

New York, 8 May 2023

Excellency,

I am writing to you with respect to the 25th anniversary of the adoption of the Rome Statute of the International Criminal Court, which will be commemorated by an event held at the United Nations Headquarters in New York on 17 July 2023.

During the morning session of the commemorative event, states will have the opportunity to deposit instruments of ratification or accession to amendments to the Rome Statute. These arrangements are outlined in the enclosed letter from Ms Silvia Fernández de Gurmendi, President of the Assembly of States Parties of the International Criminal Court.

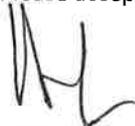
In this context, I would particularly like to draw your attention to the **Kampala amendments on the crime of aggression**. These amendments introduced new provisions defining the crime of aggression and setting out the conditions for the exercise of jurisdiction over this crime. For further guidance on these amendments, I invite you to refer to the enclosed Handbook on Ratification and Implementation of the Kampala Amendments on the Crime of Aggression to the Rome Statute of the ICC.

Forty-five States from all regions of the world have already ratified or accepted the crime of aggression amendments, while this makes them the most successful set of Rome Statute amendments, it is essential to increase the number of ratifications for this important legal regime which took effect on 17 July 2018. Ratifying States will not only help to protect themselves against the commission of acts of aggression, but also send the clear message that they support the right of all people to live in peace and dignity, under the rule of law. The importance of this message has never been clearer.

The consensus reached by the Assembly of States Parties on these amendments represents a milestone in the development of international criminal justice and the rule of law. **On the occasion of the 25th anniversary of the Rome Statute, I therefore encourage your Government to consider taking this opportunity to ratify the crime of aggression amendments.**

Should you or your Minister wish to deposit your country's instrument of ratification for these amendments please contact the Secretariat (asp@icc-cpi.int) as soon as possible, preferably by 15 June, as outlined in the enclosed letter.

Please accept, Excellency, the assurance of my highest consideration.



Christian Wenaweser
Ambassador, Permanent Representative

Enclosures (2)

- Letter from the President of the Assembly of States Parties
- Handbook on ratification and implementation of the Kampala amendments on the crime of aggression



Reference: ASP/2023/40

The Hague, 26 April 2023

Excellencies,

The twenty-fifth anniversary of the adoption of the Rome Statute of the International Criminal Court will be commemorated on 17 July 2023 at the United Nations Headquarters in New York. The commemoration is intended to celebrate this extraordinary achievement of the international community, to provide visibility and enhance political support for the Rome Statute system, and to reflect on its future.

The morning segment of the commemorative event will include a treaty ceremony for the deposit of instruments of ratification or accession to the Rome Statute, its amendments and the Agreement on Privileges and Immunities, as well as the conclusion of voluntary cooperation agreements with the Court.

I would like to encourage those States who have not yet done so to join the Rome Statute system by ratifying or acceding to the Statute, its amendments or the Agreement on Privileges and Immunities. I also encourage States to consider using the opportunity of this commemoration to sign voluntary cooperation agreements with the Court, which are extremely important for the conduct of proceedings. In this regard I underscore the need to increase the current number of voluntary agreements, including in particular voluntary agreements on interim release.

I kindly ask States intending to take any of these treaty actions to contact the Secretariat asp@icc-cpi.int as soon as possible, preferably before 15 June, so that arrangements can be made for the ceremony in New York.

Sincerely,

Silvia Fernández de Gurmendi
President
Assembly of States Parties
International Criminal Court

HANDBOOK

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





This handbook is based on a workshop on the ratification and implementation of the Kampala amendments on the crime of aggression that took place at New York University on 25 June 2012. The workshop was co-hosted by the Permanent Mission of the Principality of Liechtenstein to the United Nations and the Global Institute for the Prevention of Aggression with the support of the Liechtenstein Institute on Self-Determination at Princeton University (LISD).

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Permanent Mission of the Principality of Liechtenstein
to the United Nations
Global Institute for the Prevention of Aggression
Institute for International Peace and Security Law
Liechtenstein Institute on Self-Determination at Princeton University

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November 2019

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PERMANENT MISSION
OF THE PRINCIPALITY OF LIECHTENSTEIN
TO THE UNITED NATIONS
NEW YORK

INSTITUTE FOR
INTERNATIONAL PEACE
AND SECURITY LAW



GLOBAL INSTITUTE FOR THE
PREVENTION OF AGGRESSION

It is our honor and privilege to present to you the Third Edition of the *Handbook on the Ratification and Implementation of the Kampala Amendments on the Crime of Aggression to the Rome Statute of the ICC*. It is the product of our collaborative effort aimed at assisting States in ratifying the amendments adopted by consensus in Kampala and helping criminalize the most serious forms of the illegal use of force.

