

**HANDBOOK**

**RATIFICATION  
AND  
IMPLEMENTATION  
OF THE  
KAMPALA  
AMENDMENTS  
TO THE  
ROME STATUTE  
OF THE ICC**

**CRIME OF AGGRESSION  
WAR CRIMES**





Part I of the handbook is based on a workshop on the ratification and implementation of the Kampala amendments on the Crime of Aggression that took place at New York University on 25 June 2012. The workshop was co-hosted by the Permanent Mission of the Principality of Liechtenstein to the United Nations and the Global Institute for the Prevention of Aggression (recently affiliated with Middlesex University School of Law, London), with the support of the Liechtenstein Institute on Self-Determination at Princeton University (LISD). The handbook benefited further from the Colloquium «From Rome to Kampala – the first two amendments to the Rome Statute,» organized by the Belgian Interministerial Commission for Humanitarian Law on 5 June 2012 in Brussels. Part II of the handbook was drafted with the kind assistance of the International Committee of the Red Cross (ICRC).

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# PART I

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We consider it an honor and a privilege to present to you the *Handbook on the Ratification and Implementation of the Kampala Amendments to the Rome Statute of the International Criminal Court*. It is the product of our collaborative effort aimed at assisting States in ratifying the amendments adopted by consensus in Kampala – amendments which are critical to the process of effectively criminalizing the illegal use of force in international affairs.

In Kampala, the Review Conference adopted provisions which will allow the Court to exercise its jurisdiction over the crime of aggression, expressly pledging its resolve to activate such jurisdiction «as early as possible.» This accomplishment has been hailed as a historic landmark, both in international law and in the quest for global peace and security. For the first time in history, a permanent independent international court will have the competence to hold national leaders accountable for the most serious forms of the illegal use of force against other States.

The minimum 30 ratifications that are required to activate the Court’s jurisdiction over the crime of aggression will finally align the system of present-day international criminal justice with the principles established at Nuremberg.

At Nuremberg, world leaders responded affirmatively to a plea of humanity to law. Today, one might say that the tables have turned. The provisions of the Kampala amendments will only have their full effect if we ratify them. In a very real sense, they represent a plea of law to humanity.

We therefore offer this handbook as a tool to assist in making a reality what was promised in Nuremberg and made possible in Kampala – that our children will live in a world where the illegal use of armed force might be effectively deterred through the rule of law. It is a hope etched on the hearts of people of goodwill everywhere, enshrined in the preamble to the UN Charter – the hope that we will make good on the promise to «save succeeding generations from the scourge of war.» We believe that ratification of the Kampala amendments is an important step forward on the path to making that hope a reality, and we invite you to join us on that path.

Our goal is to help achieve as many ratifications as possible, and at the earliest possible time, in order that the Court may exercise its jurisdiction over the crime of aggression from 2017 onwards, as contemplated by the terms of the resolution adopted by consensus in Kampala. We look forward to working with you to achieve this goal.

*Christian Wenaweser*

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Principality of Liechtenstein to the United Nations

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Convener, The Global Institute for the Prevention of  
Aggression



LIECHTENSTEIN INSTITUTE  
ON SELF-DETERMINATION  
AT PRINCETON UNIVERSITY

I welcome this publication about the ratification and implementation of the Kampala amendments to the Rome Statute of the International Criminal Court. Beginning in 2004, the Liechtenstein Institute on Self-Determination at Princeton University (LISD) hosted five annual Intersessional Meetings of the Special Working Group on the Crime of Aggression at Princeton University. It is thus with great pleasure that the Institute has been able to contribute in a meaningful way to deliberations by the SWGCA as part of the «Princeton Process on the Crime of Aggression», to subsequent work culminating at the 2010 Kampala Review Conference at which ICC States Parties defined and delineated a jurisdictional regime for the crime of aggression, and to the production of this handbook, which will assist the ratification and implementation process.

The International Criminal Court is one of the most important institutions in the emerging international system. In my opinion, the ICC is critical for the creation of a more just and equitable world order. The Liechtenstein Institute's focus on issues related to and emerging from self-determination and the effects of international crises only heightens the awareness of the need for a permanent international criminal court that can deal with the most egregious offenses and offenders – from war crimes to crimes against humanity to genocide – as well as the necessity to clearly delineate the jurisdiction of this international court as a step toward strengthening its prosecutorial abilities and thereby enhancing the Court's ability to deter future crimes of aggression. Ratification and implementation of the Kampala amendments will therefore move the international community forward in creating a stable, transparent system in which all States and leaders are held equally accountable for their actions.

It was once said to me that «the road to Kampala goes from Rome via Princeton», but continued and patient travel is necessary before the promise of an effective and universal ICC becomes a reality. It is in this spirit, and aligned with LISD's mission and commitment to educate the next generation of leaders, that – together with the Permanent Mission of the Principality of Liechtenstein to the United Nations and the Global Institute for the Prevention of Aggression – we publish this handbook.

*Wolfgang Danspeckgruber*

Director, Liechtenstein Institute on Self-Determination at Princeton University

PART I  
**CRIME OF AGGRESSION**  
(NEW ARTICLE 8 *BIS ET AL*)

# 1. THE CRIME OF AGGRESSION: A BRIEF HISTORY

«A person stands a better chance of being tried and judged for killing one human being than for killing 100,000.»

José Ayala Lasso, Former United Nations High Commissioner for Human Rights

The crime of aggression is one of the four crimes over which the International Criminal Court has jurisdiction in accordance with the Rome Statute. On 11 June 2010, States Parties to the Rome Statute adopted a definition of the crime. In essence, a crime of aggression is committed when a political or military leader of a State causes that State to illegally use force against another State, provided that the use of force constitutes by its character, gravity, and scale a manifest violation of the United Nations Charter. In the future, though not earlier than 2017, the ICC will be able to prosecute crimes of aggression, provided a number of jurisdictional conditions are fulfilled. Once activated, the Court's jurisdiction over the crime of aggression will provide some measure of criminal accountability at the international level for this «supreme crime,» for the first time since the Nuremberg and Tokyo Trials. The following are the most important steps that led to this development, beginning with the seminal year 1945; note however that there were already efforts to prohibit and criminalize illegal war-making prior to 1945.

## 1.1. THE UN CHARTER AND THE NUREMBERG AND TOKYO TRIALS (1945 – 48)

On 24 October 1945, the United Nations Charter entered into force, thus establishing a system of collective security. Article 2(4) of the Charter of the United Nations prohibits the «threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.» The Charter allows the use of force only for the purpose of lawful individual or collective self-defense or upon authorization by the Security Council. The Charter mandates the Security Council to respond to threats to the peace, breaches of the peace, and acts of aggression. It does not however define the notion of aggression, nor does it provide for individual criminal accountability in cases of aggression.

The victorious powers of World War II conducted trials in Nuremberg (1945 – 46) and Tokyo (1946 – 48) to prosecute those most responsible for crimes against peace, war crimes, and crimes against humanity. The Nuremberg Charter defined crimes against peace as «planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of the foregoing.» It did not however specify further what was meant by «aggression.» Subsequent to the Nuremberg and Tokyo trials, the UN General Assembly affirmed the principles of the Nuremberg Charter and of the Nuremberg Tribunal's judgment in Resolution 95(I).



## 1.2. THE GENERAL ASSEMBLY DEFINITION (1974)

Following decades of negotiations, in December 1974, the UN General Assembly adopted Resolution 3314 (XXIX). The purpose of the definition of aggression annexed to the Resolution was to give guidance to the Security Council in its determination of the existence of an act of aggression. Notably, the definition deals with the State act of aggression, not the act of an individual who may be responsible for the State act. The definition of aggression essentially mirrors the notion of the illegal use of force contained in Article 2(4) of the Charter and enumerates specific examples of acts of aggression, such as the invasion or attack by the armed forces of a State of the territory of another State (including related military occupation), bombardment by the armed forces of a State against the territory of another State, etc. The core provisions of the 1974 definition (Articles 1 and 3) were later incorporated into part of the 2010 definition of the crime of aggression under the Rome Statute.

## 1.3. THE ROME CONFERENCE (1998)

The question whether or not to include the crime of aggression, and if so, how to define it, was one of the central disputes at the July 1998 diplomatic conference that led to the adoption of the Rome Statute of the International Criminal Court. Delegates could not agree on a definition of the crime of aggression, as some wanted only «wars of aggression» to be covered, whereas others wanted to use what is arguably the broader notion of «acts of aggression» contained in the 1974 GA definition. Even more difficult was the question of whether the ICC should only prosecute crimes of aggression once the Security Council has determined the existence of an act of aggression by one State against another. As part of the final compromise, the crime of aggression was included in the list of crimes under the jurisdiction of the Court, but the definition and the conditions for the exercise of jurisdiction (including the question of the role of the Security Council) were deferred for consideration by the first Review Conference.

## 1.4. THE KAMPALA REVIEW CONFERENCE (2010)

Following the 1998 Rome Conference, the Preparatory Commission for the ICC (Prep-Comm, 1999 – 2002) and later the Special Working Group on the Crime of Aggression (SWGCA, 2003 – 2009) continued negotiations on the outstanding issues regarding the crime of aggression. In February 2009, the SWGCA found a consensus agreement on the definition of the crime of aggression. The 2010 Kampala Review Conference used that definition and could thus focus on other outstanding issues, i.e. the «conditions for the exercise of jurisdiction.» States Parties seized the historic opportunity and adopted Resolution RC/Res.6 by consensus. The resolution amended the Rome Statute to include, inter alia, new article 8 *bis* containing a definition of the crime of aggression and new articles 15 *bis* and 15 *ter*, containing complex provisions on the conditions for the exercise of jurisdiction. Notably, the compromise included a clause that prevents the Court from exercising jurisdiction over the crime of aggression immediately. Instead, the Assembly of States Parties will have to take a further one-time decision to activate the Court's jurisdiction, no earlier than 2017. Also, one year must have passed since the 30th ratification before the Court can exercise its jurisdiction over the crime of aggression.

# 2. RATIFYING THE KAMPALA AMENDMENTS

## 2.1. WHY RATIFY?

### **PROMOTING PEACE AND THE RULE OF LAW AT THE INTERNATIONAL LEVEL:**

Every ratification is a step toward the activation of the ICC's jurisdiction over the crime of aggression, which requires at least 30 ratifications (in addition to a one-time activation decision by States Parties). Once activated, the amendments will, for the first time in the history of mankind, establish a permanent system of international criminal accountability aimed at enforcing the most fundamental rule governing the peaceful coexistence of nations: the prohibition of the illegal use of force. The crime of aggression is the supreme violation of the *jus ad bellum*, which relates to the legitimacy of using force in the first place. Activating the Court's jurisdiction over this crime will help deter illegal uses of force, as leaders will have to take the Court's jurisdiction into account when taking relevant decisions. Ratifying States will thus make a highly visible contribution to the rule of law at the international level and to international peace and security. They will do their part to help fulfil the promise of Nuremberg that never again would those who dare to commit the crime of aggression do so with impunity.

### **PROTECTING HUMAN RIGHTS AND PREVENTING SUFFERING:**

Ratifying States also make an important contribution to the protection of human rights. Acts of aggression typically bring with them countless violations of human rights and international humanitarian law, affecting in particular the most vulnerable individuals during conflict, such as women and children. The effective criminalization of aggression will contribute to the prevention of such acts by targeting the very behaviour that stands at the beginning of the causal chain – the behavior of the decision-makers who unleash the illegal use of force.

