

## THE ACT OF AGGRESSION AS A FORM OF STATE LIABILITY

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**ABSTRACT:** *At the ICC Review Conference held in 2010 in Kampala, Uganda, State Parties have taken important decisions, in this regard by adopting definitions for "the act of aggression" and "the crime of aggression" and making the jurisdiction potentially available even in the absence of a referral from the Security Council. At the same time, the State Parties have decided that the ICC's jurisdiction over this crime will only enter into force after January 1, 2017, on the basis of a subsequent decision of the State Parties. Even then, the ICC jurisdiction for this offense will be limited, as there are exceptions available to State Parties wishing to avoid exposure to this jurisdiction and it will not extend to states that are not parties to the Rome Statute. In addition, there are considerable uncertainties and ambiguities about the exact process of activating the jurisdiction, how the jurisdiction will operate once it is activated, its institutional effects on the Security Council and the ICC itself and its long-term implications for jus ad bellum (the right to war). (Murphy, 2013)*

**KEYWORDS:** *crime of aggression; state liability; armed force; International Criminal Court.*

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The definition of the crime of aggression, agreed in Kampala, has several layers. It describes the key elements of the crime, delimits the categories of people who can be held accountable, and lists various specific acts that qualify as aggression. The definition of aggression referred to in Article 8bis of Resolution RC / Res. 6 of 11 June 2010 can be divided into two parts (i) the crime of aggression and (ii) the act of aggression. While an act of aggression is a form of state conduct, the crime of aggression focuses on individual criminal responsibility. In order to judge an individual for the crime of aggression, one must first demonstrate that there was a state aggression. (Gillett, 2012)

According to the amendment to the Rome Statute, the crime of aggression is defined as follows:

*“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*

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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.”<sup>1</sup>

As mentioned above, the definition of the aggression crime adopted by the States Parties in Kampala consists of two paragraphs; Paragraph 1, which refers to “the crime of aggression”, and in this sense builds the basis for the individual criminal liability of potential perpetrators; And paragraph 2 defining the “act of aggression”, listing a number of acts that until now were usually associated with a state's responsibility, but which could now offer the possibility of prosecuting a person for acts of aggression. (Heinsch, 2010)

The batch of amendments on defining the international crime of aggression, adopted at the Kampala Review Conference was accompanied by a series of specifications called „Elements of the Crime of Aggression”, as follows:

“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.

<sup>1</sup> Article 8 bis from Resolution RC/Res. 6 from 11 June 2010, available on the internet at: <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf>

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 person<sup>2</sup> in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.*

3. *The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.*

4. *The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.*

5. *The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.*

6. *The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations..”<sup>3</sup>*

## 1. THE ACT OF AGGRESSION

The first requirement of defining aggression is the existence of an act of aggression. Article 8bis (2) defines an act of aggression in two parts. The introductory clause of Article 8bis (2) defines the general definition (“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”). The second sentence of Article 8bis (2) provides a non-exhaustive list of examples of behavior that qualify as acts of aggression. The creators of the aggression amendments eventually agreed on a merger of Article 6 of the Nuremberg Statute (peace crimes) and the definition of aggression contained in the UN General Assembly Resolution 3314. This complex definition imposes the dual benefits of the historic pedigree of the Nuremberg definition and the consensus gained in Resolution 3314. (Gillett, 2012)

## 2. ARMED FORCE

In line with Article 8bis, the initial requirement is the use of “armed forces”. The term “armed force” in Article 8bis seems to have its normal meaning: kinetic force directed against the opponent by military weaponry or blockades supported by such weapons. The definition does not include non-kinetic attacks, such as economic embargos or cyber wars.<sup>4</sup> The few cases in which operations have been called aggression by important parts of the international community support this interpretation because they all involved armed physical confrontation. For example, the Nuremberg Court referred to “the annexation of Austria and Czechoslovakia” by Nazi Germany through the invasion of armed forces

<sup>2</sup> In terms of aggression, several people may be in a position to meet these criteria.

