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Ministry of Foreign Affairs and Worship



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LIECHTENSTEIN INSTITUTE  
ON SELF-DETERMINATION  
AT PRINCETON UNIVERSITY



GLOBAL INSTITUTE FOR THE  
PREVENTION OF AGGRESSION

## **Seminar for States Parties to the Rome Statute of the ICC on the Activation of the Court's Jurisdiction over the Crime of Aggression**

*17 and 18 June 2016, Princeton, New Jersey*

### **Report**

*(prepared by the organizers)*

### **I. Purpose of the Meeting and Background**

On 17 and 18 June 2016, State Party representatives, academics and representatives of civil society, at the invitation of the Permanent Missions of Argentina, Australia, Brazil, Liechtenstein, Slovenia, Tunisia, and the Global Institute for the Prevention of Aggression (GIPA) and the Liechtenstein Institute on Self-Determination (LISD), met at Princeton University for a comprehensive discussion of the Kampala amendments on the crime of aggression.

The crime of aggression is one of the four core crimes of the Rome Statute. It was included in the Statute in 1998, but was left undefined with the understanding that provisions on definition and exercise of jurisdiction should be adopted by a Review Conference. The 2010 Review Conference in Kampala, Uganda, adopted by consensus a definition of the crime of aggression and provisions on the conditions for the ICC's exercise of jurisdiction. As part of the compromise it was agreed that the Court would exercise jurisdiction over this crime after 30 States Parties have ratified the amendments and the Assembly of States Parties has taken an activation decision, no earlier than 2017.<sup>1</sup>

### **II. Discussions**

#### **Introductory remarks**

Professor Wolfgang Danspeckgruber (LISD) and Ambassador Christian Wenaweser (Liechtenstein) welcomed the participants and expressed their hope that the seminar in Princeton would facilitate the activation decision on the Court's jurisdiction over the crime of aggression. Ambassador Wenaweser

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<sup>1</sup> For more information see the website of the Global Campaign for the Ratification and Implementation of the Kampala Amendments of the Crime of Aggression ( [www.crimeofaggression.info](http://www.crimeofaggression.info))

highlighted that an activation decision could very likely be taken as early as next year – given that 29 of the 30 required ratifications were already in place. Former Nuremberg Prosecutor Benjamin Ferencz, via video message, issued a call on States Parties to continue the work they have been doing on the illegal use of force and reaffirmed his motto of “law not war.”

Ms. Päivi Kaukoranta (Finland) recounted her country’s experience in ratifying the Kampala Amendments, particularly the decision to incorporate the crime of aggression into Finland’s Criminal Code. Although this step was legally not required under the Kampala amendments, Finland found implementation to be a logical starting point, as the primary responsibility to prosecute crimes of aggression under the Statute rested with States, in accordance with the principle of complementarity. Ms. Kaukoranta reassured States wishing to ratify that the ratification procedure was manageable, even with the implementing legislation, and reminded them that they could build upon experiences of others as well as consult the Ratification and Implementation Handbook.<sup>2</sup>

### **Session 1: Negotiation history of the Amendments**

Ms. Patrícia Galvão Teles (Portugal) recalled that the crime of aggression had always been an integral part of the overall negotiations both before and during the Rome Conference. She recounted the steps taken toward a consensus agreement on the definition of the crime and act of aggression, which was adopted in February 2009 by the Special Working Group on the Crime of Aggression, and thus agreed long before Kampala.

Ms. Fernanda Millicay (Argentina) explained how political momentum for the adoption of the amendments on the crime of aggression was built in the run-up to the Review Conference. She highlighted the supportive role played by several groups, in particular the African Group as well as the Non-Aligned Movement (NAM) during the Review Conference and provided detailed descriptions of the compromises that were made in Kampala. Ms. Millicay reminded States Parties that the Kampala amendments were adopted by consensus.

For further details on the negotiation history, see the Background Note (pp. 2-4) in Annex 2.

### **Session 2: Understanding the definition of a crime of aggression**

The crime of aggression entails both an act of a State as well as individual conduct. Dr. Carrie McDougall (Australia) explained the State act element. She clarified that the definition required not only that a State commit an act of aggression as defined in Article 8 *bis* (2), but also that such an act had to meet

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<sup>2</sup> Handbook on Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC (<http://crimeofaggression.info/documents/1/handbook.pdf>)

the threshold contained in Article 8 *bis* (1): namely that it constitute, by its “character, gravity and scale,” a “manifest” violation of the UN Charter. That threshold was meant to ensure that not every illegal use of force could give rise to individual criminal responsibility, but only the most serious and legally unambiguous cases.

