

States Parties Approve New Crimes for International Criminal Court

By [David Scheffer](#)

Introduction



The Review Conference of the Rome Statute of the International Criminal Court (ICC),^[1] mandated by Article 123(1) of the Rome Statute, convened in Kampala, Uganda, from May 31 to June 11, 2010 and achieved a historic milestone in the development of international criminal law. For the first time since the Nuremberg and Tokyo military tribunals following World War II, the prospect now exists that individual leaders who plan and launch military aggression will be held accountable before an international court of law.

Most of the 111 States Parties, and many non-party States attending as observers, including the United States, joined the deliberations in Kampala, which also included a series of stocktaking discussions in which delegations considered key areas of international justice. This Insight examines the proposed amendments, focusing in large measure on the new crime of aggression.

Prohibited Weapons

By far the least controversial amendment added various poisonous weapons and expanding or flattening bullets to the ICC war crimes jurisdiction in non-international armed conflicts.^[2] These weapons are already subject to the Court's jurisdiction over international armed conflicts;^[3] thus, the amendment simply reflected the reality that they are also used in civil wars and other internal conflicts and should be criminalized in those theaters of combat as well. Relevant elements of the crime were approved.^[4]

Following adoption of this particular amendment, the French delegation, supported by the Canadian, Israeli, and American delegations, orally expressed their interpretation of the amendment to mean that the perpetrator who employs the prohibited bullets must do so with the *specific* intent to "uselessly aggravate suffering or the wounding effect" in the target.^[5]

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The amendment will enter into force for each State Party one year after the instrument of ratification is deposited or the amendment is accepted, in accordance with Article 121(5) of the Rome Statute.

Reaffirmation of the Right to Opt Out of War Crimes Liability

Under a resolution adopted by consensus, the Assembly of States Parties decided to retain Article 124 of the Rome Statute in its current form and to further review it during the 14th session of the Assembly (probably in 2016).^[6] This decision signifies that the right of a new State Party to the Rome Statute to opt out of liability for war crimes for seven years after entry into force of the Statute for that State still remains available. Only France and Colombia have taken advantage of it since 2002, and presently no State Party is exempt from war crimes under the provision. But some delegations, including some non-party States, claimed that retaining Article 124 could encourage States to join the Court and thus promote the universality of the Rome Statute.

The Crime of Aggression

The second and much debated amendment “activated” the crime of aggression pursuant to several new complex procedures.^[7] The Rome Statute has always included the crime of aggression within its subject matter jurisdiction,^[8] but the crime could not be investigated and prosecuted until the treaty was amended to provide a definition and a jurisdictional means to trigger cases before the Court.^[9] Numerous legal and political issues needed to be overcome before consensus on the amendment could be reached. The end game of the negotiations focused on four issues: the different means of referring or initiating an investigation of the crime of aggression before the Court; temporal jurisdiction; the authority of the Security Council; and the crime’s definition.

a. Initiating the Court’s Jurisdiction over Aggression

An important distinction arose during the negotiations between, on the one hand, a State Party’s referral of a situation of aggression (Article 13(a)) or the Prosecutor’s initiation of an investigation of aggression (Article 13(c)) and, on the other hand, the Security Council’s referral of a situation of aggression (Article 13(b)). The procedures activating the Court’s jurisdiction will differ between the two scenarios. When the Security Council refers a situation of aggression to the Court pursuant to a United Nations Charter Chapter VII resolution, any State Party and any non-party State can be swept into that referral “irrespective of whether the State concerned has accepted the Court’s jurisdiction in this regard.”^[10] Therefore, its nationals can be subject to investigation and prosecution for the crime of aggression.

In contrast, when a State Party refers a situation of aggression or the Prosecutor initiates an investigation of aggression, the Court must determine whether the crime of aggression arises from an act of aggression by a State Party that previously declared to the Registrar of the Court that it does not accept the Court’s jurisdiction on aggression.^[11] If such a declaration was filed, then the Court may not proceed against the nationals of such State Party—apparently even in connection with any crime of aggression

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committed on its territory.

