



Council of the
European Union

165566/EU XXVII. GP
Eingelangt am 06/12/23

Brussels, 5 December 2023
(OR. en)

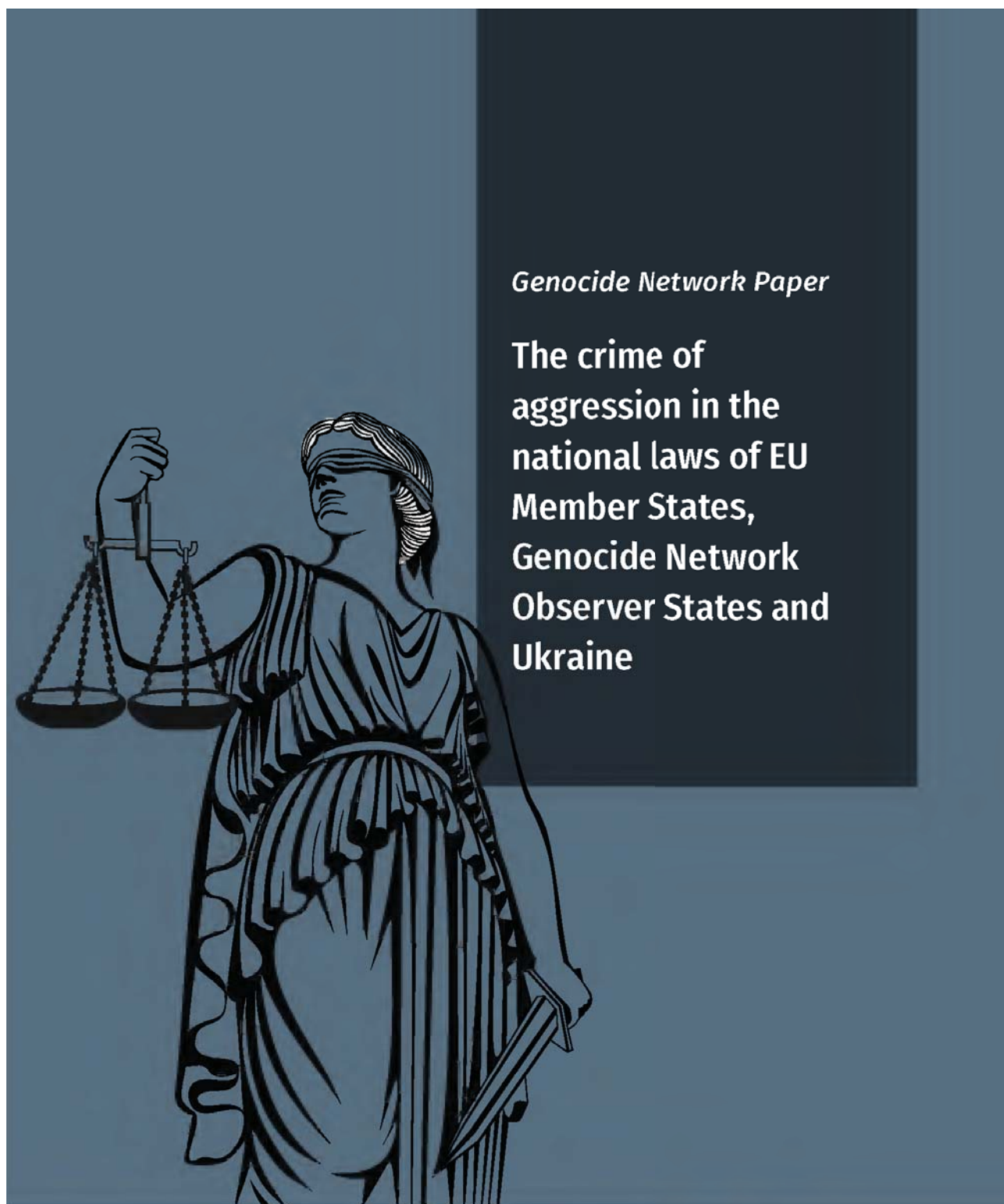
16420/23

COPEN 435
EUROJUST 45
JAI 1621

NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Genocide Network Paper - The crime of aggression in the national laws of EU Member States, Genocide Network Observer States and Ukraine

Delegations will find attached the above-mentioned paper, which is also available on Eurojust's [website](#).



Genocide Network Paper

**The crime of
aggression in the
national laws of EU
Member States,
Genocide Network
Observer States and
Ukraine**



Network for investigation and
prosecution of genocide, crimes
against humanity and war crimes

Luxembourg: Publications Office of the European Union, 2023

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Print ISBN 978-92-9404-004-6 doi:10.2812/538401 QP-04-23-800-EN-C
PDF ISBN 978-92-9490-998-5 doi:10.2812/446599 QP-04-23-800-EN-N

Genocide Network Paper

**The crime of aggression
in the national laws of
EU Member States,
Genocide Network
Observer States and
Ukraine**

October 2023



The Genocide Network

The European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (the Genocide Network) was established by the Council of the European Union in 2002 to ensure close cooperation between national authorities in investigating and prosecuting the crime of genocide, crimes against humanity and war crimes. The Genocide Network facilitates the exchange of information among practitioners, encourages cooperation between national authorities in EU Member States, and provides a forum for sharing knowledge and best practices. The Genocide Network is supported in its work by its Secretariat, based at the European Union Agency for Criminal Justice Cooperation (Eurojust) in The Hague, the Netherlands.

Eurojust helps prosecutors and judicial authorities solve some of Europe's most serious and complex crimes. Eurojust's work enables Member States to decide on common strategies and to build synergies that drive concrete operational results.

This report has been prepared by the Genocide Network Secretariat and is meant solely for information purposes.

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1.

Executive summary



Since the very first days of the full-scale Russian invasion of Ukraine in February 2022, calls have mounted for the establishment of a special tribunal for the crime of aggression, either in an international or hybrid form (incorporating mixed international and national features). The initial proposal of this kind, brought forward by Professor Philippe Sands on 28 February 2022 ⁽¹⁾, was soon relayed by numerous international lawyers, diplomats and politicians ⁽²⁾.

