

Workshop on the Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC

Gaborone, Botswana, 15 & 16 April 2013

Summary Report

The workshop showed the continued commitment of African States Parties to promoting international criminal justice and their strong interest in ratifying the Kampala amendments, in particular those on the crime of aggression (Article 8 bis et al). Workshop participants witnessed the signing of Botswana's ratification of the Kampala amendments by the President, H.E. Lieutenant General Seretse Khama Ian Khama. The President set the tone for the workshop with an inspiring opening speech on the importance of the amendments and the need for all States Parties' to cooperate with the ICC, with a view to ending impunity and protecting victims. In a message to workshop participants, UN Secretary-General H.E. Ban Ki-moon called the amendments a "major step forward in building a new age of accountability". Subsequently, several panels highlighted aspects of the Kampala amendments, including their relevance for the African continent, in order to facilitate their ratification and implementation. Most of the presentations were based on the Ratification and Implementation Handbook, available at www.crimeofaggression.info. Several representatives from African States Parties indicated that their countries intended to move forward with the ratification process.

Official opening session

- H.E. Lieutenant General Seretse Khama Ian Khama, President of the Republic of Botswana
- H.E. Mr. Dikgakgamatso R. Seretse, Minister of Defence, Justice and Security, Republic of Botswana
- Welcoming message by H.E. Mr. Ban Ki-moon, Secretary-General of the United Nations (presented by H.E. Mr. Zachary Muburi-Muita, Special Representative of the UN Secretary-General to the AU)

President Ian Khama stressed the importance of the ICC and the obligation of all States Parties to cooperate with the Court in order to bring perpetrators to answer for their atrocities against defenseless and innocent civilians, mostly women and children. He noted that *"the adoption of the Kampala amendments on the crime of aggression has brought the international community a step closer to expanding criminal liability from individuals to aggressor states"*. Referring to Botswana's ratification of the amendments, he appealed to delegates to play their part to make *"the activation of the jurisdiction of the court over the crime of aggression on 1 January 2017 an absolute certainty"*.

In his message to workshop participants, UN Secretary-General Ban Ki-moon noted that the Kampala consensus has set the stage for a paradigm shift in international law and international relations. He hoped that more States would follow the example of the five States which had ratified the amendments, in order to facilitate their timely entry into force. He added that *“acceptance of the Kampala amendments will signify the realization of the long-held dream to institutionalize the achievements of Nuremberg and Tokyo and have a permanent international criminal court exercising jurisdiction over this, perhaps the most serious of crimes of international concern”*. In this context, he referred to the Charter of the United Nations, which prohibits the threat or the use of force in international relations. He stated that he would personally use every opportunity to encourage States Parties to ratify the Kampala amendments.

High-level panel discussion

- H.E. Mr. P.T.C. Skelemani, Minister of Foreign Affairs and International Cooperation of the Republic of Botswana
- H.E. Ms. Aurelia Frick, Minister of Foreign Affairs, Principality of Liechtenstein
- H.E. Mr. Dikgakgamatso N. Seretse, Minister of Defence, Justice and Security of the Republic of Botswana
- H.E. Mr. Andries Nel, Deputy Minister of Justice and Constitutional Development of South Africa

All panelists expressed their commitment to the work of the ICC and the ratification of the Kampala amendments on the crime of aggression. Liechtenstein’s Foreign Minister Frick stated that *“now is the time to add a new dimension to the commitment by all of us to effectively outlaw the illegal use of force”*.

Botswana’s Minister of Defense, Justice and Security Seretse emphasized that peaceful coexistence and respect for human rights were key to the existence of mankind. Self-defense should only be used as a last resort and all States should first try and resolve any conflict amicably.

South Africa’s Deputy Justice Minister Nel referred to South Africa’s Freedom Charter which states that *“there shall be Peace and Friendship!”* and accordingly, that *“South Africa shall be a fully independent state which respects the rights and sovereignty of all nations and that South Africa shall strive to maintain world peace and the settlement of all international disputes by negotiation - not war”*. South Africa was currently preparing the necessary Cabinet memorandum seeking approval to submit the Kampala Amendments to Parliament for ratification.

