



Council of the European Union  
General Secretariat

**Brussels, 12 February 2025**

**WK 1337/2025 REV 1**

**LIMITE**

**COJUR**

*This is a paper intended for a specific community of recipients. Handling and further distribution are under the sole responsibility of community members.*

**MEETING DOCUMENT**

---

From: Presidency  
To: Working Party on Public International Law - International Criminal Court  
(COJUR-ICC)

---

Subject: Presentation by Professor Patrycja Grzebyk - Revised version

---

Dear Delegates,

Please find attached the revised version of the powerpoint presentation of Professor Patrycja Grzebyk, who intervened in COJUR-ICC on 6 February 2025.

Kind regards,

COJUR-ICC Secretariat

# Amendments to the Rome Statute concerning **crime of aggression**

[Corrected version as of 6.02.2025)

Prof. Patrycja Grzebyk

University of Warsaw

patrycja.grzebyk@uw.edu.pl

# History of the crime of aggression within the Rome Statute

- 1998 – Article 5 – place hold for the crime of aggression
- 2010 – Kampala amendments
- 2017 – Decision on activation of the jurisdiction of the ICC (with additional one year delay)
- 17 July 2018 – Jurisdiction activated – the Court becomes the master of the interpretation of amendments
- 2025 – Amendments on amendments?

So far no proceedings concerning crime of aggression in the ICC;

No decision of the court on single-track or dual track-process of entering into force of Kampala amendments

# Kampala amendments on crime of aggression

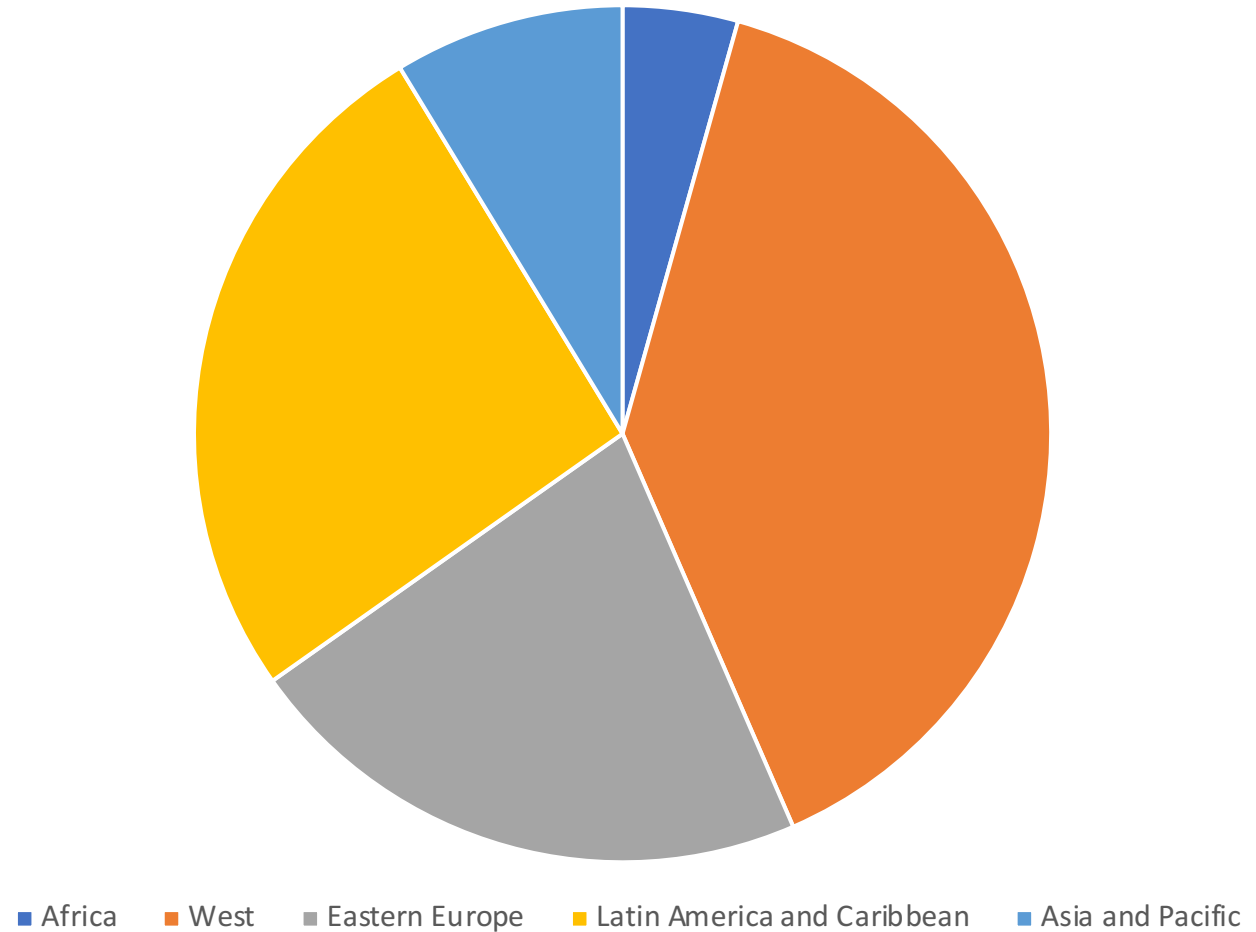
- Article 5(2) – repealed
- Article 8bis - definition of the crime of aggression
- Article 9(1) – reference to Elements of crimes
- Article 15bis – jurisdiction in case of state referral or proprio motu
- Article 15ter – jurisdiction in case of SC’s referral
- Article 20(3) – adding reference to Article 8bis in ne bis in idem provision
- Article 25(3bis) – individual criminal responsibility

