

**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*) based on the Commonwealth Model Law to Implement the Rome Statute of the ICC (PGA was invited by the CW Secretariat to produce research and input for the revision of the CW Model Law in 2011) and on provisions included in the draft legislation tabled by Dr. Kennedy Graham, MP (Member of PGA), in the New Zealand Parliament entitled the “International Non-Aggression and Lawful Use of Force Bill 2009”.

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**[...] 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.

**[15 bis] 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.

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