<sup>3</sup> Elements of Crimes, p. 43, document available on the internet at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>

<sup>4</sup> The report of the Special Working Group on the Crime of Aggression (ICC-ASP / 6/20 / Add.1 / Annex II), para. 35, p. 14. Available on the internet at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ICC-ASP-6-20-Add.1%20English.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-6-20-Add.1%20English.pdf)

across borders as examples of aggression. Subsequently, the rare occasions when the UN Security Council referred to acts of aggression also involved the use of military forces in foreign territories. Consequently, the demonstration of use of military force in the military sense will be a prerequisite for any allegation of aggression against the ICC. (Gillett, 2012)

The elements of aggression crimes require the act of aggression. Consequently, threats of committing aggressive acts will not be covered by the current incrimination of the aggression crime, no matter how severe or sinister they are. (Gillett, 2012)

### 3. BY A STATE AGAINST ANOTHER STATE

By defining an act of aggression as "*the use of armed force by a State*", the Kampala amendments exclude the use of force by non-state entities. Violent attacks by terrorist groups, insurgents, criminal organizations, mercenaries or dissident groups will not fulfill this per se condition, even if they are committed on a large scale, with serious effects equivalent to an attack of the armed forces of a State. (Schaack, 2010)

Although States are unlikely to interfere with the substantial redefinition of aggression, consideration should be given to extending the definition of aggression to include the use of armed force by non-state entities. Creators and rulers of aggression acts should be condemned and punished at international level, regardless of whether they direct the mechanisms of states or non-state entities. The world has witnessed large-scale armed attacks in recent years by non-state entities, especially when Al-Qaeda hit the World Trade Center and other targets on September 11, 2001. The attacks of 7 July 2005 followed when they blew up public transport vehicles in London, including the bombing of Domodedovo airport in Russia by Chechen rebels in 2011. This shows the ability of non-state organizations to organize violent and serious attacks of aggressive nature. However, in their current form, the amendments to the aggression crime do not extend to such attacks. This means that Osama Bin Laden, for example, would have been immune to prosecution for the crime of aggression. Although he was the leader of Al-Qaeda, he was not in a position to actually control a state or direct the military or political action of a state, and thus would not have fulfilled the elements of the definition of aggression. (Gillett, 2012)

Avoiding this abnormal outcome could be achieved by extending the definition of the crime of aggression to cover attacks by non-state actors. The leader's clause should be amended as follows: "... *in an effective position to exercise control over or direct the political or military action of a State or a non-state entity.*" Although there is no jurisdiction over isolated armed attacks by non-state actors, the Court will have jurisdiction to rule out whether an armed attack by a non-state actor can be attributed to a state. (Gillett, 2012)

According to its attributions, the Court will have to decide whether to adopt the narrower meaning of "*effective control*" advocated by ICJ in the case of Nicaragua and referred to in the Draft Statements on State Responsibility elaborated by the International Law Commission or the broader meaning of "*general control*" set up by the ICTY Appeal Chamber in the criminal case of the prosecutor against Duško Tadić. The content of the aggression crime amendments is closer to the ICJ approach, since Article 8bis (2) essentially reproduces the ICJ's reasoning by prohibiting "*the sending by or on behalf of a*

*State of gangs, groups, irregular forces or armed mercenaries carrying out acts of violence armed against another State and which are so severe that they acquire the character of the acts listed above, or their substantial involvement in such acts.*" However, the subject of the amendments to the aggression crime - the assumption of responsibility for persons triggering large-scale armed violence in violation of the provisions of the UN Charter - is in favor of a broader interpretation, addressed by the ICTY. This interpretation will ensure that States sending armed groups to carry out acts of violence on their behalf will be held accountable and will not be able to avoid incrimination on the grounds that they have not directed those specific acts of violence that constitute aggression. (Gillett, 2012)

No matter which approach is ultimately favored, there is also a third option that can coexist with any of the above approaches. This applies when a state recognizes and adopts the acts of a non-state actor as its own.<sup>5</sup>

Regarding entities that may be victims of aggression, the definition is a little ambiguous. It states that "*the use of the 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*". Can the question arise if attacks against non-state entities qualify as aggression? At first glance, Article 8bis suggests that no. The examples of aggression listed in Article 8bis paragraph (2) (a) to (g) relate to acts committed against another State. However, the question is largely theoretical, since an attack against a non-state entity is also likely to be an attack against the territory of the state in which the non-state entity is located. Such an attack could be described as aggression in the simple terms of the amendments - provided that the state did not agree to such acts. (Gillett, 2012)

