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INTERPRETATION OF THE KAMPALA AMENDMENTS – ONE OF THE KEY ISSUES FOR ACTIVATING THE JURISDICTION OF THE ICC OVER THE CRIME OF AGGRESSION

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Abstract:
This study proposes an overview over one of the most contentious questions of interpretation linked to the Kampala Amendment on crime of aggression. The question concerns whether whether the ICC would have jurisdiction in case of an alleged act of aggression commited by a State Party to the Rome Statute which has not ratified/accepted the Kampala Amendment against the territory of a State Party which has ratified/accepted the Amendment. The study exposes the two opposite views and tries to identify the correct question. Moreover, a very brief assesment of the interpretative approach is provided.
Keywords*: International Criminal Court, crime of aggression, jurisdiction, State consent, Kampala Amendment*

Introduction

Seven years have passed since the Kampala Conference adopted, by consensus, the "package" on the crime of aggression[1] . The consensus was not easy to reach: the push for the final result, surrounded with emotions, was reached in the early morning of Saturday, 12 June 2017, at. 00:20 hours[2] . The main difficulty related to the crime of aggression was not necessarily its definition per se, but designing the jurisdictional mechanism of the ICC over it, for the following reason: unlike the other crimes within the jurisdiction of the ICC (genocide, war crimes, crimes against humanity), the crime of aggression is necessarily the "crime of a State". It cannot exist in the absence of State responsibility.

If one reads the definition of the crime of aggression as provided by article 8 bis of the Statute, as amended by the Kampala Amendment: "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United

Nations" (emphasis added) – one could note the link between the crime and the act. Moreover, the act is characterized by a gravity test: a "manifest" violation[3] . As Claus Kress affirmed, the crime of aggression is: "the only crime under international law that requires the commission of certain internationally wrongful conduct by a state." [4]

Two main positions were shaped even before the Kampala conference: one envisaged full Security Council control over the determination of an act of aggression (the so-called "Option 1"), while the other envisaged that the Security Council would be given an opportunity to determine whether an act of aggression exists, while the final jurisdictional filter would be represented by the Pre-Trial Chamber of the ICC (the so-called "Option 2")[5] . The main difficulty arose from making the States supporting Option 1 (simply to imagine that the permanent members of the Security Council were included) accept that the Security Council would lose the exclusive control over determining the existence of an act of aggression. The final result balanced, in my opinion, towards Option 2 – reflected in the end in what is now article 15 bis of the Amendment. However, the difficulty in achieving consensus and the lack of transparency of the final negotiations led to a very complex text: for the sake of having the possibility of prosecuting the crime of aggression following State referrals or proprio motu referrals by the prosecutor, several elements were introduced: the "postponement clause" – a decision to be taken by the State Parties after 1 January 2017; the 30 ratifications condition (which is not a condition for the entry into force, but for activating the jurisdiction); the "opt out" clause; the non-application of article 12 (2) of the Statute, by virtue of article 15 bis (5) and the "chance" given to the Security Council, for a period of six months[6] .

2017 would be the year of a decision to be taken. However, a question of interpretation – over which few thought when the Amendment was adopted[7] – may affect the willingness of States to reach consensus. This article has the purpose to expose the matter and the two diverging views. It would be too ambitious at this point to suggest a solution – however, some thoughts would be useful on the interpretative approach that could be taken.

While presenting the question to be interpreted and the diverging views, I would not omit that the international law witnesses in most cases arguments that come in pairs[8] . All great questions of the international order witness "pros" and "cons" – this is

one of the examples. And this case also witnesses categories of arguments founded on values which are not by themselves prior to others – in the concept of Martti Koskenniemi, “pairs” of arguments based on “reversible” concepts[9] . This is why it is very difficult to overcome the interpretation dilemma.

