

On the Kampala Amendment on the Crime of Aggression under the ICC

The Rome Statute which established the International Criminal Court (ICC) came into force in 2002. Under Article 5 of the Rome Statute, the ICC has subject-matter jurisdiction to try four core crimes: war crimes, crimes against humanity, genocide, and the highly-debated crime of aggression. Though Article 5(1) (d) of the Rome Statute included the ‘crime of aggression’ as one of the crimes under the jurisdiction of ICC, the actual exercise of that jurisdiction was made conditional upon further action by the State Parties. According to Article 5(2), the Court shall exercise jurisdiction over the crime of aggression only once amendments to the Rome Statute are adopted, which would define the crime and set out the conditions under which the Court can exercise its jurisdiction in this regard.

Seven years after the entry into force of the Rome Statute, a review conference was held in accordance with Article 123 of the Rome Statute to consider amendments, including a definition of the crime of aggression. This review conference was held in Kampala, Uganda from 31 May to 11 June 2010. At this review conference the crime of aggression came to be defined in Article 8bis of the Rome Statute. With the adoption of the definition, for the first time in history we have a permanent independent international court which will have the competence to hold national leaders accountable for the most serious forms of illegal use of force against other States.

Under the new Article 8 bis (1) three essential elements are required to constitute the crime of aggression:

- *First*, the perpetrator must be a political or military leader, i.e. a “person in a position effectively to exercise control over or to direct the political or military action of a State”.
- *Second*, the Court must prove that the perpetrator was involved in the planning, preparation, initiation or execution of such a State act of aggression.
- *Third*, such a State act must amount to an act of aggression in accordance with the definition contained in General Assembly Resolution 3314,¹ and it must, by its character, gravity and scale, constitute a manifest violation of the UN Charter. This implies that only the most serious forms of illegal use of force between States can be subject to the Court’s jurisdiction. Cases of lawful individual or collective self-defence, as well as action authorized by the Security Council are thus clearly excluded.

The Kampala amendments will enter into force for those state parties that have accepted them one year after the deposit of their instrument of ratification or acceptance. For the ICC to actually exercise jurisdiction over the crime of aggression two other conditions need to be fulfilled:

¹ The General Assembly adopted a consensus definition of aggression in 1974 by way of its Resolution 3314. This non-binding resolution provides a generic definition of state aggression and a non-exhaustive enumeration of specific acts that meet its criteria.

- firstly, the alleged crime must have occurred more than one year after *thirty states* have ratified or accepted the amendments.
- Secondly, after 1 January 2017 a decision must be taken by a two-thirds majority of the Assembly of State Parties granting the ICC approval to exercise jurisdiction over the crime of aggression.

Upon fulfilment of these above mentioned requirements, the jurisdiction of the ICC is 'activated'. In the situation of a UN Security Council referral, the same procedural conditions are applicable. However, in the situation where an investigation commences on the basis of the initiative of the Prosecutor (*proprio motu*) or after referral by a State Party, the procedural conditions for jurisdiction are slightly different. In those cases, the Court may only exercise jurisdiction over an act of aggression committed by a state party, unless that state party has previously made a declaration that it does not accept such jurisdiction. This means that no jurisdiction exists for the crime of aggression with respect to Non-State parties and State parties that have opted-out. In addition, one of the two states involved must have ratified the amendment. Moreover, the Prosecutor must ascertain whether the Security Council has made a determination of an act of aggression by the state concerned and notify the UN Secretary-General of the situation before the court. If the Security Council has made such a determination, the Prosecutor may continue the investigations; if not, the Prosecutor may only proceed six months after the date of notification and with the authorization of the Pre-Trial Division of the Court to commence the investigation. With respect to state party or *proprio motu* referral, it has been argued that the Security Council will, in effect, operate as a preliminary filter mechanism: Six months after ascertaining inaction by the Council, the Prosecutor will go to the Pre-Trial Division and have to convince four judges to allow him to proceed with the aggression investigation. The Pre-Trial Division will likely take judicial notice of, and accord significant evidentiary weight to, the fact that the Security Council declined to either refer the situation itself or to make the necessary aggression determination.

With the 30th ratification of the Kampala amendment on the crime of aggression by Palestine on June 26, 2016, a new interest has arisen around the crime of aggression. Palestine's ratification seems to open the possibility for the Assembly of States Parties, to adopt after January 1st 2017 the decision to activate the Court's treaty-based aggression-related jurisdiction. But it is worth highlighting here that a vote by a 2/3 majority in favour of activating the ICC's jurisdiction is still needed.