Likewise, the Court cannot exercise jurisdiction over the crime of aggression when committed by a non-party State's nationals or on a non-party State's territory.^[12] This critical provision achieved the much sought-after protection from jurisdiction for key non-party States, such as China, India, Indonesia, Russia, and the United States. It corrected, at least for the crime of aggression, the apparent drafting flaw in Article 121(5) in which only a State Party can declare its non-acceptance of a new crime to the Rome Statute.^[13] This concession to non-party States should facilitate overall acceptance of the amendments activating the crime of aggression.

b. Temporal Jurisdiction for the Crime of Aggression

After much discussion, delegations in Kampala finally agreed to regard the amendments on aggression as entering into force in accordance with Article 121(5) of the Rome Statute rather than Article 121(4).^[14] This was a contentious debate, with Japan, for example, strongly advocating adherence to Article 121(4)^[15] for any amendment that was outside the scope of Articles 5, 6, 7, or 8, which pertain to the subject matter jurisdiction of the Court and are amended pursuant to Article 121(5). Any nod towards Article 121(4) greatly complicated entry into force procedures for the crime of aggression because the jurisdictional filter for aggression would be grounded in new Articles 15 *bis* and 15 *ter*. If the jurisdictional filter required a 7/8ths majority for ratification or acceptance by all States Parties, then it might take a very long time for jurisdiction over the crime of aggression to be fully activated.

The final agreement, to which Japan acquiesced while warning that the “dubious legal foundation” of the amendments warranted future action by the Assembly of States Parties, allocated all of the aggression amendments to the procedures of Article 121(5), which normally would have meant they would come into force for a State Party one year following the ratification or acceptance of the amendments by that State Party. However, the amendments for new Articles 15 *bis* and 15 *ter* modify the Article 121(5) procedures with two critical and unusual conditions: 1) the Court may exercise jurisdiction only over crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties;^[16] and 2) the Court may exercise jurisdiction only following at least a two-thirds vote of the Assembly of States Parties after January 1, 2017, reconfirming the agreed procedures in the amendment to activate jurisdiction over the crime of aggression.^[17]

The first caveat essentially raises the bar for entry into force under Article 121(5) and lowers it under the abandoned Article 121(4)—an artful albeit fragile compromise. The second caveat requires the Assembly of States Parties to revisit the issue in 2017 and determine (by consensus or a two-thirds vote) whether to proceed with the agreed procedures. Such radical tinkering with amendment procedures arguably merits an Article 121(4) amendment of the Rome Statute's amendment procedures—which is what Japan's concerns revealed—but the alternative course described above ultimately prevailed.

c. Authority of the Security Council

When there is either a State Party referral (under Article 13(a)) or an investigation by the Prosecutor (under Article 13(c)) of a situation or crime of aggression, new Article 15 *bis* stipulates a unique procedure to determine whether the matter will be investigated and prosecuted by the Court. Initially, if the Prosecutor decides that there is a reasonable basis to proceed with an investigation of a crime of aggression following an Article 13(a) or (c) action, he or she must first “ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned.”^[18] Such a determination likely would arise from a U.N. Charter Article 39 decision by the Security Council.^[19] If the Council has so determined, the Prosecutor may proceed with the investigation of a crime of aggression.^[20]

If such Security Council determination is not made within six months after the date on which the Prosecutor notifies the U.N. Secretary-General that there is a reasonable basis to proceed with an investigation of an alleged crime of aggression, then the Prosecutor may proceed with an investigation, provided the Pre-Trial Division of the Court has authorized the commencement of the investigation in accordance with the original procedures under Article 15.^[21] Negotiations at the Review Conference led to the requirement that all of the Pre-Trial Chamber judges constituting the Pre-Trial Division must arrive at this decision.^[22]

The fall-back to the Pre-Trial Division challenged the primacy of the Security Council in determining acts of aggression under the U.N. Charter. This tactic of keeping an investigation of aggression alive before the Court, when the Council fails to act, was debated intensively for years in the Special Working Group on the Crime of Aggression and among the entire Assembly of States Parties and major non-party States.^[23]