### **CLOSING A LOOPHOLE IN THE ROME STATUTE:**

The criminalization of aggression through the Rome Statute, once fully activated, will also protect the right to life of individual soldiers. Currently, the Rome Statute does not protect the life of combatants who are unlawfully sent to war, nor the right to life of the soldiers of the attacked State; they are deemed to be legitimate targets who may be killed at will, provided the relevant rules pertaining to the conduct of hostilities are followed. This is a serious loophole in international law that needs to be closed.

### **JUDICIAL PROTECTION AGAINST AGGRESSION BY ANOTHER STATE:**

By contributing to the activation of the Court's jurisdiction over the crime of aggression, ratifying States also serve their own national interest of deterring the illegal use of force against them. The Court will in the future be able to investigate and prosecute crimes of aggression on the basis of Security Council referrals, irrespective of whether the States in question have accepted the Court's jurisdiction in this regard (article 15 *ter* of the Statute). In addition, ratifying States may enjoy the Court's deterrent influence even when the

Security Council does not refer a situation to the Court (Article 15 *bis*). The latter type of jurisdiction requires however that one of the States Parties involved have ratified the amendments, and other restrictions apply. Nevertheless, only by ratifying the amendments does a State increase the likelihood of indeed being able to count on the Court's protection against an act of aggression by another State. By ratifying, a State sends a clear message that it supports the right of all people to live in peace and dignity, under the rule of law.

**PUBLIC COMMITMENT NOT TO COMMIT AGGRESSION:**

Any State that ratifies the amendments on the crime of aggression is essentially declaring to the world that it will not commit acts of aggression, as its government leaders might otherwise themselves be subject to investigation and prosecution by the Court. Ratifying States also help to deter the commission of acts of aggression by their future governments and from the repercussions of such acts. In this regard, a further avenue for judicial deterrence would be to incorporate the definition of the crime of aggression into domestic legislation, thereby ensuring that the judicial branch would in the future exercise appropriate judicial oversight at the national level. Some 25 countries have already included such provisions in their domestic criminal codes prior to Kampala, and a number of States have already implemented the Kampala definition (see attached materials in Annex, 7.3).

**SUPPORTING THE INTERNATIONAL CRIMINAL COURT:**

The Kampala amendments on the crime of aggression emanated from a mandate given by the Rome Statute; they effectively «complete» the Statute. By ratifying, States Parties show their support for the Court and for the integrity and full effect of the Rome Statute.

**FULL COMPATIBILITY WITH THE UNITED NATIONS CHARTER:**

The definition of the crime of aggression in Article 8 *bis* leaves no doubt that the use of force in lawful self-defence, as well as the use of force authorized by the Security Council, cannot qualify as an act of aggression. The definition covers only the most serious forms of the illegal use of force, namely those that manifestly violate the UN Charter by their «character, gravity and scale.» The Court would have to consider all circumstances of a particular case, including the gravity of the acts concerned as well as their consequences (Understanding 6). States Parties to the Rome Statute thus took great care to ensure that the amendments on the crime of aggression would not adversely affect the legitimate security interests of States.

## 2.2. WHEN TO RATIFY?

There is no reason to wait. At the 2010 Review Conference, States Parties expressed their resolve to «activate the Court's jurisdiction over the crime of aggression as early as possible» (Resolution RC/Res.6). The earliest moment in time for such activation is «after 1 January 2017», when States Parties will have to take a one-time decision to allow the Court to exercise jurisdiction over the crime of aggression. This decision will however only take effect once the amendments have entered into force for 30 States Parties. Since the amendments only enter into force for any ratifying State one year after the deposit of the instrument of ratification, the threshold of 30 ratifications should ideally already be reached by 1 January 2016 (or practically speaking, by the end of 2015). Given how long the domestic

process for ratification of international instruments can take in many countries, those wishing to support the activation of the Court's jurisdiction over the crime of aggression should start the process as soon as possible.

### 2.3. RATIFYING AND IMPLEMENTING AT THE SAME TIME?

States wishing to ratify the amendments will have to address the question of whether to adopt implementing legislation, and if so, at what time.

#### **COOPERATION WITH THE COURT REGARDING INVESTIGATIONS AND PROSECUTIONS:**

The Rome Statute contains clear and legally binding obligations for States Parties to cooperate with the Court, which will in the future also arise with regard to the crime of aggression, once the jurisdiction is activated. Article 86 of the Rome Statute requires all States Parties to cooperate fully with the Court in its investigation and prosecution «of crimes within the jurisdiction of the Court.» Arguably, this provision implies that *all* States Parties – and not just those that ratify the amendments – will have to cooperate with the Court with respect to the crime of aggression. Furthermore, Article 88 specifically requires States Parties to «ensure that there are procedures available under their national law» for cooperation. All States Parties should therefore ensure that their domestic laws allow for such cooperation by the time the Court's jurisdiction over the crime of aggression is activated.

#### **CRIMINALIZATION OF THE CRIME OF AGGRESSION IN DOMESTIC CRIMINAL CODES:**

This issue will be dealt with in further detail below. It should be noted at this stage, however, that there is no obligation stemming from the Rome Statute regarding the domestic implementation of the crime of aggression. It is thus perfectly acceptable – from an international law point of view – to ratify the Rome Statute without implementing the definition, or to ratify the amendments now and to implement the definition at a later stage, or not to implement the definition at all. Many States will nevertheless wish to implement the definition at the same time as a matter of domestic law or policy when ratifying international treaties, or in order to give full effect to the principle of complementarity contained in the Rome Statute (for examples, see Annex, 7.3).

#### **IMPLEMENTING FIRST, RATIFYING LATER:**

Some States have already implemented the Kampala definition of the crime of aggression while not yet having ratified the amendments (e.g. Croatia, Luxembourg, Slovenia). This approach can be advisable where the ratification process is expected to take longer. Ratification would, however, contribute to activating the exercise of jurisdiction by the ICC.

# 3. UNDERSTANDING RESOLUTION RC/RES.6

Below are brief descriptions of the most important aspects of resolution RC/Res.6, by which the amendments were adopted.

## 3.1. PREAMBLE AND OPERATIVE PARAGRAPHS OF RC/RES.6

The preamble is mostly procedural in nature and recalls the various bases for the negotiation process leading up to the adoption of resolution RC/Res.6. It also contains more substantive references to article 12(1) of the Rome Statute (according to which States Parties to the Statute have already accepted the Court's exercise of jurisdiction over the crime of aggression) and expresses the States Parties' resolve to activate the jurisdictional regime *as early as possible*.

By operational paragraph 1, States Parties adopt the amendments to the Rome Statute on the crime of aggression, which are contained in Annex I, and state that the amendments enter into force in accordance with Article 121(5) of the Rome Statute. Accordingly, the amendments enter into force for each State Party respectively one year after the deposit of the instrument of ratification in accordance with the first sentence of Article 121(5). Operational paragraph 1 also notes that prior ratification of the amendments is not a condition for a State Party to opt-out of the Court's jurisdiction in accordance with Article 15 *bis* (4).

Note that the question as to when the amendments enter into force for a ratifying State Party needs to be distinguished from the more complex question of under which conditions the Court may exercise jurisdiction over an individual regarding the crime of aggression (see below, articles 15 *bis* and 15 *ter*).

Operational paragraphs 2 and 3 adopt the Elements of Crimes and the Understandings (see below).

Under operational paragraph 4 the amendments will be reviewed seven years after the beginning of the Court's exercise of jurisdiction, i.e. not earlier than 2024.

Operational paragraph 5 contains the customary call upon all States Parties to ratify or accept the amendments.

## 3.2. AMENDMENT 1: DELETION OF ARTICLE 5(2) OF THE STATUTE

The first amendment is mainly technical in nature and deletes Article 5(2), which contained the mandate for States Parties to adopt a provision on the crime of aggression.

### 3.3. AMENDMENT 2: ADDITION OF NEW ARTICLE 8 *BIS* (DEFINITION)

The second amendment contains the definition of the crime of aggression. Its main elements are:

#### **DEFINITION OF THE ACT OF THE INDIVIDUAL:**

The actions of the individual perpetrator are defined as the «planning, preparation, initiation or execution» of an act of aggression. These verbs are meant to describe what the primary perpetrator actually does when committing the crime, and closely resemble the verbs used in the Nuremberg Charter with respect to a Crime Against Peace.

#### **LEADERSHIP CLAUSE:**

The definition limits criminal responsibility to leaders, who are defined as persons «in a position effectively to exercise control over or to direct the political or military action of a State.» As is further clarified in the Elements, more than one person can be in such a leadership position.

#### **DEFINITION OF THE STATE ACT OF AGGRESSION:**

The State act of aggression is defined using the core elements of the 1974 GA Definition of aggression. The reference to this definition consists of two parts. First, Article 8 *bis* (1) contains a general clause requiring «the use of armed force 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.» This formulation mirrors Article 1 of the 1974 Definition, which in turn builds upon Article 2(4) of the United Nations Charter. Accordingly, the use of force in lawful self-defence, as well as the use of force authorized by the Security Council cannot qualify as an act of aggression. Second, Article 8 *bis* (2) contains a list of acts of aggression that is taken verbatim from Article 3 of the 1974 GA Definition, such as invasion, military occupation, and bombardment by the armed forces of one State against another. To qualify as an act of aggression, the use of force must however meet the criteria of the general clause.

#### **THRESHOLD CLAUSE:**

Article 8 *bis* uses the 1974 GA Definition of aggression only as the first step in the definition of the State component of the crime of aggression. As a second step, it requires that any such act of aggression constitutes «by its character, gravity and scale» a «manifest violation of the Charter of the United Nations.» This was a central element of the compromise found on the definition of the crime of aggression. The threshold clause ensures that only very serious and unambiguously illegal instances of a use of force by a State can give rise to individual criminal responsibility of a leader of that State under the Statute.

### 3.4. AMENDMENT 3: ADDITION OF NEW ARTICLE 15 *BIS*

Article 15 *bis* contains provisions regarding the conditions under which the ICC may exercise jurisdiction over the crime of aggression in the absence of a Security Council referral, i.e. based on a State referral or *proprio motu*. Paragraph 1 merely indicates that the crime

of aggression can be investigated on the basis of these two triggers, and that additional conditions apply, as contained in the subsequent paragraphs.

**ACTIVATION OF JURISDICTION:**

Paragraphs 2 and 3 contain general (not situation-specific) conditions for the exercise of jurisdiction, which are replicated in Article 15 *ter* and thus apply to all ICC investigations regarding the crime of aggression. According to paragraph 2, the ICC may only exercise its jurisdiction over crimes of aggression committed after the amendments have entered into force for at least 30 States Parties. Paragraph 3 stipulates a further, cumulative condition: States Parties have to take an additional one-time decision activating the Court's jurisdiction. They may do so only after 1 January 2017, by consensus or by at least an absolute two-thirds majority of States Parties. This clause was the last piece of the compromise struck in Kampala.

Paragraphs 4 to 8 contain conditions for the exercise of jurisdiction that must be met in specific situations. They create a consent-based jurisdictional regime, which ultimately preserves the Court's judicial independence, but which limits the Court's scope of jurisdiction compared to the three other core crimes.

Paragraphs 4 and 5 stipulate specific conditions regarding the States involved in a particular situation.

