

The Crime of Aggression at the International Criminal Court

The Rome Statute ('the Statute') provisions on the crime of aggression became fully operational on 17 July 2018. In the absence of prosecutions and practice, the precise nature and scope of the crime will remain a matter of debate. However, as with all International Criminal Court ('ICC' or 'Court') crimes and as discussed below, this debate will be informed by its Rome Statute definition, including the Elements of Crimes, its drafting history, Assembly of State Party's ('ASP') resolutions and a volume of academic commentary.

How was the crime of aggression adopted?

At the time of the adoption of the Statute in 1998, the crime of aggression became one of the four crimes within the jurisdiction of the ICC. However, unlike genocide, crimes against humanity, and war crimes, the crime of aggression did not become operational with the entry into force of the Statute in July 2002. At that time, the crime of aggression and the conditions under which the Court could exercise jurisdiction over it remained undefined.¹ This was primarily due to the following factors:

- **A lack of an agreement on the definition of the crime:** by 1998, the only authoritative and detailed definition of an 'act of aggression' was found in the UN General Assembly's Resolution 3314 (XXIX). This definition, however, concerned the act of aggression committed by a State and was not intended to establish or define individual criminal responsibility. Accordingly, delegates at the Rome Conference² were called upon to reach an agreement on the definition for the purposes of the ICC Statute, which proved to be rather difficult. While some Delegations wanted the crime to encompass only "wars of aggression", others argued that, in line with Resolution 3314 (XXIX), the broader notion of "acts of aggression" should be included.³

¹ Rome Statute, Article 5(2); International Criminal Court Assembly of States Parties, Res RC/Res.6, 13th Plenary Meeting, 11 June 2010 ('Res RC/Res.6').

² The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (also known as the Rome Conference) was a diplomatic conference held between 15 June and 17 July 1998 where more than 160 governments negotiated the Rome Statute of the International Criminal Court. By the end of the conference, 120 states voted in favour of the adoption of the Statute, opening it for signature and ratification. For further information, see CICC, History of the ICC, Rome Conference, at <http://archive.iccnw.org/?mod=rome&idudctp=13&order=dateasc>

³ Liechtenstein Institute on Self-Determination, Handbook on Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC, 2012 ('Handbook'), available at: <https://crimeofaggression.info/documents/1/handbook.pdf>.

- A lack of experience and jurisprudence: The crime of aggression has rarely been prosecuted internationally. In fact, it has not been subject to international criminal proceedings since the post-World War II Nuremberg and Tokyo Trials. The post-World War II jurisprudence, however, was not considered helpful. Delegates to the Rome Conference regarded the judgments as failing to provide any sufficiently precise definition. Furthermore, the drafters did not have guidance from national legal systems as the crime of aggression was rarely punishable under national penal codes;

- Fears related to the politicisation of the Court: Although the ICC deals with the individual criminal responsibility of natural persons, in establishing the crime of aggression, it will necessarily have to make findings relevant to the responsibility of a State in assessing the commission of any act of aggression by one or more of its officials. Some of the Delegations considered this to be a political determination and thus an inappropriate exercise for a judicial body such as the ICC. They regarded this exercise to be, primarily, within the responsibility of the UN Security Council.⁴

Accordingly, the final compromise of the Rome Conference of 1998 was to include the crime of aggression in the list of crimes under the ICC's jurisdiction but to defer the decision on its definition, and the conditions under which the Court may exercise jurisdiction over it, for consideration during the first Review Conference.⁵

The first Review Conference of the Rome Statute was held in Kampala, Uganda between 31 May and 11 June 2010. During the Conference, following the preparatory work by the Special Working Group on the Crime of Aggression ('SWGA') between 2003 and 2009, ICC States Parties adopted an official decision (i.e. the 'Kampala Resolution') and agreed upon the definition of the crime of aggression and the conditions under which the Court may exercise jurisdiction over the crime.⁶

⁴ UN General Assembly, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, Supplement Now. 22 (A/50/22), 1995, paras. 64-65, 68-70, available at: <https://www.legal-tools.org/doc/b50da8/pdf/>; UN General Assembly, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I: Proceedings of the Preparatory Committee during March-April and August 1996, Supplement No. 22 (A/51/122), 1996, paras. 68-71, available at: <https://www.legal-tools.org/doc/e75432/pdf/>; See also Rome Statute, Article 8bis.

⁵ Handbook on Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC.

⁶ ICC, 'Review Conference of the Rome Statute of the International Criminal Court' (Kampala, 31 May-11 June 2010) (Official Records, RC/9/11), Annex III, p. 45 et seq. ('Review Conference, Official Records, RC/9/11').

However, the ICC Assembly of States Parties also decided that the Court's actual exercise of jurisdiction on the crime of aggression would be subject to a decision to be taken by the two-thirds of the States Parties after 1 January 2017 and one year after the ratification or acceptance of the Kampala Resolution by 30 States Parties, whichever was later.⁷ Following the ratification of the Kampala Resolution by 30 States Parties in June 2016⁸ and the adoption of a resolution on the activation of the jurisdiction of the Court over the crime of aggression by the ASP of the ICC in December 2017, the aggression provisions finally came into force on 17 July 2018.⁹

What is the Crime of Aggression?

Article 8bis of the Statute defines the crime of aggression as the following:

- 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:

⁷ Review Conference, Official Records, RC/9/11, para. 32.