At Nuremberg, world leaders responded affirmatively to a plea of humanity to law. Today, one might say that the tables have turned. In a very real sense, the Kampala amendments represent a plea of law to humanity, and they call out for broad support from the global community.

In Kampala in 2010, the Review Conference adopted provisions which now allow the Court to exercise its jurisdiction over the crime of aggression. This accomplishment has been hailed as a historic landmark, both in international law and in the quest for global peace and security. For the first time in history, a permanent independent international court has the competence to hold national leaders accountable for the most serious forms of the illegal use of force against other States.

In New York in 2017, States Parties to the Rome Statute made the historic decision to enable the ICC to prosecute the crime of aggression – marking the first time that humanity has had a permanent international court with the authority to hold individuals accountable for their decisions to commit the worst forms of the illegal use of force. The ICC's jurisdiction over the crime of aggression went into effect on 17 July 2018, which also marked the 20th anniversary of the Rome Statute.

Preventing armed conflict was a core objective of those who drafted the Charter of the United Nations. Bringing illegal war-making under the jurisdiction of a permanent international criminal court was the element we were missing. Never has humanity had a permanent international court with the authority to hold individuals accountable for their decisions to commit aggression. Now we do. But more work remains to be done. The provisions of the Rome Statute will only have their full effect once all States Parties to the Rome Statute ratify them. We therefore offer this handbook as a tool to assist in making a reality what was promised in Nuremberg and made possible in Kampala – that our children will live in a world where the illegal use of force is effectively deterred through the rule of law. It is a hope etched on the hearts of people of goodwill everywhere, enshrined in the preamble to the UN Charter – the hope that we will make good on the promise to «save succeeding generations from the scourge of war». We believe that ratification of the Kampala amendments is an important step forward on the path to making that hope a reality, and we invite you to join us on that path.

Our goal is to help achieve as many ratifications as possible. We look forward to working with you to achieve this goal.

Christian Wenaweser

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1. THE CRIME OF AGGRESSION: A BRIEF HISTORY

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

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

The crime of aggression is one of the four crimes over which the International Criminal Court has jurisdiction in accordance with the Rome Statute. On 11 June 2010, States Parties to the Rome Statute adopted a definition of the crime. In essence, a crime of aggression is committed when a political or military leader of a State causes that State to illegally use force against another State, provided that the use of force constitutes by its character, gravity, and scale a manifest violation of the United Nations Charter. Subsequently, on 14 December 2017, States Parties to the Rome Statute made the historic decision to enable the ICC to prosecute the crime of aggression. The ICC's jurisdiction over the crime of aggression went into effect on 17 July 2018, which also marked the 20th anniversary of the adoption of the Rome Statute. The Court's jurisdiction over the crime of aggression provides some measure of criminal accountability at the international level for this «supreme crime» for the first time since the Nuremberg and Tokyo Trials. The following are the most important steps that led to this development, beginning with the seminal year 1945; note however that there were already efforts to prohibit and criminalize illegal war-making prior to 1945.

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

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

The victorious powers of World War II conducted trials in Nuremberg (1945–46) and Tokyo (1946–48) to prosecute those most responsible for crimes against peace, war crimes, and crimes against humanity. The Nuremberg Charter defined crimes against peace as «planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the

accomplishment of the foregoing.» It did not however specify further what was meant by «aggression.» Subsequent to the Nuremberg and Tokyo trials, the UN General Assembly affirmed the principles of the Nuremberg Charter and of the Nuremberg Tribunal's judgment in Resolution 95(I).

