

## **The Crime of Aggression in Brief:**

*The Crime of Aggression continues to be a controversial topic among States Parties and non-States Parties alike. In order to understand the issue at hand, background is required.*

### **Background**

In the May/June of 2010, the first Review Conference of the Rome Statute of the International Criminal Court (ICC) took place in Kampala, Uganda. States Parties and non-States Parties gathered to review the implementation and impact of the Rome Statute since its entry into force in July 2002. Several amendments to the Statute were also proposed at this time, including a proposed definition and conditions of activation and jurisdiction for the *crime of aggression*, one of the core crimes under the ICC's jurisdiction previously listed under Article 5 of the Rome Statute. The definition of the crime of aggression criminalizes the use of armed force by one state against another carried out in contravention of the UN Charter. After much discussion, an agreement was reached resulting in the adoption of the *Kampala Amendments*, the crime of aggression included, on 10-11 June 2010.

### **Crime of Aggression Amendment**

- **Article 8 bis**, which provides a definition for the *crime of aggression*;
- **Article 15 bis, 15 ter**, which outline activation of the Court's exercise of jurisdiction and the jurisdictional conditions for the different trigger mechanisms with regard to State referral or *proprio motu* (initiated by the ICC Prosecutor), and Security Council referral.

The amendments enter into force *for a State* one year after ratification or acceptance *by that State*. However, entry into force of the crime of aggression amendment is not sufficient to allow for the exercise of jurisdiction by the Court. In order for the Court to exercise jurisdiction, two further conditions must be met.

### ***Conditions required for the exercise of jurisdiction***

(1) The amendments must have been ratified by at least 30 States Parties; (2) the Assembly of States Parties (ASP) must take a decision, by consensus or at least 2/3 majority, to allow the Court to begin exercising its jurisdiction (This decision may only be taken after 1 January 2017).

Once these conditions are met, the Court may exercise jurisdiction over the crime of aggression, but further requirements must be observed, depending on the situation.

### *Situations that allow for the exercise of jurisdiction*

#### *State referrals and Prosecutor's proprio motu investigations (Article 15 bis)*

In the case of a State referral, the Court will only be allowed to exercise jurisdiction if the amendments have entered into force for at least one of the States Parties, victim or aggressor, involved. The Prosecutor must then determine there to be a reasonable basis to proceed with an investigation in both scenarios. If this occurs, the Prosecutor must notify the UN Secretary-General of the situation. The Security Council itself has the authority to determine whether an act of aggression has been committed. The Prosecutor must allow the Security Council six months to make a determination. If no such determination is made, the Prosecutor may still proceed with investigation only with authorization of the Pre-Trial Division judges.

In the case of an investigation initiated by the Prosecutor (proprio motu), the same conditions apply.

**States Parties** do have **the option to “opt-out”** of the Court's jurisdiction over the crime of aggression by submitting a declaration with the Registrar of the Court. The declaration must be submitted **before** the act of aggression is committed.

**Non-States Parties** to the Rome Statute are **excluded** from the Court's jurisdiction over the crime of aggression, regardless of victim or aggressor status.

**Table of Jurisdictional Regime of the Crime of Aggression**

	Victim State has ratified the amendments	Victim State has not ratified the amendments
Aggressor State has ratified and not opted out	Jurisdiction: YES	Jurisdiction: YES
Aggressor State has not ratified and not opted out	Jurisdiction: YES <sup>i</sup>	Jurisdiction: NO
Aggressor State has ratified and opted out	Jurisdiction: NO	Jurisdiction: NO
Aggressor State has not ratified and opted out	Jurisdiction: NO	Jurisdiction: NO

<sup>i</sup> Note however the views expressed by some that there would be no jurisdiction in this scenario.

#### *Security Council referrals (Article 15 ter)*

If the Security Council refers a situation, the Prosecutor has the authority to investigate any of the four core crimes, including the crime of aggression, committed in any territory by any state's national. In this situation, the Court is able to exercise jurisdiction over acts of aggression involving **States Parties, regardless of their individual ratification status or “opt-out” status, and Non-States Parties** alike.

### **Main issue**

The main issue surrounding this new amendment to the Rome Statute relates to jurisdiction. The reported view held by the majority of states parties holds that once the two conditions (ratification by at least 30 States Parties and the decision by the ASP) are met, the Court's jurisdiction over the crime of aggression **applies to all States Parties** (unless an opt out declaration has been submitted), regardless of individual ratification status. An alternate view has also been advanced stating that the Court's jurisdiction over the crime of aggression **only applies to the States Parties who have ratified** the amendment. Furthermore, a dispute exists over whether **only one of the two or both** relevant States Parties needs to have ratified the amendment in order to permit the Court to exercise jurisdiction over this specific crime.

### **What's next?**

As of 6 April 2017, 32 States Parties have ratified the crime of aggression amendment. The second condition (the decision by the ASP) has the potential to occur at this year's 16<sup>th</sup> ASP. The Assembly of States Parties decided in November 2016 to establish a facilitation, based in New York, open only to States Parties, to discuss activation of the Court's jurisdiction over the crime of aggression. The goal of this facilitation is to reach consensus.