#### **4. THE QUALIFIERS ("AGAINST THE SOVEREIGNTY, TERRITORIAL INTEGRITY OR POLITICAL INDEPENDENCE OF ANOTHER STATE, OR IN ANY OTHER MANNER INCONSISTENT WITH THE CHARTER OF THE UNITED NATIONS ")**

The use of the armed force will have the desired meaning in the general definition of aggression in Article 8bis only if it is used against "*the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the Charter of the United Nations*". These qualifiers reflect the definition in Resolution 3314 and are broadly in line with the terms of Article 2 (4) of the UN Charter ("*All members shall abstain in their international relations from 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*").<sup>6</sup>

These qualifiers do not limit the definition of aggression significantly. The UN Charter requires states to resolve their disputes peacefully. Thus, the use of force to resolve an

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<sup>5</sup> Article 11 of the Work of State Responsibility, issued by the International Law Commission, 2001. Available on the internet at: [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)

<sup>6</sup> The United Nations Charter was signed on June 26, 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and entered into force on 24 October 1945. Available on the internet at: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

interstate dispute, even in international waters or in a space without impact on the territory (in the territorial sea or territory) of a state, for example, would be incompatible with the Charter. Consequently, almost any use of the armed force by a State against another State will meet one or more of the qualifiers, as illustrated by the broad list of examples in Article 8bis (2). (Gillett, 2012)

During the negotiations, Germany attempted to add an additional qualifier to the crime of aggression, which would have been limited to armed attacks "*having the object or effect of establishing a military occupation or of annexing the territory of a state or a part of it by the armed forces of the attacking state.*" The German proposal was rejected, indicating that the occupation or annexation of the territory is not a necessary feature of aggression. (Gillett, 2012)

It is not clear whether these qualifiers refer to the subjective purpose for which the armed force is used (to the extent that a state can have a subjective will) or to the objective results of the use of force. Although the distinction would seem right, it might be disproportionate in some circumstances. For example, if a state attack was directed against an objective that did not meet any of the qualifiers (such as against a terrorist group operating within state boundaries), but the attack had unintentional but serious effects in another state (such as a rocket attack on a terrorist group that also caused damage outside the state's borders, whether due to inaccurate aim of the missiles or simply because of the magnitude of the attack), could these unintentional consequences constitute an act of aggression? The conventional notion of aggression would suggest not, affirming the act of aggression to a malevolent or animus malus purpose held by the attacking state, rather than merely objective responsibility for damages to another state. However, there is room for interpretation in this respect. The concepts of negligence and imprudence are not unknown to public international law and could be a basis for finding a state responsible for an act of aggression. By analogy, in the case of the Corfu Canal, the ICJ considered that in order to establish Albania's liability for an unlawful act, it was sufficient for it to know or to have known about the presence of mines in its territorial waters and to have done nothing to warn states of their presence.<sup>7</sup> Consequently, the first part of Article 8bis (2) could be interpreted in a broad sense to include acts of aggression caused by imprudence. This would not necessarily lead to over-criminalization, as the criminal responsibility for an act of aggression requires proof that the act is committed with intent and knowledge. (Gillett, 2012)

## **5. LIST OF EXAMPLES COVERED: INVASIONS, BLOCKADES AND OTHER ACTS OF AGGRESSION**

The list of acts of aggression in Article 8bis (2) sets out the typical means by which the armed force is used aggressively in international relations. (Gillett, 2012)

✓ Article 8bis (2) (a) clarifies that any invasion, attack, military occupation, or annexation of a State's territory by another State will be qualified as aggression. There is no minimum duration of the attack, although short-term attacks can ultimately not meet

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<sup>7</sup> The case of the Corfu Canal at the ICJ (Great Britain v. Albania), 15 December 1949. Available on the internet at: <http://www.icj-cij.org/docket/files/1/1663.pdf>

the threshold for a clear violation of the UN Charter. If an invasion is encountered without armed resistance does not automatically rule out an act of aggression.

✓ Bombing the territory of another state will be classified as aggression, in accordance with Article 8bis para. (2) lit. (b). However, the question of collateral damage or unintentional damage remains unresolved, at least to the extent that it is determined whether an act of aggression has occurred.

