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The Crime of Aggression within the Rome Statute of the International Criminal Court

In brief

Article 1 of the Charter of the United Nations (UN) cites the “suppression of acts of aggression” as a primary purpose of the UN. When adopted in 1998, the Rome Statute (RS), which provides for individual accountability, as opposed to States’ or governments’ responsibility, listed – although did not then define – “the crime of aggression” as the fourth crime falling under the jurisdiction of the International Criminal Court (ICC) (RS Article 5).

Following the 2010 amendments defining the crime and the modalities for ICC jurisdiction, a decision by the States Parties on activation was made at the 16th session of the Assembly of States Parties (ASP) to the Rome Statute in December 2017.

Background

From May-June 2010, the first Review Conference of the Rome Statute of the ICC took place in Kampala, Uganda. States Parties and non-states parties gathered to review the implementation of the treaty since its entry into force in July 2002.

Several amendments to the Statute were also considered at this time, including a proposed definition and conditions of activation and jurisdiction for the *crime of aggression*, one of the core crimes of the ICC’s jurisdiction under Article 5 of the Statute.

After much discussion, an agreement was reached resulting in the adoption of the so-called *Kampala Amendments*, the crime of aggression included, on 10-11 June 2010.

Crime of Aggression amendments

1. **Article 8 bis** provides a definition for the crime of aggression: “*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*



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2. *character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.*"

2. **Articles 15 *bis* and *ter*** outline the process for activating the Court's exercise of jurisdiction as well as the modalities regarding State Party referral, the ICC Prosecutor's *proprio motu* authority, and referral by the UN Security Council (UNSC).

Rome Statute amendments enter into force *for a State* one year after ratification or acceptance *by that State*. However, entry into force of the crime of aggression amendments is not sufficient to enable the Court to exercise jurisdiction; two further conditions were required.

Conditions for the exercise of jurisdiction

1. The amendments must have been ratified or accepted by at least 30 RS States Parties, after which 1 year must pass before the Court could exercise its jurisdiction; and,
2. The ASP had to make a decision after 1 January 2017, by consensus or at least 2/3 majority, to allow the Court to begin exercising its jurisdiction.

Note: As of 27 November 2019, 34 RS States Parties have deposited their ratification instruments for the amendments on the crime of aggression.

Both of these conditions have already been met, therefore the Court may now exercise its jurisdiction over the crime of aggression.

Situations that would allow for the ICC to exercise its jurisdiction

1. State referrals and Prosecutor's *proprio motu* investigations (Article 15 *bis*)

In the case of a RS State Party referral, the Court will only be allowed to exercise jurisdiction if the amendments have entered into force for both States Parties involved, victim and aggressor. The Prosecutor must then determine there to be a reasonable basis to proceed with an investigation. If this occurs, the Prosecutor must notify the UN Secretary-General of the situation.

The UNSC itself has the authority to determine whether an *act of aggression* has been committed (an authority accorded to the UNSC by Article 39 of the UN Charter). The Prosecutor must allow the UNSC six months to make a determination. Where the UNSC has



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made a determination that an act of aggression has been committed, the Prosecutor may proceed with the investigation.

If such a determination is not made within six months, the Prosecutor may still proceed with an investigation but only with authorization of the Pre-Trial Chamber.

The same conditions apply in the case of an investigation initiated by the Prosecutor (*proprio motu*).

2. UN Security Council referrals (Article 15 ter)¹

If the Security Council refers a situation to the ICC under Chapter VII of the UN Charter powers that extend to the entire international community, the Prosecutor has the authority to investigate any of the four core crimes under RS Article 5, including the crime of aggression, committed in any territory by any state's national.

Note: In this situation, the Court is able to exercise jurisdiction over crimes of aggression involving States Parties, regardless of their individual ratification status or “opt-out” status, and non-states parties alike.

Opt-outs and exclusions from the ICC's jurisdiction

States Parties have the option to “opt-out” of the Court's jurisdiction over the crime of aggression **when exercised via state referral or proprio motu powers**, by submitting a declaration with the Registrar of the Court. The declaration must be submitted *before* the act of aggression is committed.

Nationals of non-states parties to the Rome Statute are **excluded** from the Court's jurisdiction over the crime of aggression **when exercised by way of state referral or proprio motu powers**, even if the victim state has accepted the jurisdiction.

However, where **UNSC referrals** are concerned, the Court is able to exercise jurisdiction over crimes of aggression committed **on the territories or by nationals of States Parties and non-states parties** alike.

¹ Observers have expressed the concern that this augmented role of the UNSC in determining whether criminal acts have taken place risks supplanting the independent investigations and role of the Prosecutor as well as the apolitical vision of the judicial process.



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Table of jurisdictional regime of the Crime of Aggression applicable to Rome Statute States Parties

(RS Article 15 *bis*: State referrals & *proprio motu*)

	Victim state has ratified the amendments	Victim state has NOT ratified the amendments
Aggressor State has ratified and NOT opted out	Jurisdiction: YES	Jurisdiction: NO
Aggressor State has NOT ratified and NOT opted out	Jurisdiction: NO	Jurisdiction: NO
Aggressor State has ratified and opted out	Jurisdiction: NO	Jurisdiction: NO
Aggressor State has NOT ratified and opted out	Jurisdiction: NO	Jurisdiction: NO

COALITION FOR THE INTERNATIONAL CRIMINAL COURT

About the ICC and Rome Statute system

Established by international treaty, the Rome Statute, the ICC is the only permanent international judicial body capable of trying individuals for genocide, crimes against humanity and war crimes when national courts are unable or unwilling to do so. It is an independent institution² and can only prosecute crimes that occurred from 2002 onwards – the date of its establishment.

The Court may only exercise jurisdiction³ if:

- The accused is a national of a state party or a state that has accepted the jurisdiction of the Court; or
- The alleged crime took place on the territory of a state party or a non-state party which has made an ad hoc declaration accepting the jurisdiction of the Court; or
- The UN Security Council has referred the situation to the prosecutor, irrespective of the nationality of the accused or whether the state is a party to the Rome Statute.

³“ICC - ICC at a Glance.” *International Criminal Court*. Accessed March 2015: http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx



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An investigation may be opened by the ICC prosecutor in three ways:

- A referral of a situation by a state party; or
- A referral by the UN Security Council; or
- Of own accord (*proprio motu*) following a preliminary examination. Authorization by ICC judges required.

Central to the Court's mandate is the principle of complementarity, which holds that it is the primary responsibility of states themselves to investigate and prosecute those suspected of having committed crimes. The ICC will only act if states are unable or unwilling to investigate and prosecute alleged perpetrators on their own.

Criminal responsibility will be applied equally to all persons without distinction as to whether he or she is a head of state or government, a member of a government or parliament, an elected representative or a government official.

About the Coalition for the ICC

The Coalition for the International Criminal Court is a global network of more than 2500 civil society organizations in over 150 countries working in partnership to strengthen international cooperation with the ICC; ensure that the Court is fair, effective and independent; make justice both visible and universal; and advance stronger national laws that deliver justice to victims of war crimes, crimes against humanity and genocide. www.coalitionfortheicc.org

Where to find more information

- [Coalition for the International Criminal Court website](http://www.coalitionfortheicc.org)
- [International Criminal Court website](http://www.iccnij.org)
- [Rome Statute of the ICC](http://www.un.org/icee)