⁸ ICC Press Release, ICC-ASP-20160629-PR1225, State of Palestine becomes the thirtieth State to ratify the Kampala amendments on the crime of aggression, 29 June 2016, available at https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/PR1225.aspx

⁹ International Criminal Court Assembly of States Parties, Res. ICC-ASP/ASP/16/Res.5 on the Activation of the jurisdiction of the Court over the crime of aggression, 14 December 2017 ('ASP Res. ICC-ASP/ASP/16/Res.5'). As of 18 April 2019, 38 states ratified Kampala amendments: Andorra, Argentina, Austria, Belgium, Botswana, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, El Salvador, Estonia, Finland, Georgia, Germany, Guyana, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, North Macedonia, Panama, Paraguay, Poland, Portugal, Samoa, San Marino, Slovakia, Slovenia, Spain, State of Palestine, Switzerland, Trinidad and Tobago, and Uruguay.



(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;



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(d) Напад збройними силами держави на сухопутні, морські чи повітряні сили, або морські та повітряні флоти іншої держави;



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



(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.

Who can be held Responsible for the Crime of Aggression?

Under Article 8bis, the perpetrator of the act of aggression must be a person who is in a position effectively to exercise control over or to direct the political or military action of a State.¹⁰ This includes, at the very least, heads of States and governments, ministers of defence and other military leaders such as high-level commanders and generals and may also include individuals who may qualify as exercising such control or direction.¹¹ The use of the term 'effectively' signifies that what matters is the factual (de facto) capability of the perpetrator rather than his or her formal (de jure) rank or title.¹²

In addition to the required leadership position, the perpetrator must have taken an active part in the act of aggression through the preparation, initiation or execution of the invasion, bombardment, blockade, or any other act as enumerated in Article 8bis(2) of the Statute.¹³

In which cases can the ICC exercise jurisdiction over the crime of aggression?

As per the decision of ASP of December 2017 on the activation of the crime of aggression, the Court may only exercise its jurisdiction over aggression committed after 17 July 2018.¹⁴ Consistent with the general prohibition provided by the Statute on the exercise of retroactive jurisdiction by the ICC,¹⁵ the Court may not exercise jurisdiction over acts of aggression committed before this date.¹⁶

The Statute provides distinct jurisdictional requirements for the investigation and prosecution of the crime of aggression depending on whether the crime was referred to the ICC by a State, or the UN Security Council or the examination was launched by the Prosecutor on her own initiative.

➤ Competence of the ICC Following a State Referral or Initiative by the Prosecutor

Article 15bis of the Statute defines the jurisdictional regime applicable to the situations when the ICC Prosecutor investigates and prosecutes acts of aggression either (i) through a referral by a State Party to the ICC Prosecutor; or (ii) on her own initiative.

¹⁰ Rome Statute, Article 8bis(1); Elements of Crimes of the ICC, Article 8bis, Element 2.

¹¹ Triffterer & Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (3rd Edition), 2016, p. 591.

¹² Ibid.

¹³ Elements of Crimes of the ICC, Article 8bis(1); Review Conference, Official Records, RC/9/11, Annex II.

¹⁴ ASP Res. ICC-ASP/ASP/16/Res.5, para. 1.

¹⁵ See Rome Statute, Articles 11 and 24.

¹⁶ See SWGA, 'Report of the Special Working Group on the Crime of Aggression', ICC-ASP/7/20/Add.1, pp. 27-28, paras. 40-41; SWGA, 'Non-paper on other substantive issues on aggression to be addressed by the Review Conference', ICC-ASP/7/20/Add.1, p. 36, paras. 13-14.

In these situations, the ICC may exercise its jurisdiction over the crime of aggression if it was committed by the nationals or on the territory of a State Party to the Statute that has ratified the Kampala Resolution as long as the relevant act occurs one year after the date of ratification.¹⁷

The Court is unable to exercise jurisdiction over the crime of aggression if the crime was committed by the nationals or on the territory of a State that did not ratify the Statute.¹⁸ However, for State Parties, the State would have to opt out through lodging a declaration with the ICC Registrar stating that it does not accept jurisdiction over the crime of aggression.¹⁹



Competence of the ICC following a referral by the Security Council

Article 15ter of the Statute allows the ICC to exercise its jurisdiction over the crime of aggression committed in the territory and by the nationals of any State when it is referred to the ICC Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter. There is no requirement for the involved States to consent to the investigation or prosecution, meaning the ICC may exercise its jurisdiction irrespective of whether or not the State in question is a party to the Statute and has ratified the Kampala Resolution.²⁰

What is the threshold for the act of aggression?

The act of aggression must constitute a manifest violation of the UN Charter by its character, gravity and scale.²¹ The term "manifest" is an objective qualification, i.e. it is an objective determination to be made by the Court (rather than the subjective view of the alleged perpetrator).²² In determining whether the act of aggression constitutes a manifest violation of the UN Charter, the Court must view the character, gravity and scale of the act in question cumulatively.²³

¹⁷ Rome Statute, Article 15bis(4); ASP Res. ICC-ASP/ASP/16/Res.5, para. 2.

¹⁸ Rome Statute, Article 15bis(4) and (5); Coalition for the International Criminal Court, The Crime of Aggression ('The Crime of Aggression Brief'), available at: <http://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression>.

¹⁹ Ibid.

²⁰ Review Conference, Official Records, RC/9/11, Annex III; The Crime of Aggression Brief.

²¹ Rome Statute, Article 15bis(1); Elements of Crimes of the ICC, Article 8bis, Element 5.

²² Elements of Crimes of the ICC, Article 8bis, Introduction, para. 2-4.S, Barriga, C. Kreß, 'The Travaux Préparatoires of the Crime of Aggression' (Cambridge University Press, 2012), p. 77.

²³ Review Conference, Official Records, RC/9/11, Annex III; Y. Dinstein, 'War, Aggression and Self-Defence' (Cambridge University Press, 2017), p. 144.



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