These proposals stemmed from the fact that the most readily available international judicial institution, the International Criminal Court (ICC), is currently unable to exercise its jurisdiction over the crime of aggression in Ukraine. Under the Rome Statute, the ICC's exercise of jurisdiction over this crime is subject to stringent conditions: both the State in whose territory the act of aggression is committed and the State whose nationals are the authors of the aggression must be parties to the Statute and must also have ratified the 2010 Rome Statute amendment relating to the crime of aggression (the 'Kampala amendments') ⁽³⁾. Since neither Russia nor Ukraine have done so, the ICC cannot exercise its jurisdiction over the crime of aggression allegedly committed by Russian nationals in Ukraine.

Towards the end of 2022, the prospect of a special tribunal for the crime of aggression, possibly backed by the United Nations, gained support at the intergovernmental level and within the EU institutions ⁽⁴⁾. In January 2023, the European Parliament issued a resolution wherein it underscored: 'the urgent need for the EU and its Member States, in close cooperation with Ukraine and the international community, preferably through the UN, to push for the creation of a special international tribunal to prosecute the crime of aggression against Ukraine perpetrated by the political and military

⁽¹⁾ P. Sands, 'Putin's use of military force is a crime of aggression', *Financial Times*, 28 February 2022.

⁽²⁾ For an overview, see O. Corten and V. Koutroulis, 'International Tribunal for Russia's Crime of Aggression against Ukraine – A legal assessment', European Parliament, December 2022.

⁽³⁾ Rome Statute, Art. 15bis §2.

⁽⁴⁾ 'Statement by President von der Leyen on Russian accountability and the use of Russian frozen assets', 30 November 2022.

leadership of the Russian Federation and its allies and to find a legally sound, common way forward on this matter' ⁽⁵⁾.

Shortly after, President von der Leyen announced the establishment of an International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA), to be set up in The Hague, in the Netherlands, embedded within the joint investigation team (JIT) constituted between Estonia, Latvia, Lithuania, Poland, Romania, Slovakia and Ukraine with the support of Eurojust ⁽⁶⁾.

On 5 March 2023, JIT members amended the JIT's constitutive agreement in order to reflect the future role of the ICPA, which was formally launched on 3 July 2023 ⁽⁷⁾. The ICPA is not a standalone structure, but a 'judicial hub' forming part of the existing support structure for the JIT, with a specific focus on supporting and enhancing investigations into the crime of aggression by securing key evidence and facilitating the case-building process. Dedicated prosecutors from different countries will be able to work together at Eurojust and agree on a common investigative and prosecution strategy, irrespective of the jurisdiction which will ultimately prosecute perpetrators. The ICPA receives legal, operational, technical and logistical support from Eurojust.

It is still too early to expect potential developments in the direction of a full-fledged special tribunal for the crime of aggression. Nonetheless, the investigative work to be led by the ICPA is certainly intended to pave the way for such an institution to be established in the future. In the meantime, six of the JIT members (Ukraine, Lithuania, Poland, Estonia, Latvia and Romania) will lead and contribute to that work. In doing so, they will act not as an international investigative mechanism, tribunal or

court, but within the parameters set by their own national legislations.

Naturally, a number of issues arise when considering the investigation and prosecution of the crime of aggression by domestic jurisdictions. The crime of aggression is considered to be a 'leadership crime', meaning that, according to the Rome Statute definition, only persons in a position to effectively control or direct the political or military action of a State may incur individual criminal responsibility for this crime ⁽⁸⁾. In most cases, this would concern State officials, who generally benefit from personal (*ratione personae*) or functional (*ratione materiae*) immunity, preventing criminal prosecution before domestic courts.

However, this paper does not aim to further discuss the issue of immunity or other obstacles that may arise as to the exercise of (domestic) jurisdiction over the crime of aggression. The purpose of this paper is to provide a comparative overview of the way in which EU Member States, Genocide Network Observer States and Ukraine have implemented the crime of aggression in their domestic laws. How is the crime of aggression defined in national criminal codes? Have the majority of states adopted the definition provided by Article 8bis of the Rome Statute? Do they exercise universal jurisdiction over this crime, similar to war crimes, crimes against humanity and genocide?

The first part of the paper briefly presents the historical evolution of the crime of aggression under international law, looking at how its main components have been shaped from the aftermath of the Second World War up until the adoption of the 2010 Kampala amendments to the Rome Statute. The second part of the paper provides an overview of the national criminal laws of EU Member States, Genocide Network Observer States and Ukraine and takes a look at the English translations of domestic provisions defining the crime of aggression, highlighting common features and main differences.

⁽⁵⁾ European Parliament, [Resolution of 19 January 2023 on the establishment of a tribunal on the crime of aggression against Ukraine](#) (2022/3017(RSP)).

⁽⁶⁾ 'Statement by President von der Leyen at the joint press conference with Ukrainian President Zelenskyy', 2 February 2023.

⁽⁷⁾ For more information, consult <https://www.eurojust.europa.eu/international-centre-for-the-prosecution-of-the-crime-of-aggression-against-ukraine>.

⁽⁸⁾ Rome Statute, Art. 8bis §1 and Art. 25§3 bis.

2.

Evolution of the definition of the crime of aggression and international customary law status



2.1. Historical background

After inconclusive attempts at criminalising aggression at the end of the First World War⁽⁹⁾, the crime of aggression was first considered as an international crime giving rise to individual criminal liability on 8 August 1945, with the adoption of the London Agreement establishing the Nuremberg Tribunal, or International Military Tribunal (IMT)⁽¹⁰⁾.

Prior to this, Article 2(4) of the UN Charter of 26 June 1945 had established a ban on the illegal use of force, enabling the Security Council to respond to threats to the peace, breaches of the peace and 'acts of aggression'. However, the UN Charter prohibition is sanctioned by state responsibility, and ignores the question of individual or personal accountability for such violations⁽¹¹⁾.

Therefore, the IMT, set up by victorious allied powers to prosecute and punish German war criminals, was the first international tribunal to seek convictions of individuals for the crime of aggression. Article 6(a) of the IMT Charter provided a definition of 'crimes against peace' – the crime of aggression – as follows:

'[...] planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'.

At the time, the crime of aggression was seen as a special crime, above or at the origin of other international crimes: according to the IMT, '[t]o initiate a war of aggression (...) is not only an international

crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'⁽¹²⁾.

On 11 December 1946, 3 weeks after the IMT rendered its judgement, the UN General Assembly adopted Resolution 95(I), affirming 'the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'.

