

## **Legal Workshop for States Parties Interested in the Ratification and Implementation of the Kampala Amendments to the Rome Statute**

*Saturday, 17 November 2012, World Forum Convention Centre, The Hague*

### **Informal Summary**

#### Moderators:

Donald Ferencz, *Convenor, Global Institute for the Prevention of Aggression*

Stefan Barriga, *Deputy Permanent Representative of Liechtenstein to the UN*

#### **Session 1: Crime of aggression - Policy considerations for ratification and/or implementation**

Deborah Ruiz Verduzco, *Deputy-Director, International Law and Human Rights Programme, Parliamentarians for Global Action*

The speaker elaborated on the policy reasons for ratification (as contained in the Handbook<sup>1</sup> pages 4-5): promoting peace and the rule of law at the international level; protecting human rights and preventing suffering; closing a loophole in the Rome Statute; judicial protection against aggression by another State; public commitment not to commit aggression; supporting the International Criminal Court; and supporting the implementation of the United Nations Charter.

The speaker also referred to the need to domestically criminalize the Kampala definition (Handbook p. 14-15), as Croatia, Luxembourg and Slovenia had already done (Handbook p. 30-33). Domestic implementation was particularly important for the purpose of deterring aggression through domestic procedures, including legislation and other mechanisms to control decision-making (see e.g. the bill currently before the New Zealand parliament).<sup>2</sup> The possibility of criminal prosecutions by a country's own judicial branch was seen as the most promising mechanism for the prevention of the unlawful use of force.

In light of the applicability of Part 9 of the Rome Statute to the Kampala amendments, she also highlighted the need for all States Parties to ensure that their domestic legislation relating to cooperation with the ICC guaranteed full cooperation regarding the investigation and prosecution of the crime of aggression (Handbook p. 6).

In the discussion, a participant stated that an additional reason for ratification and implementation was the need to eliminate an existing double standard affecting the armed

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<sup>1</sup> *Handbook Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC*, available for download at [www.crimeofaggression.info](http://www.crimeofaggression.info).

<sup>2</sup> The International Non-Aggression and the Lawful Use of Force (Implementation of Amendment to the Statute of Rome) Bill, tabled by Mr. Kennedy Graham, MP (New Zealand) and currently under ballot, is available <http://www.pgaction.org/pdf/2012-Kampala-NZ-GrahamBill.pdf>.

forces. Currently, leaders of States were not subjected to accountability for causing the illegal use of force, while those who participated in hostilities were held accountable with respect to war crimes and other crimes.

The point was also made that prosecuting leaders for crimes of aggression may be more efficient and more likely to lead to convictions than prosecuting leaders for war crimes, since a leader's intent to commit an illegal use of force may be much easier to prove than a leader's intent that war crimes be committed in the course of a military operation.

The point was added that States Parties, which adopted the amendments in Kampala by consensus, may wish to seem consistent in their actions and consequently ratify and implement the amendments as early as possible.

## **Session 2: Crime of aggression - Entry into force and exercise of jurisdiction by the ICC**

Claus Kreß, *Professor of Criminal Law and International Law, University of Cologne*

The speaker recalled the distinction between the entry into force of the amendments and the conditions for the exercise of jurisdiction by the Court. He explained that the amendments entered into force for each ratifying State Party one year after the deposit of the instrument of ratification, in accordance with Article 121(5) (Handbook p. 7).

The conditions for the exercise of jurisdiction were more complex and required first of all that one year have passed since the 30<sup>th</sup> ratification, plus an activation decision by States Parties after 1 January 2017 (Handbook p. 9). Secondly, different rules applied depending on how the investigation was triggered. On the basis of a Security Council referral (Article 15 *ter*), the Court could investigate crimes of aggression (once the jurisdiction was activated) without further conditions. Neither a Security Council determination that an act of aggression had occurred was required, nor the consent of the States concerned (Handbook p. 12; see also Understanding 1).

The conditions for investigations based on State referrals or *proprio motu* were more complex (Article 15 *bis*). Non-States Parties remained entirely outside the scope of such jurisdiction, and for States Parties the regime was consent-based. At least one of the States Parties – which could be the victim or the aggressor – had to have ratified the amendments. Such ratification would then provide the jurisdictional link via Article 12 of the Rome Statute (the crime either happened on the territory of the State Party that had ratified, or was committed by a national of the State Party that had ratified). It was thus not necessarily required that the aggressor State Party have ratified the amendments, provided that the victim State Party had ratified them. Nevertheless, the regime remained consent-based as it allowed the alleged aggressor State to “opt-out” of the Court's jurisdiction prior to the use of force. This aggression-specific legal regime (exclusion of non-States Parties, opt-out possibility for States Parties) was mainly based on Article 5(2) of the Rome Statute, which empowered States Parties to define the conditions for the

exercise of jurisdiction (Handbook p. 9-11). The speaker acknowledged however that some held a different legal view, namely that jurisdiction was precluded regarding a State Party that had not ratified the amendments. This view was based on the assumption that Article 121(5), second sentence,<sup>3</sup> would apply to the crime of aggression.

The discussion focused on the question whether Article 121(5), second sentence, was indeed applicable to the crime of aggression and thus precluded jurisdiction regarding non-ratifying States Parties. A participant arguing for the applicability of the sentence stated that a State could not be bound by a provision it had not ratified. It was also argued that delegations at the 1998 Rome Conference did not intend to empower States Parties to define the conditions for the exercise of jurisdiction without any constraints. Article 121(5), second sentence, protected States Parties from even minor increments in the definition of e.g. war crimes; accordingly it was hard to accept that such protection should not be applicable for the crime of aggression.