I. Exposing the question

Let us remind that for the genocide, crimes against humanity and war crimes, the ICC is competent to hear a case, when the case is referred to the Prosecutor by a State or is started proprio motu, when the crime was committed by a national of a State Party to the Statute or on the territory of a State Party[10] . Thus, even if a person is not the national of a State Party, the Court will have jurisdiction on that person’s conduct, if the alleged crime is committed on the territory of a State Party.

In the case of the crime of aggression, the above mentioned approach is completed by the following rule: in cases of State referral or proprio motu referral, according to article 15 bis (5) of the Kampala Amendment: “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”.

Thus, if a national of State A, which is not a party to the Statute, commits a crime of aggression on the territory of State B – meaning that, in practice, it would be required that State A would commit an act of aggression against State B, the Court will not have jurisdiction. The core question that appears is, nevertheless, the following: what happens if State A is a party to the Statute, but has not ratified/accepted the Amendment? Thus, the most debated question is whether the Court would have jurisdiction over a crime of aggression committed by a national of a State Party to the Statute, but that has not ratified/accepted the Amendment, on the territory of a State Party that ratified/accepted the Amendment.

The sensitivity of the questions derives from the fact that, as a preliminary issue, the Pre-Trial Chamber will have to decide on one of the “constitutive elements” of the crime: the existence of an act of aggression by a State, which represents a “manifest violation” of the Charter. In such case, the Court will seek to adjudicate not only on the

conduct of a person, but on the act of a State - merely on "a use of force by a state that has not given its consent to the adjudication by the Court on that question"[11] .

While article 15 bis (5) remains silent on the situation of a State that is not a party to the Amendment (it refers only to a State which is not a party to the Statute), the analysis has to bear in mind article 121 (5) of the Statute itself, which refers to amendments: "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" (emphasis added). Following debates in Kampala, it was agreed that the Amendment would be adopted in accordance with paragraph (5) of article 121, and not in accordance with paragraph (4)[9] .

The question whether the Court could assess an alleged act of aggression committed by a State Party which has not ratified/accepted the Amendment against the territory of a State which ratified/accepted the Amendment led to two fundamental diverging positions.

II. The argument in favour of establishing the Court's jurisdiction

The argument in favour of establishing the Court's jurisdiction in case of an act committed by a State Party who has not accepted/ratified the Amendment against the territory of a State that has accepted/ratified Amendment is put forward by Liechtenstein[12] and the writings of Stefan Barriga[13] . The argument is grounded on

[9] In operative paragraph 1 of resolution RC/Res.6, the Review Conference adopted, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court, the amendments to the Statute contained in annex 1 to the resolution, "which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5" - C.N.651.2010.TREATIES-8 (Depositary Notification), 29 November 2010; Sean D. Murphy, The Crime of Aggression at the ICC, in Marc Weller, (ed.), Oxford Handbook on the Use of Force, Oxford University Press, 2013, p. 15; Paragraph (4) provided for a different procedure for entry into force: „Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them".

mainly two elements: the negotiating history and the interpretation of articles 121 (5), 5 (2) and 12 (1) of the Statute.

Stefan Barriga argues that during the negotiations two group of States have been formed: a group arguing on a “consent” model (meaning that the consent of the aggressor State would be required, notwithstanding the form in which it is expressed), and a second group, advocating for a “protection model” (which was based on the concept that the consent of the aggressor State would not be required)[14] . In the early years of the Princeton Process, this divergence generated different views related to the article to be used for the entry into force of the Amendment: 121 (4) – an uniform solution for all - or 121 (5) – a consent based approach[15] . However, Stefan Barriga argues that between the “extremes” of the two models, two “milder” solutions could have been identified: i) establishing “automatic” jurisdiction only for State Parties to the Rome Statute, not for all States (as desired initially) – a solution regarded by Stefan Barriga as closer to the “protection” model and ii) establishing “automatic” jurisdiction only for State Parties to the Statute, plus creating the “opt-out” system – a solution which was closer to “consent model” (because the “opt-out” enabled States – mainly State Parties, to “withdraw the consent”)[16] .