1.2. THE GENERAL ASSEMBLY DEFINITION (1974)

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

1.3. THE ROME CONFERENCE (1998)

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

1.4. THE KAMPALA REVIEW CONFERENCE (2010)

Following the 1998 Rome Conference, the Preparatory Commission for the ICC (PrepComm, 1999–2002) and later the Special Working Group on the Crime of Aggression (SWGCA, 2003–2009) continued negotiations on the outstanding issues regarding the crime of aggression. In February 2009, the SWGCA found a consensus agreement on the definition of the crime of aggression. The 2010 Kampala Review Conference used that definition and could thus focus on other outstanding issues, i.e., the «conditions for the exercise of

jurisdiction.» States Parties seized the historic opportunity and adopted Resolution RC/Res.6 by consensus. The resolution amended the Rome Statute to include, inter alia, new article 8 *bis* containing a definition of the crime of aggression and new articles 15 *bis* and 15 *ter*, containing complex provisions on the conditions for the exercise of jurisdiction. Notably, the compromise included a clause that prevented the Court from exercising jurisdiction over the crime of aggression immediately. Instead, the Assembly of States Parties had to take a further one-time decision to activate the Court's jurisdiction, no earlier than 2017 and the Court could not exercise its jurisdiction until a year after the 30th ratification, which occurred on 26 June 2016.

1.5 THE SIXTEENTH SESSION OF THE ASSEMBLY OF STATES PARTIES (2017)

On 14 December 2017, States Parties to the Rome Statute made the historic decision to enable the ICC to prosecute the crime of aggression by adopting Resolution ICC-ASP/16/Res.5 by consensus. The Court's jurisdiction over the crime of aggression subsequently went into effect on 17 July 2018, which also marked the 20th anniversary of the Rome Statute. This marks the first time that humanity has had a permanent international court with the authority to hold individuals accountable for their decisions to commit aggression – the worst form of the illegal use of force. The historic decision to activate the ICC's jurisdiction over the crime of aggression not only completes the Rome Statute as originally drafted, but also reinforces the Charter of the United Nations by helping to deter aggressive war-making.

2. RATIFYING THE KAMPALA AMENDMENTS

2.1. WHY RATIFY?

Promoting peace and the rule of law at the international level:

The amendments, for the first time in the history of mankind, establish a permanent system of international criminal accountability aimed at enforcing the most fundamental rule governing the peaceful coexistence of nations: the prohibition of the illegal use of force. The crime of aggression is the supreme violation of the *jus contra bellum*, which governs the resort to force. The activation of the Court's jurisdiction over this crime helps to deter illegal uses of force, as leaders have to take the Court's jurisdiction into account when making relevant decisions. Ratifying States will thus make a highly visible contribution to the rule of law at the international level and to international peace and security. They will do their part

to help fulfil the promise of Nuremberg that never again would those who dare to commit the crime of aggression do so with impunity.

Protecting human rights and preventing suffering:

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

Closing a loophole in the Rome Statute:

The criminalization of aggression through the Rome Statute also protects the right to life of individual soldiers. Without it, the Rome Statute does not protect the life of combatants who are unlawfully sent to war, nor the right to life of the soldiers of the attacked State; they are deemed to be legitimate targets who may be killed at will, provided the relevant rules pertaining to the conduct of hostilities are followed.

Judicial protection against aggression by another State:

Ratifying States also serve their own national interest of deterring the illegal use of force against them. The Court can investigate and prosecute crimes of aggression on the basis of Security Council referrals, irrespective of whether the States in question have accepted the Court's jurisdiction in this regard (article 15 *ter* of the Statute). In addition, ratifying States may enjoy the Court's deterrent influence even when the Security Council does not refer a situation to the Court (Article 15 *bis*). Only by ratifying the amendments does a State increase the likelihood of indeed being able to count on the Court's protection against an act of aggression by another State. By ratifying, a State sends a clear message that it supports the right of all people to live in peace and dignity, under the rule of law.

Public commitment not to commit aggression:

Any State that ratifies the amendments on the crime of aggression is essentially declaring to the world that it will not commit acts of aggression, as its government leaders might otherwise themselves be subject to investigation and prosecution by the Court. Ratifying States also help to deter the commission of acts of aggression by their future governments and from the repercussions of such acts. In this regard, a further avenue for judicial deterrence would be to incorporate the definition of the crime of aggression into domestic legislation, thereby ensuring that the judicial branch would in the future exercise appropriate judicial oversight at the national level. Some 30 countries included such provisions in their domestic criminal codes prior to Kampala, and a number of States have implemented the Kampala definition since (see attached materials in Annex, 7.4 -7.7).