# State of affairs (as of January 2025)

47 states parties to the amendments on crime of aggression

(out of 125 thus 37% of all states members of the Rome Statute)

Parties to Amendments



# State of affairs (as of January 2025)

- **African States** (Botswana, Niger) – 2 out of 33 **thus 6%**
- **Western Europe** (Andorra, Austria, Belgium, Denmark, Finland, Germany, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Portugal, San Marino, Spain, Sweden, Switzerland) -18 out of 25 **thus 75%**
- **Eastern European States** (Croatia, Czechia, Estonia, Georgia, Latvia, Lithuania, North Macedonia, Poland, Slovakia, Slovenia) – 10 out of 20 **thus 50%**
- **Latin American and Caribbean States** (Argentina, Bolivia, Chile, Costa Rica, Ecuador, El Salvador, Guyana, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay) -12 out of 28 **thus 43%**
- **Asian and Pacific States** (Cyprus, Mongolia, Palestine, Samoa) - 4 out of 19 **thus 21%**

# State of affairs (as of January 2025)

Among EU states the following states did not ratify amendments on crime of aggression:

- Bulgaria
- France
- Greece
- Hungary
- Romania

After 2017 ASP decision on the activation of the Court's jurisdiction over crime of aggression **three states** ratified the Rome Statute: Kiribati, Armenia and Ukraine, but only Ukraine together with the ratification of the ICC Statute decided to ratify amendments on the crime of aggression.

# 47 states' ratifications in general perspective

1998 Rome Statute (**125** states parties)

2010 amendments on Article 8 – poisonous weapon etc. (**47** states parties)

2015 amendment concerning Article 124 (**24** states parties)

2017 amendment on Article 8 – biological weapon (**23** states parties)

2017 amendment on Article 8 – undetectable fragments (**21** states parties)

2017 amendment on Article 8 Blinding laser weapons (**21** states parties)

2018 amendment on Article 8 Intentionally using starvation of civilians (**19** states parties)

# Why should we avoid discussion on amendments on crime of aggression?

- Prosecution of aggression almost always involves prosecution of high officials enjoying privileges and immunities
- Potential return to the SC's competences dilemma
- Division of resources available to the ICC and distraction of attention from other core crimes
- Unique problems with crime of aggression proceedings (linkage with state responsibility; access to data; functional immunity; protection of victims)

# Why do we need to discuss amendments?

- Formal obligation (Resolution RC/Res.6 - para. 4, *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction)
- Harmonization of the jurisdiction
  - Strengthen the legal order and security
  - Stop the erosion of the legal order concerning prohibition to use of force
  - Deter aggression
  - Introduce the incentive to join the Rome Statute for the better protection
  - Logic consequence of the prohibition of aggression (confirmed by the resolution 3314)
  - Avoid accusation of double standards policy
  - Reduce selectivity
  - Address the whole evil of the illegal war (killings of soldiers; damages justified by IHL; collateral damages)
  - Costs of the establishment of new tribunals dealing with the crime of aggression
- International court is better equipped to prosecute crime of aggression (ILC)
- Prosecution of aggression as an element of self-defence toolbox

# What could be changed?

- Mainly - changes in the jurisdiction in case of referral by state(s) and *proprio motu* proceedings – **Article 15 bis**
- Potential role for the UN General Assembly
- (unlikely) definition of the crime of aggression – list of acts
- (unlikely) the role of the UN Security Council

# Article 12 of the Rome Statute (*Preconditions to the exercise of jurisdiction*)

1. *A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.*
2. *In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:*
  - (a) *The State **on the territory of which the conduct in question occurred** or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;*
  - (b) *The State **of which the person accused of the crime is a national.***
3. *If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.*

# ICC's jurisdiction is derived from classic state's competences

- Territorial jurisdiction
- Active personal jurisdiction

What is missing?

- passive personal jurisdiction;
- protective jurisdiction;
- universal jurisdiction.

## *Article 15bis (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. [ACHIEVED in 2016!]*
- 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. . [ACHIEVED in 2017!]*

## *Article 15bis (Exercise of jurisdiction over the crime of aggression -State referral, proprio motu)*

*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.*

# Article 15bis (Exercise of jurisdiction over the crime of aggression -State referral, proprio motu)

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.

# The use of Article 121(5) for Kampala amendments on aggression

*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.*

Resolution RC/Res.6 - para. 1 *Decides* to adopt (...) 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.

What was agreed in Kampala concerning states parties to the Rome Statute and the possibility to exercise jurisdiction over crime of aggression?