**JURISDICTION OVER CRIMES ARISING FROM ACTS OF STATES PARTIES:**

According to paragraph 4, only crimes arising from acts of aggression committed by one State Party to the Rome Statute against another State Party may lead to the Court's exercise of jurisdiction in the wake of a State referral or *proprio motu* investigation. In addition, with regard to these two triggers, any State Party may opt-out of the Court's jurisdiction by way of a declaration lodged with the Registrar. Paragraph 4 encourages such States Parties to at least consider the withdrawal of such a declaration within three years; there is however no obligation to withdraw and no automatic expiration of the declaration.

For the Court to exercise jurisdiction in accordance with paragraph 4, the amendments must have been ratified by and entered into force for at least one of the States Parties involved – be it the presumed aggressor or the victim State. This is because the amendments enter into force for each ratifying State Party individually, in accordance with the first sentence of Article 121(5) of the Statute, and because existing Article 12 of the Statute continues to apply for all crimes under the Statute. Accordingly, the Court may apply the amendments on the crime of aggression where either the territorial State (Article 12(2)(a) of the Statute) or the State of nationality of the perpetrator (Article 12(2)(b) of the Statute) have ratified the amendments. The Court would not however be able to exercise jurisdiction under Article 15 *bis* where the amendments have not entered into force for any of the States Parties involved.

The conditions for the Court's exercise of jurisdiction over the crime of aggression are different from those contained in the second sentence of Article 121(5), which reads as follows: «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.» The reason for this difference is as follows. The second sentence of Article 12(1) deviates from the jurisdictional scheme of Article 12 of the Statute, but the special jurisdictional scheme under the second sentence of Article 12(1) applies only to those crimes that were not originally within the jurisdiction of the Court. The crime of aggression, however, has been within the Court's jurisdiction from the outset by virtue of Article 5(1)(d) of the Statute. States Parties accepted the Court's jurisdiction over the crime of aggression by virtue of Article 12(1) of the Statute when ratifying the Statute in its original form. Yet, Article 5(2) of the Statute empowered States Parties to provide for a *sui generis* set of conditions for the exercise of jurisdiction tailor-made for the crime of aggression, and this is what States Parties did in Kampala.

Given the possibility for any State Party to opt-out of the Court's exercise of jurisdiction, the special jurisdictional regime governing the crime of aggression is consent-based. Passive consent in the form of the abstention from opting-out of the Court's exercise of jurisdiction suffices. Note, however, that following the Kampala Conference some States Parties have publicly taken the different position that active consent would be required, i.e. that the Court could only exercise jurisdiction regarding States Parties that have ratified the amendments. If need be, this question of interpretation will have to be decided by the Court in due course. The practical importance of this question is limited due to the fact that it only affects States Parties that do *not* ratify the amendments and also do not opt out of the Court's jurisdiction.

The complex jurisdictional regime of Article 15 *bis* (4) can be summarized graphically as follows (both aggressor and victim States are presumed States Parties to the Rome Statute):

	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	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

**NO JURISDICTION OVER NON-STATES PARTIES:**

According to paragraph 5, the ICC may not exercise jurisdiction regarding non-States Parties to the Rome Statute, i.e. whenever a crime of aggression is committed by a national of a non-State Party or on its territory. Non-States Parties are thus excluded both as potential aggressor and victim States. This is a significant departure from the existing regime of Article 12(2), which otherwise protects the territory of States Parties with respect to genocide, crimes against humanity, and war crimes committed by nationals of Non-States Parties. It is also a departure from Article 12(3) which permits Non-State Parties to accept the jurisdiction of the Court on *ad hoc* and case by case basis. The exception is based on the



authorization in Article 5(2) to set up a special jurisdictional regime for the crime of aggression. The non-State Party exception constitutes a core element of the delicate compromise reached in Kampala.

It should be kept in mind, however, that the exclusion of non-State Party nationals and the opt-out possibility for States Parties only apply to situations that are *not* referred by the Security Council. Note also that they do also not affect investigations regarding the other three core crimes, which may also have been committed in a situation involving an act of aggression. These aggression-specific restrictions will therefore not necessarily lead to impunity.

**ROLE OF THE SECURITY COUNCIL:**

Paragraphs 6 to 8 contain further conditions for the exercise of jurisdiction, as well as procedural requirements dealing with the Court's relationship with the UN Security Council. These provisions accord to the ICC the same degree of judicial independence from the Security Council as already existed regarding the other three core crimes. Notably, there is no requirement for the Security Council to actively determine the existence of an act of aggression or to authorize ICC investigations for the Court to proceed. This solution was possible because paragraphs 4 and 5 create a consent-based regime and thereby reduce the scope of the Court's jurisdiction.

Paragraphs 6 and 7 describe the scenario where the Security Council – after having been informed by the Prosecutor of his or her intention to formally open an investigation – itself determines that an act of aggression has been committed. Such a determination is a sufficient – but not necessary – condition for the investigation to proceed.

Paragraph 8 directs the Prosecutor to allow a time period of six months for the Security Council to make such a determination. Where no such determination is made, the Prosecutor may still proceed, provided that the judges of the Pre-Trial Division authorize him or her to do so, following the same procedure as is already envisaged for *proprio motu* investigations. Paragraph 8 further recalls that the Security Council may at any time suspend an investigation in accordance with Article 16 of the Statute.

**DETERMINATION OF AGGRESSION BY OUTSIDE ORGAN:**

Paragraph 9 confirms that a determination of an act of aggression by an external organ, such as the Security Council, is not binding on the Court, thereby protecting the existing due process standards contained in the Statute.

**NO IMPACT ON OTHER INVESTIGATIONS:**

Paragraph 10 confirms that the special conditions and requirements attached to investigations regarding the crime of aggression have no impact on investigations into other crimes that may arise under the same situation. Accordingly, the Prosecutor would not have to wait for up to six months with such investigations during the time when the Security Council considers the question of aggression.

### 3.5. AMENDMENT 4: ADDITION OF NEW ARTICLE 15 *TER*

Article 15 *ter* contains provisions regarding the conditions under which the ICC may exercise jurisdiction over the crime of aggression on the basis of a Security Council referral.

The general conditions regarding the exercise of jurisdiction (i.e. activation through 30 ratifications and a one-time decision by States Parties) contained in paragraphs 2 and 3 are the same as those in Article 15 *bis*. Beyond that, no further situation-specific conditions have to be met. In particular, there is no requirement for the involved States to give any type of consent to the investigation, as is already the case for the other three core crimes, given that the Court's jurisdiction under Article 15 *ter* derives from the Security Council's powers under Article 25 of the UN Charter. This means, generally speaking, that once the Court's jurisdiction is activated under paragraphs 2 and 3, the Court may also investigate possible crimes of aggression in situations referred to it by the Security Council.

Paragraphs 4 and 5 are identical to paragraphs 9 and 10 of Article 15 *bis* (see above).

### 3.6. AMENDMENT 5: CHANGE TO ARTICLE 25(3) – *NE BIS IN IDEM*

Due to the addition of a new article 8 *bis* on the crime of aggression, a consequential and merely technical change had to be made to the first sentence of Article 20(3), thus confirming that the principle of *ne bis in idem* (i.e. the rule against being tried twice for the same offense) also applies to the crime of aggression.

### 3.7. AMENDMENT 6: ADDITION OF NEW ARTICLE 25 (3 *BIS*) – LEADERSHIP CLAUSE

Article 25 enumerates the various forms of participation in a crime that give rise to individual criminal responsibility. The newly added paragraph 3 aims to ensure that the leadership clause contained in the definition of the crime of aggression is also applied to secondary perpetrators. As a consequence, persons that participate in the crime in a less direct manner, such as through aiding and abetting, will only be held responsible by the Court if they too fulfil the leadership requirement.

### 3.8. AMENDMENT 7: CHANGE TO ARTICLE 9(1) (ELEMENTS OF CRIMES)

Due to the addition of Article 8 *bis* to the Statute, the list of crimes referred to in Article 9(1) had to be amended to include Article 8 *bis*. This amendment is primarily of technical nature. Note however that Resolution RC/Res.6 also includes substantive additions to the Elements of Crimes (see 4.3 below).

### 3.9. ADDITION TO THE ELEMENTS OF CRIMES

Annex II of Resolution RC/Res.6 contains additions to the Elements of Crimes. These additions are in essence a checklist of the elements of the crime of aggression that the

Prosecutor would have to prove to the Court. They also clarify how the «intent and knowledge» standard of Article 30 of the Statute applies to the crime of aggression. At the same time, these additions to the Elements can serve to confirm some aspects of the definition. For example, the use of force must in all cases be «inconsistent with the Charter of the United Nations;» an act of aggression must have occurred; and the leadership qualification may apply to more than one person. Note that the Elements of Crimes were simply adopted by the Review Conference and do not need to be ratified by States Parties.

### 3.10. UNDERSTANDINGS

Annex III of Resolution RC/Res.6 contains a number of «Understandings.» They have not been declared by States Parties to enjoy any particular legal status, but can at the very least be seen as indicating the intentions of the drafters of the amendments, given that they were adopted simultaneously and by consensus.

Understanding 1 confirms that the Court exercises its jurisdiction on the basis of Security Council referrals only regarding crimes of aggression committed after the Court's jurisdiction is fully activated (i.e. after the activation decision and one year after the 30th ratification), and thus has no retroactive effect. This clarifies in particular how Article 11 of the Statute (Jurisdiction *Ratione Temporis*, addressing the point in time at which a crime committed could fall within the Court's jurisdiction) relates to the crime of aggression.

Understanding 2 confirms that the Court does not need the consent of the States concerned when acting on the basis of a Security Council referral, since its jurisdiction in such situations derives from the authority of the Security Council under the UN Charter.

Understanding 3 is the corollary to Understanding 1 and confirms that also in cases of State referrals and *proprio motu* investigations, there is no retroactive effect. Only crimes committed after the full activation of the Court's jurisdiction can be investigated.

Understanding 4 confirms that the definition of the act and the crime of aggression is only meant for the purposes of the Rome Statute, as is already indicated in the opening phrase of Article 8 *bis* itself («For the purpose of this Statute, «crime of aggression» means ...») and as is the case for the other three core crimes as well. The Security Council, for example, is not bound to use the same definition for its determination of acts of aggression under Chapter VII of the UN Charter. The Understanding further replicates Article 10 of the Rome Statute, according to which Part II of the Rome Statute (containing *inter alia* the definitions of crimes) shall not be seen as «limiting or prejudicing» other rules of international law, such as rules of customary international law.<sup>1</sup>

Understanding 5 states that the «amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.» This understanding confirms that the Rome Statute, while built

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1. Note that as recently as 2006, the UK's then high court, the House of Lords, declared that the crime of aggression exists today in customary international law, essentially unchanged since the time of the Nuremberg Trials (*In re Jones*).

on the principle of complementarity, does not regulate under what conditions States may or must exercise domestic jurisdiction over international crimes, but merely regulates under which conditions the ICC may exercise jurisdiction.

Understanding 6 replicates certain elements of GA Resolution 3314 (XXIX), stressing that aggression is the «most serious and dangerous form of the illegal use of force,» and thereby confirming that not every illegal use of force is aggression. It further states that «all the circumstances of each particular case» have to be considered, including the «gravity of the acts» and their «consequences.» This understanding, read in conjunction with Understanding 7 (below), is clearly aimed at requiring the Court to consider all relevant facts and circumstances pertaining to a particular alleged illegal use of force. Where it cannot be demonstrated that the use of force was manifestly in contravention of the UN Charter, the Court would not be in a position to conclude that an act of aggression has occurred.

Understanding 7 seeks to further clarify the threshold clause contained in Article 8 *bis* (1) by stating that all «three components of character, gravity and scale must be sufficient to justify a «manifest» determination. No one component can be significant enough to satisfy the manifest standard by itself.»