Mr. Noah Weisbord (Florida International University) explained the individual elements required to establish criminal responsibility for a crime of aggression. Article 8 *bis* (1) described the actions of the defendant as the “planning, preparation, initiation or execution” of a State act of aggression. Furthermore, the defendant had to be a leader, i.e. a “person in a position to effectively exercise control over or to direct the political or military action of a State.” The leadership requirement extended even to secondary perpetrators, such as those who may be aiding and abetting the commission of the crime (Art. 25 (3 *bis*)). Mr. Weisbord further explained how the “Elements of Crimes” adopted in Kampala helped in establishing whether the crime was committed with the requisite intent and knowledge.

During the discussion, the panelists noted that some of the criticisms voiced with respect to the Kampala amendments could be addressed through the definition’s strict threshold clause. Participants also discussed the potential impact of the amendments on “humanitarian interventions” (e.g. Kosovo 1998). It was noted that most States considered such interventions, without authorization by the Security Council, to be illegal under the UN Charter, while some considered them to be justifiable or legitimate. The panelist took the view that a genuine humanitarian intervention would not constitute a “manifest” violation of the UN Charter, particularly in light of the criteria of “character” and “gravity”. Ultimately, the issue would have to be decided by the judges, which would further enhance legal certainty.

For further details on the definition of the crime of aggression, including related criticism, see the Background Note (pp. 4-6) in Annex 2.

### **Session 3: Understanding the jurisdictional regime**

Mr. Stefan Barriga (Liechtenstein) explained the jurisdictional regime of the Kampala amendments. He emphasized that the amendments were legally already in effect, as they had entered into force for those States Parties that had ratified them more than one year ago (Art. 121(5)). However, the Court’s jurisdiction had yet to be “activated”, as it requires 30 ratifications as well as an activation decision. Once activated, the Court could consider situations involving (inter alia) crimes of aggression based on the existing three triggers. In case of a Security Council referral (Art. 15 *ter*), the Court could investigate crimes of aggression without any further conditions attached and without the consent of the States concerned. A more complex regime applied to State referrals and *proprio motu* proceedings (Art. 15 *bis*), as the amendments established a restricted, consent-based regime: (1) Jurisdiction was excluded regarding acts of aggression committed by or against non-States Parties to the Rome Statute, even where the State concerned would make a declaration under Article 12(3); (2) In case of acts of

aggression committed by one State Party to the Rome Statute against another, the Court would have jurisdiction if at least one of them had ratified the amendments and had thereby provided the jurisdictional link to the Court. Nevertheless, jurisdiction would be excluded if the alleged aggressor State Party had previously declared that it does not accept the Court's jurisdiction (opt-out under Art. 15 *bis* (4)).

During the discussion, some participants took the view that the Court would not be able to exercise jurisdiction with regard to a State Party that had *not* ratified the amendments and also not opted out (cf. Background note, p. 8). Mr. Barriga noted that while not without merit, there were stronger arguments against such an interpretation, and that it would not reflect the nature of the compromise struck in Kampala (an opt-out system). He emphasized that even under the latter view, non-ratifying States Parties would not be “bound” by the amendments; the Court's jurisdiction would stem from the jurisdictional link (nationality or territory) of the State Party that had ratified the amendments. This was not unusual, since the original Rome Statute itself allowed the exercise of jurisdiction over nationals of non-States Parties. Some participants suggested that the issue should be clarified, while others warned against any attempt to reopen the negotiations. In closing, Mr. Barriga noted that in any event, the jurisdictional regime was consent-based. Accordingly, any State Party that took the above-mentioned legal view could achieve that result for itself by informing the Registrar that it does not accept the Court's jurisdiction over the crime of aggression prior to its own ratification or acceptance of the amendments.

For further details on the jurisdictional regime, including related criticism, see the Background Note (pp. 6-7) in Annex 2.

#### **Session 4: Case study of a crime of aggression**

Professor Roger Clark (Rutgers University) presented a hypothetical case study of a crime of aggression, which allowed participants to tackle issues that could arise in a crime of aggression situation.

#### **Session 5: Looking ahead to the activation decision**

Dr. Athaliah Molokomme (Botswana) encouraged all States Parties to ratify and support the activation of the Kampala amendments, in particular those from the African continent. She pointed to Africa's great contribution in creating the Rome Statute as well as to the success of the Kampala Review Conference. She also noted that Botswana was ready to provide assistance to those wishing to ratify.

