potential scope of liability and submitted a proposal that ‘raised the question whether there should be liability under the Rome Statute for direct and public incitement to aggression.’1 The proposal was tabled and incitement was not ultimately incorporated into the aggression amendments adopted at the Kampala Review Session in 2010.2 In the meantime, as a normative matter, regardless of the Rome Statute's final text, Professor Clark's question remains unanswered: should incitement to aggression have been included in the Kampala Amendments? This paper analyzes that question and concludes it should have—but with important limitations on the scope of the crime.

So why include incitement to aggression and what kind of limitations would be implicated? To answer those questions, we must first consider that, in relation to incitement, aggression-related discourse can theoretically be bifurcated between what we may refer to as ‘war-council’ speech and ‘war-mongering’

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* The author would like to thank Professor Roger Clark for all his great insights during the drafting of this paper.


speech. Regarding the former, it is important to consider that aggression is a leadership-oriented crime with an *in personam* jurisdiction limited to an individual exercising control over the political or military action of a State. However, such an individual, even if the most powerful dictator, is not capable of carrying out himself the multitude of simultaneous and multi-level tasks necessary to plan and launch a modern aggressive war. He will operate within some sort of bureaucratic framework and/or military hierarchy that will necessarily require communication with other government/military officials as part of such an enterprise. Such communications essentially represent ‘councils of war’ conducted in the relatively insular corridors of power. With respect to such ‘war-council’ aggression speech, the utility of any corollary incitement provision is questionable—those who would act—the controllers of the government/military apparatus—need no exhorting as they monopolize agency.

Related to this, and in contrast to the other ICC core crimes, war-council-related aggression conduct (necessarily entailing internal government discussions) is inextricably linked with speech. So it may appear somewhat redundant or superfluous to criminalize speech that would trigger other such speech. As a result, in order to capture the inchoate potential of the offense, ‘attempt to commit aggression’ would seem to criminalize effectively essayed but unrealized projects of illegitimate state-initiated armed violence against other states. Moreover, unlike the other core crimes, any theoretical ‘inciting’ speech connected to war-council aggression conduct does not as directly entail dehumanization or marginalization of an out-group being targeted for violence or inhumane treatment. Thus, the unique power of speech in relation to mass atrocity—its capacity to demean and objectify the other—is not as directly implicated with regard to war-council aggression.

But the other variety of aggression-related discourse that a theoretical incitement crime implicates, ‘war-mongering,’ is quite different. It entails government leaders conditioning their citizens to support illegal war campaigns through speeches and mass media. It is not always a *sine qua non* for perpetrating the crime of aggression (as war-council conduct is) but, in cases of controversial war campaigns, it is sometimes needed to assure sufficient troop morale and civilian cooperation. And, it empirically entails speech dehumanizing the enemy population. Further, it has historically been recognized as an offense. So, criminalizing it via incitement makes more sense and, indeed, fills in important gaps within the aggression offense’s definitional and operational framework. Thus, the crime of direct and *public* incitement to commit aggression, the public element implicitly excluding ‘war-council’ communication, is certainly viable.