## 4. DOMESTIC IMPLEMENTATION OF THE KAMPALA DEFINITION

### 4.1. REASONS FOR IMPLEMENTING THE DEFINITION

There is no legal obligation to implement the Kampala amendments on the crime of aggression originating from the Rome Statute, before or after ratification. Note however preambular paragraph 5 of the Statute, which recalls «that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.» Indeed, domestic criminalization of the crime of aggression did by no means begin with Kampala. Several States Parties, as well as some non-States Parties, already had domestic provisions criminalizing aggression prior to the Review Conference that may overlap with the Kampala definition of the crime of aggression. These include Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Germany, Georgia, Hungary, Kazakhstan, Kosovo, Latvia, Macedonia, Moldova, Mongolia, Montenegro, Poland, Russian Federation, Serbia, Slovakia, Slovenia, Tajikistan, Ukraine, and Uzbekistan. Some of them have since adapted their domestic legislation to align it with the Kampala definition (Croatia, Slovenia).

When implementing the definition of the crime of aggression, States will have to decide whether to extend the domestic criminalization only to its own leaders, or to leaders of other States as well.

#### **DOMESTIC CRIMINALIZATION OF AGGRESSION BY A STATE'S OWN LEADERS:**

As mentioned above, the ICC's jurisdiction over the crime of aggression serves to help prevent the illegal use of force, and to bring to justice those leaders that blatantly violate the prohibition of the use of force. That effect is even greater if the definition of aggression is implemented at the national level, as domestic courts do not encounter the same jurisdictional restrictions as the ICC. Most importantly, domestic rules criminalizing aggression could help deter the leaders of that same country from committing aggression in the future. These leaders would in the future, when taking decisions regarding the use of force, take such laws into consideration. Implementation thus serves the purpose of deterrence and emphatically signals to a domestic audience the illegality of aggression.

Another consideration in this regard is the principle of complementarity, which also applies to the crime of aggression. A State Party that does not implement the definition essentially waives its primary right to deal with aggression cases within its own jurisdiction in the future and expresses a preference for international prosecution of such cases. This may not be in the interest of that State, as it may prefer to take it upon itself to prosecute its own nationals for having committed a crime of aggression rather than leaving the matter to the Court.

#### **DOMESTIC CRIMINALIZATION OF AGGRESSION BY FOREIGN LEADERS:**

Depending on the jurisdictional regime chosen by the implementing State, its domestic laws may criminalize aggression by foreign leaders, in particular when the act of aggression was committed against the prosecuting State (which could assert its own territorial jurisdiction). The implementing State should however bear in mind that the leadership clause of the crime of aggression will result in a very low number of potential suspects, and that certain immunities may apply (see below). Such an assertion of jurisdiction over foreign nationals could therefore turn out to be difficult to implement in a concrete case. States which limit jurisdiction solely to their own nationals may well avoid significant cross-border political and legal complexities related to prosecutions of foreign nationals.

## 4.2. OPTIONS FOR IMPLEMENTING THE DEFINITION

When implementing the Kampala definition, some States may wish to make some adjustments in order to address domestic legal requirements. It is however recommended to use the exact wording agreed upon in Kampala («*verbatim implementation*»), rather than using a narrower or a broader definition. Some legal systems would allow for a simple reference in the domestic law to the Rome Statute definition, thereby incorporating the Kampala definition by reference. The early State practice post-Kampala tends toward an almost *verbatim implementation* of Article 8 *bis*.

#### **NARROWER VS. BROADER IMPLEMENTATION:**

States should bear in mind the principle of complementarity, which will apply once the Court's jurisdiction over the crime of aggression is activated. If substantial elements of the definition are missing in a domestic criminal code, a case may be admissible for investigation and prosecution by the ICC. The State in question could thus lose its position as the primary forum for prosecution if the domestic definition is too narrow. A broader

definition would not appear to pose a legal problem, to the extent that it covers only nationals of the prosecuting State. However, attempts to prosecute non-nationals for acts beyond the Kampala definition of aggression may result in lack of cooperation from other States, and may be seen as lacking a basis in customary international law.

#### **INDIVIDUAL CONDUCT:**

Criminal responsibility for the crime of aggression arises out of the participation of an individual in an act of aggression by a State. The individual's contribution to that act, i.e. the individual's conduct, is defined in Article 8 *bis* as the «planning, preparation, initiation or execution» of an act of aggression. These conduct words have to be read in conjunction with the general part of the Rome Statute («Part 3: General Principles of Criminal Law»), in particular in conjunction with the forms of participation reflected in Article 25(3). When implementing the definition, States may be able to copy the conduct words «planning, preparation, initiation or execution» into their domestic criminal code, or they may have to choose a different description of the individual's contribution that better fits with their respective general part of the criminal code. States should also ensure that the mental element («knowledge and intent») of the crime of aggression is appropriately reflected in domestic law.

#### **THE LEADERSHIP CLAUSE:**

Under the Rome Statute, only «leaders» can be prosecuted for the crime of aggression, as defined in Article 8 *bis* as well as in Article 25(3 *bis*). The leadership requirement is a central feature of the definition and extends even to secondary perpetrators, such as those who may be aiding and abetting in the commission of the crime. It highlights the nature of the crime, and implies that it is not up to the individual soldier to determine whether the State's use of force is legal or not. Nevertheless, States can choose whether to implement the same type of leadership requirement, or whether to criminalize the conduct more broadly, at least regarding its own nationals. For example, States may consider it appropriate, in dealing with their own nationals, to criminalize the conduct of non-leaders who are aiding and abetting the crime. In fact, most States that criminalized aggression prior to Kampala did so without any leadership requirement. It would be sensible to expect that secondary perpetrators would face less severe penalties than primary perpetrators.

#### **THE STATE ACT OF AGGRESSION:**

The simplest and most uniform manner is to incorporate into domestic law the definition of the State act contained in Article 8 *bis*, and this approach is recommended.

From a strictly legal perspective, there is, however, room for different approaches. Some States may wish to use (or keep using) the term «war of aggression,» rather than «act of aggression» as defined in Article 8 *bis*, given the historic precedents in the Nuremberg Charter and existing domestic legislation prior to Kampala. Whether and to what extent such a national definition would be construed by the national judiciary concerned in a narrower manner than the State component in Article 8 *bis*, would remain to be seen. In this context, it is noteworthy that some States, which previously criminalized only a «war of aggression,» expanded their definition post Kampala.

Some States may wish not to include the reference to GA Resolution 3314 contained in Article 8 *bis* (2), as their legislative standards may prohibit them from referring to external documents in the definition of crimes. Similarly, based on domestic requirements regarding the principle of legality, some States may want to incorporate the list of acts contained in Article 8 *bis* (2) in such a manner as to ensure that it is read as an exhaustive list, rather than an exemplary list.

## 5. BASES FOR DOMESTIC JURISDICTION

As discussed above, when implementing the definition of the crime of aggression, States will have to decide under what circumstances they wish to establish jurisdiction. The Rome Statute does not contain any criteria for domestic jurisdiction. Article 17 simply instructs the Court to defer to a State which «has jurisdiction» over the crimes in the Statute. The question is thus whether general law suggests some limitations on domestic legislation with regard to applicable jurisdictional bases. Overall, it appears that States have the discretion to choose which jurisdictional base they would like to use for domestic jurisdiction over the crime of aggression.

### 5.1. ACTIVE PERSONALITY PRINCIPLE

Criminalizing aggression committed by the State's own citizens does not raise a problem under international law and relatively strong policy reasons support the decision of States to avail themselves of this jurisdiction. It also appears that all countries that currently criminalize aggression domestically extend such jurisdiction at least over their own citizens. These citizens are usually the leaders of the State and usually act on the territory of their State; hence the active personality principle largely overlaps with the territoriality principle.

### 5.2. TERRITORIALITY PRINCIPLE

The territoriality principle is a longstanding and well-accepted basis of jurisdiction. In some legal systems, it is the only legal basis for the exercise of criminal jurisdiction. It can serve as a basis to establish jurisdiction regarding aggression committed against a State's territory (i.e. victim State jurisdiction), since the crime or its consequences typically occur on the territory of the victim State. It can also serve as a basis to establish aggressor State jurisdiction, in addition to the active personality principle mentioned above. All States that criminalize aggression domestically include jurisdiction regarding aggression committed against their territory.

Note however that the use of the territoriality principle in combination with a substantive definition of the crime of aggression that exceeds the boundaries of customary international law may lead to important legal questions regarding the exercise of domestic jurisdiction over foreign officials (which are further alluded to below, 6.2).

### 5.3. UNIVERSALITY PRINCIPLE

Some States may wish to exercise domestic jurisdiction over the crime of aggression even when there is no established personal or territorial jurisdictional link (i.e. the State is neither itself the victim nor the aggressor). Some States have included the universality principle as a jurisdictional base for the crime of aggression, sometimes in an effort to treat all four Rome Statute crimes equally.

Universal jurisdiction is exercised in its purest form when the State has no personal or territorial nexus related to the alleged criminal acts in question. Some States require at least the presence of the alleged perpetrator on their territory before they assert such universal jurisdiction. Some States only exercise universal jurisdiction if the States with the closer jurisdictional nexus neglect to initiate proceedings.

Thus far, the question as to whether States may, as a matter of international law, exercise universal jurisdiction over the crime of aggression has not been judicially tested. States wishing to do so should certainly not use a substantive definition of the crime that exceeds the boundaries of Article 8 *bis*. In light of the more recent practice on universal jurisdiction, it may be advisable to avoid universal jurisdiction, or to exercise universal jurisdiction only on a subsidiary basis vis-à-vis States with a direct jurisdictional link. States may also wish to consider the wisdom of the same jurisdictional restraint vis-à-vis the ICC, which is better placed than a single State to exercise the *jus puniendi* of the international community over a crime of aggression.

## 6. BARS FOR EXERCISING DOMESTIC JURISDICTION

While States enjoy wide discretion in applying the appropriate bases for domestic jurisdiction, certain procedural bars may have to be taken into account when actually exercising such jurisdiction.

### 6.1. IMMUNITY *RATIONE PERSONAE* OF FOREIGN OFFICIALS

States that wish to exercise domestic jurisdiction will have to consider applicable immunities of foreign officials, as confirmed by the ICJ's decision in *DRC v. Belgium* («Arrest Warrant case,» also referred to as «Yerodia»). Accordingly, Heads of State, Heads of Government, Foreign Ministers and potentially some other high-ranking officials, including, perhaps, the Defense Minister, would enjoy immunity from arrest under international law, provided they are still in office. Given the leadership nature of the crime of aggression, such immunities severely limit the prospect of domestic adjudication of foreign officials. Some categories of persons that could fall under the leadership clause would however not enjoy such personal immunity, such as generals or industrialists who would satisfy the stringent criteria of Article 8 *bis*.



Note however that the question of immunities *ratione personae* of foreign officials also arises in the domestic implementation of the other three core crimes; consequently States could simply apply the same rules to the crime of aggression.

## 6.2. IMMUNITY *RATIONE MATERIAE* OF FOREIGN OFFICIALS

The legal picture is more complex with respect to the question of an immunity *ratione materiae* of (present and former) organs of a foreign aggressor State in national criminal proceedings. The ICJ has not decided the question with respect to crimes under international law in general in *DRC v. Belgium*, and this is currently pending before the International Law Commission. In international legal scholarship, there is a widespread and powerful view that the immunity *ratione materiae* suffers from an exception in cases of crimes under international law.