Supporting the International Criminal Court:

The Kampala amendments on the crime of aggression emanated from a mandate given by

the Rome Statute; the activation of the Court's jurisdiction over the crime of aggression effectively completed the Statute. By ratifying, States Parties show their support for the Court and for the integrity and full effect of the Rome Statute.

Full compatibility with the United Nations Charter:

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

2.2. WHEN TO RATIFY?

There is no reason to wait. Activation of the Court's jurisdiction over the crime of aggression occurred on 17 July 2018. Given how long the domestic process for ratification of international instruments can take in many countries, states should start their ratification processes as soon as possible.

2.3. RATIFYING AND IMPLEMENTING AT THE SAME TIME?

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

Cooperation with the Court regarding investigations and prosecutions:

Article 86 of the Rome Statute requires all States Parties to cooperate fully with the Court in its investigation and prosecution «of crimes within the jurisdiction of the Court.» Arguably, this provision implies that *all* States Parties – and not just those that ratify the amendments – 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.

Criminalization of the crime of aggression in domestic criminal codes:

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

international treaties, or in order to give full effect to the principle of complementarity contained in the Rome Statute (for examples, see Annex, 7.4-7.7).

Implementing first, ratifying later:

Some States implemented the Kampala definition of the crime of aggression before ratifying the amendments, while others have implemented the Kampala definition and have yet to ratify. This approach can be advisable where the ratification process is expected to take longer.

3. UNDERSTANDING RESOLUTION RC/RES.6

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

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

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

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

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

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

Under operational paragraph 4 the amendments will be reviewed seven years after the beginning of the Court's exercise of jurisdiction.

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

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

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

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

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

Definition of the act of the individual:

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

Leadership clause:

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

Definition of the State act of aggression:

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

of one State against another. To qualify as an act of aggression, the use of force must however meet the criteria of the general clause.

Threshold clause:

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

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

Article 15 *bis* contains provisions regarding the conditions under which the ICC may exercise jurisdiction over the crime of aggression in the absence of a Security Council referral, i.e. based on a State referral or *proprio motu*. Paragraph 1 merely indicates that the crime of aggression can be investigated on the basis of these two triggers, and that additional conditions apply, as contained in the subsequent paragraphs.

Activation of jurisdiction:

Paragraphs 2 and 3 contain general (not situation-specific) conditions for the exercise of jurisdiction, which are replicated in Article 15 *ter* and thus apply to all ICC investigations regarding the crime of aggression. According to paragraph 2, the ICC could only exercise its jurisdiction over crimes of aggression committed after the amendments entered into force for at least 30 States Parties (which occurred on 26 June 2017). Paragraph 3 stipulates a further, cumulative condition: States Parties would have to take an additional one-time decision activating the Court's jurisdiction (which occurred on 14 December 2017). This clause was the last piece of the compromise struck in Kampala.

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

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

Jurisdiction over crimes arising from acts of States Parties:

According to paragraph 4, only crimes arising from acts of aggression committed by one State Party to the Rome Statute against another State Party may lead to the Court's exercise of jurisdiction in the wake of a State referral or *proprio motu* investigation. In addition, with regard to these two triggers, any State Party may opt-out of the Court's jurisdiction by way

of a declaration lodged with the Registrar. Paragraph 4 encourages such States Parties to at least consider the withdrawal of such a declaration within three years; there is however no obligation to withdraw and no automatic expiration of the declaration.

No jurisdiction over non-States Parties:

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

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

Role of the Security Council:

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

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

Paragraph 8 directs the Prosecutor to allow a time period of six months for the Security Council to make such a determination. Where no such determination is made, the Prosecutor may still proceed, provided that the judges of the Pre-Trial Division authorize him or her to do so, following the same procedure as is already envisaged for *proprio motu*

investigations. Paragraph 8 further recalls that the Security Council may at any time suspend an investigation in accordance with Article 16 of the Statute.

Determination of aggression by outside organ:

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

No impact on other investigations:

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

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

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

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

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

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

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

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

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

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

Due to the addition of Article 8 *bis* to the Statute, the list of crimes referred to in Article 9(1) had to be amended to include Article 8 *bis*. This amendment is primarily of technical nature. Note however that Resolution RC/Res.6 also includes substantive additions to the Elements of Crimes (see 3.9 below).