- Broad interpretation

Ratification of the aggression amendments by one of the victim or aggressor states is sufficient in case aggression is committed by State Party to the Rome Statute

- Narrow interpretation

Both – the victim and aggressor states must ratify amendments on the crime of aggression

## Broad interpretation

- Article 5(2)—(*“The Court shall exercise jurisdiction over the crime of aggression once a provision is **adopted** in accordance with articles 121 and 123 defining the crime and **setting out the conditions** under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”* authorization to create *lex specialis*)
- Resolution RC/Res.6 refers to Article 5(2) in order to clarify relation between Article 12 and 121(5)
- The wording of other than RC/Res.6 resolutions concerning amendments are constructed (repeating the full Article 121(5))
- National explanations during ratification processes
- Art. 15 *bis* is a *lex specialis* because
  - Minimum requirement of 30 ratification
  - Opt-out declarations (Kenya and Guatemala)
  - Is allowed according to Article 31(3) VCLT (subsequent agreement)
- Inclusion of additional requirements for crime of aggression
- States already accepted jurisdiction –RC/Res.6 refers to Article 12 which para 1 states *“A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5”*)
- Difference between Article 15 bis para. 4 and 5 (*committed by a State Party v. committed by that State’s nationals or on its territory*)

## Narrow interpretation

- Literal meaning of article 121(5)
- No competence to change amendment system
- Hypocrisy does happen in international relations
- Resolution ICC-ASP/16/Res.5 of 2017 para.2 support narrow interpretation *“**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 crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments”*
- Narrow interpretation was a condition of 2017 compromise

# Is the discussion over?

- Unclear status of the resolution of 2017
- Reference to Article 40(1) and 119 of the Rome Statute in ICC-ASP/16/Res.5 of 2017 “*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.”

What kind of aggression might be judged by the ICC now according to Kampala amendments? (if we accept broad interpretation)

YES

- State party (K) v. State party (K)
- State party (K) v. State party
- State party (K) v. State party (O)
- State party v. State party (K)
- State party v. State party (K/O)

No

- State party (K) v. Non- state party
- State party (O) v. State party (K)
- State party (O) v. Non-State party
- State party (O) v State party (O)
- Non state party v. State party (K)
- Non state party v. State party (O)
- Non state party v. state party
- Non state party v. non state party
- State party v. state party

# Propositions

- Deletion of *Art. 15 bis (5) RS* as well as its corresponding part in *Art. 15 bis (4) RS* (“arising from an act of aggression committed by a State Party”) – thus return to *Art. 12(2)* and *12(3)* conditions
- Introduction in *Art. 15 bis (5) RS* of the authorising function of the General Assembly - GA, acting under the “Uniting for Peace” mechanism, exceptionally authorises the application of *Art. 12 RS* to Non-States Parties.
- Alternative wording of *Article 15 bis para. 4 and 5* + transitional provisions – slight alteration of *Article 12*
- Potential retrospective effect of amendments

# Results of simple deletion of Article 15 bis para 4 and 5

- If Article 121(5) applied – than the second sentence applied as well and broad interpretation is not relevant
- The result of 47 ratifications achieved so far nullified
- Not clear situation of a non-party accepting the Court's jurisdiction (Article 12(3) case)

# States need to remember

There are:

- states which accepted amendments of 2010!
- states which still need to ratify amendments
- states which submitted opt-out declarations
- states which consider ratification of the Rome Statute (with or without ratification of amendments on aggression)

# Even with new amendments still strong limitations concerning prosecution of crime of aggression

- Authorization from the SC or authorization by Pre-Trial Division (so 6-7 judges instead of 3 judges panel of Pre-Trial Chamber)
- Authorization needed not only in *proprio motu* but also in case of state(s)'s referral
- Opt-out declaration (prior to the commission of a relevant state act of aggression)
- Substance of the definition of the crime of aggression
  - *Leadership crime*
  - *By its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.*

# Amendment procedure

## Adoption

- Art. 121 (3) RS requires the **adoption** of an amendment by at least 2/3 of the States Parties.

## Entrance into force

- Art. 121 (4) RS
- Art. 121 (5) RS
- *inter se* regime.

# Comparison of amendment procedures

## Article 121 (4)

- For amendments of all provisions except Articles 5,6,7,8 and amendments concern Article 15 *bis*
- High threshold (!) of ratification needed -7/8 of the States Parties (so 110 states)
- Entrance into force **for all thus** no fragmentation

## RISKS

- Only amendments to Kampala provisions would enter into force for all (but not Kampala amendments themselves)
- Dead letter for a long time
- Open the doors for withdrawal (Article 121(6))
- Even with 7/8 threshold still the need to wait for ratification of Kampala based on Article 121(5)

## Art. 121 (5)

- For amendments of Art. 5, 6, 7 and 8 RS.
- an individual entry into force for each ratifying State Party (low threshold)

In FAVOUR because

- Originally Article 121 (5) was used for the adoption of Kampala amendments
- Article 8bis and 15bis and 15 tier - a package deal

## RISKS

- Article 15 bis is not Art. 5, 6, 7 and 8 RS
- Subsequent practice v. literal meaning
- Fragmentation (further) – sub-sub regime