Some jurisprudence on the notion of crimes against peace emerged from the IMT (with 12 defendants found guilty on this count), the Tokyo International Military Tribunal⁽¹³⁾ (25 defendants found guilty) and some of the US military tribunals established by Control Council Law No 10⁽¹⁴⁾. Following the Nuremberg and Tokyo trials, however, the prosecution of the crime of aggression was not at the forefront of international accountability efforts until recently. This can be explained by several considerations. The post-Second-World-War context made it particularly easy to penalise the leaders of the vanquished States. Furthermore, while the UN Charter had established a ban on the illegal use of force in international relations, it also provided for exceptions, leading to some grey areas of international legal regulation, and therefore rendering the criminalisation of aggression quite problematic given the requirement for legal precision in order to hold individuals criminally liable. Finally, during the Cold War era major powers refrained from elaborating on the notion of aggression⁽¹⁵⁾.

⁽⁹⁾ IMT Judgement, 1 October 1946, p. 25.

⁽¹⁰⁾ Art. 5(a) of the 1948 Charter of the International Military Tribunal for the Far East contains an almost identical definition, except that it refers to war 'in violation of international law' in addition.

⁽¹¹⁾ Art. II (1)(a) of Control Council Law No 10, which was slightly expanded compared to the IMT Charter definition, defined crimes against peace as the 'initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'.

⁽¹²⁾ Cassese, p. 139; Bassiouni, pp. 554–555.

⁽⁹⁾ See Kress, *The Crime of Aggression: A Commentary*, Cambridge University Press, 2016 (hereinafter referred to as the 'Commentary'), pp. 21–46.

⁽¹⁰⁾ Agreement for the prosecution and punishment of the major war criminals of the European Axis, London, 8 August 1945. For a complete historical overview, see Commentary, pp. 143–145 and p. 203; Cassese's *International Criminal Law*, Third Edition, OUP, 2013, p. 139; Bassiouni, *Introduction to International Criminal Law*, Second Revised Edition, Martinus Nijhoff Publishers, 2013, p. 554–555.

⁽¹¹⁾ Art. 2(4) and 39 of the UN Charter. See Commentary, p. 146.

It is only in 1974 that the UN General Assembly adopted by consensus ⁽¹⁶⁾ a non-legally binding resolution containing the following 'Definition of Aggression' ⁽¹⁷⁾.

Article 1

Aggression is 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, as set out in this Definition.

[...]

Article 2

The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, 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.

Article 5

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.

2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

⁽¹⁶⁾ *Commentary*, pp. 152–154.

⁽¹⁷⁾ UNGA, 'Definition of Aggression', Resolution 3314 (XXIX) of 14 December 1974. One should note that the primary purpose of the resolution was to serve as a guideline for the Security Council to determine acts of aggression by States under the UN Charter, rather than to define an international criminal offence. See *Commentary*, pp. 155–156 and p. 167.

The subsequent articles carve out a more detailed definition, and provide a non-exhaustive list of specified acts of aggression⁽¹⁸⁾.

The definition provided in Resolution 3314 remained voluntary broad and gave discretion to the Security Council in characterising other acts as aggression under the UN Charter. Furthermore, the resolution pointed out that aggression is a 'crime against international peace', giving 'rise to international responsibility' (as an international wrongful act of States), but did not mention criminal liability of individuals for the crime of aggression.

2.2. Status under customary international law

In 1986, the International Court of Justice asserted that the UN Charter prohibition of the (illegal) use of force is a norm of customary international law⁽¹⁹⁾, which has since reached the status of *jus cogens* – an overriding principle of international law recognised by the entire international community and which cannot be derogated from. It also identified the concept of aggression as the 'most grave' form of the use of force⁽²⁰⁾.

In addition, the crime of aggression is generally considered as a crime under customary international law, as held in 2006 by the United Kingdom House of Lords in *R v Jones et al*⁽²¹⁾. Nonetheless, the exact scope and elements of the crime under customary international law remain subject to debate⁽²²⁾.

2.3. The crime of aggression in the Statute of the International Criminal Court

In the absence of a binding convention defining the crime of aggression, the ICC Statute negotiations taking place in Rome in 1998 did not lead to a consensus on the definition of the crime. States were unable to agree on a definition, the conditions of exercise, the jurisdictional scope and triggering mechanism⁽²³⁾. Yet the crime of aggression, despite the lack of State practice, was already by then generally viewed by scholars as part of customary international law, in part due to the historical baggage associated with it⁽²⁴⁾.

It is only later, during the first Review Conference of the Rome Statute of the ICC, taking place from 31 May to 11 June 2010 in Kampala, Uganda, that a resolution⁽²⁵⁾ was adopted providing a definition of the crime of aggression and a specific procedure for the activation of the Court's jurisdiction over this crime. This definition builds upon the language of the London Charter, the UN Charter and Resolution 3314. Interestingly, the definition of the crime as such was not at the heart of the debate during the Review Conference, contrary to jurisdictional issues⁽²⁶⁾.

Article 8bis⁽²⁷⁾ of the Rome Statute defines the crime of aggression as follows.

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

⁽¹⁸⁾ UNGA, *Definition of Aggression*, Resolution 3314 (XXIX).

⁽¹⁹⁾ International Court of Justice, *Case concerning military and paramilitary activities in and against Nicaragua*, Judgment of 27 June 1986, para. 176.

⁽²⁰⁾ *Nicaragua case*, para. 191.

⁽²¹⁾ UK House of Lords, *R v Jones et al* [2006] paras. 12–19, 44, 59.

⁽²²⁾ Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd Edition, OUP, 2016, p. 303.

⁽²³⁾ Bassiouni, 634.

⁽²⁴⁾ Bassiouni, 633.

⁽²⁵⁾ Resolution RC/Res.6 of 11 June 2010.

⁽²⁶⁾ Bassiouni, 636.

⁽²⁷⁾ Inserted by resolution RC/Res.6 of 11 June 2010.

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.

As per Article 15*bis* of the Rome Statute, the Court may only exercise jurisdiction with respect to crimes of aggression committed 1 year after the

ratification or acceptance of the Kampala amendments by thirty States Parties. In addition, it was decided that a decision should be taken after 1 January 2017 by the same majority of States Parties, as required for the adoption of an amendment of the Rome Statute, for the Court to be able to exercise its jurisdiction. In application of those provisions, on 14 December 2017 the Assembly of States Parties decided to activate the jurisdiction of the Court over the crime of aggression as of 17 July 2018 ⁽²⁸⁾.