3.9. ADDITION TO THE ELEMENTS OF CRIMES

Annex II of Resolution RC/Res.6 contains additions to the Elements of Crimes. These additions are in essence a checklist of the elements of the crime of aggression that the Prosecutor would have to prove to the Court. They also clarify how the «intent and knowledge» standard of Article 30 of the Statute applies to the crime of aggression. At the same time, these additions to the Elements can serve to confirm some aspects of the definition. For example, the use of force must in all cases be «inconsistent with the Charter of the United Nations»; an act of aggression must have occurred; and the leadership qualification may apply to more than one person. Note that the Elements of Crimes were simply adopted by the Review Conference and do not need to be ratified by States Parties.

3.10. UNDERSTANDINGS

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

Understanding 1 confirms that the Court exercises its jurisdiction on the basis of Security Council referrals only regarding crimes of aggression committed after the Court's jurisdiction is fully activated (i.e. after 17 July 2018), and thus has no retroactive effect. This clarifies in particular how Article 11 of the Statute (Jurisdiction *Ratione Temporis*, addressing the point in time at which a crime committed could fall within the Court's jurisdiction) relates to the crime of aggression.

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

Understanding 3 is the corollary to Understanding 1 and confirms that also in cases of State referrals and *proprio motu* investigations, there is no retroactive effect. Only crimes committed after 17 July 2018 (activation of the Court's jurisdiction) can be investigated.

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

Understanding 5 states that the «amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.» This understanding confirms that the Rome Statute, while built on the principle of complementarity, does not regulate under what conditions States may or must exercise domestic jurisdiction over international crimes, but merely regulates under which conditions the ICC may exercise jurisdiction.

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

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

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

manifest standard by itself.»

4. DOMESTIC IMPLEMENTATION OF THE KAMPALA DEFINITION

4.1. REASONS FOR IMPLEMENTING THE DEFINITION

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

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

Domestic criminalization of aggression by a State's own leaders:

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

Another consideration in this regard is the principle of complementarity, which also applies

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

Domestic criminalization of aggression by foreign leaders:

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

4.2. OPTIONS FOR IMPLEMENTING THE DEFINITION

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

Narrower vs. broader implementation:

States should bear in mind the principle of complementarity. If substantial elements of the definition are missing in a domestic criminal code, a case may be admissible for investigation and prosecution by the ICC. The State in question could thus lose its position as the primary forum for prosecution if the domestic definition is too narrow. A broader definition would not appear to pose a legal problem, to the extent that it covers only nationals of the prosecuting State. However, attempts to prosecute non-nationals for acts beyond the Kampala definition of aggression may result in lack of cooperation from other States, and may be seen as lacking a basis in customary international law.

Individual conduct:

Criminal responsibility for the crime of aggression arises out of the participation of an individual in an act of aggression by a State. The individual's contribution to that act, i.e. the individual's conduct, is defined in Article 8 *bis* as the «planning, preparation, initiation or execution» of an act of aggression. These conduct words have to be read in conjunction with the general part of the Rome Statute («Part 3: General Principles of Criminal Law»), in

particular in conjunction with the forms of participation reflected in Article 25(3). When implementing the definition, States may be able to copy the conduct words «planning, preparation, initiation or execution» into their domestic criminal code, or they may have to choose a different description of the individual's contribution that better fits with their respective general part of the criminal code. States should also ensure that the mental element («knowledge and intent») of the crime of aggression is appropriately reflected in domestic law.

The leadership clause:

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

The State act of aggression:

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

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

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

5. BASES FOR DOMESTIC JURISDICTION

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

5.1. ACTIVE PERSONALITY PRINCIPLE

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

5.2. TERRITORIALITY PRINCIPLE

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

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

5.3. UNIVERSALITY PRINCIPLE

Some States may wish to exercise domestic jurisdiction over the crime of aggression even

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

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

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

6. BARS FOR EXERCISING DOMESTIC JURISDICTION

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

6.1. IMMUNITY *RATIONE PERSONAE* OF FOREIGN OFFICIALS

States that wish to exercise domestic jurisdiction will have to consider applicable immunities of foreign officials, as confirmed by the ICJ's decision in *DRC v. Belgium* («Arrest Warrant case» also referred to as «Yerodia»). Accordingly, Heads of State, Heads of Government, Foreign Ministers and potentially some other high-ranking officials, including, perhaps, the Defense Minister, would enjoy immunity from foreign criminal proceedings under international law, provided they are still in office. Given the leadership nature of the crime of aggression, such immunities severely limit the prospect of domestic adjudication of foreign officials. Some categories of persons that could fall under the leadership clause would

however not enjoy such personal immunity, such as generals or industrialists who would satisfy the stringent criteria of Article 8 *bis*.

