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## **CRIME OF AGGRESSION: RATIFICATION AND IMPLEMENTATION**

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### Abstract

*When the Rome Statute entered into force in 2002, it marked an historic moment of consensus in international criminal law: it established the first permanent International Criminal Court (ICC). The paper focus on the importance of the crime of aggression as one of the four crimes over which the International Criminal Court has jurisdiction in accordance with the Rome Statute. Seven years after the entry into force of the Rome Statute, and after two weeks of intense debate and years of preparatory work, on 11 June 2010, the Review Conference of Rome Statute adopted by consensus amendments to the Rome Statute which include a definition of the crime of aggression and a regime establishing how the Court will exercise its jurisdiction over this crime. This review conference was held in Kampala, Uganda from 31 May to 11 June 2010. This paper presents the exact definition of the crime of aggression that the States Parties were able to reach consensus on during the Kampala Review Conference. However, significant attention will be given to the elements and mechanisms of the crime of aggression. Finally, such paper makes a general overview of the states that have ratified and/or implemented and or adopted the Kampala amendments in their domestic legislation so far.*

*Keywords: Aggression; International Criminal Court (ICC); Rome Statute; Kampala Review Conference; Ratification/Implementation/Adoption*

### **1. Introduction**

In a compromise reached during the negotiation of the Rome Statute in 1998, Article 5 of the Rome Statute lists the crime of aggression as one of the core crimes under the Court's jurisdiction. However, the Contracting States at the Rome Diplomatic Conference for an International Criminal Court (ICC) could not agree on a definition of the crime of aggression. (Rome Statute of the International Criminal Court (adopted July 17, 1998, entered into force July 1<sup>st</sup>, 2002). 2187 UNTS 90,

available at: [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf)).

In contrast to the other three crimes such as genocide, crimes against humanity and war crimes, the Court remained unable to exercise jurisdiction over the crime of aggression as the Statute did not define the crime or set out jurisdictional conditions. Although the crime of aggression was included in the Rome Statute as one of the core crimes, it was not until the 2010 Kampala Review Conference on the Rome Statute that the States Parties were able to reach consensus on an exact definition of the crime of aggression. (*S-D. Bachmann & G. Kemp, 'Aggression as 'Organized Hypocrisy' – How the War on Terror and Hybrid Threats Challenge the Nuremberg Legacy', 30 The Windsor Yearbook of Access to Justice (2012) 233. Available online at:[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1871912](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871912);*)

While the aggression amendments will only go into force after 1 January 2017, the Kampala definition is already regarded to be a significant development in international criminal law. (*A. G. Wills, 'The Crime of Aggression and the Resort to Force Against Entities in Statu Nascendi', 10 Journal of International Criminal Justice (2012) 83, at 83, doi:10.1093/jicj/mqr062; and M. Gillet, 'The Anatomy of an International Crime: Aggression at the International Criminal Court', International Criminal Law Review (2013) 1 available at <http://ssrn.com/abstract=2209687>.*)

## 2. Definition of the crime of aggression

During the first session of the Assembly of States Parties ('ASP') in 2002, a Special Working Group was established with the duty to prepare a future meeting in which a draft would be considered that addressed several of the main problems arising with the crime of aggression. The Special Working Group's proposals for a provision on aggression were finalised in 2009 and became the definition that was eventually adopted at the Kampala Review Conference in 2010.

Article 8 *bis* adopted in Kampala defines the individual crime of aggression as the planning, preparation, initiation or execution by a person in a leadership position of an act of aggression. (Mauro Politi, *The ICC and the Crime of Aggression*, *Journal of International Criminal Justice* 10 (2012) p. 285-286) Importantly, it contains the requirement that the act of aggression must constitute a manifest violation of the Charter of the United Nations. (*Claus Kreß, 'Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus.'* (2010) 20(4) *EJIL* 1129.)

An act of aggression is defined as the use of armed force by one State against another State without the justification of self-defense or authorization by the Security Council. The definition of the act of aggression, as well as the actions qualifying as acts of aggression contained in the amendments (for example invasion by armed forces, bombardment and blockade), are influenced by the UN General Assembly Resolution 3314 (XXIX) of 14 December 1974.

The crime of aggression, as mentioned in Article 8bis of the Rome Statute, provides:

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.*

Therefore, the definition of aggression set out in article 8bis, as mentioned above, can be divided into two parts:

- (i) the act of aggression, and
- (ii) the crime of aggression.