During the last days of the Kampala Conference, in order to diminish the gap between the “consent” model and the “protection” model, proposals were made by Argentina, Brazil and Switzerland (ABS group – closer to “protection” model) and Canada (closer to “consent”). The argument of Stefan Barriga is that during negotiations, the ABS made an intermediary step forward, accepting the exclusion of non-Parties, while Canada made on its turn a concession, accepting the “opt-out” system, in order to give up “a pure consent based system”, which might have functioned simply, each state opting in through ratification[17] . Thus, if somebody would conceive that solution would be that a State should “opt in” though ratification or acceptance, and then have the possibility to “opt out”, as provided in article 15 bis (4) of the Amendment, in the words of Barriga, “it would mean that Camp Protection first came all the way over to Camp Consent, and then went even beyond!”[18]. Thus, accepting that the Court would not have jurisdiction over an act of aggression committed by a State Party to the Statute, but not to the Amendment, against

the territory of a State Party to the Statute and the Amendment would defy the logic of the negotiations.

The second argument is related to the interpretation of article 121(5) of the Statute, which reads in its second phrase “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”. As the literal meaning of this phase would lead to a clear opposite result, Stefan Barriga argues that article 121 (5) has to be interpreted in the context of other provisions – meaning article 5 and article 12 (1) of the Statue and in accordance with the object and purpose of the Statute[19] . Thus, it is argued that according to article 12 (1), all State Parties have accepted the jurisdiction of the Court with respect to all crimes in article 5, including the crime of aggression. This would lead to a direct contradiction with the text of article 121 (5), second phrase. According to Stefan Barriga, “The tension can be resolved if article 12(1) is seen as the lex specialis that prevails over the more general rule of article 121(5), second sentence, but only as far as amendments dealing with the crime of aggression are concerned”[20] . In his view, a supplementary argument is the “recalling” of article 12 (1) din the preamble of Resolution RC/Res. 6, that adopted the amendments. Article 121 (5) second phrase would apply for new crimes, such as terrorism, that may be introduced in the future, or in case of amendments to the definition of existing crimes – as it was the case for the “Belgian amendment” introduced in Kampala, in relation to war crimes[21] .

Another argument put forward by Stefan Barriga is that article 5 (2), which stated “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations”, referred merely to “adoption” which involves all State Parties without any further formalities: article 5 (2) did not refer to other elements, “such as entry into force of amendments or the limitation to the Court’s jurisdiction under article 121(5), second sentence”[22] .

As a very short conclusion, the theory that the Kampala Amendment allows exercise of jurisdiction in case of aggression committed by a State Party that did not

accept/ratify the amendment against the territory of a State Party which accepted the amendment relies on: i) the negotiating history; ii) the non-application of the second phrase of article 121 (5) to the crime of aggression, based on the contextual interpretation and the relation of this text to articles 5 (2) and 12 (1), which are considered as lex specialis[23] .

III. The argument based on consent: against the establishing of jurisdiction

The argument according to which, absent the consent of the aggressor State, manifested though becoming a party to the amendment, is required for the Court to have jurisdiction, is put forward by US scholars Harold Koh and Todd Buchwald[24] (who previously acted as legal advisor and deputy legal advisor of the US Department of State), as well as by other scholars[25] .

The first argument put forward is that when the decision to adopt the Kampala Amendment on the basis of article 121 (5) was taken, the States “have accepted the principle that, absent action by the Security Council, the consent of the aggressor State should, in fact, be required in order for jurisdiction to exist over the crime of aggression”[26] . By this assumption, Koh and Buchwald are referring to the matter of principle: even the States or scholars that argue for the expansion of the scope of jurisdiction are assuming that State Parties to the Statute (but not to the Amendment) have accepted the jurisdiction over the crime of aggression[27] .