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

6.2. IMMUNITY *RATIONE MATERIAE* OF FOREIGN OFFICIALS

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

In the specific context of the crime of aggression, some have argued that the functional State immunity (*par in parem imperium non habet*) would constitute a bar to proceedings because a domestic court would be precluded from determining that another State has committed aggression. The International Law Commission has pronounced itself in that direction in the commentary to the 1996 Draft Code of Crimes against the Peace and Security of Mankind.² This position is, however, open to argument and has been criticized accordingly. Note in particular that the Nuremberg Judgment has stated that the act of State doctrine cannot be applied to crimes under international law, including the crime of waging wars of aggression. Understanding 5 does not contradict this classic statement of the law. It states that «the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State» (emphasis added). This leaves open the question of whether such a right – while not «created» by the amendments themselves – may exist elsewhere in international law, irrespective of the amendments themselves. A number of States have exercised domestic criminal jurisdiction regarding the acts of other States in the aftermath of World War II³ or have domestic legislation allowing territorial (or even universal) jurisdiction. This appears to confirm that the Nuremberg precedent is confined to the crime of aggression as a crime under customary international law and may thus arguably not apply to the extent that a domestic definition of the crime of aggression goes beyond the ambit of Article 8 *bis*. This, however, can be no more than a tentative legal assessment and a comprehensive coverage of this complex legal issue surpasses the ambit of this handbook.

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

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

7. ANNEXES

7.1. RESOLUTION RC/RES.6⁴

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

RC/Res.6

The crime of aggression

The Review Conference,

Recalling paragraph 1 of article 12 of the Rome Statute,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic

⁴ See Depository Notification C.N.651.2010 Treaties-8, dated 29 November 2010, available at <http://treaties.un.org>.

Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

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

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

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

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

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

3. *Also decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in annex III of the present resolution;

4. *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;

5. *Calls upon* all States Parties to ratify or accept the amendments contained in annex I.

Annex I

Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

1. *Article 5, paragraph 2, of the Statute is deleted.*

2. *The following text is inserted after article 8 of the Statute:*

Article 8 *BIS*

Crime of aggression

1. For the purpose of this Statute, «crime of aggression» means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, «act of aggression» means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

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

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

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

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

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

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

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

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

Article 15 BIS

**Exercise of jurisdiction over the crime of aggression
(State referral, *PROPRIO MOTU*)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided

otherwise in accordance with article 16.

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

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

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

Article 15 TER

**Exercise of jurisdiction over the crime of aggression
(Security Council referral)**

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

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

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

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

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

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

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

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

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

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

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

Annex II

Amendments to the Elements of Crimes

Article 8 *BIS*

Crime of aggression

Introduction

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

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person⁵ 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.

⁵ With respect to an act of aggression, more than one person may be in a position that meets these criteria.

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

Annex III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

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

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

Jurisdiction *RATIONE TEMPORIS*

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

Domestic jurisdiction over the crime of aggression

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

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

Other understandings

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

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

7.2. RESOLUTION ICC-ASP/16/RES.5

Adopted at the 13th plenary meeting, on 14 December 2017, by consensus

ICC-ASP/16/Res.5

Activation of the jurisdiction of the Court over the crime of aggression

The Assembly of States Parties,

Recognizing the historic significance of the consensual decision at the Kampala Review Conference to adopt the amendments to the Rome Statute on the crime of aggression, and in this regard recalling resolution RC/Res.6,

Reaffirming the purposes and principles of the Charter of the United Nations,

Recalling its resolve to activate the Court's jurisdiction over the crime of aggression as early as possible, subject to a decision according to paragraphs 3 of article 15 *bis* and article 15 *ter*,

Noting with appreciation the report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression,⁶ which summarizes the views of States Parties,

Recalling paragraph 4 of article 15 *bis* and paragraph 5 of article 121,

Recalling also that in paragraph 1 of RC/Res.6 the Review Conference decided to adopt, in accordance with paragraph 2 of article 5 the amendments regarding the crime of aggression, which are subject to ratification or acceptance and shall enter into force in accordance with paragraph 5 of article 121; and noted that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance of the amendments,

1. *Decides* to activate the Court's jurisdiction over the crime of aggression as of 17 July 2018;
2. *Confirms* that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a

⁶ ICC-ASP/16/24.

crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments;

3. *Reaffirms* paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court;

4. *Renews* its call upon all States Parties which have not yet done so to ratify or accept the amendments to the Rome Statute on the crime of aggression.