Ambassador Wenaweser recalled that the Review Conference, as part of its consensual decision, had expressed its resolve “to activate the Court's exercise of jurisdiction over the crime of aggression as early as possible,” and therefore activation was merely a procedural step.

The discussion evolved into a tour-de-table, during which almost all participants took the floor and expressed support for the activation of the amendments through a consensus decision in 2017. Some participants noted the need to clarify some of the issues discussed, including in the context of a formal process, to which other participants responded that the amendments had been adopted by consensus and could not be reopened. It was generally felt that a continuation of the discussion of the activation decision in 2017 would be helpful, both in an informal and more institutionalized fashion. In response to a question whether the Working Group on Amendments (WGA) could serve as a potential forum for such a process, the point was made that the activation decision was not an amendment, and that the WGA with its specific mandate was therefore not the right forum. Preference was expressed for a separate facilitation process in the framework of the work of the ASP. There was general agreement that the activation decision should be taken in 2017 at the regularly scheduled session of the ASP. Some participants preferred a stand-alone resolution containing the activation decision reflecting the importance of the matter, whereas others were open to including the decision in the omnibus resolution. There was agreement that further informal discussions, such as this seminar held in Princeton, would be highly beneficial.

### **Closing remarks**

In closing, Mr. Donald Ferencz (GIPA) and Dr. David Donat Cattin (Parliamentarians for Global Action) underscored the importance of ensuring the timely activation of the ICC's jurisdiction over the crime of aggression. Mr. Ferencz reminded those in attendance that we lived in an age of crimes against humanity, but also one of humanity against crimes.

## **III. Annexes**

### **1.) Programme**

### **2.) Background Note**



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17 and 18 June 2016, Princeton, New Jersey

organized by the Permanent Missions of Argentina, Australia, Brazil, Liechtenstein, Slovenia, Tunisia, the  
Global Institute for the Prevention of Aggression and the Liechtenstein Institute on Self-Determination  
at Princeton University

Friday, 17 June 2016	
8:45 am	<b>Bus: Manhattan to Princeton University</b>
11:00 am – 11:15 am	<b>Arrival Princeton University and coffee</b>
11:15 am – 12:15 pm	<p><b>Welcome and introductory remarks</b> (Burr Hall – corner of Washington Road and Nassau Street)</p> <p><i>Wolfgang Danspeckgruber, Director of the Liechtenstein Institute on Self-Determination</i>  <i>Christian Wenaweser, Permanent Representative of Liechtenstein to the UN</i>  <i>Päivi Kaukoranta, Director-General of Legal Affairs, Ministry of Foreign Affairs of Finland</i>  <i>Video Message: Benjamin Ferencz, former Nuremberg Prosecutor</i></p> <ul style="list-style-type: none"> <li>• Current status of the ratification and activation process</li> <li>• What are the key reasons for activating the Court's jurisdiction over the crime of aggression?</li> <li>• Ratification experience of States</li> </ul>
12:15 pm – 1:30 pm	<p><b>Session 1: Negotiation history of the amendments</b></p> <p><i>Fernanda Millicay, Minister Counsellor, Ministry of Foreign Affairs of Argentina</i>  <i>Patrícia Galvão Teles, Senior Legal Consultant, Ministry of Foreign Affairs of Portugal</i></p> <ul style="list-style-type: none"> <li>• From Rome to Princeton to Kampala: overview of the negotiations</li> </ul>