In the specific context of the crime of aggression, some have argued that the functional State immunity (*par in parem imperium non habet*) would constitute a bar to proceedings because a domestic court would be precluded from determining that another State has committed aggression. The International Law Commission has pronounced itself in that direction in the commentary to the 1996 Draft Code of Crimes against the Peace and Security of Mankind.<sup>2</sup> This position is, however, open to argument and has been criticized accordingly. Note in particular that the Nuremberg Judgment has stated that the act of State doctrine cannot be applied to crimes under international law, including the crime of waging wars of aggression. Understanding 5 does not contradict this classic statement of the law. It states that «the *amendments* shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State» (emphasis added). This leaves open the question of whether such a right – while not «created» by the amendments themselves – may exist elsewhere in international law, irrespective of the amendments themselves. A number of States have exercised domestic criminal jurisdiction regarding the acts of other States in the aftermath of World War II<sup>3</sup> or have domestic legislation allowing territorial (or even universal) jurisdiction. This appears to confirm that the Nuremberg precedent is confined to the crime of aggression as a crime under customary international law and may thus arguably not apply to the extent that a domestic definition of the crime of aggression goes beyond the ambit of Article 8 *bis*. This, however, can be no more than a tentative legal assessment and a comprehensive coverage of this complex legal issue surpasses the ambit of this handbook.

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2. Report of the International Law Commission on the work of its 48th session, UN Doc. A/51/10 (1996), 30.

3. China against Japanese Generals, notably in the case of Takashi Sakai; Poland in the Greiser case; the USSR in numerous cases against German generals. Practice is thin since then.

# 7. ANNEXES

## 7.1. RESOLUTION RC/RES.6<sup>1</sup>

*Adopted at the 13th plenary meeting, on 11 June 2010, by consensus*

### **RC/RES.6 THE CRIME OF AGGRESSION**

*The Review Conference,*

*Recalling* paragraph 1 of article 12 of the Rome Statute,

*Recalling* paragraph 2 of article 5 of the Rome Statute,

*Recalling* also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

*Recalling* further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

*Taking note* of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

*Resolved* to activate the Court's jurisdiction over the crime of aggression as early as possible,

1. *Decides* to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: «the Statute») the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and *notes* that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance;

2. *Also decides* to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;

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<sup>1</sup> See Depository Notification C.N.651.2010.Treaties-8, dated 29 November 2010, available at <http://treaties.un.org>.

3. *Also decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in annex III of the present resolution;
4. *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;
5. *Calls upon* all States Parties to ratify or accept the amendments contained in annex I.

**ANNEX I**  
**AMENDMENTS TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT**  
**ON THE CRIME OF AGGRESSION**

1. *Article 5, paragraph 2, of the Statute is deleted.*
2. *The following text is inserted after article 8 of the Statute:*

**ARTICLE 8 BIS**  
**CRIME OF AGGRESSION**

1. For the purpose of this Statute, «crime of aggression» means 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.

2. For the purpose of paragraph 1, «act of aggression» means the use of armed force 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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

3. *The following text is inserted after article 15 of the Statute:*

**ARTICLE 15 BIS**  
**EXERCISE OF JURISDICTION OVER THE CRIME OF AGGRESSION**  
**(STATE REFERRAL, *PROPRIO MOTU*)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General

of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

*4. The following text is inserted after article 15 bis of the Statute:*

**ARTICLE 15 TER**  
**EXERCISE OF JURISDICTION OVER THE CRIME OF AGGRESSION**  
**(SECURITY COUNCIL REFERRAL)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

5. *The following text is inserted after article 25, paragraph 3, of the Statute:*

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

6. *The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:*

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

7. *The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court.

## **ANNEX II AMENDMENTS TO THE ELEMENTS OF CRIMES**

### **ARTICLE 8 *BIS* CRIME OF AGGRESSION**

#### **INTRODUCTION**

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term «manifest» is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the «manifest» nature of the violation of the Charter of the United Nations.

#### **ELEMENTS**

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person<sup>1</sup> in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

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1. With respect to an act of aggression, more than one person may be in a position that meets these criteria.

3. The act of aggression – the use of armed force 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 – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

### **ANNEX III**

#### **UNDERSTANDINGS REGARDING THE AMENDMENTS TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ON THE CRIME OF AGGRESSION**

##### **REFERRALS BY THE SECURITY COUNCIL**

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

##### **JURISDICTION *RATIONE TEMPORIS***

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

##### **DOMESTIC JURISDICTION OVER THE CRIME OF AGGRESSION**

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

#### **OTHER UNDERSTANDINGS**

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a «manifest» determination. No one component can be significant enough to satisfy the manifest standard by itself.

## 7.2. UN GA RESOLUTION 3314 (XXIX) OF 14 DECEMBER 1974

*The General Assembly,*

*Having considered* the report of the Special Committee on the Question of Defining Aggression, established pursuant to its resolution 2330(XXII) of 18 December 1967, covering the work of its seventh session held from 11 March to 12 April 1974, including the draft Definition of Aggression adopted by the Special Committee by consensus and recommended for adoption by the General Assembly,<sup>1</sup>

*Deeply convinced* that the adoption of the Definition of Aggression would contribute to the strengthening of international peace and security,

1. *Approves* the Definition of Aggression, the text of which is annexed to the present resolution;

2. *Expresses its appreciation* to the Special Committee on the Question of Defining Aggression for its work which resulted in the elaboration of the Definition of Aggression;

3. *Calls upon* all States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations;<sup>2</sup>

4. *Calls the attention* of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression.

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1. Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr. 1).

2. Resolution 2625 (XXV), annex.



2319th plenary meeting  
14 December 1974

**ANNEX**  
**DEFINITION OF AGGRESSION**

*The General Assembly,*

*Basing itself* on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,

*Recalling* that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

*Recalling also* the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice,

*Bearing in mind* that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations,

*Considering also* that, since aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences, aggression should be defined at the present stage,

*Reaffirming* the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity,

*Reaffirming also* that the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof,

*Reaffirming also* the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,

*Convinced* that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and

the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim,

*Believing* that, although the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, it is nevertheless desirable to formulate basic principles as guidance for such determination,

Adopts the following Definition of Aggression:<sup>3</sup>

#### **ARTICLE 1**

Aggression is the use of armed force 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, as set out in this Definition.

Explanatory note: In this Definition the term «State»:

- (a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;
- (b) Includes the concept of a «group of States» where appropriate.

#### **ARTICLE 2**

The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

#### **ARTICLE 3**

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

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3. Explanatory notes on articles 3 and 5 are to be found in paragraph 20 of the Report of the Special Committee on the Question of Defining Aggression [Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr. 1)]. Statements on the Definition are contained in paragraphs 9 and 10 of the report of the Sixth Committee (A/9890).

- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

#### **ARTICLE 4**

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

#### **ARTICLE 5**

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.
2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.
3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

#### **ARTICLE 6**

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

#### **ARTICLE 7**

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

#### **ARTICLE 8**

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

## 7.3. IMPLEMENTING LEGISLATION – LUXEMBOURG

**NO 62302**

CHAMBRE DES DEPUTES

Session ordinaire 2011 – 2012

### **PROJET DE LOI**

portant adaptation du droit interne aux dispositions du Statut de Rome de la Cour pénale internationale, approuvé par une loi du 14 août 2000 portant approbation du Statut de Rome de la Cour pénale internationale, fait à Rome, le 17 juillet 1998

\* \* \*

**DEPECHE DU PRESIDENT DE LA CHAMBRE DES DEPUTES AU PRESIDENT DU CONSEIL D'ETAT**  
(13.10.2011)

### **B. ARTICLE 136QUINQUIES**

La Commission juridique propose de supprimer le libellé initial de l'article 136quinquies et de le réécrire de la manière suivante:

*«Art. 136quinquies. (1) Est qualifié de crime d'agression la planification, la préparation, le lancement ou l'exécution par une personne effectivement en mesure de contrôler ou de diriger l'action politique ou militaire d'un Etat, d'un acte d'agression qui, par sa nature, sa gravité et son ampleur, constitue une violation manifeste de la Charte des Nations Unies.*

*Aux fins de l'alinéa 1er, on entend par «acte d'agression» l'emploi par un Etat de la force armée contre la souveraineté, l'intégrité territoriale ou l'indépendance politique d'un autre Etat, ou de toute autre manière incompatible avec la Charte des Nations Unies.*

*Il s'agit des actes suivants:*

- a) l'invasion ou l'attaque par les forces armées d'un Etat du territoire d'un autre Etat ou l'occupation militaire, même temporaire, résultant d'une telle invasion ou d'une telle attaque, ou l'annexion par la force de la totalité ou d'une partie du territoire d'un autre Etat;*
- b) le bombardement par les forces armées d'un Etat du territoire d'un autre Etat, ou l'utilisation d'une arme quelconque par un Etat contre le territoire d'un autre Etat;*
- c) le blocus des ports ou des côtes d'un Etat par les forces armées d'un autre Etat;*
- d) l'attaque par les forces armées d'un Etat des forces terrestres, maritimes ou aériennes, ou des flottes aériennes et maritimes d'un autre Etat;*
- e) l'emploi des forces armées d'un Etat qui se trouvent dans le territoire d'un autre Etat avec l'agrément de celui-ci en contravention avec les conditions fixées dans l'accord pertinent, ou la prolongation de la présence de ces forces sur ce territoire après l'échéance de l'accord pertinent;*
- f) le fait pour un Etat de permettre que son territoire, qu'il a mis à la disposition d'un autre Etat, serve à la commission par cet autre Etat d'un acte d'agression contre un Etat tiers;*

*g) l'envoi par un Etat ou au nom d'un Etat de bandes, groupes, troupes irrégulières ou mercenaires armés qui exécutent contre un autre Etat des actes assimilables à ceux de forces armées d'une gravité égale à celle des actes énumérés ci-dessus, ou qui apportent un concours substantiel à de tels actes.*

*(2) Les infractions énumérées au paragraphe (1) sont punies de la réclusion de dix à quinze ans.»*

## 7.4. IMPLEMENTING LEGISLATION – SLOVENIA

*Disclaimer:*

*The articles listed below are part of the Slovenian Criminal Code (KZ-1), which has been amended (KZ-1B) and entered into force on 15 May 2012. Both documents are official translations; however a compilation of the two documents has not been issued by Slovenia officially. The relevant legislation related to aggression has therefore been compiled by the authors of this handbook.*

Crime of Aggression in the Slovenian Criminal Code (KZ-1) as amended by KZ-1B

### **SENTENCE OF IMPRISONMENT**

#### **ARTICLE 46**

(1) A prison sentence may be imposed for a term not shorter than fifteen days and not longer than one month.

(2) A sentence of life imprisonment may be imposed for criminal offences of genocide, crimes against humanity, war crimes and aggression, and under conditions under point 1 of paragraph 2 of Article 53 of this Penal Code for two or more criminal offences under paragraph 5 of Article 108, Article 116, Article 352, paragraph 2 of Article 360, paragraph 4 of Article 371, and paragraph 3 of Article 373.

(3) In prescribing a prison sentence for a term of not more than two years, the statute shall not prescribe the minimum term for which sentence may be imposed.

(4) A prison sentence shall be determined in full years and months, unless its term does not exceed a period of six months, in which case it may be determined in full days.

### **AGGRESSION**

#### **ARTICLE 103**

(1) An official or other person in a position effectively to exercise control over or to direct the political or military action of the state, who plans, prepares, initiates or executes an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations, shall be sentenced to at least fifteen years in prison.

