The Global Institute for the Prevention of Aggression

Questions and Answers on the Crime of Aggression

At the 2010 Review Conference of the Rome Statute of the International Criminal Court adopted amendments to the Rome Statute on the Crime of Aggression. In November 2010, the Secretary-General of the United Nations circulated the amendments in order to enable States Parties to ratify or accept the amendments. Below are a number of questions and answers that may assist States Parties in this process.

How has the crime of aggression been defined?

The Rome Statute now has a new article 8 *bis* defining the crime of aggression. In essence, three elements are required. First, the perpetrator must be a 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, and it must, by its character, gravity and scale, constitute a manifest violation of the UN Charter. This implies that only the most serious illegal uses of force between States can be subject to the Court's jurisdiction. Genuine cases of individual or collective self-defence, as well as action authorized by the Security Council would thus clearly be excluded.

How was the controversial question of the role of the Security Council resolved?

The Security Council plays more than one role with respect to the crime of aggression. First, the Council may serve as a jurisdictional trigger: it may refer a situation to the Court under the Statute's existing article 13 (b). The new article 15 *ter* provides that in such a scenario, the Court may in the future also investigate and prosecute charges of aggression, provided there is a reasonable basis to believe a crime of aggression was committed.

Second, the Council serves as the primary jurisdictional filter where the Prosecutor intends to open an investigation *proprio motu* or on the basis of a State referral. Under new article 15 *bis*, the Prosecutor must notify the Council so that it can determine an act of aggression. If no determination is made within six months, the Prosecutor may only proceed with the authorization of the Pre-Trial Division. Even in that case, however, the Council may suspend proceedings under article 16. This complex system maintains the judicial independence of the Court, in particular since the amendments clearly stipulate – for reasons of due process – that the Court is not bound by a determination of aggression by an outside organ.

How do the amendments on aggression affect non-States Parties to the Statute?

In case of a Security Council referral, the Court may investigate and prosecute the crime of aggression with respect to both Non-States Parties and States Parties, as was already the case in respect of the other three core crimes. In case of *proprio motu* investigations and State referrals,

however, article 15 *bis*, paragraph 5, excludes jurisdiction with respect to crimes of aggression committed on the territory or by nationals of Non-States Parties.

Article 15 *bis* allows any State Party to opt-out of the Court's jurisdiction over the crime of aggression. What are the reasons behind this provision?

The opt-out clause has to be seen in the context of the negotiation history. There were fundamental disagreements as to whether the consent of the alleged aggressor State should be a condition for the Court's exercise of jurisdiction. Positions ranged from a strictly consent-based opt-in approach, whereby the Court could only deal with cases involving an aggressor State that has previously consented to the Court's jurisdiction, to a strictly victim-centered approach, whereby aggression committed by any State Party and even by a Non-State Party could come under the Court's jurisdiction, provided that the victim was party to the Statute. The compromise solution was to follow a consent-based approach, based on the fact that States Parties have already accepted the Court's jurisdiction over the crime of aggression when ratifying the Rome Statute (see article 12(1) of the Statute). Nevertheless, in order to keep the regime truly consent-based, a State Party may at any time, also prior to its own ratification of the amendments, submit an opt-out declaration.[1] This opt-out declaration would however only affect future acts, and not exempt from accountability with respect to acts committed prior to the opt-out declaration. The opt-out system only applies to *proprio motu* investigations and State referrals, not to Security Council referrals.

Since the Court's jurisdiction over aggression appears to be "frozen" until at least 1 January 2017, why should States Parties ratify the amendments before that?

The activation decision in 2017 will only take its intended effect if at least 30 ratifications have been reached by that time. Therefore, the Review Conference invited States Parties to ratify or accept the amendments at the present time.

What is the nature of the future decision to activate the Court's jurisdiction as envisaged by paragraph 3 of article 15 *bis* and 15 *ter*? Does it require a further amendment to the Statute?

It does not require a further amendment to the Rome Statute, since the provision empowering States Parties to activate the jurisdiction is already contained in the amendments adopted in Kampala. It would be a decision taken by States Parties by consensus, or at least by a majority of two-thirds of them, in the context of an Assembly of States Parties or a Review Conference. This decision itself would not have to be ratified and would not change the amendments themselves.

What about new States Parties to the Rome Statute? Do they have a choice of ratifying the "old" or the "new" Statute?

[1] Understood this way, the Court would have jurisdiction over an act of aggression committed by a State Party that has not ratified the amendments, and also not opted out, if the victim is a State Party that has ratified the amendments. Following the Kampala Conference, however, some delegations have posited a different understanding, i.e. that the Court would only have jurisdiction in situations where both the victim and the aggressor State have ratified the amendments. Regardless of one's interpretation, it should be kept in mind that, other than for Security Council referrals, the jurisdiction of the Court on aggression is still entirely consent-based. Ultimately, and in the absence of any further guidance from States Parties, the Court would have to interpret these provisions and decide whether active consent (by ratification) or passive consent (by not submitting an opt-out declaration) is required.

Since current States Parties have a choice whether to ratify the amendments or not, new States Parties have the same choice. According to the practice of the UN Office for Legal Affairs, new States Parties would have to indicate clearly in their instrument ratifying the Rome Statute that they also wish to ratify the amendments, otherwise they are deemed to have ratified the "old" Statute - meaning that, as to the crime of aggression, they would be in the same position as States Parties that have not yet ratified the Kampala amendments on aggression.

Do States Parties that ratify the amendments have to incorporate the crime of aggression into their domestic criminal codes?

Given that the principle of complementarity also applies to the crime of aggression, States Parties should ensure that they are able to prosecute the crime of aggression domestically, which may require incorporating the definition of the crime of aggression into the criminal code. At the same time, given that the Court's jurisdiction can only be activated in 2017, there are no adverse consequences if a State Party ratifies the amendments already now but delays the relevant implementing legislation until that moment. Furthermore, the Review Conference clarified that the amendments do not create the right or obligation for any State Party to exercise domestic jurisdiction with respect to an act of aggression committed by another State (Understanding 5). This implies that States Parties should focus their implementing legislation on crimes of aggression committed by its own leaders, though it does not exclude a more expansive jurisdictional regime (e.g. over crimes of aggression committed against the State Party in question). It should be kept in mind, in this regard, that States which undertake genuine investigation and prosecution of their own nationals for crimes within the jurisdiction of the Court would have priority to try such perpetrators in their own Courts, in which case the ICC would defer to the national prosecution.

What are the policy reasons for which any State would ratify the amendments on the crime of aggression?

Only States Parties that have ratified the amendments will enjoy the broadest possible judicial protection in case of acts of aggression committed against them. Furthermore, the first 30 ratifications will get the Court closer to the activation of its jurisdiction over the crime of aggression. Ratifying States also serve the noble goal of promoting a system of international accountability for the most serious instances of illegal use of force between States, including by promoting the definition of the crime of aggression in international law. States Parties, would also avoid the appearance of inconsistency in their respective policies by moving forward with the amendments which they universally agreed upon in Kampala.

2 December 2011

Donald M. Ferencz
Convenor, The Global Institute for the Prevention of Aggression
St. Anne's College
Woodstock Road
Oxford, OX2 6HS
United Kingdom
Landline: 44-(0)1628-670-694
Mobile: 44-(0)7884-482-974
donferencz@aol.com