

Conference Room Paper on the Crime of Aggression

Draft resolution: 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,¹

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,

1. *Decides to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: “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;***
2. *Also decides to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;*
3. *Further decides to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in annex III of the present resolution;*
4. *Calls upon all States Parties to ratify or accept the amendments contained in annex I.*

(Add further operative paragraphs if needed)²

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, annex II.

² Such as, e.g., a possible review clause. Such a review clause could also be included in the Statute itself, e.g. in article 5, paragraph 2, or in draft article 15 *bis*.

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 (a) and (c), subject to the provisions of this article.³

[1 bis The Court may, in accordance with article 12, exercise jurisdiction with respect to an act of aggression committed by a State Party, unless that State has lodged a declaration of non-acceptance with the Registrar.⁴

1 ter The Court may not exercise jurisdiction with respect to an act of aggression committed by a Non-State Party.]

2. 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.

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

4. **(Alternative 1)** In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.⁵

4. **(Alternative 2)** Where no such determination is made within [6] 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 Chamber⁶ has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

5. 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.

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

³ The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. "The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression." Such a paragraph would only be relevant in case article 121, paragraph 5, of the Statute were to be applied.

⁴ **The suggestion has been made to add modalities for the lodging of the declaration, as well as a clause delaying the exercise of jurisdiction by a number of years or ratifications.**

⁵ The suggestion has been made to allow the Prosecutor to proceed with an investigation in respect of a crime of aggression if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.

⁶ The suggestion has been made to enhance the internal filter, e.g. by involving all judges of the Pre-Trial Division or by subjecting the decision of the Pre-Trial Chamber to an automatic appeals process.

3 bis. *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 (b).⁷

[2. 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.

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

4. In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.⁸]⁹

5. 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.

6. 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 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.

5. *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 suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. "The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression." Such a paragraph would only be relevant in case article 121, paragraph 5, of the Statute were to be applied.

⁸ The suggestion has been made to allow the Prosecutor to proceed with an investigation in respect of a crime of aggression if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.

⁹ **The suggestion has been made to delete paragraphs 2, 3 and 4. This would dispense with the need for a determination of an act of aggression by the Security Council in order to proceed, bearing in mind that this article should not negatively affect the ability of the Security Council to exercise its competence under Art. 13(b).**

6. *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 person¹ 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.
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.

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

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 over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute once the amendment on aggression **has entered into force**.
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 (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, in accordance with article 11, paragraph 1, of the Statute, that the Court has jurisdiction only with respect to crimes of aggression committed after the amendment **has entered into force**.
4. It is understood, in accordance with article 11, paragraph 2, of the Statute, 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 the entry into force of the amendment for that State, unless that State has made a declaration under article 12, paragraph 3.

Domestic jurisdiction over the crime of aggression

5. 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.
6. **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

7. **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.**
8. **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.**