Session 1: From Rome to Kampala and beyond

- H.E. Dr. Athaliah Molokomme, Attorney-General of Botswana
- H.E. Mr. Christian Wenaweser, Permanent Representative of Liechtenstein to the UN
- Mr. Donald M. Ferencz, Convenor, Global Institute for the Prevention of Aggression
- H.E. Mr. Zachary Muburi-Muita, Special Representative of the UN Secretary-General to the AU

Dr. Molokomme stressed the importance of African States promoting the ratification of the Kampala amendments, pointing to Africa’s great contribution in creating the Rome Statute, as well as the large number of African high-level officials and staff working for the ICC. Botswana was at present in the final stages of preparing a domestication bill. She called upon delegates to stay optimistic and move forward with the ratification, despite the hard work involved in the process.

Ambassador Wenaweser recalled that the crime of aggression had been at the forefront of the discussions leading to the establishment of the ICC, since many believed that there should not be an ICC that does not cover what has been called the “supreme crime”. Mr. Ferencz stressed the importance of States Parties’ support for the Court and of ratifying the amendments, emphasizing that *“if we in this room are not part of the solution, we are part of the problem”*. During the discussion, an appeal was made to all people present to make every effort to ensure that the amendments would be ratified.

Session 2: Understanding the amendments on the crime of aggression: activation, jurisdiction

- Hon. Mr. Daniel David Ntanda Nsereko, Judge, Special Tribunal for Lebanon
- Mr. Stefan Barriga, Deputy Permanent Representative of Liechtenstein to the UN

Judge Nsereko noted with regret that States have seldom exercised their criminal jurisdiction over international crimes, as only few States had the required domestic legislation. He noted that the ICC’s jurisdiction merely filled a gap left by national courts (principle of complementarity). He noted that *“by ratifying and implementing these amendments, African States will help breathe life into the amendments; and by implementing them they will demonstrate to the rest of the world their desire and resolve to live in peace with each other and turn swords into ploughshares”*.

Mr. Barriga addressed a number of technical questions regarding the Court’s future exercise of jurisdiction. He noted that for the Court to exercise jurisdiction at the earliest possible moment, 30 ratifications should be reached by the end of 2015.¹ He explained that with regard to the crime of aggression, the ICC enjoyed the same amount of judicial independence from the Security Council as with regard to the other core crimes – this was a big victory in the negotiations for

¹ See Handbook p. 5.

African States.² He stressed that domestic implementation of the definition of aggression was optional, but that all States Parties were obliged under Art. 86 of the Rome Statute to cooperate with future ICC investigations regarding the crime of aggression.³

Session 3: The crime of aggression in the African context

- H.E. Mr. Allieu Kanu, Ambassador, Executive Director, Sierra Leone Institute of International Law
- Hon. Mr. Ben M. Kioko, Judge, African Court on Human and Peoples' Rights

Ambassador Kanu commended those States that had either ratified or taken steps towards ratification of the Kampala amendments (see Status Report). He considered the Court a key element in the restoration of peace and the rule of law and emphasized the need for all African States to continue their efforts towards universal ratification and implementation of the Kampala amendments. He noted that the crime of aggression could come in many forms and referred to the example of Sierra Leone, where aggression was committed through rebel forces acting under the auspices of Charles Taylor.⁴

Judge Kioko explored the difficulties in ratifying treaties, such as long and cumbersome domestic ratification processes; the lack of technical capacity; and most importantly, the lack of political will. He recommended that advocacy efforts should be directed toward political decision-makers. He emphasized that criminalizing aggression was nothing new for the African continent, and recalled a number of African legal instruments, both at regional and sub-regional level in this regard. These include the African Union Non-Aggression and Common Defense Pact (2005), Article 4 of the AU's Constitutive Act, the Protocol on Non-Aggression and Mutual Defense in the Great Lakes Region (2006), the Solemn Declaration on a Common African Defense and Security Policy of the African Union (2004) and the Southern African Development Community (SADC) Protocol on Politics, Defense and Security Cooperation (2001) (see Handout: "Preventing aggression in the African context").