	<ul style="list-style-type: none"> <li>• What were the main positions of States throughout the process? How was the consensual outcome achieved?</li> <li>• Which compromises were struck and why? What is their effect?</li> </ul>
1:30 pm – 2:45 pm	<b>Lunch break</b> (Burr Hall – corner of Washington Road and Nassau Street)
2:45 pm – 4:00 pm	<b>Session 2: Understanding the definition of a crime of aggression</b>  <i>Carrie McDougall, Legal Adviser, Permanent Mission of Australia to the UN</i>  <i>Noah Weisbord, Associate Professor of Law, FIU College of Law</i> <ul style="list-style-type: none"> <li>• What are the main elements of the crime of aggression?</li> <li>• What are the main criticisms of the definition and how can they be addressed?</li> </ul>
4:00 pm – 4:15 pm	<b>Coffee break</b>
4:15 pm – 6:00 pm	<b>Session 3: Understanding the jurisdictional regime</b>  <i>Stefan Barriga, Minister, Deputy Permanent Representative of Liechtenstein to the UN</i> <ul style="list-style-type: none"> <li>• Under which conditions will the ICC exercise jurisdiction over a crime of aggression?</li> <li>• What is the role of the Security Council with respect to the crime of aggression?</li> <li>• What are the main criticisms of the jurisdictional regime and how can they be addressed?</li> </ul>
6:30 pm	<b>Dinner</b> (Nassau Club, 6 Mercer Street)  Keynote speech: <i>Athaliah Molokomme, Attorney-General of Botswana</i>
8:30 pm	<b>Check in at hotel</b> (Hyatt Regency Princeton, 102 Carnegie Center Drive)
<b>Saturday, 18 June 2016</b>	
8:30 am – 9:15 am	<b>Light breakfast</b> (Burr Hall – corner of Washington Road and Nassau Street)
9:15 am – 10:30 am	<b>Session 4: Case study of a crime of aggression</b>  <i>Roger Clark, Professor of Law, Rutgers University</i> <ul style="list-style-type: none"> <li>• If the ICC were to hear a possible case involving an alleged crime of aggression – what would it look like?</li> </ul>
10:30 am – 10:45 am	<b>Coffee break</b>

10:45 am – 12:30 pm	<p><b>Session 5: Looking ahead to the activation decision</b></p> <p><i>Christian Wenaweser, Permanent Representative of Liechtenstein to the UN</i></p> <p><i>Athaliah Molokomme, Attorney-General of Botswana</i></p> <ul style="list-style-type: none"> <li>• How does the activation work in practice? What are the different options available?</li> <li>• Should the activation decision be taken during the regularly scheduled ASP session in 2017 or in another format?</li> <li>• What steps can be taken to build support for the activation of the Amendments in 2017 among all States Parties?</li> </ul>
12:30 pm – 1:00 pm	<p><b>Closing remarks</b></p> <p><i>Donald Ferencz, Global Institute for the Prevention of Aggression</i></p> <p><i>David Donat Cattin, Parliamentarians for Global Action</i></p>
1:00 pm – 2:00 pm	<b>Lunch</b> (Burr Hall – corner of Washington Road and Nassau Street)
2:00 pm	<b>Bus: Princeton University to Manhattan</b> (pick-up in front of Burr Hall)

# **Seminar for States Parties to the Rome Statute of the ICC on the Activation of the Court's Jurisdiction over the Crime of Aggression**

*17 and 18 June 2016, Princeton, New Jersey*

## **Informal Background Paper**

### **Introduction**

The crime of aggression is one of the four core crimes of the Rome Statute. It was included in the Statute in 1998, but was left undefined. The 2010 Review Conference in Kampala, Uganda, adopted a definition of the crime of aggression and agreed on the conditions for the ICC's exercise of jurisdiction. As part of the consensus, it was agreed that the Court would exercise jurisdiction over this crime only after 30 States Parties have ratified the amendments and the Assembly of States Parties has made a decision to activate the amendments, no earlier than 1 January 2017.<sup>1</sup>

### ***Status of ratifications***

At the time of writing, 28 States Parties from all regions of the world have ratified the amendments; this includes a State that has joined the Rome Statute in its amended version (El Salvador). The 30<sup>th</sup> ratification is expected at some point in 2016. States interested in ratifying the amendments (or the Rome Statute in the amended version) are invited to use the information and materials available at [www.crimeofaggression.info](http://www.crimeofaggression.info), or to contact the Campaign for specific assistance needed. A number of States Parties that have completed the ratification (and in some cases implementation) process are also available to share their experiences for this purpose.

### ***Why ratify and activate the amendments?***

By ratifying the amendments on the crime of aggression and supporting their activation in 2017, States will:

- underline their commitment to the prohibition of the use of force, a key provision of the Charter of the United Nations and customary international law;
- benefit from the protection of the law from acts of aggression;
- help deter the most serious forms of the illegal use of force and prevent the death and destruction they entail;

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<sup>1</sup> For more information see the website of the Global Campaign for the Ratification and Implementation of the Kampala Amendments of the Crime of Aggression ( [www.crimeofaggression.info](http://www.crimeofaggression.info) ) including especially the Handbook on Ratification and Implementation ( <http://crimeofaggression.info/documents/1/handbook.pdf> ), which is also available on the website in French and Spanish.

- contribute to the rule of law at the international level;
- demonstrate their support for the ICC and the fight against impunity;
- uphold the decision taken in Kampala.