In response, it was stated that the view presented by the speaker did not imply that non-ratifying States Parties were legally bound by the amendments. Indeed, the argument was not that the amendments would enter into force for non-ratifying States Parties; much rather, it was argued that the Court could, under certain circumstances, exercise jurisdiction over crimes committed by nationals or on the territory of States Parties that had not ratified. This was consistent with the current jurisdictional regime of Article 12 of the Rome Statute, which even allowed the Court to exercise jurisdiction over crimes committed by nationals of States that have not ratified the Rome Statute. As for the intention behind Article 5(2), it was stated that it could only be speculated what the intention of the drafters may have been, in particular since it was drafted at the very end of the Rome Conference, and that, in any event, the plain and ordinary wording of the provision was the key to its correct interpretation.

It was also stressed that the best way to address the question whether the Court had jurisdiction regarding nationals or the territory of non-ratifying States Parties was for States Parties to ratify the amendments.

### **Session 3: Crime of aggression - The definition of Article 8 bis as the guiding light for domestic law**

Astrid Reisinger Coracini, *Executive Director, Salzburg Law School on International Criminal Law, Humanitarian Law and Human Rights Law*

The speaker highlighted the reasons for domestic implementation (Handbook p. 14-15) and elaborated further on how to do it. She recalled that a number of States already had domestic criminal law provisions on the crime of aggression prior to Kampala. Compared to States with no such provisions, these States were obviously in better position to fulfill

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<sup>3</sup> The sentence reads: “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.”

their primary jurisdiction. However, since the pre-existing provisions frequently deviated from the Kampala definition, these States may face comparable practical and policy considerations when reviewing their domestic laws as States without such prior legislation.

The speaker then reflected on the relationship of implementing legislation, the Kampala definition and the crime of aggression under customary international law. As was the case with the other three core crimes, States might either wish to implement primarily the core crimes as defined in the Rome Statute, or consider implementing customary international law. With regard to both objectives, the Kampala definition served as a guiding light. Where States sought to implement aggression as a core crime under the Rome Statute, it was expected that the Kampala definition would either be referred to, implemented as such, or implemented with minor adjustments required by the language and structure of the respective domestic criminal laws. The speaker did not expect such adaptations (as well as minor deviations caused by translation) to open significant loopholes under the complementarity regime. She stressed that the Kampala definition would equally guide States wishing to implement the crime of aggression under customary international law, referring to the dual nature of the definitions of core crimes in the Rome Statute. While being clearly defined for the sole purpose of the Statute, there was also a strong assumption of their authoritative status with a view to customary international law. In addition, States opting for a *narrower* definition might face the risk of losing cases to the Court's complementary jurisdiction. While a *wider* definition would not pose any difficulties under the complementarity regime, it would open other risks, in particular where a State were to implement a more advanced perception of the crime of aggression under customary international law in combination with universal jurisdiction or laws exempting foreign officials from their immunities. Overall, the speaker therefore recommended that States Parties use the Kampala definition *verbatim* or with necessary minor adjustments for implementation, as this would fit best with the principle of complementarity of the Rome Statute. This was indeed the early State practice after Kampala.<sup>4</sup> She further recommended that non-States Parties that do not yet have such legislation consider incorporating the crime of aggression into their domestic criminal codes.

Finally the speaker elaborated on some particular aspects of the definition and the options for implementation (Handbook p. 16). She exemplified that minor adjustments might include the semi-closed nature of the list of acts of aggression of Article 8 *bis* (2), when domestically the principle of legality required the list to be exhaustive. Adjustments might also have to be made regarding the phrase "planning, preparation, initiation or execution" in Article 8 *bis* (1), as some domestic criminal codes might require that modes of participation be dealt with in the general part. An enlarged circle of perpetrators, on the other hand, might easily go beyond the Kampala definition. Clearly that would be the case where domestic laws did not require the leadership element for all types of

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<sup>4</sup> Luxemburg, Slovenia, Croatia (Handbook p. 30-33). For a wider definition at the regional level see Art. 28M of the draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, African Union Report of the Meeting of Ministers of Justice and/or Attorneys General on Legal Matters, 14 and 15 May 2012, Addis Ababa, Ethiopia.

perpetrators. The same would apply for broadening the definition of the underlying State act of aggression, which was negotiated for many years and ultimately agreed for the purpose of the Rome Statute. She recommended to remain within the wording of Kampala and to address, if necessary, certain issues by way of interpretation.

**Session 4: The war crimes amendment – bringing Article 8 in line with customary international law**

Gloria Gaggioli, *Legal Adviser, International Committee of the Red Cross*

The speaker highlighted the reasons for ratification (Handbook p. 45): promoting the goals of international humanitarian law; closing a loophole in the Rome Statute; no adverse consequences for law enforcement; and easy implementation. She recalled that the amendments were fully consistent with customary international law. There was no reason to wait with ratification. She further elaborated on the conditions for the Court's exercise of jurisdiction regarding the amendment (Handbook p. 46). Where a crime falling under the amendment was committed by a national of one State Party on the territory of another State Party, the Court would only be able to exercise jurisdiction where both States had ratified the amendments (see the preamble of Resolution RC/Res.5).