Session 4: Criminalizing the crime of aggression at the domestic level – definition, jurisdiction, immunities

- Prof. Claus Kress, Professor of Law, Cologne University
- Mr. Dapo Akande, Lecturer in Public International Law, Oxford University

Prof. Kress presented the main elements of the definition of aggression.⁵ He noted in particular that under Art. 8 bis (2)(g), the activities of non-State actors could, under certain circumstances, also constitute a State act of aggression. He noted that States Parties had to decide for themselves whether they wished to also incorporate the crime of aggression into domestic criminal codes, or

² See Handbook p. 11-12.

³ See Handbook p. 6; p. 14.

⁴ The sending by a State of armed bands to another State may qualify as aggression, see Art. 8 bis (2)(g).

⁵ See Handbook p. 8.

whether they preferred to leave jurisdiction entirely to the ICC, given that domestic prosecution of the crime of aggression could be difficult in practice. He recommended that those States wishing to incorporate the crime of aggression domestically should do so on the basis of the wording adopted in Kampala, unless there were strong domestic reasons to deviate in some respects.

Mr. Akande stated that the issue of immunities was likely to arise in the context of the crime of aggression due to the leadership element. For the purpose of domestic prosecutions of aggression, two types of immunities applied to certain foreign officials. Immunity *ratione personae* applied to e.g. Heads of States, Foreign Ministers and Ambassadors while they served in office. Such immunity would prevent a domestic prosecution of aggression.⁶ Regarding Immunity *ratione materiae* attached to all official acts of State officials, Mr. Akande noted that it would not apply to international crimes (*Pinochet case*). Countries wishing to apply this exemption and to prosecute aggression against foreign officials should however ensure their domestic definition stays as close as possible to the Kampala definition.⁷ Regarding international prosecution of aggression, Mr. Akande clarified that national or international immunities would not prevent the ICC from exercising jurisdiction.

Session 5: The war crimes amendment – bringing Article 8 in line with customary international law

- Mr. Jonas Perilleux, Federal Coordination Unit for the Belgian Cooperation with the International Criminal Court and the International Criminal Tribunals
- Ms. Mutsa Mangezi, Legal Officer, International Committee of the Red Cross

The speakers highlighted the reasons for ratification:⁸ promoting the goals of international humanitarian law; closing a loophole in the Rome Statute; no adverse consequences for law enforcement; and easy implementation. They recalled that the amendments were fully consistent with customary international law and that there was no reason to wait with ratification.

Closing session/ discussion

- H.E. Dr. Athaliah Molokomme, Attorney-General of Botswana
- Mr. Donald Ferencz, Convenor, Global Institute for the Prevention of Aggression
- Ms. Deborah Ruiz Verduzco, Deputy-Director, International Law and Human Rights Programme, Parliamentarians for Global Action

Several representatives expressed commitment towards the ratification process and expected progress in their countries; these include Burundi, Central African Republic, Chad, Cote d'Ivoire, the Democratic Republic of the Congo, Gabon, Ghana, Guinea, Lesotho, Madagascar, Mauritius, Niger, Nigeria, and Sierra Leone.

⁶ See Handbook p. 18

⁷ See Handbook p. 19

⁸ See Handbook p. 45

During the entire workshop, discussions were lively and there was strong interest amongst all participants to learn more about the issues at stake. Several representatives had not had a chance to examine the amendments in depth prior to the workshop, partly because of capacity constraints. **The Mission of Liechtenstein to the United Nations as well as the Global Institute for the Prevention of Aggression continue to provide assistance on issues related to the ratification and implementation of the amendments upon request to all interested States Parties.**

Official closing address

- H.E. Mr. P.T.C. Skelemani, Minister of Foreign Affairs and International Cooperation of the Republic of Botswana

Botswana's Minister of Foreign Affairs and International Cooperation Skelemani ended the workshop by stating: *"We return to our respective capitals with sustained momentum that this workshop has generated in popularising the Kampala amendments. The people of Africa aspire to live in a region free of the fear of aggression"*.