Of course, States Parties that have not yet ratified the crime of aggression amendments can – and should – support activation, consistent with the consensus adoption of the amendments in Kampala, which completed the work commenced in Rome and fulfilled the Nuremberg and Tokyo legacy.

### **Session 1: Negotiation history of the amendments**

The following are the most important steps that led to the Kampala consensus on the crime of aggression.<sup>2</sup>

#### The Rome Conference (1998)

The question of whether and how to include the crime of aggression was one of the central disputes in the run-up to and at the Rome Conference. Delegates could neither agree on a definition of the crime nor on the conditions for exercise of jurisdiction. Important proposals and submissions promoting the full inclusion of the crime of aggression were made *inter alia* by Germany, Egypt and Italy, a group of Arab States and Iran, as well as by the Non-Aligned Movement.<sup>3</sup> As part of the final compromise, the **crime of aggression was included as a crime over which States Parties accept the jurisdiction of the Court** (Articles 5(1) and 12(1)), but agreed to **defer exercise of jurisdiction** until provisions on the definition and the conditions for the exercise of jurisdiction (including the question of the role of the Security Council) were adopted. This discussion was deferred for consideration by the first Review Conference.<sup>4</sup>

#### From Rome to Kampala (1998 – 2010)

After Rome, the Preparatory Commission for the ICC (PrepComm, 1999 – 2002) and later the Special Working Group on the Crime of Aggression (SWGCA, 2003 – 2009) continued negotiations on the outstanding issues, in particular in the context of the “Princeton Process”. All States were invited to participate in these discussions on equal footing, including non-State Parties. Formal written proposals were submitted *inter alia* by Germany; Greece and Portugal; Colombia; Italy; Bosnia and Herzegovina, New Zealand and Romania; Guatemala; Netherlands;

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<sup>2</sup> For a more detailed historical overview going back to the Nuremberg and Tokyo Trials, please refer to the Handbook (p. 2)

<sup>3</sup> All these submissions are collected in: Barriga/Kreß, *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press 2012).

<sup>4</sup> Art. 5(2): „The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

Samoa; Belgium, Cambodia, Sierra Leone and Thailand; Norway; and Venezuela.<sup>5</sup> In February 2009, the SWGCA made a first breakthrough: it **agreed on a draft definition of the crime of aggression by consensus** (later adopted without any changes as article 8 *bis*).

#### The Kampala Review Conference (2010)

With the definition of the crime already settled, negotiators in Kampala focused on outstanding jurisdictional issues. In this regard, agreement was found rather quickly that the Court should be able to investigate and prosecute crimes of aggression based on **Security Council referrals** (Art. 15 *ter*) in the same manner as the other three core crimes (apart from the need for activation, cf. below).

Significant disagreement persisted, however, regarding jurisdiction with respect to the other two triggers: ***proprio motu* investigations** and **State referrals**. A first divisive question in that regard was whether some sort of **consent** by the alleged aggressor State should be required, even when the victim State had ratified the amendments. Roughly half of the delegations preferred that no such consent should be required, so that the victim State would benefit from the same level of protection that existed for the other three crimes.<sup>6</sup> The other half preferred a regime that required the consent (via ratification) of the alleged aggressor State.<sup>7</sup> On this question, a compromise was found thanks to initiatives by Argentina, Brazil and Switzerland (ABS), by Slovenia as well as by Canada. Their efforts resulted in a joint proposal for a **consent-based regime** that was ultimately included in Art. 15 *bis* (4). As a result, acts of aggression committed on the territory, or by nationals, of non-States Parties to the Rome Statute are entirely excluded from the jurisdiction of the Court.<sup>8</sup> On the basis of the consent provided in Articles 5(1) and 12(1) of the Rome Statute, the Court will be able to exercise jurisdiction over a crime of aggression committed by a State Party against another State Party – so long as at least one of those State Parties has ratified the amendments, and the aggressor State does not **opt out of the Court's jurisdiction** prior to the commission of the alleged crime of aggression in question.

A second question was whether in case of *proprio motu* investigations and State referrals, the Court should only be allowed to proceed where the **Security Council has determined that an act of aggression** has occurred. The solution adopted provides that the Council has the first opportunity to do so, but if no such determination is made within six months, the Court's Pre-

<sup>5</sup> Also collected in Barriga/Kreß, FN 3.