A second argument is related to the interpretation of article 121 (5) of the Rome Statute. Based on the negotiation history in Rome, it is demonstrated that, due to the fact that in the initial text the current articles 5, 6, 7 and 8 represented a single provision, “Article121(5) applies in the same way as it would have applied had the content of these four articles been retained as a single Article 5”[28] . Thus, it would apply in the same way when: a new crime is introduced or the definition of one of the existing crimes is changed – this is exactly what has been done with the crime of aggression. Therefore, it is argued that State Parties were expected to “opt in” with respect to any new crimes, by acceptance or ratification of the amendment, before jurisdiction would be exercised[29] .

With respect to the interpretation of article 121 (5), Harold Koh and Todd Buchwald refer to the two schools of thought, labelled “positive understanding” and “negative

understanding". The "negative understanding" represents the literal meaning of the second phrase: it means what it says[30] . The "positive understanding" is regarded by the two scholars as meaning "opposite" of what it actually says. Thus, this "positive" interpretation is rejected on the basis of the basic rule contained by article 31 of the Vienna Convention on the Law of Treaties. Moreover, Harold Koh and Todd Buchwald argue that recourse to supplementary means of interpretation should be made when the interpretation given according to the general rule "leaves the meaning ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable"[31] . Nevertheless, the "pure positive understanding" has been abandoned and was replaced with what is now article 15 bis of the Kampala Amendment, described as "softened consent-based regime"[32] (according to which the operation of article 12 and 5 (2) would lead to the result that article 121 (5) does not apply only in the case of aggression). And it is argued that it would be illogic for States to have established an amendment process that strongly protected their interests only for other crimes than aggression (allowing those states to avoid jurisdiction by non-ratification), but allow this amendment process to leave States "vulnerable" in the case of aggression, whose link to the State conduct would have required mode "deference to State consent"[33] .

Harold Koh and Todd Buchwald reject the theory based on the combined interpretation of articles 5 (2), 12 (1) and 121 (5). They argue that if someone would accept that, according to article 5 (2) of the Statute, it would be enough to "adopt" the definition of aggression and the provision related to the conditions for exercising jurisdiction, "there would not, insofar as the Rome Statute is concerned, be any need for the aggression amendments to be ratified at all"[34] . Thus, if the "article 5 (2) theory" would be accepted, it would lead to the absurd result that the Parties in Rome accepted to agree to "whatever definition and whatever conditions for exercising jurisdiction a two thirds majority would agree". Such result would not stand before any legislature seeking for ratification of the Rome Statute[35] .

Finally, a general principle of international law is invoked, the Monetary Gold principle, according to which an international court is not able to adjudge upon the legality of a conduct of a State or upon its international responsibility, if that State does not agree[36] . Thus, the specificity of the crime of aggression would lead to the ICC

establishing, as a "prerequisite" for establishing the individual criminal responsibility, that a State is internationally responsible for an act of aggression[37] . Thus, it is argued that the requirement of the consent of the alleged aggressor State is a requirement deriving from international law[38] , not from the result of the negotiating history of the Kampala Amendment.

IV. Brief assessment

The issues of interpretation exposed above raise multiple questions. However, we would dare to propose two starting points: i) first, the text of the Statute and of the Kampala Amendment are subject to interpretation, but, in any case, the result of the interpretation could not lead to a conclusion that would be contrary to general principles of international law applicable to international jurisdiction; ii) second, the interpretation of the Statute and of the Kampala Amendment should be subject to all rules of interpretation provided by international law – meaning by articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969, which are considered as customary international law.