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

The General Assembly,

Having considered the report of the Special Committee on the Question of Defining Aggression, established pursuant to its resolution 2330(XXII) of 18 December 1967, covering the work of its seventh session held from 11 March to 12 April 1974, including the draft Definition of Aggression adopted by the Special Committee by consensus and recommended for adoption by the General Assembly,⁷

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

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

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

3. *Calls upon* all States to refrain from all acts of aggression and other uses of force contrary to the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations;⁸

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

2319th plenary meeting
14 December 1974

⁷ Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 19 (A/9619 and Corr. 1).

⁸ Resolution 2625 (XXV), annex.

Annex

Definition of Aggression

The General Assembly,

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

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

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

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

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

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

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

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

Convinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim,

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

Adopts the following Definition of Aggression:⁹

Article 1

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

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

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

Article 2

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

Article 3

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

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

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

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

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

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

Article 4

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

Article 5

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Article 6

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

Article 7

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

Article 8

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

7.4. IMPLEMENTING LEGISLATION – LUXEMBOURG

No 62302

CHAMBRE DES DEPUTES
Session ordinaire 2011 – 2012

PROJET DE LOI

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

* * *

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

B. Article 136quinquies

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

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

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

Il s'agit des actes suivants:

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

f) le fait pour un Etat de permettre que son territoire, qu'il a mis à la disposition d'un autre Etat, serve à la commission par cet autre Etat d'un acte d'agression contre un Etat tiers;
g) l'envoi par un Etat ou au nom d'un Etat de bandes, groupes, troupes irrégulières ou mercenaires armés qui exécutent contre un autre Etat des actes assimilables à ceux de forces armées d'une gravité égale à celle des actes énumérés ci-dessus, ou qui apportent un concours subs-tantiel à de tels actes.

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

7.5. IMPLEMENTING LEGISLATION – SLOVENIA

Disclaimer:

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

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

Sentence of Imprisonment

Article 46

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

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

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

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

Aggression

Article 103

(1) An official or other person in a position effectively to exercise control over or to direct the political or military action of the state, who plans, prepares, initiates or executes an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the

Charter of the United Nations, shall be sentenced to at least fifteen years in prison.

(2) An act of aggression means the use of armed force against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression:

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

Association and Incitement to Genocide, Crimes Against Humanity or Aggression

Article 105

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

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

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

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

Public Incitement to Hatred, Violence or Intolerance

Article 297

(1) Whoever publicly provokes or stirs up hatred, violence or intolerance in respect of

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

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

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

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

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

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

7.6. IMPLEMENTING LEGISLATION – CROATIA

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

Crime of Aggression

Article 89

(1) Whoever, being in a position effectively to exercise control over or to direct the political or military action of a state, uses the armed forces of one state against the sovereignty, territorial integrity or political independence of another state, or in any other manner

inconsistent with the Charter of the United Nations executes an act of aggression which, by its character, gravity and scale, constitutes a violation of the Charter of the United Nations shall be sentenced to imprisonment for a term of at least five years or to long-term imprisonment.

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

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

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

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

7.7. IMPLEMENTING LEGISLATION – DRAFTING ASSISTANCE BY PGA

PARLIAMENTARIANS FOR GLOBAL ACTION (PGA)

Campaign for the Effectiveness and Universality of the Rome Statute system

Legislative sample for Members of Parliaments to «domesticate» the crime of aggression
(adopted by the Kampala Review Conference of the Rome Statute of the ICC, 11 June 2010)

Crime of Aggression

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

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

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

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

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

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

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

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

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

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

(a) if the crime involves the wilful killing of at least one protected-person under

international humanitarian law, be [the same as the penalty for murder prescribed by the law of ... (name of country)] [life imprisonment]; and

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

(4) Lawful use of armed force

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

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

Scope of domestic jurisdiction over the crime of aggression (territorial or active personality jurisdiction)

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

Brief Commentary

For a clear distinction between individual responsibility and State responsibility for the same incriminated conduct with respect to all core crimes under international criminal law, including aggression, the commentary to article 58 of the *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, International Law Commission (ILC) (Cf. UN doc. A/56/10, 2001, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf), 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 practice of national jurisdictions (and of the ICC itself) when an «act of state» of genocide would be the consequence of a crime of genocide allegedly perpetrated by an individual who uses the State-machinery (e.g. the Omar Al Bashir case). In both situations, the «act of state» is the consequence of the criminal behaviour of the individual, and not vice versa.