<sup>6</sup> In an informal roll-call several months prior to the Kampala Conference, the following countries preferred a regime that was not based on the consent of the alleged aggressor State: Argentina, Belize, Bolivia, Botswana, Brazil, Burkina Faso, Chile, Congo, Costa Rica, Democratic Republic of Congo, Djibouti, Ecuador, Finland, Gabon, Ghana, Greece, Guinea, Guyana, Jordan, Kenya, Lesotho, Madagascar, Namibia, Nigeria, Republic of Korea, Romania, Samoa, Senegal, Slovenia, South Africa, Switzerland, Tanzania, Trinidad and Tobago, Uganda, Venezuela, and Zambia.

<sup>7</sup> Albania, Andorra, Australia, Austria, Belgium, Bulgaria, Canada, Colombia, Croatia, Estonia, Fiji, France, Germany, Hungary, Ireland, Italy, Japan, Latvia, Luxembourg, Macedonia (FYROM), Mexico, The Netherlands, Norway, Paraguay, Peru, Poland, Portugal, New Zealand, Slovakia, Spain, Sweden, and the United Kingdom.

<sup>8</sup> Also excluding the possibility of an investigation based on a 12(3) declaration, see FN 11.

Trial Division will have the competence to authorize the investigation, following the existing procedure of Art. 15.

The final piece of the Kampala compromise were provisions on the **activation** of the amendments, as some delegations preferred to delay the exercise of jurisdiction. Accordingly, it was agreed that the Court would only be able to exercise jurisdiction after 30 ratifications, and after an additional decision to be taken by States Parties, no earlier than 1 January 2017. In the same breath, States Parties “resolved to activate the Court’s jurisdiction over the crime of aggression as early as possible”.

The Review Conference also adopted a number of **interpretive understandings**. They are aimed at further clarifying questions relating to: jurisdiction; the definition; the question of domestic jurisdiction over the crime of aggression; as well as to the relationship between the amendments and other rules of international law (in particular customary international law).

## **Session 2: Understanding the definition of the crime of aggression**

Article 8 *bis* contains the definition of the crime of aggression. The definition is split into two parts. Paragraph 8*bis* (2) defines an act of aggression. Paragraph 8*bis* (1) makes it clear that only a subset of acts that meet the definition of an **act** of aggression can form the basis of the **crime** of aggression, and identifies the group of persons who can perpetrate the crime under the Statute, as well as the conduct that will enliven individual criminal responsibility.

### Leadership clause

The definition limits the group of persons who can be held criminally responsible for the crime of aggression 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 act of the individual

The actions of an individual perpetrator that will enliven individual criminal responsibility are defined as the “planning, preparation, initiation or execution” of an act of aggression. These verbs 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.

### Definition of the State act of aggression

The State ‘act of aggression’ is defined using the core elements of the 1974 General Assembly Definition of aggression. Article 8 *bis* (2) defines an act of aggression as “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 accordance with Article 51 of the UN Charter, as well as a use of force authorized by the Security Council under Chapter VII, are excluded from this definition. Article 8 *bis* (2) also contains an illustrative, non-exhaustive, 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.

#### *Definition of the State act element of the crime of aggression*

To meet the definition of the State act of aggression under Article 8 *bis* (1), an act of aggression (as defined in Article 8 *bis* (2)) must “by its character, gravity and scale” constitute 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 the most serious and unambiguously illegal instances of a use of force by a State** can give rise to individual criminal responsibility of a leader of the State responsible for an alleged act of aggression under the Statute.

#### Critical perspectives

While the definition was adopted by consensus in Kampala and already agreed to by the negotiating parties more than one year prior to that, some criticism has been voiced. This criticism is not new in substance, but was already discussed at length during the negotiations:

*“The definition does not include non-State actors and is thus not reflecting today’s realities”*

During the negotiations, some delegations wanted to widen the definition to include non-State actors more broadly. Most delegations, however, preferred to stay within the realm of the definition as adopted by the General Assembly in 1974 on the basis that while at least certain inter-State uses of armed force by non-State actors may deserve criminal punishment, the crime of aggression was not the appropriate route to bring such acts under the ICC’s jurisdiction. It should also be noted that the definition does include actions by “armed bands, groups, irregulars or mercenaries”, provided they have been “sent” by or are acting “on behalf of” a State.

*“The definition could criminalize a humanitarian intervention”*

It has been argued, including during the negotiations, that the definition could criminalize the actions of a State that wishes to intervene without Security Council authorization to protect a population from mass atrocity crimes (humanitarian intervention). The definition does not *explicitly* address this question. The definition is very clear, however, that not every use of force in contravention of the UN Charter qualifies as a crime of aggression, but only the use of force which, “by its character, gravity and scale constitutes a manifest violation of the Charter of the United Nations.”