With respect to the first proposal, we give a lot of weight to the argument put forward by Dapo Akande, who suggest that the application of the Amendment should not lead to a breach of general rules of international law in relations to States who are not parties to that specific legal instrument. The general rule, postulated by the Monetary Gold and East Timor[39] cases is that a court could not adjudge when it would be called to rule upon rights and obligations or the responsibility of a third State, who does not agree to jurisdiction. The principle is transposed in the advisory proceeding before the ICJ by the means of the "decisive reasons", as mentioned for the first time in the Eastern Carelia advisory opinion[40] - where the Court has been asked to rule on a dispute between Finland, a member to the League of Nations, and the USSR, a non-member. The ICJ reaffirmed the principle in an enlightening manner in the Western Sahara advisory opinion, emphasizing the following:

In certain circumstances, therefore, the lack of consent of an interested State may render the giving of an advisory opinion incompatible with the Court's judicial character. An instance of this would be when the circumstances disclose that to give a reply would have the effect of circumventing the principle that a State is not obliged to allow its

disputes to be submitted to judicial settlement without its consent. If such a situation should arise, the powers of the Court under the discretion given to it by Article 65, paragraph 1, of the Statute, would afford sufficient legal means to ensure respect for the fundamental principle of consent to jurisdiction[41] (emphasis added).

Thus, even if the negotiations in Kampala would have been divided between "camp consent" and "camp protection"[42] , the most important question is whether international law would allow that the "fundamental principle of consent to jurisdiction" would be overridden. In fact, from a conceptual basis, the so-called "softened consent-based regime"[43] does not put into question the issue of consent, but merely departs from the assumption that the State Parties to the Statute expressed their consent to be adjudged on the crime of aggression though ratifying the initial Statute.

Second, having in mind that the presumption is that "consent should not be overruled", the interpretation of the relevant articles of the Statute (121 (5), 12 (1), 5 (2)[44]) and of the Kampala Amendment (especially 15 bis paras (4) and (5)) should answer to the following question: the consent of a State Party for adjudication with respect to aggression, may it be "presumed" from the operation of articles 12 (1) and 5 (2) of the Statute or should it be explicitly given through ratification/acceptance of the Kampala Amendment? Thus it would be important to identify correctly the question: the question is not whether the consent is needed, but it is whether the consent can be "presumed" or should be "express".

In order to answer this question, all means of interpretation should be applied in the same time with equal weight, as international law does not foresee an absolute and rigid system of interpretation[45] . As outlined by the Special Rapporteur on the law of treaties, Humphrey Waldock, the rules of interpretation act as guidelines, as their application in a particular case depends upon the appreciation of the context and circumstances of the elements that have to be interpreted[46] .

Thus, on one hand, Harold Koh and Todd Buchwald argue that the text of article 121 (5) is clear[47] . This argument seems to be based on Emerich de Vattel positivist assumption „in claris non fit interpretatio" (there is no need to interpret what is clear). However, as put forward by Myres McDougal within the Vienna Conference on the Law

of Treaties of 1968, the question whether a specific text has to be interpret is itself a matter of interpretation[48] .

On the other hand, Stefan Barriga relies in a very large sense on the negotiating history of the Kampala Amendment. In our opinion, this argument is subject to two major elements of criticism: i) it is not merely the text of the Kampala Amendment itself that leads, according to Barriga, to the conclusion that the Court has jurisdiction (in fact, article 15 bis deals only with non-parties), but the combined effect of articles 12 (1) and 5 (2) of the Statute; indeed, it is consistent that the Kampala Amendment could not have effect on States that have not expressed their consent through ratification or acceptance[49] ; ii) it is a matter of reality that the compromise between the ABS group and Canada[50] , even if of crucial importance, was characterized by lack of transparency during the Kampala conference. I am daring to make this affirmation in my position of alternate delegate of Romania to the Kampala conference. Thus, during the last days of the conference, the delegations ”knew little” about what was going on ”on the corridors”. Moreover, even if the debate between ”camp consent” and „camp protection” was an important one, most of the delegations saw it as being translated in the choice between articles 121 (4) and 121 (5) as procedural means for entry into force. And the most important dillema was – as our delegation saw it – not the ”consent” issue, but the exclusive/non-exclusive competence of the Security Council for determining the existence of an act of aggression (the dillema between Option 1 and Option 2 presented in the introduction to this study)[51] . Therefore, I can testify that delegations were concerned, at the very last moment of the Conference, about the posibility of calling a vote and for the permanent members to vote against – being well known that they supported „Option 1”. Thus, we viewed the compromise as accepting full „consent” based jurisdiction (recourse to article 121 (5)), for the compromise of the permanent members to agree by consensus a non-exclusive role of the Security Council.