(2) An act of aggression means the use of armed force against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent

with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression:

- 1) invasion of or an armed attack on the territory, sea, aircrafts, ports or vessels of another state, or any military occupation, temporary or permanent, or any annexation by the use of force of the territory of another state or part thereof;
- 2) bombardment of or the use of any weapons against the territory of another state;
- 3) blockade of the ports or coasts of another state;
- 4) the use of armed forces of one state which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- 5) the action of the Republic of Slovenia in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state;
- 6) the sending of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force of such gravity as to amount to the acts listed above.

#### **ASSOCIATION AND INCITEMENT TO GENOCIDE, CRIMES AGAINST HUMANITY OR AGGRESSION**

##### **ARTICLE 105**

(1) Whoever establishes a criminal organisation to commit criminal offences under Articles 100 to 103 of this Penal Code shall be sentenced with imprisonment between one and ten years.

(2) Any person who becomes a member of the organisation referred to in the previous paragraph shall be sentenced with imprisonment between six months and five years.

(3) The perpetrator of the criminal offence under paragraphs 1 or 2 of this Article, who prevents the committing of criminal offences specified in paragraph 1 or declared the offence in due time, shall be sentenced with imprisonment of up to three years, or the sentence may also be remitted.

(4) Whoever incites or instigates to directly commit the criminal offences under Articles 100 to 103 of this Penal Code shall be sentenced with imprisonment between six months and five years.

#### **PUBLIC INCITEMENT TO HATRED, VIOLENCE OR INTOLERANCE**

##### **ARTICLE 297**

(1) Whoever publicly provokes or stirs up hatred, violence or intolerance in respect of nationality, race, religion, ethnicity, gender, skin colour, origin, financial situation, education, social position, political or other beliefs, disability, sexual orientation, or any other personal circumstance, and commits the offence in a manner that can jeopardise or disturb public law and order, or uses force or threat, verbal abuse or insult shall be sentenced to up to two years in prison.

(2) The same sentence shall be imposed on a person who, in the manner referred to in the preceding paragraph, publicly disseminates ideas on the supremacy of one race over another, or provides aid in any manner for racist activity or denies, diminishes the significance of, approves, justifies, makes fun of, or advocates genocide, holocaust, crimes against humanity, war crime, aggression, or other criminal offences against humanity, as they are defined in the legal system of the Republic of Slovenia.

(3) If the offence referred to in the preceding paragraphs has been committed by publication in mass media or on the websites, the editor or the person acting as the editor shall be imposed the sentence referred to in paragraph 1 or 2 of this Article, except if this was a live broadcast of a show that he could not prevent or a publication on websites that enable users to publish content in real time or without prior review.

(4) If the offence under paragraphs 1 or 2 of this Article has been committed by coercion, maltreatment, endangering of security, desecration of ethnic national, ethnic or religious symbols, damaging the movable property of another, desecration of monuments or memorial stones or graves, the perpetrator shall be punished by imprisonment of up to three years.

(5) If the acts under paragraphs 1 or 2 of this Article have been committed by an official by abusing their official position or rights, he shall be punished by imprisonment of up to five years.

(6) Material and objects bearing messages from paragraphs 1 and 2 of this Article, and all devices intended for their manufacture, multiplication and distribution, shall be confiscated, or their use disabled in an appropriate manner.

## 7.5. IMPLEMENTING LEGISLATION – CROATIA

Criminal Code passed by Croatian Parliament at its session on 21 October 2011. Entry into force on 1 January 2013.

### **CRIME OF AGGRESSION**

#### **ARTICLE 89**

(1) Whoever, being in a position effectively to exercise control over or to direct the political or military action of a state, uses the armed forces of one 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 executes an act of aggression which, by its character, gravity and scale, constitutes a violation of the Charter of the United Nations shall be sentenced to imprisonment for a term of at least five years or to long-term imprisonment.

(2) Whoever takes part in the operations of the armed forces referred to in paragraph 1 of this Article shall be sentenced to imprisonment for a term of between three to fifteen years.

(3) Whoever directly and publicly incites to the crime of aggression shall be sentenced to imprisonment for a term of between one and ten years.

(4) Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression referred to in paragraph 1 of this Article:

1. The invasion or attack by the armed forces of a state on the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another state or part thereof;
2. bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state;
3. the blockade of the ports or coasts of a state by the armed forces of another state;
4. an attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state;
5. the use of armed forces of one state which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
6. the action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state; or
7. the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein.

## 7.6. IMPLEMENTING LEGISLATION – DRAFTING ASSISTANCE BY PGA

### **PARLIAMENTARIANS FOR GLOBAL ACTION (PGA)**

#### **CAMPAIGN FOR THE EFFECTIVENESS AND UNIVERSALITY OF THE ROME STATUTE SYSTEM**

#### **LEGISLATIVE SAMPLE FOR MEMBERS OF PARLIAMENTS TO «DOMESTICATE» THE CRIME OF AGGRESSION**

*(adopted by the Kampala Review Conference of the Rome Statute of the ICC, 11 June 2010)*

#### **CRIME OF AGGRESSION**

(1) Every person *in a position effectively to exercise control over or to direct the political or military action [of a State]* who, in ... (name of country) or elsewhere, commits a crime of aggression shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to the penalty specified in subsection (3).

(2) For the purpose of this section, [in conformity with article 8 bis of the Rome Statute of the ICC,] «*crime of aggression*» means 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 the following prohibited acts relating to the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations regardless of a declaration of war.*



*a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;*

*b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;*

*c) The blockade of the ports or coasts of a State by the armed forces of another State;*

*d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;*

*e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;*

*f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;*

*g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.*

(3) The penalty for the crime referred to in subsection (1) shall—

(a) if the crime involves the wilful killing of at least one protected-person under international humanitarian law, be [the same as the penalty for murder prescribed by the law of ... (name of country)] [life imprisonment]; and

(b) in any other case, be imprisonment for a term not exceeding 30 years [or a term of life imprisonment] when justified by the gravity of the conduct and the individual circumstances of the convicted person.

(4) Lawful use of armed force

(a) Nothing in this Section shall prevent the lawful use of armed force by the State of (... name of country) and other States in the exercise of the inherent right of individual or collective self-defence of any Member of the United Nations or if the use of armed force has been authorised by the United Nations Security Council under Chapter VII of the UN Charter.

(b) No person who directs political or military action by (... name of country) or other States in accordance with Chapter VII or article 51 of the Charter of the United Nations is liable for the crime of aggression.

#### **SCOPE OF DOMESTIC JURISDICTION OVER THE CRIME OF AGGRESSION (TERRITORIAL OR ACTIVE PERSONALITY JURISDICTION)**

Where an act constituting an offence under section [7 bis] is committed by any person in or outside the territory of ... (name of country), proceedings may be instituted against that person for that offence in ... (name of country) *if he or she is in a position effectively to exercise control over or to direct the political or military action of ... (name of country)* or if the prohibited acts listed in section 7 bis(2)(a) to (g) are carried out in the territories of ... (name of country).

#### **BRIEF COMMENTARY**

For a clear distinction between individual responsibility and State responsibility for the same incriminated conduct with respect to all core crimes under international criminal law, including aggression, the commentary to article 58 of the *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, International Law Commission (ILC) (Cf. UN doc. A/56/10, 2001, available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)), at its subsection 3, reads as follows:

«(3) Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.[839] The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.[840] Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them. The former principle is reflected, for example, in article 25, paragraph 4, of the Rome Statute of the International Criminal Court, which provides that: «[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.» The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.[841]»

National jurisdictions shall apply the above criteria of distinction and confine their fact-finding to the complex area of individual criminal responsibility.

This principle of distinction between individual criminal responsibility and State responsibility is one of the main legacies of the Nuremberg Trial, the judgement of which included the famous obiter dictum:

«Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.»  
Cf. Nuremberg Trial's Judgment, 30 September 1946 (Vol. XXII, p. 466)

On a purely logical plain, there is no need for a national judge to call the «act of State» an act of aggression if all the elements of the crime of aggression can be proven, including the utilization of the state-apparatus by a leader to commit aggression. This is analogous to the practise of national jurisdictions (and of the ICC itself) when an «act of state» of genocide would be the consequence of a crime of genocide allegedly perpetrated by an individual who uses the State-machinery (e.g. the Omar Al Bashir case). In both situations, the «act of state» is the consequence of the criminal behaviour of the individual, and not vice versa.

## 7.7. RELEVANT WEBLINKS

Overview of relevant ICC events and conferences on aggression  
<http://www.icc-cpi.int/Menus/ASP/Crime+of+Aggression/>

Review Conference Website  
<http://www.icc-cpi.int/Menus/ASP/ReviewConference>

Coalition for the International Criminal Court (CICC)  
<http://www.iccnw.org/?mod=review>

Parliamentarians for Global Action (PGA)  
<http://www.pgaction.org/programmes/ilhr/overview.html>

Ben Ferencz online  
<http://www.benferencz.org>

Blog by William Schabas  
<http://iccreviewconference.blogspot.com/>

Blog by EJIL – Talk  
<http://www.ejiltalk.org/the-aggression-negotiations-at-the-icc-review-conference/>

Blog IntLawGrrls – aggression series  
<http://www.intlawgrrls.com/search/label/Crime%20of%20aggression%20series>

Blog Justice in Conflict  
<http://justiceinconflict.org/category/crime-of-aggression/>

## 7.8. RECENT LITERATURE ON THE CRIME OF AGGRESSION

(SINCE JUNE 2010)

### BOOKS

S. Barriga and C. Kreß, *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012).

Y. Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press, 2011).

### CHAPTERS IN EDITED BOOKS

F. Anggadi, G. French, and J. Potter, «Negotiating the Elements of the Crime of Aggression,» in S. Barriga and C. Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 58 – 80.

S. Barriga, «Negotiating the Amendments on the Crime of Aggression,» in S. Barriga and C. Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 3 – 57.

C. Kreß, S. Barriga, L. Grover, and L. v. Holtzendorff, «Negotiating the Understandings on the Crime of Aggression,» in S. Barriga and C. Kreß (eds.), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012), 81 – 97.

### JOURNAL ARTICLES

K. Ambos, «The Crime of Aggression after Kampala,» *German Yearbook of International Law*, 53 (2010), 463 – 509.  
[http://www.department-ambos.uni-goettingen.de/index.php/component/  
option=com\\_docman/Itemid,133/gid,131/task,cat\\_view](http://www.department-ambos.uni-goettingen.de/index.php/component?option=com_docman/Itemid,133/gid,131/task,cat_view).

S. Barriga and L. Grover, «A Historic Breakthrough on the Crime of Aggression,» *American Journal of International Law*, 105 (2011), 517 – 33.  
[http://www.regierung.li/uploads/media/105\\_AJIL\\_July\\_2011\\_-\\_Barriga-  
Grover\\_-\\_Historic\\_Breakthrough\\_on\\_the\\_Crime\\_of\\_Aggression\\_01.pdf](http://www.regierung.li/uploads/media/105_AJIL_July_2011_-_Barriga-Grover_-_Historic_Breakthrough_on_the_Crime_of_Aggression_01.pdf)

J. F. Bertram-Nothnagel, «A Seed for World Peace Planted in Africa: The Provisions on the Crime of Aggression Adopted at the Kampala Review Conference for the Rome Statute of the International Criminal Court,» *African Legal Aid Quarterly* (April-June 2010), 9 – 27.

