



PERMANENT MISSION
OF THE PRINCIPALITY OF LIECHTENSTEIN
TO THE UNITED NATIONS
NEW YORK



GLOBAL INSTITUTE FOR THE
PREVENTION OF AGGRESSION

Interactive panel discussion on the occasion of the Day of International Criminal Justice:

“Into the homestretch: towards the activation of the Kampala Amendments on the Crime of Aggression”

Chair’s summary

Tribute to the late A. N. R. Robinson

A minute of silence was observed in honor of A. N. R. Robinson, former President and Prime Minister of Trinidad and Tobago. In 1989, he suggested the creation of an international criminal court at the United Nations and was the spiritual father of the Rome Statute. He subsequently served on the Board of the Trust Fund for Victims.

Introduction

The crime of aggression had formed an integral part of the post-WWII prosecutions at Tokyo and Nuremberg, where American lead prosecutor Robert Jackson had termed it “the supreme international crime, differing only from other crimes in that it contains within itself the accumulated evil of the whole.” In the post-war period, the crime of aggression had been seen as contentious and political. Though UN General Assembly had nevertheless been able to adopt a resolution defining an act of aggression in 1974,¹ genocide was increasingly referred to as the crime of crimes in the postwar period.

At Rome in 1998, the crime of aggression was included in the International Criminal Court’s statute, but there was no agreement on its definition or on the role of the UN Security Council. These issues were deferred to a Review Conference, which was held in Kampala, Uganda, in 2010.

Agreement at Kampala

The importance of finishing the job left undone at Rome was acknowledged. All participants at Kampala were trying to find an outcome, which had made the consensus possible. The resultant compromise may have been complicated, but everyone had made concessions.

¹ General Assembly Resolution 3314 (XXIX) of 14 December 1974

The outlines of the Kampala agreement were briefly sketched out. The definition of the act of aggression was taken from the 1974 resolution of the United Nations General Assembly on this subject. The crime of aggression was linked to an individual in a leadership position. The amendments respected the right of the Security Council, under Article 39 of the UN Charter, to determine an act of aggression. However, should the Council not make such a determination, it was also possible for the Pre Trial Division of the ICC to reach that conclusion. The entire regime did not apply to non-States Parties and States Parties had the ability to opt out.

The Princeton Process was highlighted as instrumental in making the Kampala Agreement possible. Delegates had arrived in Kampala with an agreed definition, and with many years of mutual interaction, which had facilitated negotiations.

Towards activation of the amendments

The work of the global campaign for ratification and implementation of the Kampala amendments, which had held regional events in Botswana, New Zealand and Slovenia, was highlighted. Its goal was to achieve 30 ratifications by the end of 2017 and to prepare for the amendments' activation in 2017. Particular attention was drawn to the commitment of the Eastern European Group of States, where a number of countries had already ratified the Kampala amendments and several more, including Albania, Czech Republic, Georgia, Macedonia and Poland, pledged to do so before the end of the year.

The opinion was also expressed that the delay before activation of the amendments gave States the opportunity to achieve a "genuine consensus" on their content, allowing them to be activated in such a way that strengthens the Court. Certain issues might require further exploration. The activation decision should be used to achieve a genuine, shared understanding on all aspects of the crime of aggression. It was considered that endangering the Court with overly politicized cases should be avoided. In response, it was argued that the Kampala agreement was in fact adopted by consensus and that the ratification process was proceeding smoothly. This underlined that States Parties were comfortable with the amendments.

The suggestion was made that States be creative in their ratification. In particular, it was suggested that States submit "partial opt out" declarations, stating that they do not recognize the jurisdiction of the Court for uses of force deployed to prevent the commission of other crimes within the jurisdiction of the Rome Statute. This could be a way of preserving a space for humanitarian intervention and the third pillar of the Responsibility to Protect norm. It was also noted, however, that the opt-out clause provided for in the Kampala agreement had never yet been made use of. With respect to the suggested "partial opt" out, it was suggested that this might constitute a reservation, which would be prohibited under article 120 of the Rome Statute and was not compatible with the Kampala consensus. It was further pointed out that almost half of the States that had ratified the amendments were members of the North Atlantic Treaty Organization (NATO).

The opinion was also expressed that States should include the Understandings as an integral part of their domestic ratification process and the subsequent instruments of ratifications, as they add important nuance to the text.

It was noted that technical assistance was available in the ratification and implementation of the amendments, not least from the Liechtenstein-led global campaign.

In the ensuing discussion, Austria announced that it had just become the 15th State Party to the amendments. Poland and Spain announced that they would soon finish their domestic ratification procedures.

Considerations in domestic implementations

It was agreed that States Parties had to decide for themselves whether and how to incorporate the definition of the crime of aggression into their domestic laws. Indeed, not all States that had ratified the amendments to date had implemented them into their national legislation. . Those that did choose to do so had taken different routes when implementing the Crime of Aggression provisions. Some had incorporated the Kampala definition into their national penal codes. Different bases of jurisdiction – including the territoriality principle and universal jurisdiction, could be relied upon. Many States had pre-existing legislation outlawing the crime of aggression or the waging of a war of aggression.

A panelist suggested that a careful consideration of whether and how to implement was necessary. She noted that the crime of aggression was different to the other crimes: any trial of this crime would hinge of a finding of whether a State had committed the act of aggression. This might not be an appropriate determination for a State to make.

The opinion was expressed that very little attention was paid to how complementarity would work with regard to the crime of aggression. One solution might be to vest domestic courts only with jurisdictions over its own nationals. Another possibility was making domestic proceedings conditional on a Security Council determination of an act of aggression. States were also cautioned not to be too idiosyncratic in their domestic definitions to avoid further fracturing in the law. Due to faults in drafting, it was unclear how many of the extant definitions would be applied in Court, given the principle of legality.

The role of the Court

It was considered important that the International Criminal Court be given the opportunity to adjudge this crime, as it represented the biggest danger to international peace and security.

The judges of the ICC would need to assess whether and how the rules and regulations of the Court needed to be adjusted, which would be a matter for the new bench, taking office in March 2015. The opinion was expressed that the capacity of the Office of the Prosecutor would probably need to be strengthened to deal with this crime, which might involve a budget increase. Attendant capacity problems in the judiciary might also arise.