It is not the purpose of this study to provide a solution for the question for which interpretation is called upon. We will reserve this task for a future study. However, it would be important to point out that the question whether the consent to jurisdiction should be „presumed” or „express”, or whether it should be „flexibly read” or „strictly read” is not singular in international law. For example, this question appeared in investment

arbitrations related to the so-called „MFN based jurisdiction"[52] . It appeared when the ICJ was called upon to interpret special agreements or compromisory clauses by which States sought to establish jurisdiction[53] .

In the end, it appears that the two different values[10] would lead the two proposed solutions: on one hand, the „fundamental principle of consent to jurisdiction" may be considered to be a value per se, a cornerstone of the inter-State legal relations, while, on the other hand, another value is called upon to bring „flexibility" to the principle of State consent: in the case of Kampala Amendment, it is the general desire to disuade States from committing aggression (while in the case of the „MFN based jurisdiciton", it was the need to protect investment). Thus, the question is not only one of interpretation, but one of values within the international community: what is more important – to dissuade aggression on the „cost" of a flexible consent? or to secure the certainty of inter-State legal relations on the „cost" of a less ambitious disuasion of aggression?

Conclusion

The purpose of this study was to expose one of the most difficult issues of interpretation related to the Kampala Amendment to the Rome Statute of the International Criminal Court. Two opposite views have been presented related to the question whether the ICC would have jurisdiction in case of an alleged act of aggression commited by a State Party to the Rome Statute which has not ratified/accepted the Kampala Amendment against the territory of a State Party which has ratified/accepted the Amendment.

One of the most important issues is the correct identification of the question. Thus, the question is not whether the consent of the alleged aggressor State is „needed", but whether it is „presumed" by the operation of articles 12 (1) and 5 (2) of the Statute, against the express provision of article 121 (5), or whether consent should be explicitely given through ratification or acceptance of the Amendment. It appears, therefore, that the question of interpretation concerns merely the Rome Statute itself, and not necessarily the Kampala Amendment. It is logic to consider so, as the question concerns the consent given by States which are not parties to the Amendment, and thus the Amendment could

[10] The values may be linked to the object and purpose of a treaty, as a means of interpretation.

not have a legal effect upon them. The question is whether consent is presumed from the operation of the provisions of the Statute.

In order to answer this question, all the methods of interpretation should be used. In fact, the study argues that no single method of interpertation should be given priority: neither the textual approach, nor the travaux preparatoires, should be decisive. Moreover, the travaux preparatoires would be difficult to rely upon, having in mind the rather non-transparent behind the scene negotiations in the final days of the Kampala conference.

It was not the purpose of this study to analyse the question though all the means of interpretation offered by the Vienna Convention. Nevertheless, the starting point that we propose to be taken into consideration is the value-based approach. The question whether consent should be „presumed" or should be „expressly given" is one that puts in ballance the fundamental principle of state consent to jurisdiction with another value within the international community, which in this case is the desire to dissuade aggression in a more powerful way.

We think it is important to repeat the dillema: what is more important – to dissuade aggression on the „cost" of a flexible consent? or to secure the certainty of inter-State legal relations on the „cost" of a less ambitious disuasion of aggression?

And, as a last element of conclusion, let us remember that disuasion of aggression would be „something new", would be „a step forward" in the international legal community, while the principle of state concerned is a „well anchored" fundamental rule. Thus, we might reformulate the question in the following way: what is preferred: a solid, ambitious „step forward", with a shaky foundation or a less ambitious „step forward" (but still a step forward), with a solid foundation?