N. Blokker and C. Kreß, «A Consensus Agreement on the Crime of Aggression: Impressions from Kampala,» *Leiden Journal of International Law*, 23 (2010), 889 – 95.

L. v. Braun and A. Micus, «Judicial Independence at Risk: Critical Issues Regarding the Crime of Aggression Raised by Selected Human Rights Organizations,» *Journal of International Criminal Justice*, 10 (2012), 111 – 32.

- R. S. Clark, «Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May-11 June 2010,» *Goettingen Journal of International Law*, 2 (2010), 689 – 711.  
[http://internationalcriminallawbook.com/Resources/Kampala%20\(Goettingen\).pdf](http://internationalcriminallawbook.com/Resources/Kampala%20(Goettingen).pdf).
- M. E. O'Connell and M. Niyazmatov, «What is Aggression? Comparing the *Jus ad Bellum* and the ICC,» *Journal of International Criminal Justice*, 10 (2012), 189 – 207.  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2013155](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013155).
- E. Creegan, «Justified Uses of Force and the Crime of Aggression,» *Journal of International Criminal Justice*, 10 (2012), 59 – 82.
- D. M. Ferencz, «The Crime of Aggression: Some Personal Reflections on Kampala,» *Leiden Journal of International Law*, 23 (2010), 905 – 8.
- R. Heinsch, «The Crime of Aggression after Kampala: Success or Burden for the Future?» *Goettingen Journal of International Law*, 2 (2010), 713 – 43.
- K. Heller, «The Uncertain Legal Status of the Aggression Understandings,» *Journal of International Criminal Justice*, 10 (2012), 229 – 48.  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1883351](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1883351).
- H. P. Kaul, «Is It Possible to Prevent or Punish Future Aggressive War-making?» *FICHL Occasional Paper Series*, 1 (2011).  
[http://www.fichl.org/fileadmin/fichl/documents/FICHL\\_OPS/FICHL\\_OPS\\_1\\_Kaul.pdf](http://www.fichl.org/fileadmin/fichl/documents/FICHL_OPS/FICHL_OPS_1_Kaul.pdf).
- C. Kreß and L. von Holtzendorff, «The Kampala Compromise on the Crime of Aggression,» *Journal of International Criminal Justice*, 8 (2010), 1179 – 217.  
<http://jicj.oxfordjournals.org/content/8/5/1179.abstract>.
- R. Manson, «Identifying the Rough Edges of the Kampala Compromise,» *Criminal Law Forum*, 21 (2010), 417 – 43.  
<http://www.bepj.org.uk/wordpress/wp-content/uploads/CLF-2010-Manson-final-ed-by-authorTrack-changes-accepted.pdf>.
- M. Milanovic, «Aggression and Legality: Custom in Kampala,» *Journal of International Criminal Justice*, 10 (2012), 165 – 87.  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1925724](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1925724).
- M. Politi, «The ICC and the Crime of Aggression: A Dream that Came Trough and the Reality Ahead,» *Journal of International Criminal Justice*, 10 (2012), 267 – 88.

- A. Reisinger Coracini, «The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression – at Last ... in Reach ... over Some,» *Goettingen Journal of International Law*, 2 (2010), 745 – 89. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1678420](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1678420).
- F. Rosenfeld, «Individual Civil Responsibility for the Crime of Aggression,» *Journal of International Criminal Justice*, 10 (2012), 249 – 65. <http://jicj.oxfordjournals.org/content/10/1/249.full?keytype=ref&ijkey=8EcPKAu61rIPaUZ>.
- B. v. Schaack, «Negotiating at the Interface between Law and Politics: The Crime of Aggression,» *Columbia Journal of Transnational Law*, 49 (2011) 505 – 601. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1668661](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1668661).
- B. v. Schaack, «*Par in Parem Imperium Non Habet*: Complementarity and the Crime of Aggression,» *Journal of International Criminal Justice*, 10 (2012), 133 – 64. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1875863](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1875863).
- B. v. Schaack, «The Aggression Amendments: Points of Consensus and Dissension,» in American Society of International Law (ed.), *Proceedings of the 105th Annual Meeting (The American Society of International Law, 2012)*, 154 – 7. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1816507](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1816507).
- D. Scheffer, «The Complex Crime of Aggression under the Rome Statute,» *Leiden Journal of International Law*, 23 (2010), 897 – 904.
- K. Schmalenbach, «Das Verbrechen der Aggression vor dem Internationalen Strafgerichtshof: Ein politischer Erfolg mit rechtlichen Untiefen,» *Juristen Zeitung*, 65 (2010), 745 – 52.
- J. Trahan, «A Meaningful Definition of the Crime of Aggression: A Response To Michael Glennon,» *University of Pennsylvania Journal of International Law* 101 (2012), 33. <https://www.law.upenn.edu/live/files/973-trahan33upajintl9072012pdf>.
- J. Trahan, «Is Complementarity The Right Approach For The International Criminal Court's Crime of Aggression? Considering the Problem of 'Overzealous' National Court Prosecutions,» *Cornell University Journal of International Law* (2012) [forthcoming].
- J. Trahan, «The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference,» *International Criminal Law Review*, 11 (2011), 49 – 104. <http://www2.americanbar.org/calendar/section-of-international-law-2011-spring-meeting/Pages/Friday.aspx>.

- T. Weigend, “‘In general a principle of justice’: The Debate on the ‘Crime against Peace’ in the Wake of the Nuremberg Judgement,» *Journal of International Criminal Justice*, 10 (2012), 41 – 58.  
<http://jicj.oxfordjournals.org/content/10/1/41.abstract>.
- N. Weisbord, «Judging Aggression,» *Columbia Journal of Transnational Law*, 50 (2011), 82 – 168.  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1846916](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1846916).
- C. Wenaweser, «Reaching the Kampala Compromise on Aggression: The Chair’s Perspective,» *Leiden Journal of International Law*, 23 (2010), 883–87.
- A. G. Wills, «The Crime of Aggression and the Resort to Force against Entities *in Statu Nascendi*,» *Journal of International Criminal Justice*, 10 (2012), 83 – 110.  
<http://jicj.oxfordjournals.org/content/10/1/83.abstract>.
- A. Zimmermann, «Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties,» *Journal of International Criminal Justice*, 10 (2012), 209 – 27.  
<http://jicj.oxfordjournals.org/content/10/1/209.abstract>.





PART II  
**WAR CRIMES**  
(AMENDMENT TO ARTICLE 8)

# 1. THE ARTICLE 8 AMENDMENT: HISTORICAL BACKGROUND

At the 2010 Review Conference, States Parties to the Rome Statute amended Article 8 of the Rome Statute by consensus (Resolution RC/Res.5).<sup>1</sup> The amendment criminalizes the employment of poison or poisoned weapons; the employment of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and the employment of bullets which expand or flatten easily in the human body (also known as dum-dum bullets) during times of *non-international armed conflict*. Already under the 1998 version of the Rome Statute, the use of these types of weapons constituted a war crime during times of *international* armed conflict. The 2010 amendment thus took a step to harmonize the law applicable to both international and non-international armed conflicts, in the sense that the employment of such weapons will come within the jurisdiction of the Court regardless of the character of the conflict.

This is consistent with existing customary international law. The question is thus why the employment of such weapons was not already included in the 1998 version of the Rome Statute. It appears that this was the result of a political compromise, as opposed to States holding the belief that the use of such weapons was not criminal under international law in times of non-international armed conflict. In fact, the weapons provisions relating to non-international armed conflict were dropped altogether.

The determination of a list of weapons the use of which would constitute a war crime in times of international armed conflict already gave rise to much contention during the Rome Conference in 1998, in particular the possible inclusion of weapons of mass destruction (especially nuclear weapons). Debates and negotiations were centered on the question as to which weapons should be included in the list of crimes applicable to international armed conflict, leaving little room for debates on which weapons to include in non-international armed conflict. Finally, the only option left in order to resolve the deadlock, was the deletion of all weapons of mass destruction from the Draft Statute.

The proposal for the amendments was initiated by Belgium, cosponsored by 18 States and also supported by the ICRC. It was adopted by consensus on 10 June 2010, as the first amendment ever to the Rome Statute.

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1. For more information on this amendment, consult La Haye, E., La Rosa, A.-M., «The first amendment to the Rome Statute: Bringing Article 8 of the Rome Statute in line with international law,» in *From Rome to Kampala: The First 2 Amendments to the Rome Statute* (Bruylant, 2012), 68 – 146 (including the Annex).

# 2. RATIFYING AND IMPLEMENTING THE ARTICLE 8 AMENDMENT

## 2.1. WHY RATIFY?

### **PROMOTING THE GOALS OF INTERNATIONAL HUMANITARIAN LAW:**

By ratifying the amendment, States Parties will help bring Article 8 of the Rome Statute in line with customary international law. Ratifying the amendments promotes a central goal of international humanitarian law: the protection of civilians. Poison or poisoned weapons, employing asphyxiating, poisonous or other gases and all analogous liquids, materials or devices, are weapons that are by nature indiscriminate.<sup>2</sup> These weapons may pose a particular threat to civilians. Therefore, their use should also be criminalized during times of non-international armed conflict.

Ratifying the amendments further serves to confirm and reinforce the protection granted by international humanitarian law of restricting means and methods of warfare considered to be of a nature to cause superfluous injury or unnecessary suffering for combatants. This is the case for all three prohibited weapons within the amendments to Article 8(2)(e).

### **CLOSING A LOOPHOLE IN THE ROME STATUTE:**

As mentioned above, the fact that these weapons were not already included in the Rome Statute as prohibited weapons during times of non-international armed conflict, was a by-product of the broader negotiations rather than a deliberate choice. Weapons that are by nature indiscriminate (Rule 71, ICRC Customary International Law Study) and weapons that are of a nature to cause superfluous injury or unnecessary suffering (Rule 70, ICRC Customary International Law Study) are prohibited under customary international law in both international and non-international armed conflict. States that ratify the amendments thus help in closing an important loophole in the Statute. They contribute to the reinforcement of the relevant customary rules.

### **NO ADVERSE CONSEQUENCES FOR LAW ENFORCEMENT AND NO PRACTICAL DIFFICULTY IN IMPLEMENTATION:**

States Parties took great care to ensure that the prohibition of expanding bullets does not negatively affect law enforcement, as is explained in more detail below. From a practical perspective, States are already prohibited from using these weapons in international armed conflict. It is unlikely that States have different sets of weapons for international and non-international armed conflict. Thus, it should not be difficult to refrain from using the already prohibited weapons in times of non-international armed conflict.

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2. In most instances, the effects of poison and gas cannot be limited to combatants or other weapon bearers and these weapons have thus indiscriminate effects. It is possible however to conceive that gas could be used in a closed environment and its effects would therefore be limited to weapon bearers.

## 2.2. WHEN TO RATIFY?

The amendment to Article 8 can be ratified at any time, and there is no reason to wait.

# 3. UNDERSTANDING RESOLUTION RC/RES.5

Below are brief descriptions of the most important aspects of resolution RC/Res.5, by which the amendment was adopted.

## 3.1. PREAMBLE AND OPERATIVE PARAGRAPHS OF RC/RES.5

The preamble of Resolution RC/Res.5 contains a number of substantive statements that may be important for the interpretation and application of the amendments.

