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BOFAXE



The Road to the Activation of the ICC's Jurisdiction over the Crime of Aggression

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Fokus

On 14 December 2017, the 16th session of the Assembly of States Parties to the Rome Statute of the International Criminal Court reached an historical agreement enabling the Court to exercise its jurisdiction over the crime of aggression.

Quellen

https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf

https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf

Since the prosecution of "crimes against peace" at Nürnberg, no international tribunal has ever had again jurisdiction over what many scholars consider "the crime of crimes". More than 50 years later, in 1998, the crime of aggression has been included in Article 5 of the Rome Statute (RS) which established the first permanent international criminal court (ICC). However, its definition and the conditions for the exercise of jurisdiction by the Court with respect to the crime were left for a Review Conference (Art.5(2)), which took place in Kampala, Uganda in 2010. The delegations to the Kampala Review Conference reached a compromise which made the amendment of the RS possible by applying to the crime of aggression a more stringent jurisdictional regime than that of the other crimes under the Court's ambit.

Regarding in particular the activation of the Court's jurisdiction over this crime, the States Parties agreed in Kampala on a seven-year delay (Art. 15bis(3) and 15ter(3)), on a precondition of 30 ratifications of the amendment and a further one-year delay after the 30th ratification (Art. 15bis(2) and 15ter(2)). The jurisdiction could still not be activated without a 2/3 majority vote of the Assembly of States Parties (ASP) (Art. 15bis(3) and 15ter(3)). Most importantly, the States Parties would be allowed to *opt out* from the jurisdiction of the Court in a case of a *proprio motu* investigation of the prosecutor or a State referral, by simply "lodging a declaration with the Registrar" (Art. 15bis(4)). In other words, should the jurisdiction with regard to the crime of aggression be activated, the States Parties would still have the option to declare that they do not accept such jurisdiction and thus render RS Article 15bis inapplicable to them.

By the time the 16th ASP session kicked off, 35 States had ratified the amendments. Since the seven years' temporal limit has also passed, one would expect the activation at the 2017 ASP to be a mere procedural issue. Unfortunately, this has not been the case.

During a preparatory meeting held some months before the 16th ASP session, it became clear that there were two competing readings of the Kampala agreement regarding the activation of the crime of aggression. The controversy related to the question whether the Court's jurisdiction over the crime would apply to all States Parties which have not submitted an *opt-out* declaration. A minority view had been advanced stating that the Court's jurisdiction over the crime of aggression should only apply to those States Parties who have ratified the Kampala amendments. This group of around 35 countries out of 123 which have ratified the RS was led by Canada, Colombia, France, Japan, Norway and the UK. In a joint paper they demanded that "this point [be] clarified before any decision is taken to activate the crime of aggression". In other words, they wanted the *opt-out* clause to be supplemented by an *opt-in* clause, that is to say a further restriction to the jurisdiction of the Court. According to them, this would be consistent with the second sentence of RS Article 121(5), which 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".

Proponents of the contrary view - that absent an *opt-out* declaration each State Party should be bound by the aggression amendments - insisted that the provision was irrelevant to the crime of aggression, which had been, already in Rome, submitted to the Court's jurisdiction under RS Article 5. They suspected that the minority concern was an effort to avoid the political cost of a probable disapproval of the public opinion following an *opt-out* declaration.

The debates on the issue lasted until the last minute of the ASP session and culminated in the undeniably monumental achievement for international criminal law, the activation of the ICC's jurisdiction over the crime of aggression as of 17 July 2018, the 20th anniversary of the adoption of the RS. Nevertheless, the desire for an emblematic consensus, rather than a 2/3 majority vote came at a major cost for the reach of the Court: the acceptance of the powerful will of the *opt-in* camp.

Verantwortung

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