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[26] Harold Koh, Todd Buchwald, The Crime of Aggression: The United States Prespective¸ loc. cit., p. 273;
[27] Ibid.
[28] Ibid, p. 279;
[29] Ibid.
[30] Ibid., p. 283;
[31] Ibid.

[32] Shean Murphy, loc. cit., p.22;
[33] Ibid. p. 23.
[34] Harold Koh, Todd Buchwald, The Crime of Aggression: The United States Prespective¸ loc. cit., p. 285;
[35] Ibid., p. 286;
[36] Monetary Gold case (Italy v. France, United Kingdom & United States), (1954) ICJ Rep, p. 19; East Timor case (Portugal v. Australia), (1995) ICJ Rep p. 90; Dapo Akande, Prosecuting the Crime of Aggression, loc. cit., p. 13;
[37] Dapo Akande, Prosecuting the Crime of Aggression, loc. cit., p. 17; Phosphates in Nauru Case, (1990) ICJ Rep, p. 240, 261;
[38] Dapo Akade, Antonios Tsakanopoulos, loc. cit., p. 36;
[39] Supra, note 37;
[40] PCIJ, Ser. B, no. 5, 1923, p. 27;
[41] Western Sahara, Advisory Opinion, ICJ Reports, 1975, p. 25, para. 33;
[42] Stefan Barriga, Stefan Barriga, Exercise of Jurisdiction and Entry Into Force…, loc. cit., p. 19.
[43] Shean Murphy, loc. cit., p.22;
[44] One should note, however, that article 5 (2) was abrogated by the Kampala Amendment;
[45] Draft articles on the Law of Treaties, 1966, Yearbook of the International Law Commission, 1966, vol II, p. 219, para. 8; Affaire concernant l'apurement des comptes entre le Royaume des Pays-Bas et la Republique française en application du Protocole du 25 septembre 1991 additionel à la Convention relative à la protection du Rhin contre la pollution par les chlorures du 3 décembre 1976, Sentence Arbitrale du 12 mars 2004, Cour Permanente d'Arbitrage, para. 65; Lake Lanoux (Spain v. France), award of 16 November 1957, RIAA, vol. XII, p. 281; Ion Galea, Dreptul tratatelor, Ed. Ch Beck, 2015, p. 182;
[46] Sixth Report of tSpecial Rapporteur, 1966, doc. A/CN.4/186 and Add.1, 2/Rev.1, 3-7, Yearbook of the International Law Commission 1966, vol. VI, p. 94; Richard Gardiner, Treaty Interpretation, Oxford University Press, 2008, p. 38;
[47] Harold Koh, Todd Buchwald, loc. cit., p. 283;
[48] Official Records of the Vienna Conference on the Law of Treaties, 31st Meeting, 19 April 1968, p. 167, para. 41; Ion Gâlea, op. cit., p 41;
[49] Article 34 of the Vienna Convention on the Law of Treaties; Mark Villiger, Commentary to the 1969 Vienna Convention on the Law of Treaties, Martinus Nijhoff, 2009, p. 435;
[50] Stefan Barriga, Introduction to the Negotiating History , loc. cit., p. 50-51;
[51] This focus on the role of the Security Council is witnessed also by Harold Koh: "As described above, the United States' view had been that the ICC should be able to exercise jurisdiction only if the Security Council has made a prior determination that aggression had ,in fact, occurred. The United States was therefore less focused upon whether the consent of the "aggressor state" should be required for the Court to proceed than were many of the other states that attended the meetings in Kampala", Harold Koh, Todd Buchwald, loc. cit., p. 274;
[52] Julie A. Maupin, MFN-based jurisdiction in investor-state arbitration: is there a hope for consistent approach?, Journal of International Economic Law, vol. 14, Issue 1, p. 157-190, 159;
[53] For example: Oil Platforms, Preliminary Objections, ICJ Reports, 1996, p. 803; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening), Preliminary Objections, ICJ Reports, 1992, p. 351.
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