Most notably, the second preambular paragraph confirms that States Parties were of the view that the second sentence of Article 121(5) of the Rome Statute would apply to the Article 8 amendments. It is stated that «in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory.» This has important consequences for situations involving two States Parties, for example a national of State Party A committing one of the three new crimes on the territory of State Party B. In such a case, the Court would only be able to exercise its jurisdiction over such a crime where both States Parties have ratified the amendment.<sup>3</sup>

In addition, the paragraph confirms States Parties' «understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute.» If the Court were to share this understanding (which departs from the strict wording of Article 121(5), second sentence), it would not be able to exercise its jurisdiction where such a crime is either committed by a national of a Non-State Party, or on the territory of a Non-State Party.

The seventh preambular paragraph confirms that the prohibition does not apply to law enforcement situations (see the explanations regarding the Elements of Crimes below).

The eighth and ninth preambular paragraphs reflect States Parties' belief that the amendment is consistent with existing customary international law. The ninth preambular paragraph specifies further that the use of dum-dum bullets constitutes a crime only «if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets,» thus confirming the understanding that the use of such bullets

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3. Note that Resolution RC/Res.6 on the crime of aggression contains no such statement.

can be justified in certain situations, such as hostage-takings or crowd control. The paragraph should be interpreted in line with Element 3 of the crime (see below), which details the *mens rea* of the crime: «the perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.»

By operational paragraph 1, States Parties adopt the amendments to Article 8 of the Rome Statute, which are contained in Annex I, and state that the amendments enter into force in accordance with Article 121(5) of the Rome Statute. Accordingly, the amendments enter into force for each State Party individually one year after the deposit of the instrument of ratification, in accordance with the first sentence of Article 121(5).

Operational paragraph 2 adopts the Elements of Crimes (see below).

### 3.2. AMENDMENT TO ARTICLE 8

The amendment to article 8 reads as follows:

Add to article 8, paragraph 2 (e), the following:

(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

The amendment reproduces the language already contained in paragraph 2(b) of Article 8 for international armed conflict. The uniformity shows that the exact same rule of customary international law prohibiting such weapons applies in both non-international and international armed conflicts.

#### **POISON OR POISONED WEAPONS:**

The wording of Article 8(2)(b)(xvii) and (e)(xiii) is taken verbatim from Article 23(a) of the 1907 Hague Regulations. This has also been acknowledged by Rule 72 in the Study on Customary International Humanitarian Law («The ICRC Customary Law Study»). Article 70 of the 1863 Lieber Code provides that «the use of poison in any manner be it to poison wells, or food, or arms, is wholly excluded from modern warfare.»

#### **ASPHYXIATING, POISONOUS OR OTHER GASES, AND ALL ANALOGOUS LIQUIDS, MATERIALS, OR DEVICES:**

The wording of Article 8(2)(b)(xviii) and (e)(xiv) is taken verbatim from the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. This Protocol reaffirms, amongst other things, the 1899 Hague Declaration (IV, 2) concerning Asphyxiating Gases. Furthermore, asphyxiating,

poisonous, or other gases (as well as analogous liquids, materials, or devices) fall within the definition of chemical weapons within the 1993 Chemical Weapons Convention. Depending on their nature (living source or not), poisons could fall within either the 1993 Chemical Weapons Convention or the 1972 Biological Weapons Convention. The ICRC has established that the use of both chemical (Rule 74, ICRC Customary Law Study) and biological weapons (Rule 73, ICRC Customary Law Study) is prohibited under customary international law in both non-international and international armed conflict.

**EMPLOYING BULLETS WHICH EXPAND OR FLATTEN EASILY IN THE HUMAN BODY, SUCH AS BULLETS WITH A HARD ENVELOPE WHICH DOES NOT ENTIRELY COVER THE CORE OR IS PIERCED WITH INCISIONS:**

The prohibition of this weapon can be found in the 1899 Hague Declaration concerning Expanding Bullets. The preamble of the Hague Declaration considers that weapons that would «uselessly aggravate the sufferings of disabled men or render their death inevitable» should be prohibited. This principle is also reflected in Article 23(e) of the 1907 Hague Regulation. Under Rule 77 (ICRC Customary Law Study), it is established that the prohibition of such weapons is customary international law under both international and non-international armed conflict.

From the above, it can be seen that the rules under international law prohibiting the aforementioned weapons has attained the status of customary international humanitarian law. Furthermore, there is little debate as regards the fact that their violation entails individual criminal responsibility and thus amounts to a serious violation of international humanitarian law.

### 3.3. ADDITIONS TO THE ELEMENTS OF CRIMES

Resolution RC/Res.5 also included additions to the Elements of Crime, which are taken verbatim from the corresponding elements of crimes regarding international armed conflict. They played a crucial role for the acceptance of the amendments by consensus, as they «help in their interpretation and application» (see the seventh preambular paragraph of Resolution RC/Res.5).

The specific concern was to ensure that the prohibition of expanding bullets does not adversely affect law enforcement, as some law enforcement agents may have to use such bullets in situations such as hostage taking or in situations where there are crowds and there is a need to minimize the risk for innocent bystanders.<sup>4</sup> Elements 4 and 5 for Article 8(2)(e)(xv) require inter alia that the conduct took place in the context of and was associated with an armed conflict not of an international character and that the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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4. The use of these bullets, particularly when confronting an armed person in an urban environment or a crowd of people, can allow for the bullet not to pass through the body of the suspect into another person and would increase the chance that once hit, the subject is rapidly or instantly immobilized and prevented from firing back. For more explanations on the effects of bullets on the human body, see ICRC DVD, *Wound Ballistics: An Introduction for Health, Legal, Forensic, Military and Law Enforcement Professionals*, 29-07-2008 Film Ref. V-F-CR-F-00943, especially Chapters 1-5 and 14.

These Elements of Crimes address the fact that the prohibition to use expanding bullets is not absolute in all situations: they require that the incriminated conduct takes place in the context of and is associated with an armed conflict. In other words, these Elements confirm that Article 8(2)(e)(xv) does not criminalize the use of such bullets in law enforcement situations that are not regulated by international humanitarian law. This follows also from Article 8(2)(f) of the Rome Statute.

Furthermore, Element 3 requires the demonstration that the perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.

## 4. DOMESTIC IMPLEMENTATION AND BASES FOR JURISDICTION

It is recommended that States implement the amendment to Article 8 by incorporating the prohibition of these weapons into their criminal codes, as well as by updating their military manuals, where this has not already been done. In many cases, domestic war crimes legislation will not make a distinction between international and non-international armed conflict, and therefore no changes may be necessary.<sup>5</sup> States Parties that have not yet incorporated the Rome Statute crimes into domestic legislation should do so in a comprehensive manner, and in the process ensure that the Article 8 amendments are fully covered as well as other international humanitarian law incumbent to them. Also, States should seize the occasion of the implementation of the Rome Statute and its amendments to Article 8 to verify to what extent general principles of criminal law fulfill the requirements of international law, at least when dealing with war crimes. In this regard, measures should ensure: non-applicability of statutes of limitation, recognition of modes of liability involving the responsibility of commanders, non-applicability of the defense of obedience to superior, and the non-recognition of amnesties for war criminals.

Finally, this process should also involve an examination of the appropriate basis for domestic jurisdiction, based on the territoriality, personality or universality principles. Crimes such as grave breaches to the Geneva Conventions of 12 August 1949 that have been included in Article 8 of the Rome Statute are subject to universal jurisdiction. State practice has helped in consolidating a customary rule whereby States are entitled to endow their courts with universal jurisdiction over other war crimes. It is worth noting that States that incorporate the war crimes provisions of the Statute in their domestic legislation do not tend to apply different bases of jurisdiction to the various crimes. Instead, they apply the same bases of jurisdiction, including universal jurisdiction, to all of them in a uniform manner.

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5. For more information concerning the implementation of international humanitarian law at domestic level, consult ICRC, *The Domestic Implementation of International Humanitarian Law – A Manual*, 2012, in particular chapters 3 and 7.

# 5. ANNEX: RESOLUTION RC/RES.5

*Adopted at the 12th plenary meeting, on 10 June 2010, by consensus*

## **RC/RES.5<sup>1</sup>**

### **AMENDMENTS TO ARTICLE 8 OF THE ROME STATUTE**

*The Review Conference,*

*Noting* article 123, paragraph 1, of the Rome Statute of the International Criminal Court which requests the Secretary-General of the United Nations to convene a Review Conference to consider any amendments to the Statute seven years after its entry into force,

*Noting* article 121, paragraph 5, of the Statute which states that any amendment to articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and confirming its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute,

*Confirming* that, in light of the provision of article 40, paragraph 5, of the Vienna Convention on the Law of Treaties, States that subsequently become States Parties to the Statute will be allowed to decide whether to accept the amendment contained in this resolution at the time of ratification, acceptance or approval of, or accession to the Statute,

*Noting* article 9 of the Statute on the Elements of Crimes which states that such Elements shall assist the Court in the interpretation and application of the provisions of the crimes within its jurisdiction,

*Taking due account of the fact* that the crimes of employing poison or poisoned weapons; of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and of employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, already fall within the jurisdiction of the Court under article 8, paragraph 2 (b), as serious violations of the laws and customs applicable in international armed conflict,

*Noting* the relevant elements of the crimes within the Elements of Crimes already adopted by the Assembly of States Parties on 9 September 2000,

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<sup>1</sup> See Depository Notification C.N.651.2010.Treaties-6, dated 29 November 2010, available at <http://treaties.un.org>.



*Considering* that the abovementioned relevant elements of the crimes can also help in their interpretation and application in armed conflict not of an international character, in that inter alia they specify that the conduct took place in the context of and was associated with an armed conflict, which consequently confirm the exclusion from the Court's jurisdiction of law enforcement situations,

*Considering* that the crimes referred to in article 8, paragraph 2 (e) (xiii) (employing poison or poisoned weapons) and in article 8, paragraph 2 (e) (xiv) (asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices) are serious violations of the laws and customs applicable in armed conflict not of an international character, as reflected in customary international law,

*Considering* that the crime referred to in article 8, paragraph 2 (e) (xv) (employing bullets which expand or flatten easily in the human body), is also a serious violation of the laws and customs applicable in armed conflict not of an international character, and understanding that the crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law,

1. *Decides* to adopt the amendment to article 8, paragraph 2 (e), of the Rome Statute of the International Criminal Court contained in annex I to the present resolution, which is subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5, of the Statute;

2. *Decides* to adopt the relevant elements to be added to the Elements of Crimes, as contained in annex II to the present resolution.

#### **ANNEX I**

##### **AMENDMENT TO ARTICLE 8**

*Add to article 8, paragraph 2 (e), the following:*

«(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.»

#### **ANNEX II**

##### **ELEMENTS OF CRIMES**

*Add the following elements to the Elements of Crimes:*

**ARTICLE 8 (2)(E)(XIII)**

**WAR CRIME OF EMPLOYING POISON OR POISONED WEAPONS  
ELEMENTS**

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**ARTICLE 8 (2)(E)(XIV)**

**WAR CRIME OF EMPLOYING PROHIBITED GASES, LIQUIDS, MATERIALS OR DEVICES  
ELEMENTS**

1. The perpetrator employed a gas or other analogous substance or device.
2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.<sup>1</sup>
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

**ARTICLE 8 (2)(E)(XV)**

**WAR CRIME OF EMPLOYING PROHIBITED BULLETS  
ELEMENTS**

1. The perpetrator employed certain bullets.
2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.
3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

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1. Nothing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons.

«To initiate a war of aggression ... is not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.»

Nuremberg Judgment, 1946

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Further information and resources, as well as updates on the ratification and implementation process regarding the crime of aggression can be found at:

[www.crimeofaggression.info](http://www.crimeofaggression.info).

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