On the final day of the review conference, however, language appeared that confirms Security Council power to flash a “red light” on the Pre-Trial Division. The compromise language provides that the Pre-Trial Division can trigger an investigation of the crime of aggression provided “the Security Council has not decided otherwise in accordance with article 16.”^[24] Article 16 of the Rome Statute explicitly empowers the Security Council to prevent an investigation or prosecution from commencing or proceeding for twelve months after the Council adopts a U.N. Charter Chapter VII resolution requesting the Court to that effect. Such a request, and hence the Council’s “red light” authority, can be renewed by the Council under the same conditions every year.

While the “red light” requires the Security Council to take an affirmative action to block the Pre-Trial Division, as opposed to simply remaining silent, the provision upholds the Council’s primacy with respect to determinations of acts of aggression. However, in order for the Pre-Trial Division to authorize the investigation of a crime of aggression, it will need to determine, pursuant to new Article 15 *bis* (4), that a crime of aggression arises from an act of aggression.^[25] That requirement challenges the view that the Security Council has the exclusive authority to determine an act of aggression. But the Council’s primacy on the matter can be reasserted with a U.N. Charter Chapter VII resolution ending the Pre-Trial Division’s intervention for at least twelve months and for renewable one year periods thereafter by resolutions

of the Security Council consistent with Article 16 of the Rome Statute.

Once the Court is fully seized with the crime of aggression in any particular situation, a determination of an act of aggression by an organ outside the Court “shall be without prejudice to the Court’s own findings” under the Rome Statute.^[26] Thus, the ICC judges are authorized to make their own determinations on aggression once the Pre-Trial Division can rule under new Article 15 *bis* (8) and when individual cases come before the Court, including after Security Council action in accordance with Article 13(b) of the Rome Statute.

d. Definition of Aggression

The Review Conference defined both a “crime of aggression”^[27] and an “act of aggression.”^[28] Both tasks were accomplished long ago in the Special Working Group on the Crime of Aggression, and no interest among States Parties existed in opening up either definition at the Kampala talks. The U.S. delegation acknowledged Washington’s long absence from the Special Working Group during the George W. Bush Administration but sought to reveal weaknesses in the definitions. In the end, U.S. negotiators succeeded in obtaining approval of four substantive understandings regarding new Article 8 *bis*.^[29] As constructive as these interpretative provisions currently appear, it remains uncertain to what extent the ICC judges will consider such understandings in future cases.

The “crime of aggression” is committed by leaders who plan or execute an act of aggression that constitutes “by its character, gravity and scale” a “manifest violation of the Charter of the United Nations.”^[30] An “act of aggression” is the use of armed force against a State or in any other manner inconsistent with the U.N. Charter, including any of the acts set forth in U.N. General Assembly Resolution 3314,^[31] which are recited in new Article 8 *bis* (2).^[32] Much scholarship has been and will be devoted to examining these definitions.^[33] However, this is the deck of cards dealt in Kampala; so the Court, practitioners, and scholars have at least seven years to ponder their application before the first case of aggression can be investigated.

The Special Working Group had finalized elements of the crime of aggression, which proved easy to adopt in Kampala.^[34] The elements mirror some of the points raised in the U.S.-sponsored understandings to the crime of aggression and clarify that the perpetrator need not be shown as having made a legal evaluation about “whether the use of armed force was inconsistent” with the U.N. Charter^[35] or “as to the ‘manifest’ nature of the violation” of the U.N. Charter.^[36]

Conclusion

The complexity and ambiguity of what was accomplished in Kampala will take considerable time and, ultimately, ICC jurisprudence to sort out. But we should not lose sight of how significant these amendments to the Rome Statute are in the long reach of history. Their value as both a deterrent to aggression and as an instrument of accountability, though they will remain untested for several years, should not be underestimated.