The notion that only the most serious forms of the illegal use of force qualify as aggression, and that all the circumstances of a case have to be considered, is further underlined in Understandings 6 and 7.

A significant number of States remain opposed to humanitarian intervention without authorization by the Security Council, and a clear majority of experts conclude that as yet no rule of customary international law providing for a humanitarian intervention exception to the prohibition of the use of force has crystallized. Nonetheless, humanitarian intervention was frequently referred to during the negotiations as an example of a use of force that many delegations considered should not attract individual criminal responsibility and was thus one of the drivers behind the creation of the “manifest violation” threshold. Consequently, a strong case can be made that a genuine humanitarian intervention would not meet the definition of the crime of aggression.<sup>9</sup>

### **Session 3: Understanding the jurisdictional regime**

#### **Activation**

The **amendments have already entered into force** for the vast majority of States Parties that have ratified them.<sup>10</sup> The Court, however, will be able to exercise its jurisdiction over the crime of aggression only after **two cumulative conditions** have been met: (1) The amendments must have entered into force for at least 30 States Parties; and (2) the Assembly of States Parties must have made a decision to activate the Court’s jurisdiction over the crime. This decision may only be taken after 1 January 2017.

Once the jurisdiction is activated, the Court may exercise jurisdiction over a crime of aggression in accordance with the existing provisions of the Rome Statute, as complemented, and in part modified, by the aggression-specific provisions of Art. 15 *bis* and 15 *ter*:

#### **Security Council Referrals**

In the event of a future referral of a situation by the Security Council, the Court will have the power to investigate all four crimes under its jurisdiction, including the crime of aggression, on the same basis. In particular, **consent is not required by the States involved**. In the event of a Security Council referral, the Court will thus be able to exercise jurisdiction over crimes of aggression involving non-States Parties to the Rome Statute as well as States Parties that have not ratified the amendments.

#### **State Referrals and *Proprio Motu* Investigations**

In case of future State referrals or *proprio motu* investigations, particular conditions and procedures regarding the crime of aggression need to be observed:

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<sup>9</sup> Also relevant in this context may be Article 31(1)(c) of the Statute, which excludes criminal responsibility if the person “acts reasonably to defend [...] another person [...] against an imminent and unlawful use of force in a manner proportionate to the degree of danger [...].”

<sup>10</sup> One year after deposit of the instrument of ratification or acceptance, in accordance with Article 121(5) of the Rome Statute.

### *Non-States Parties – excluded*

Acts of aggression committed by, or against, non-States Parties to the Rome Statute are excluded from the Court's jurisdiction (Art.15 *bis* (5)). This also implies that the Court cannot investigate or prosecute a crime of aggression based on an Art. 12(3) Declaration by a non-State Party.<sup>11</sup>

### *States Parties – opt-out regime*

Acts of aggression involving only States Parties will fall within the Court's jurisdiction provided the following conditions are met:

1. The amendments must have **entered into force for at least one of the States Parties** involved, be it the victim or the aggressor.
2. The aggressor State Party must **not have opted out** of the Court's jurisdiction under Article 15 *bis* (4). To be effective, such an opt-out declaration must have been lodged with the Registrar prior to the commission of the alleged crime of aggression in question.

The two above-mentioned conditions allow the Court to exercise jurisdiction in a scenario where only the victim State Party, but not the aggressor, has ratified the amendments. The possibility of opting out ensures that the provisions are consent-based.

### *Role of the Security Council*

Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of the crime of aggression in the case of State referrals or *proprio motu* investigations, the Prosecutor must notify the UN Secretary-General of the situation before the Court, providing any relevant information and documents, unless the Security Council has made a prior determination that an act of aggression has been committed. If the Security Council thereafter determines that an act of aggression has been committed, the Prosecutor can proceed with an investigation. Where the Security Council does not make such a determination within six months, the Prosecutor can proceed provided that the Pre-Trial Division has authorized an investigation, and that the Security Council has not exercised its powers to defer the investigation under Article 16 of the Rome Statute. **The Court thus remains independent in its substantive judicial determination.**

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<sup>11</sup> This is further confirmed by the drafting history of the Understandings, which initially contained a reference to the possibility of the exercise of jurisdiction based on Art. 12(3) Declarations that was later deleted, once the exclusion of non-States Parties was introduced, see Carrie McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press 2013), 263. Excluding this possibility has an inherent logic: otherwise non-States Parties that may be in an armed conflict with States Parties would have the advantage of being able to choose, including ex post facto, whether or not to permit the Court to investigate a crime of aggression. That same avenue would be foreclosed to States Parties. In any event, non-States Parties can still accept the Court's jurisdiction under article 12(3) in a situation that may involve a crime of aggression, but the Court would only have jurisdiction to investigate genocide, crimes against humanity and war crimes in that situation.