The difference between the act of aggression and the crime of aggression consists in the fact that, whereas an act of aggression is a form of State conduct, the crime of aggression focuses on individual criminal responsibility. (*Mathew Gillet, The Anatomy of an International Crime: Aggression at the International Criminal Court*)

Thus, in order to prosecute an individual for the crime of aggression, it must first be demonstrated that there was an aggression by a State. An individual acting alone, without state action or the involvement of a state, cannot commit the crime of aggression. Hence, the subparagraphs (a)–(g), of Article 8 bis describe acts of aggression but for the act to be considered a crime of aggression it needs to satisfy the ‘manifest violation’ requirement.

In essence, so to demonstrate that the crime of aggression has been committed the below mentioned elements are required:

- 1- First, the perpetrator must be a political or military leader, i.e. a “person in a position effectively to exercise control over or to direct the political or military action of a State
- 2- Second, the Court must prove that the perpetrator was involved in the planning, preparation, initiation or execution of aggression.
- 3- Third, 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- Forth, the perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent and a manifest violation with the Charter of the United Nations.
- 5- Fifth, the act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations. The “manifest violation” requirement is based on an assessment of the scale, gravity and character of the act of aggression

Therefore, aggression is a ‘leadership crime’ for which only state leaders and state officials with enough authority to direct the state’s forces into aggressive action can be considered. This implies that only the most serious forms of illegal use of force between States can be subject to the Court’s jurisdiction. Cases of lawful individual or collective self-defence, as well as action authorized by the Security Council are thus clearly excluded.

### **3. The crime of aggression and the International Criminal Court**

Article 5 (1) (d) of the Rome Statute of the International Criminal Court (ICC) determines that the ICC will have jurisdiction over the crime of aggression. However, the second paragraph of article 5 sets out that this jurisdiction shall only be exercised once a provision is adopted defining the crime and setting out the conditions under which such jurisdiction shall be exercised.

For the ICC to actually exercise jurisdiction over the crime of aggression two other conditions need to be fulfilled:

- The alleged crime must have occurred more than one year after thirty states have ratified or accepted the amendments.

- After 1 January 2017 a decision must be taken by a two-thirds majority of the Assembly of State Parties granting the ICC approval to exercise jurisdiction over the crime of aggression.

With the accomplishment of the requirements above stated, the jurisdiction of the ICC will be “activated” and the amendments will, for the first time 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. (*Greg Gordon. ‘A View of the Aggression Amendments from Kampala.’ in Opinio Juris, <<http://opiniojuris.org/2010/06/15/greg-gordon-on-the-review-conference-and-aggression/>>, 2010,(accessed 21 November 2010) refers to this diplomatic consequence as a .‘shame factor.’).*

By the operating of the Court’s jurisdiction over the crime of aggression, any of the illegal uses of force will be identified and traced, as state leaders will have to take the Court’s jurisdiction into account when taking relevant decisions. Ratifying States of the Kampala amendments will thus make a notable contribution to the rule of law at the international level and to international peace and security. They will actively participate in the accomplishment of the Nuremberg oath to end impunity to all those who commit the crime of aggression.

Considering that every ratification is an obvious achievement toward the activation of the ICC’s jurisdiction over the Crime of aggression, the ratification of the Kampala Amendments is important because it is also a crucial contribution in the protection of human rights and preventing suffering. Acts of aggression inevitably lead to countless violations of human rights and international humanitarian law, affecting in particular the most vulnerable individuals during conflict, such as women and children. Therefore, the criminalization of aggression through the Rome Statute and after the full activation of the Kampala Amendments will also protect the right to life of individual soldiers.

So far, 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 that may be killed at will, provided the relevant rules pertaining to the conduct of hostilities are followed.

Another important reason to help activate the Court’s jurisdiction on the crime of aggression is because by doing so, the ratifying States also serve their own national interest of preventing 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).

Only by ratifying the amendments does a State increase the possibility of being able to count on the Court’s protection against an act of aggression by another State. 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. By ratifying, States Parties show their support for the Court and for the integrity and full effect of the Rome Statute.

#### 4. Importance to ratifying and implementing the Kampala Amendments

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.*» 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. However, there is no legal obligation regarding the domestic implementation of the crime of aggression.

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, rather than using a narrower or a broader definition. 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 (*Part I of the handbook on a Workshop on the Ratification and Implementation of the Kampala amendments on the Crime of Aggression, New York University, 25 June 2012, available online <http://crimeofaggression.info/documents/1/handbook.pdf>*) definition would not appear to pose a legal problem, to the extent that it covers only nationals of the prosecuting State.

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 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.

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.