In line with Article 15*bis* para. 5, the Court is unable to exercise its jurisdiction over the crime of aggression in respect to a State that is not a party to the Rome Statute, when the crime of aggression is committed by that State's nationals or on its territory.

2.4. Key elements of the crime of aggression

(a) Objective elements

Section 1 of Article 8*bis* of the Rome Statute defines the crime of aggression as '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' (emphasis added).

As per the definition of Article 8*bis*, individual criminal responsibility for the crime of aggression may only be incurred by members of State leadership, subject to a threshold requirement as to the type of UN Charter violation.

⁽²⁸⁾ Resolution ICC-ASP/16/Res.5 of 14 December 2017.

• A 'manifest' violation of the UN Charter

In the situations envisaged by Article 8*bis*, only a 'manifest' violation of the UN Charter – by its 'character, gravity and scale' – would warrant criminal condemnation, in an area of law (the use of force) where many cases will be borderline and may be difficult to legally qualify as 'manifest' violations. This means that not every use of armed force by a State against another State would necessarily give rise to individual criminal responsibility ⁽²⁹⁾.

Under international customary law, some instances of 'aggression' may qualify as international wrongful acts of States or as the *actus reus* of a crime entailing individual criminal liability, or both. It is often considered that the traditional instances of aggression envisaged in the definition of Resolution 3314 would validly entail both categories of international responsibility ⁽³⁰⁾.

Furthermore, similarly to Article 8*bis*, customary international law seems to consider as an international crime the planning, organising, preparing or participating in the first use of armed force by a State against the territorial integrity and political independence of another State in contravention of the UN Charter, in cases where the acts of aggression are large-scale and produce serious consequences ⁽³¹⁾. Therefore, isolated acts such as single attacks limited in scope and time may not reach the necessary threshold to constitute the international crime of aggression, while they may give rise to the international responsibility of the State ⁽³²⁾.

⁽²⁹⁾ See *Commentary*, pp. 321–323.

⁽³⁰⁾ Cassese, 139. See also USAID, Ukrainian Supreme Court, National School of Judges of Ukraine, UpRights and Global Rights Compliance, *Benchbook on the Adjudication of International Crimes*, June 2023, pp. 378–379 (hereinafter referred to as the 'Benchbook'), para. 983.

⁽³¹⁾ This issue however, was highly debated at Kampala. See *Commentary*, pp. 507–520.

⁽³²⁾ Cassese, 140 and 143–144. According to Cassese, the rules of customary international law and the treaty provisions (Articles 2(4) of the UN Charter, read in conjunction with Articles 42–9, 51 and 53) prohibiting the unlawful use of force as an international wrongful act, are different from and broader than the customary international rules that criminalise aggression.

• A leadership crime and an act of State

It was debated at Kampala whether international customary law supported the extension of the crime to individuals belonging to non-State organisations and other organised entities (e.g. terrorist organisations) ⁽³³⁾.

Ultimately, the definition retained in Article 8*bis* restricts criminal liability to persons 'in a position **effectively to exercise control over or to direct the political or military action of a State**', therefore excluding non-State or minor official actors ⁽³⁴⁾. The leadership requirement, which commentators generally consider as part of customary international law ⁽³⁵⁾, applies both to the primary perpetrator, but also to accomplices, as per Article 25§3 *bis* of the Rome Statute ⁽³⁶⁾. Naturally, several persons within the leadership hierarchy of a State may meet the criteria: Heads of State and Government, ministers of defence, military leaders (commanders and generals), etc. Furthermore, under customary international law any person who is in a position to control and influence government policy, such as industry or religious leaders, may be held responsible for the crime of aggression ⁽³⁷⁾.

This is why the crime of aggression is often described as a '**leadership crime**'. Fundamentally, the crime of aggression (i) always results from some sort of collective action of a plurality of persons and (ii) is an offence attributable to political and military leaders, as well as other senior officials who plan, prepare, initiate or execute the crime. As a consequence, the personal criminal liability of low-level perpetrators should not be involved (e.g. soldiers crossing the border or pilots carrying out air raids in execution of an aggressive plan that they were not in a position to effectively exercise control over).

⁽³³⁾ See *Commentary*, pp. 313–315.

⁽³⁴⁾ See *Benchbook*, p. 388, para. 1018.

⁽³⁵⁾ *Commentary*, p. 309.

⁽³⁶⁾ *Commentary*, p. 309.

⁽³⁷⁾ *Commentary*, p. 565.

(b) Subjective elements

In order to determine criminal intent, it must be shown that the perpetrator intended to participate in planning, preparing or waging an act of aggression, was aware of the scope, significance and consequences of the action taken, and substantially contributed to shaping or influencing the planning or waging of aggression ⁽³⁸⁾.

International case-law from post-war trials demonstrates that leaders or high-ranking military officers, senior State officials or leading private individuals may bear responsibility if they had knowledge of other leaders' plans and willingly pursued the criminal purpose of furthering the aggressive aims ⁽³⁹⁾. Several US military tribunals ⁽⁴⁰⁾ acquitted defendants on the count of crimes against peace, finding notably that:

'[t]here first must be actual knowledge that an aggressive war is intended and that if launched it will be an aggressive war. But mere knowledge is not sufficient to make participation even by high-ranking military officers in the war criminal. It requires in addition that the possessor of such knowledge, after he acquires it shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it. If he then does the former, he becomes criminally responsible; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent (...)' ⁽⁴¹⁾.

'The **acts of commanders and staff officers below the policy level**, in planning campaigns, preparing means for carrying them out, moving

against a country on orders and fighting a war after it has been instituted, **do not constitute the planning, preparation, initiation and waging of war or the initiation of invasion that international law denounces as criminal**' ⁽⁴²⁾. (emphasis added)

Some commentators argue that the crime of aggression also requires 'special intent', that is the will to achieve territorial gains, obtain economic advantages or deliberately interfere with the internal affairs of the attacked State (e.g. bringing change in political regime or international political alignment, toppling its government) ⁽⁴³⁾.

Finally, the ICC Elements of Crimes for Article 8bis require that the perpetrator be aware of the factual circumstances that established that such a use of armed force was inconsistent with the UN Charter, as well as of the factual circumstances that established such a 'manifest violation' of the UN Charter. There is no legal requirement for the perpetrator to make a legal evaluation in that respect.

Source: see Cassese, 141; Goring and others, IMT, judgement and sentence of 1 October 1946.

⁽³⁸⁾ Cassese, 141.