✓ The blockade of ports or coasts of a State by the armed forces of another State is included in Article 8bis para. (2) lit. (c). A definition and some guiding principles for the term "blockade" are set out in the International Law Manual on Armed Conflict at Sea, from San Remo, 1994.<sup>8</sup> However, questions remain about the legality of various types of blockades, as demonstrated by the dispute between Israel and Turkey over the killing of peace activists on a Turkish ship carrying aid to Palestine.

✓ Attacks on the armed forces of another State are included in Article 8bis para. (2) lit. (d). There are also exceptions in public international law on aggression, such as self-defense and authorization received by the United Nations. The definition of the act of aggression is based on the UN Charter system. Consequently, any armed attack that is covered by UN Security Council approval will not be qualified as an act of aggression. Approval is expressed in the UN Security Council Resolution adopted under Chapter VII of the UN Charter. The key phrase that signals the authorization of the use of force is "*all the necessary means*". Any other expression usually justifies non-military interventions, such as diplomatic sanctions and pressures.

✓ Article 8bis paragraph (2) lit. (e) makes use of the use of armed force within the territory of a State, beyond the consent of the State in whose territory the armed forces are present, to be a form of aggression. As joint military operations and military assistance operations become more frequent, the possibility of scenarios falling under Article 8bis para. (2) lit. (e) could increase. It is not difficult to imagine a foreign military presence go from a welcome assistance to an unwanted interference and even aggression, as evidenced by the ICJ's findings on armed activities in Congo.<sup>9</sup>

✓ Article 8bis paragraph (2) lit. (f) essentially covers a form of aggression of a "*safe haven*". If a state permits its territory to be the point of launch for a state's armed forces against a third country, then it may be considered to have committed aggression. In particular, the use of military bases in foreign territory to trigger aggressive attacks on third countries could fall under this ban. This provision does not specify whether the level of knowledge of the "*safe haven*" state is complete knowledge and consent, knowing a risk or deliberate ignorance. The scope of this provision will largely depend on the type of interpretation adopted. It is also noteworthy that a state will not be considered to have committed an act of aggression merely by allowing its territory to be used by a non-state armed group carrying out an attack on a third State. Ensuring "*safe havens*" for terrorists will not be eligible unless the terrorist group is under the "*safe havens*" state's control.

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<sup>8</sup> The San Remo Manual is a non-binding document, but it is designed to provide a contemporary re-affirmation of international law applicable to armed conflicts at sea. Available on the internet at: <https://ihl-databases.icrc.org/ihl/INTRO/560?OpenDocument>

<sup>9</sup> The case concerning armed activities in Congo (Democratic Republic of Congo v. Uganda), 19 December 2005. Available on the internet at: <http://www.icj-cij.org/docket/files/116/10455.pdf>

✓ Article 8bis paragraph (2) lit. (g) includes the ICJ formulation for the attribution of acts of non-state entities to a state in the case of the armed activities in Nicaragua<sup>10</sup>. In particular, this provision is broad enough to include a situation similar to the attacks on the United States of 11 September 2001, when there was no conclusive evidence that the Taliban sent the al-Qaeda terrorists to attack the World Trade Center, but there were strong indications that they have been significantly involved in Al-Qaeda operations and after the attacks have taken place, they adopted them as if they were theirs.

The list of acts of aggression analyzed above is not exhaustive. The drafting of the list was a matter of compromise in drafting, and it does not prevent the ICC from finding that other uses of the armed force falling within the general definition are acts of aggression. (Weisbord, 2008)

## 6. CONCLUSIONS

Despite the difficulties in defining aggression, the Rome Statute of the International Criminal Court included aggression in its *ratione materiae*. After twelve years of negotiations in 2010, States Parties have made progress in defining the crime through consensus. However, its relevance can be questioned. The current definition refers to state action or involvement of a state to be considered a crime of aggression. The new theory of war<sup>11</sup> shows that new wars foresee an increasingly diminished role of the state. Therefore, contemporary armed conflicts no longer fit into the state-centered approach and therefore can not be understood by traditional terms. (Boas, 2013)

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<sup>10</sup> The case of military and paramilitary activities in and against Nicaragua (Nicaragua v. The United States), Judgment of 27 June 1986. Available on the internet at: <http://www.icj-cij.org/docket/files/70/6503.pdf>

<sup>11</sup> "the new war" is a term advanced by British academician Mary Kaldor to characterize war in the post-Cold War era.