About the Author

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Endnotes

[1] Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[2] Draft Resolution Amending Article 8 of the Rome Statute, Rev. Conf. of the Rome Statute, May 31-June 11, 2010, I.C.C. Doc. RC/DC/1/Add.1 (June 10, 2010) [hereinafter Draft Resolution Amending Article 8].

[3] Rome Statute, *supra* note 1, art. 8(2)(b)(xvii-xix).

[4] Draft Resolution Amending Article 8, *supra* note 2, Annex II.

[5] *Id.* (defining, with respect to Article 8(2)(e)(xv) covering “[w]ar crime of employing prohibited bullets,” the third element of crime as being satisfied where “the perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect”).

[6] Draft Resolution on Article 124, Rev. Conf. of the Rome Statute, May 31-June 11, 2010, I.C.C. Doc. RC/WGOA/2 (June 9, 2010).

[7] Rev. Conf. of the Rome Statute, 13th plenary meeting, June 11, 2010, I.C.C. Doc. RC/Res. 6 (advance version) (June 16, 2010) [hereinafter RC/Res. 6].

[8] Rome Statute, *supra* note 1, art. 5(1).

[9] *Id.* art. 5(2) (defining “the crime [of aggression] and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime,” and providing that the mega-amendment on aggression had to “be consistent with the relevant provisions of the Charter of the United Nations”). This amendment fulfilled these requirements.

[10] RC/Res. 6, *supra* note 7, Annex III, Understanding 2.

[11] *Id.* Annex I, art. 15 *bis* (4).

[12] *Id.* *bis* (5).

[13] See David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 76, 81, 86, 96 (Nov. 2001-Feb. 2002) (explains measures to correct the flaw in the second sentence of Article 121(5) of the Rome Statute, which reads: “Any amendment to articles 5, 6, 7

and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory").

[14] RC/Res. 6, *supra* note 7, 1 ("decides to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court . . . the amendments to the Statute contained in annex 1 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 . . .").

[15] Rome Statute, *supra* note 1, art. 121(4) ("Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them").

[16] RC/Res. 6, *supra* note 7, Annex I, art. 15 *bis* (2) & *ter* (2).

[17] *Id. bis* (3) & *ter* (3).

[18] *Id. bis* (6).

[19] U.N. Charter art. 39 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression . . .").

[20] RC/Res. 6, *supra* note 7, Annex I, art. 15 *bis* (7).

[21] *Id. bis* (8).

[22] There are currently six judges who will have to decide by majority vote.

[23] See Stefan Barriga, *Chapter 29: Against the Odds: The Results of the Special Working Group on the Crime of Aggression*, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 621, 632-635 (Roberto Bellelli, ed., 2010); David Scheffer, *Chapter 28: A Pragmatic Approach to the Crime of Aggression*, in INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 609-619 (Roberto Bellelli, ed., 2010).

[24] RC/Res. 6, *supra* note 7, Annex I, art. 15 *bis* (8).

[25] *Id. bis* (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").

[26] *Id. bis* (9) & *ter* (4).

[27] *Id.* art. 8 *bis* (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”).

[28] *Id. bis* (2) (“For purposes 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 . . .”).

[29] RC/Res. 6, *supra* note 7, Annex III, Understandings 4-6, 7.

[30] *Id.* Annex 1, art. 8 *bis* (1).

[31] G.A. Res. 3314, U.N. Doc. A/9631 (Dec. 14, 1974).

[32] See RC/Res. 6, *supra* note 7, Annex 1, art. 8 *bis* (2).

[33] See, e.g., Edoardo Greppi, *Chapter 23: State Responsibility for Acts of Aggression Under the United Nations Charter: A Review of Cases*, in *INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW* 499-518 (Roberto Bellelli, ed., 2010); Mark A. Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains?*, 41 *CASE W. RES. J. INT’L L.* 291 (2009); Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 *YALE J. INT’L L.* 71 (2010).

[34] RC/Res. 6, *supra* note 7, Annex II.

[35] *Id.* intro., sec. 2.

[36] *Id.* sec. 4.