⁽³⁹⁾ See in particular Goring and others, IMT, judgement and sentence of 1 October 1946.

⁽⁴⁰⁾ For instance, *Krupp and others*, United States, US Military tribunal sitting at Nuremberg, 30 July 1948, concerning private citizens (industrialists) (at 488); *Krauch and others* (*I.G. Farben* case), United States, US Military tribunal sitting at Nuremberg, 29 July 1948 (at 1108, 1128, 1306); *Von Weizsäcker and others* (*Ministries* case), United States, US Military tribunal sitting at Nuremberg, 12 December 1949 (at 425).

⁽⁴¹⁾ See *Von Leeb and others* (*High Command* case), United States, US Military tribunal sitting at Nuremberg, 28 October 1948 (at 68).

⁽⁴²⁾ See *Von Leeb and others* (*High Command* case), United States, US Military tribunal sitting at Nuremberg, 28 October 1948 (at 490-1).

⁽⁴³⁾ See Cassese, 142, referring to the views of S. Glaser. No special intent is required for the concept of aggression for the international wrongful acts of States, only a breach of Article 2(4) of the UN Charter.

3.

Criminalisation of the crime of aggression under national law



At the time of writing, 45 State Parties have ratified the Kampala amendments, which, for some countries, have been directly integrated into their national laws ⁽⁴⁴⁾.

While not all State Parties to the Rome Statute have ratified the Kampala amendments, they may still have adopted their own national legislation dealing with the crime of aggression. The same can be said of other countries that are not parties to the Rome Statute ⁽⁴⁵⁾.

Note to readers. This paper provides an overview of domestic legislation relative to the crime of aggression, but does not aim to address the obstacles (such as immunities, sovereignty issues and political legitimacy) that may arise when seeking to prosecute the crime of aggression at the domestic level ⁽⁴⁶⁾.

3.1. Criminalisation of the crime of aggression in the national law of EU Member States

(a) Overview of national provisions defining the crime of aggression

Among the 21 EU Member States that have ratified the Kampala amendments, five Member States (Belgium, Ireland, Spain, Italy, Slovakia) have yet to implement the crime in their national legislation.

Concerning the 16 EU Member States that have implemented the crime of aggression in their national legislations, the following categories can be discerned.

⁽⁴⁴⁾ See UN Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-10-b&chapter=18&clang=en#.

⁽⁴⁵⁾ For an analysis of various national legislations implementing the crime of aggression beyond the EU Member States, see *Commentary*, pp. 1038–1075.

⁽⁴⁶⁾ For a discussion on complementarity, domestic prosecutions and the crime of aggression, see *Commentary*, pp. 704–743.

- Eight Member States (Croatia, Cyprus, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Finland) have modelled their national provisions after Article 8bis of the Rome Statute, either by adopting a 'copy and paste' approach when transposing the text, or by adopting a slightly amended version of the text to accommodate national particularities.
- Four Member States (Czech Republic, Germany, Austria, Sweden) have adopted their own definitions, which generally reflect the main components of Article 8bis.
- Four Member States (Estonia, Latvia, Lithuania, Poland) have their own definitions of the crime of aggression, which, albeit echoing some traditional elements of the crime as understood under international law, are generally more succinct than Article 8bis and/or drafted in broader terms. In particular, the Latvian and Polish definitions do not clearly include a leadership element (contrary to Estonian and Lithuanian law, which seem to refer more directly to this element).

In addition, the following specificities are particularly noteworthy.

- A total of 12 Member States (Czech Republic, Germany, Estonia, Croatia, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland, Sweden), hence the majority of those having ratified the Kampala amendments, have clearly included the leadership element in their national definition of the crime of aggression. While Estonia has implemented the leadership clause in relation to the 'leading, execution or preparation of an act of aggression', it has also criminalised the 'joining of foreign armed forces or other armed entities participating in a foreign act of aggression, participating in the commission or preparation of a foreign act of aggression, or knowingly supporting a foreign act of

aggression, including financing', an offence which may apply to individuals that are not part of the State leadership. In the case of Lithuania, while the leadership element is not clearly stated, the redaction of the broad provision seems to imply that it would nonetheless apply to the criminalised acts ('Any person who causes an aggression against another state or is in command thereof' may be held liable).

- Four Member States (Estonia, Croatia, Latvia, Poland) do not restrict liability for the crime of aggression to the sole State leadership, although the application of national provisions may prove limited in practice.
- A total of 10 Member States (Czech Republic, Germany, Croatia, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Finland, Sweden) have incorporated the threshold requirement concerning the character, gravity and scale of the act of aggression.
- A total of 10 Member States (Germany, Estonia, Croatia, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Finland, Sweden) provide a definition of an 'act of aggression', generally modelled after Article 8bis of the Rome Statute (albeit with some variations), which itself relies on the definition of UN General Assembly Resolution 3314 (XXIX) of 14 December 1974.
- Four Member States (Estonia, Latvia, Lithuania, Poland) may exercise universal jurisdiction over the crime of aggression, while seven Member States (Czech Republic, Germany, Croatia, Luxembourg, the Netherlands, Portugal, Sweden) exclude the application of the universal jurisdiction principle to the crime.
- One Member State (Estonia) specifically provides for the criminal liability of legal persons for the crime of aggression.

(b) Member State definitions

In the EU, 21 Member States have ratified the Kampala amendments.

The present section lists the definitions of the crime of aggression retained in their criminal codes, in instances where the definition of the crime of aggression has been implemented in domestic criminal law. It also specifies instances in which a State may exercise universal jurisdiction over the crime of aggression, according to its legislation.

BELGIUM

No implementation into domestic law yet ⁽⁴⁷⁾.

CZECH REPUBLIC

Definition in Section 405a of the Criminal Code

Aggression

Whoever, in a position to exercise control over a State or to direct its political or military actions, in contravention of the provisions of international law, plans, prepares, initiates or carries out an act of aggression consisting in the use of armed force by such a State against the sovereignty, territorial integrity or political independence of another State or in the use of armed force by such a State in any other manner inconsistent with the Charter of the United Nations and who, by its nature constitutes a manifest violation of the Charter of the United Nations, shall be punished by imprisonment for twelve to twenty years or to an exceptional sentence of imprisonment.

Universal jurisdiction

Czech Republic does not exercise universal jurisdiction over the crime of aggression.

⁽⁴⁷⁾ See [Crime d'agression – Service public fédéral Justice \(belgium.be\)](#).

