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COMMENTARY

Editors: Jacek Foks (Editor-in-Chief), Łukasz Adamski, Beata Górka-Winter, Leszek Jesień,
Łukasz Kulesa, Marek Madej, Beata Wojna, Ernest Wyciszkievicz

Definition of Crime of Aggression in International Criminal Court Statute

by Rafał Kownacki

The first review conference of the Statute of the International Criminal Court (ICC), held between 31 May and 11 June in Kampala, ended with a major amendment incorporating a definition of crime of aggression into the document. But exercise of jurisdiction will only be possible after 1 January 2017, if states parties take such a decision at the next review conference.

An agreement reached among states parties to the Statute of the International Criminal Court, including Poland, on including a definition of the crime of aggression is an important step towards prosecuting such international crimes in future. The Statute, adopted in Rome in 1998, does have aggression on its list of core international crimes, alongside genocide, crimes against humanity and war crimes, but with no definition of the crime included, the ICC prosecutor has been unable to initiate any investigation even if developments, e.g. the Iraq war in 2003, warranted the Court's interest in the matter.

The adoption of the definition only eight years after the ICC was set up demonstrates best how politicized the notion of aggression is. The first international efforts to define it date back to the 1930s and were crowned with a definition formulated in Resolution 3314 of the UN General Assembly, adopted on 14 December 1974. That resolution provided a starting point for defining the crime of aggression for the purpose of the ICC Statute review. The legislative problem lied in adjusting premises for state action to the requirements of a criminal-law provision under which an action undertaken by an individual would be exhaustively classified as a criminal act. Consequently, the assembly of ICC states parties appointed a Special Working Group on the Crime of Aggression, comprising reputed academics and delegates from states and international organizations. At an informal meeting in Princeton in June 2009, convened at the initiative of the Liechtenstein government and attended by a Polish representative, Professor Władysław Czapliński, the group drafted a definition of the crime of aggression with explanations of its premises.

Under Resolution 4, adopted in Kampala on 11 June, Article 8 bis was added the Statute, defining the crime of aggression as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." Paragraph 2 of the new article names as acts of aggression the activities described in Resolution 3314 of 1974, i.e. "the use of armed forces by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations." Crimes of aggression will be prosecuted after first ascertaining whether the Security Council has made a determination of an act of aggression committed. In the absence of such determination, the ICC prosecutor, acting at the request of a state party or at his own initiative, will be allowed to initiate proceedings which, however, may be suspended by the Security Council in successive resolutions, effective for one-year periods.

The amendment adopted at Kampala will come into force a year after ratification by 30 states parties. The Court will be able to exercise its jurisdiction only after 1 January 2017, however, provided the states parties so decide at the next review conference.

Conclusions. The definition of the crime of aggression is a success of the review conference. At the same time, the postponement until 2017 of the actual exercise of jurisdiction and the filter in the form of UN Security Council's consent to each investigation *de facto* restricts the ICC's room for maneuver. Seeking to ensure that the new legal norm has teeth, the EU member states should take effort to build a broad coalition of states that will accept the proposed definition and than give the ICC a free hand in prosecuting crimes of aggression from 2017, with no Security Council go-ahead needed. This would implement the European Parliament's resolution of 19 May 2010, which reiterates that the EU must defend the integrity of the ICC in order to protect and widen the autonomy and effectiveness of the international judiciary, and strengthen its legitimacy. Bearing in mind the active presence at the Kampala conference of a U.S. delegation, attempts should made to persuade the U.S. administration to ratify the ICC Statute prior to the next review conference.