### Critical perspectives

The jurisdictional regime was the most difficult part of the compromise reached in Kampala. Unsurprisingly, it has received some criticism:

#### *A highly restrictive jurisdictional regime*

For those States Parties that primarily had the interests of potential victims of aggression in mind, the jurisdictional restrictions (exclusion of non-States Parties; opt-out regime for States Parties) were a difficult concession to make, but ultimately acceptable for the sake of consensus.

#### *Different views on the proper interpretation of the provisions governing the opt-out regime*

Some have taken the view that the amendments would not allow the Court to exercise jurisdiction in case of an act of aggression committed by State Party “A” that had not ratified the amendments against State Party “V” that had done so. In particular, it has been argued that there was no need for State Party “A” to submit an opt-out declaration prior to the use of force to avoid the Court’s jurisdiction. Others take a different view, arguing that the logic of an opt-out regime was that the Court has jurisdiction unless a State Party exercises its right to opt out.

The source of this difference of views is a lack of agreement going into the Review Conference as to whether the **second sentence of Art. 121(5)** would apply to the crime of aggression, which reads: “In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.”<sup>12</sup> This question was discussed at length during and prior to the Review Conference. Differing views on this were reflected in two opposing draft Understandings (the “negative” and positive” Understandings). After the opt-out approach was identified as a solution to bridge opposing views on the proper amendment provisions, both draft Understandings were abandoned. This was based on the idea that no understanding was needed, since the opt-out approach in Art. 15 *bis* (4) would in itself make it clear that the second sentence of Art. 121(5) (which contains an opt-in approach), does not apply to the crime of aggression. This is further underlined by references to Article 5 and 12 in the resolution under which the amendments were adopted. This approach was justified by the fact that the Rome Statute included the crime of aggression in the Court’s jurisdiction in Articles 5(1) and 12(1), when the Statute was adopted in Rome in 1998, as well as the fact that none of the amendment provisions in the Rome Statute were a good fit for the crime of aggression.

Two things are important to emphasize in relation to the interpretation of Article 15 *bis* (4): First, the difference of views only relates to the position of States Parties that have not ratified the amendments; **the question is moot for States that ratify them**. Second, any State Party that takes the view that, legally, it should not be subject to the Court’s exercise of jurisdiction as long as it has not ratified the amendments, can achieve this result. It would simply have to

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<sup>12</sup> In fact, there was also disagreement as to whether 121(4) or 121(5) should govern the entry into force of the amendments; ultimately the Review Conference decided that the amendments should enter into force in accordance with article 121(5).

inform the Registrar that it does not accept the Court's jurisdiction over the crime of aggression as long as it has not ratified the amendments. **States Parties can thus ensure that they will not be subject to the Court's jurisdiction over crime of aggression** (except in the case of Security Council referral).

#### **Session 4: Case study (see separate document)**

#### **Session 5: Looking ahead to the activation decision**

With the 30<sup>th</sup> ratification on the horizon, the second condition required for the Court's exercise of jurisdiction over the crime of aggression is the 2017 activation decision. Given that the amendments themselves contain all the necessary provisions for the Court to begin exercising jurisdiction, the activation decision is essentially a procedural step – a decision to “activate” the system as agreed on in Kampala. A review of the amendments themselves is foreseen in the Kampala consensus seven years after the beginning of the Court's exercise of jurisdiction, and thus no earlier than 2024.<sup>13</sup> Finally, the amendments require that the decision be taken “by the same majority as is required for the adoption of an amendment to the Statute” – i.e. by a two-thirds majority of States Parties or by consensus.

In preparation for the activation decision, the following elements can be discussed:

- Should the activation decision be taken at the regularly scheduled session of the ASP?
- How should the consultations be designed in order to ensure that the decision is well-prepared, both procedurally and substantively?
- Should it be undertaken through a stand-alone resolution, or incorporated into the omnibus resolution?

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<sup>13</sup> See OP 4 of Resolution RC/Res.6.