GERMANY

Section 13 of the Code of Crimes against International Law

Crime of aggression

- (1) Whoever wages a war of aggression or commits any other act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations shall be punished with imprisonment for life.
- (2) Whoever plans, prepares or initiates a war of aggression or any other act of aggression within the meaning of subsection (1) shall be punished with imprisonment for life or imprisonment for not less than ten years. The offence pursuant to the first sentence shall be punishable only if
 1. the war of aggression has been waged or the other act of aggression has been committed or
 2. it creates a danger of a war of aggression or any other act of aggression for the Federal Republic of Germany.
- (3) An act of aggression is 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.
- (4) Only persons in a position effectively to exercise control over or to direct the political or military action of a State may be party to an offence pursuant to subsections (1) and (2).
- (5) In less serious cases under subsection (2) the punishment shall consist of imprisonment of not less than five years.

Universal jurisdiction

Pursuant to Section 1 of the Code of Crimes against International Law, the principle of universal jurisdiction does not apply to the crime of aggression.

Section 1 provides in its second sentence that '[f] or offences pursuant to section 13 that were committed abroad, this Act shall apply independently of the law of the place where the act was committed if the perpetrator is German or if the offence is directed against the Federal Republic of Germany'.

ESTONIA

Definition in § 91 of the Criminal Code under 'Offences against peace' – Crimes of aggression [RT I, 12.07.2014, 1 – entry into force 01.01.2015]

- (1) Participation in the leading, execution or preparation of an act of aggression by any person controlling or directing the activities of the state or threatening with an act of aggression by a representative of the state is punishable by eight to twenty years' imprisonment or life imprisonment. [RT I, 19.03.2019, 3 – entry into force 01.07.2019]
- (2) The same act, if committed by a legal person, is punishable by a pecuniary punishment.
- (3) For the purposes of this Code, an act of aggression is the use of armed force by one state against another state in violation of international law. [RT I, 12.07.2014, 1 – entry into force 01.01.2015]

Additional comments concerning § 91.

According to supplementary information provided by the Genocide Network contact point for Estonia, in order to define the clause 'in conflict with international law' contained in § 91(3), Estonian criminal law turns to international customary law, Article 8bis of the Rome statute and UN General Assembly Resolution 3314 (XXIX) of 14 December 1974 although the acts of aggression are not explicitly named in the Penal Code.

§ 91(1) of the Criminal Code – Joining, participating in and supporting foreign act of aggression

- (1) Joining of foreign armed forces or other armed entities participating in a foreign act of aggression, participating in the commission or preparation of a

foreign act of aggression, or knowingly supporting a foreign act of aggression, including financing, if the act does not contain the necessary elements of an offence provided for in § 91 of this Code, is punishable by imprisonment for up to five years.

- (2) The same act, if committed by a legal person, is punishable by a pecuniary punishment.
[RT I, 28.04.2022, 24 – entry into force 08.05.2022]

Additional comments concerning § 91(1)

According to information provided by the Genocide Network contact point for Estonia, § 91(1) is one of the latest additions to the Estonian Penal Code. For this offence, Estonian law also applies if the act was committed outside the territory of Estonia, if the act was committed by a person who was an Estonian citizen, a person holding an Estonian residence permit or a right of residence, or a legal person registered in Estonia at the time of the act (§ 7 of the Penal Code).

§ 92. Of Criminal Code – Propaganda for war

- (1) Any incitement to war or other use of arms in violation of the generally recognised principles of international law is punishable by a pecuniary punishment or up to three years' imprisonment.
- (2) The same act, if committed by a legal person, is punishable by a pecuniary punishment.
[RT I 2006, 31, 234 – entry into force 16.07.2006]

Universal jurisdiction

Estonia may exercise universal jurisdiction over the crime of aggression.

§ 8. Applicability of penal law to acts against internationally protected legal rights

Regardless of the law of the place of commission of an act, the penal law of Estonia shall apply to any acts committed outside the territory of Estonia if punishability of the act arises from an international obligation binding on Estonia.
[RT I, 05.07.2013, 2 – entry into force 15.07.2013]

Universal jurisdiction is applicable only for international crimes that harm internationally protected rights, for example war crimes and crimes against humanity, genocide, torture and terrorism. Furthermore, the crime of aggression is punishable under customary international law, and Estonia has ratified the Rome Statute and Kampala amendments. Therefore, in line with Article 3(1) of the Estonian Constitution, it may exercise universal jurisdiction over the crime of aggression and over core international crimes⁽⁴⁸⁾.

IRELAND

No implementation into domestic law yet.

SPAIN

No implementation into domestic law yet.

CROATIA

Definition in Article 89 Criminal Code (2011)

- (1) Whoever, being in a position effectively to exercise control over or to direct the political or military action of a state, uses the armed forces of one 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 executes an act of aggression which, by its character, gravity and scale, constitutes a violation of the Charter of the United Nations shall be sentenced to imprisonment for a term of at least five years or to long-term imprisonment.
- (2) Whoever takes part in the operations of the armed forces referred to in paragraph 1 of this Article shall be sentenced to imprisonment for a term of between three to fifteen years.
- (3) Whoever directly and publicly incites to the crime of aggression shall be sentenced to imprisonment for a term of between one and ten years.

⁽⁴⁸⁾ See Commentary, pp. 912–913.

(4) Any of the following acts, regardless of a declaration of war, shall qualify as an act of aggression referred to in paragraph 1 of this Article:

1. the invasion or attack by the armed forces of a state on 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;
2. 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;
3. the blockade of the ports or coasts of a state by the armed forces of another state;
4. an attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state;
5. 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;
6. 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; or
7. 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.

Universal jurisdiction

Article 16 of the Criminal Code explicitly excludes the application of the universality principle to the crime of aggression ⁽⁴⁹⁾.

⁽⁴⁹⁾ See Commentary, pp. 873–876.

ITALY

No implementation into domestic law yet.

CYPRUS

Definition contained in Act 3(III)/2018

1. This Law shall be referred to as the Law on the Treaty of Rome for its Establishment International Criminal Court (Enforcement) (Amendment) Act 2018 and shall read together with those on the Treaty of Rome on the Establishment of the International Criminal Court (Enforcement) Laws 2002 to 2013 (hereafter referred to as ‘the principal law’) and the Basic Law and this Law shall together be referred to as the Treaty of Rome for Establishment of the International Criminal Court (Punitive) Laws 2002 to 2018.
2. Article 2 of the basic law is amended by adding, in the appropriate alphabet series, of the following new term and its definition: ‘crime of aggression’ means any of the acts specified in art 8*bis* of the Treaty of Rome.