#### *4.1 Concrete progress toward ratification and implementation*

According to the information available (For the status of ratification and implementation of the Kampala amendments see: <http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/> ), government or parliamentary officials in at least the following 28 States Parties are currently actively working on the ratification of the amendments on the crime of aggression: Albania, Argentina, Australia, Bolivia, Brazil, Bulgaria, Burundi, Chile, Dominican Republic, Ecuador, Greece, Honduras, Hungary, Italy, Lesotho, Madagascar, Mongolia, Montenegro, the Netherlands, New Zealand, Panama, Paraguay, Peru, Portugal, Romania, Senegal, Serbia and Venezuela.

In 8 further States Parties the process is in its early stages: Ghana, Guatemala, Ireland, Japan, Mexico, Moldova, Republic of Korea and Tunisia.

At a regional seminar about the Kampala amendments for Eastern European States, which took place in Slovenia on 15 and 16 May 2014, five States of the Eastern European Group (EEG) announced their intention to ratify before the end of the year (Albania, Czech Republic, Georgia, Macedonia, Poland), while the remaining nine EEG States Parties are working on the ratification process. The region continues to hold the highest percentage of States that have ratified the Crime of Aggression.

At the thirteenth session of the ASP (December 2014), the following States Parties made concrete commitments to ratify the amendments on the crime of aggression: Albania, Brazil, Chile, Iceland, South Africa and Tanzania. In addition, the following countries made positive references to the amendments: Austria, Estonia, Georgia, Germany, Latvia, Liechtenstein, Luxembourg, Mexico, New Zealand, Slovakia, Slovenia, South Africa, Uruguay as well as the European Union (in a statement delivered by Italy).

##### *4.1.2 Adopted Domestic Legislation*

Many states have already adopted the Kampala amendments on the Rome Statute in their domestic legislation. Specifically:

- On 27 February 2012, Luxembourg adopted a revision to its criminal code and code of criminal procedure that incorporate the Kampala definition of the crime of aggression.
- On 14 May 2012, the revised criminal code of Slovenia entered into force. Article 103 incorporates the Kampala definition of the crime of aggression.

- On October 2011, Croatia adopted the new criminal code containing the Kampala definition of the crime of aggression in Article 89. The criminal code entered into force on 1 January 2013.
- On 1 January 2014, amendments to the criminal code of the Czech Republic, reflecting the Kampala amendments, will enter into force.
- On 28 January 2014, Ecuador adopted a new Criminal Code which includes the Kampala definition of the crime of aggression in article 88. The code will enter into force on 28 August 2014.
- On 21 October 2014, the parliament of Samoa adopted its International Criminal Court Amendment Act 2014, which quotes the Kampala definition.
- On 24 July 2015, the parliament of Austria approved amendments to the criminal code that incorporate the crime of aggression based on the Kampala definition. The new criminal code entered into force on 1 January 2016.
- On 5 February 2015, the parliament of the former Yugoslav Republic of Macedonia adopted amendments to the criminal code that incorporate the Kampala definition of the crime of aggression into Article 403-b.

In Peru and Venezuela, draft criminal code bills containing the Kampala definition of the crime of aggression are under consideration at the parliamentary level. In June 2012, in New Zealand, MP Kennedy Graham tabled a Member's Bill to incorporate the Kampala definition of the crime of aggression in domestic law and to introduce a mechanism to ensure the legality of the use of force by New Zealand's leaders. A number of States Parties that are preparing ratification will also adopt legislation implementing the Kampala definition in domestic law, including Belgium, Botswana, Chile, Costa Rica, Greece, Guatemala, Honduras, Lithuania, Madagascar and Peru. In some countries, implementing legislation or possible changes to existing laws are expected to be considered after ratification, e.g. in Argentina, Germany, Liechtenstein, Switzerland, Trinidad and Tobago and Uruguay.

Several States Parties, and 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, Bangladesh, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Cuba, Czech Republic, Estonia, Germany, Georgia, Hungary, Kazakhstan, Kosovo, Latvia, Lithuania, The former Yugoslav Republic of Macedonia, Moldova, Mongolia, Montenegro, Paraguay, Poland, Russian Federation, Serbia, Slovakia, Slovenia, Tajikistan, Timor-Leste, Ukraine, Uzbekistan and Vietnam.

## 5. CONCLUSIONS

The crime of aggression is thought to have the potential to prevent the suffering caused by armed conflict by deterring state actors from using aggressive force. However, the crime turned out to be exceptionally difficult to define. It was therefore not until the 2010 Kampala Review



Conference on the Rome Statute that the States Parties were able to reach consensus on an exact definition, which is expected to go into force after 1 January 2017.

The Rome Statute's definition therefore requires the action or involvement of a state in order for an individual to be prosecuted for a crime of aggression. 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 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.

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.

If State Parties are unwilling to accept the ICC's jurisdiction over aggression, this will reduce support for the ICC and undermine its efforts in international justice

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