7.8. RELEVANT WEBLINKS

Global Campaign for the Ratification and Implementation of the Kampala Amendments on the Crime of Aggression

<https://crimeofaggression.info/>

Overview of relevant ICC events and conferences on aggression

https://asp.icc-cpi.int/en_menus/asp/crime%20of%20aggression/Pages/default.aspx

Review Conference Website

[https://asp.icc-](https://asp.icc-cpi.int/en_menus/asp/reviewconference/Pages/crime%20of%20aggression.aspx)

[cpi.int/en_menus/asp/reviewconference/Pages/crime%20of%20aggression.aspx](https://asp.icc-cpi.int/en_menus/asp/reviewconference/Pages/crime%20of%20aggression.aspx)

Coalition for the International Criminal Court (CICC)

<http://www.iccnw.org/?mod=review>

Parliamentarians for Global Action (PGA)

<http://www.pgaction.org/programmes/ilhr/overview.html>

Ben Ferencz online

<http://www.benferencz.org>

Blog by William Schabas

<http://iccreviewconference.blogspot.com/>

Blogs by EJIL – Talk

<http://www.ejiltalk.org/the-aggression-negotiations-at-the-icc-review-conference/>

<https://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/>

Blog IntLawGrrls – aggression series

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

Blog Justice in Conflict

<http://justiceinconflict.org/category/crime-of-aggression/>

7.9. RECENT LITERATURE ON THE CRIME OF AGGRESSION (SINCE JUNE 2010)

Books

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

S. Barriga and C. Kreß (eds.), *The Crime of Aggression: A Commentary* (Cambridge University Press, 2017).

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

P. Grzebyk, *Criminal responsibility for the crime of aggression* (Routledge, 2013).

C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013).

E. Salmón (ed.), *El Crimen de Agresión después de Kampala: Soberanía de los Estados y Lucha contra la Impunidad* (Instituto de Democracia y Derechos Humanos de la Pontificia

Universidad Católica del Perú, 2011).

http://idehpucp.pucp.edu.pe/images/publicaciones/el_crimen_de_agresion_despues_de_kampala.pdf

S. Sayapin, *The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (T. M. C. Asser Press and Springer, 2014).

N. Weisbord, *The Crime of Aggression: The Quest for Justice in an Age of Drones, Cyberattacks, Insurgents, and Autocrats* (Princeton University Press, 2019).

Chapters in Edited Books

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

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

R. S. Clark, «Alleged Aggression in Utopia: An International Criminal Law Examination Question for 2020,» in W. A. Schabas, Y. McDermott and N Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate, 2013), 63–78.

Y. Dinstein, «The Crime of Aggression under Customary International Law» in: L.N.Sadat (ed.), *Seeking Accountability for the Unlawful Use of Force* (Cambridge University Press, 2018), 285-302.

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

C. McDougall, «Protecting Civilians by Criminalising the Most Serious Forms of the Illegal Use of Force: activating the International Criminal Court's Jurisdiction over the Crime of Aggression» in M.Lattimer/P.Sands (eds.) *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Hart Oxford, 2018), 377-396.

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

Nuremberg Judgment, 1946

This handbook is the result of a collaborative effort that benefited from the written and/or oral contributions of the following persons (in alphabetical order): Sina Alavi, Prince Zeid Ra'ad Zeid Al-Husseini, Stefan Barriga, Jutta Bertram-Nothnagel, Roger Clark, David Donat-Cattin, Donald M. Ferencz, Jörn Eiermann, Claus Kreß, Anne-Marie La Rosa, Robbie Manson, Astrid Reisinger Coracini, Michael Scharf, Jennifer Trahan, Christian Wenaweser, and Meagan Wong. Editorial assistance was provided by Diana Barnes, Claire Hegemann, Emilia Hennenhöfer, and Svenja Raube.

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

www.crimeofaggression.info.

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