(...)

LATVIA

Definition in Section 72 of Criminal Law of Latvia, Crimes against Peace

For a person who commits crimes against peace, that is, commits planning, preparation, triggering of, participation in aggression, commits conducting of a war of aggression in violation of international agreements binding upon the Republic of Latvia, commits participation in a conspiracy for the purpose of committing crimes referred to in this Section.

The applicable punishment is life imprisonment or deprivation of liberty for a period of three and up to twenty years.

Additional comments concerning Section 72

According to information provided by the Genocide Network contact point for Latvia, the disposition of Section 72 of the CL is based on Article 6 of Charter of the International Military Tribunal, that defines the waging (conducting) of war of aggression.

While Section 72 of the CL does not include direct reference to liability of the individual, this unequivocally derives from the regulation of the General Part of the CL. Section 8 of the CL states that only a person who has committed a criminal offence deliberately (intentionally) or through negligence may be found guilty of it. Section 11 of the CL states that a natural person who, on the day of the commission of a criminal offence, has attained fourteen years of age may be held criminally liable. Therefore, Section 72 of the CL establishes the liability of the individual for aggressive war.

It has to be noted that the liability mentioned in Article 8bis of the Rome Statute is narrow – it is limited by the ‘leadership clause’. The Rome Statute states that only the leaders of the state can be held criminally liable for crime of aggression, but this liability can be extended to second level of perpetrators, that have aided and abetted the commission of the crime. It highlights the nature of the crime, and implies that it is not up to the individual soldier to determine whether the State’s use of force is legal or not. Nevertheless, States can choose whether to implement the same type of leadership requirement, or whether to criminalise the conduct more broadly, at least regarding its own nationals⁽⁵⁰⁾. Therefore, the regulation of Section 72 of the CL is broader than Article 8bis of the Rome Statute.

However, by looking at the nature of the acts mentioned in Section 72 of the CL, namely, the ‘planning, preparation, triggering of, participation in aggression, commits conducting of a war of aggression in violation of international agreements binding

upon the Republic of Latvia’, **they can mostly be committed by a person holding a leadership position and not by lower military contingent.**

Universal jurisdiction

Latvia applies universal jurisdiction to the crime of aggression, as per Section 4, Part 4 of the Criminal Law.

Section 4. Applicability of the Criminal Law Outside the Territory of Latvia

(4) Foreigners who do not have a permanent residence permit in the Republic of Latvia and who have committed a criminal offence in the territory of another state or outside the territory of any state, in the cases provided for in international agreements binding upon the Republic of Latvia, irrespective of the laws of the state in which the offence has been committed, shall be held liable in accordance with this Law, if they have not been held criminally liable for such offence or committed to stand trial in the territory of another state.

LITHUANIA

Definition in Chapter XV, Art 110 of the Criminal Code

Any person who causes an aggression against another state or is in command thereof shall be punished by a custodial sentence for a period of ten up to twenty years or by a custodial life sentence.

Universal jurisdiction

Lithuania may exercise universal jurisdiction over the crime of aggression.

⁽⁵⁰⁾ See *Handbook: Ratification and Implementation of the Kampala amendments to the Rome Statute of the ICC: Crime of Aggression*. War Crimes. Liechtenstein Institute on Self-Determination, 2013 p.16.

LUXEMBOURG

Definition in Art 136 quinquies of Criminal Code (27 February 2012)

(1) A crime of aggression is defined as the planning, preparation, launching or execution by a person effectively in a position to control or direct the political or military action of a State, of an act of aggression which, by its nature, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

For the purposes of the first paragraph, 'act of aggression' means the use by a State of armed force against the sovereignty, territorial integrity or political independence of another State, or of any otherwise inconsistent with the Charter of the United Nations.

These are the following acts:

- a) the invasion or attack by the armed forces of a State of the territory of another State or the military occupation, even temporary, resulting from such an invasion or such an attack, or the annexation by force of the whole or part of the territory of another State;
- b) the bombardment by the armed forces of a State of the territory of another State, or the use of any weapon whatsoever 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) attack by the armed forces of a State on the land, sea or air forces, or the air and sea fleets of another State;
- e) the employment of the armed forces of a State which are in the territory of another State with the consent of the latter in contravention of the conditions laid down in the relevant agreement, or the prolongation of the presence of these forces in that territory after the expiry of the relevant agreement;

f) the act of a State allowing its territory, which it has placed at the disposal of another State, to be used for the commission by that other State of an act of aggression against a third State;

g) the sending by a State or on behalf of a State of bands, groups, irregular troops or armed mercenaries who carry out against another State acts comparable to those of armed forces of a gravity equal to that of the acts listed above, or who provide substantial support for such acts.

(2) The offenses listed in paragraph (1) are punishable by ten to fifteen years' imprisonment.

Universal jurisdiction

Article 5-1 of the Criminal Procedure Code sets forth that: 'Any Luxembourger, anyone who has his usual residence in the Grand Duchy of Luxembourg, as well as the foreigner found in the Grand Duchy of Luxembourg, who has committed one of the offences under Sections 112-1, 135-1 to 135-6, 135-9 and 135-11 to 135-16, 162, 164, 165, 166, 178, 179, 198, 199, 199bis, 245-252, 310, 310-1, 348, 368-384, 389, 409bis, 496-1 to 496-4 and, under the terms of Article 506-4 3, article 506-1 of the [Criminal Code](#), may be prosecuted and tried in the Grand Duchy, although the fact is not punished by the law of the country where it was committed and the Luxembourg authority has not received either a complaint from the offended party or a denunciation of the authority of the country where the offence was committed.' However, the relevant provisions referred to in said Article 5-1 of the Criminal Procedure Code relate to terrorism only (Articles 135-1 to 135-6, 135-9 and 135-11 to 135-16) and not to core international crimes. Therefore, Luxembourg does not exercise universal jurisdiction over the crime of aggression.

MALTA

Definition in Book First, Part II (Of Crimes and Punishments), Title I (Of Genocide, Crimes Against Humanity, War Crimes and Crimes of Aggression), Articles 54A and 54DA, of the Criminal Code of Malta (Crime of aggression added by: XXIV. 2014.12)

- (1) A 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 purposes of this article an '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.
- (3) Any of the following acts, regardless of a declaration of war, shall, in accordance with UN 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; and
 - (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.

NETHERLANDS

Definition in Article 8b of International Crimes Act

- 1) He who, in a position to exercise effective control or direction to give to the political or military action of a state, an act of aggression which, by its nature, gravity and scale, constitutes an unmistakable breach of the Charter of the United Nations, plans, prepares, initiates or implements, becomes as guilty to the crime of aggression punishable by life imprisonment or temporary of not more than thirty years or a fine of the sixth category.
- 2) For the purposes of the first paragraph, 'act of aggression' means: the use of armed violence by a state against sovereignty, territorial integrity or political independence from another state, or the use of gun violence by a State which is otherwise incompatible with the Charter of the United Nations. Each of the following acts, regardless of whether there is a declaration of war has, in any case, been classified as an act of aggression:
 - a. the invasion or attack by the armed forces of a State of respectively on the territory of another State, or a military occupation, even if that of temporary is the nature resulting from such invasion or attack, or annexation by means of violence from the territory of another State or part thereof;
 - b. the bombing by the armed forces of one state of the territory of another state or the use of

any weapon by one state against the territory of another state;

- c. the blockade of the ports or coasts of one 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 the sea and air fleet of another State;
- e. the deployment of armed forces of a State which, with the consent of another State, be present in the territory of that State, contrary to the conditions laid down in the relevant agreement or an extension of their presence in that territory after the expiry of the Agreement;
- f. the fact that a State permits its territory, that it is transferred to another State is used by that other State to perform an act of commit aggression against a third state;
- g. sending by or on behalf of a state of armed gangs, groups, disordered forces or mercenaries, who commit acts involving gun violence against another state which are so serious as to be equivalent to the acts referred to above, or who are significantly involved.

Universal jurisdiction

The Netherlands exercises secondary universal jurisdiction over the crime of aggression. This means that either the suspect or the victim of this crime has Dutch nationality, or that the suspect is on Dutch territory.

AUSTRIA

Definition in § 321k of the Penal Code

Any person who is in a position to exercise control over or to direct the political or military action of a State and who initiates or executes an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations is liable to imprisonment for 10 to 20 years.

Any person who plans or prepares an act of aggression within the requirements set out in para. 1 is liable to imprisonment for five to ten years.

An 'act of aggression' within the meaning of para. 1 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.

POLAND

Definition in Article 117 (Chapter XVI: 'Crimes against peace, humanity and war crimes') of the Criminal Code

1. Whoever initiates or wages a war of aggression, is subject to the penalty of deprivation of liberty for no less than 12 years, the penalty of deprivation of liberty for 25 years or the penalty of deprivation of liberty for life.
2. (repealed).
3. Whoever publicly exhorts to initiate a war of aggression or publicly extols the initiation or waging of such war, is subject to the penalty of deprivation of liberty for between 3 months and 5 years.

Art. 126b

1. Whoever, by failing to perform a duty of due supervision, allows the commission of the act provided for in art. 117 § 3, (...) by a person being under his effective authority or supervision, is subject to the penalty provided for in those provisions.
2. If the perpetrator acts unintentionally, he is subject to the penalty of deprivation of liberty for between 3 months and 5 years.

Art. 126c

1. Whoever makes preparations to commit a crime provided for in art. 117 (...) is subject to the penalty of deprivation of liberty for no less than 3 years.

Universal jurisdiction

Art. 110

1. A Polish criminal statute applies to an alien who has committed abroad a prohibited act against the interests of the Republic of Poland, a Polish citizen, a Polish juridical person or a Polish organisational entity without a legal personality, and also to an alien who has committed abroad a crime of a terrorist character.
2. A Polish criminal statute applies to an alien who has committed abroad a prohibited act other than provided for in § 1 if the prohibited act is subject to the penalty of deprivation of liberty exceeding 2 years in a Polish criminal statute, and the perpetrator is present in the territory of the Republic of Poland and no extradition order has been issued.

Art. 111

1. Liability for an act committed abroad is applicable only if this act is also recognised as a crime by the statute being in force in the place of the commission of the act.
2. If there are differences between the Polish statute and the statute being in force in the place of the commission of the act, the court may take these differences into account to the perpetrator's benefit while applying the Polish statute.
3. The reservation provided for in § 1 applies neither to a Polish public officer who has committed a crime abroad in relation to performing his duties, nor to a person who has committed a crime in a place that is not subject to any state authority.

Art. 112

Notwithstanding the provisions being in force in the place of the commission of a prohibited act, a Polish criminal statute applies to a Polish citizen or an alien who has committed:

- 1) a crime against internal or external security of the Republic of Poland,

1a) (no longer in force),

- 2) a crime against Polish public offices or public officers or a crime of inveigling a certification of an untruth from a Polish public officer or another person authorised under the Polish law to issue a document,
- 3) a crime against substantive Polish economic interests,
- 4) a crime of false testimony, giving a false statement, opinion or translation, using a document confirming another person's identity, certifying an untruth or a fake document – against a Polish public office,
- 5) a crime from which even an indirect material benefit has been derived in the territory of the Republic of Poland.

Art. 113

Notwithstanding the provisions being in force in the place of the commission of a crime, a Polish criminal statute applies to a Polish citizen or an alien who has committed a crime abroad, which the Republic of Poland is obliged to prosecute under an international agreement, or a crime provided for in the Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998 (2003 Journal of Laws of the Republic of Poland, No 78, item 708 and of 2018, item 1753), and no extradition order has been issued.

PORTUGAL

Art 169- A of Law 31/2004 (22 July 2004) adapting Portuguese criminal legislation to the Rome Statute of the International Criminal Court, as amended by Law 11/2019 (7 February 2019)

- 1 – Whoever, being in a position to effectively control or conduct the political or military action of a State, plans, prepares, triggers or executes an act of aggression against another State, which, due to its nature, gravity and dimension, constitutes a manifest violation of the Charter of the

United Nations, shall be punished with imprisonment from 10 to 25 years.

2 – For the purposes of the preceding paragraph, an act of aggression is understood to be the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner incompatible with the Charter of the United Nations.

3 – Acts of aggression, without prejudice to others that integrate the requirements set out in the previous numbers, constitute any of the following acts, regardless of the existence or not of a declaration of war:

- a) The invasion of, or attack against, the territory of a State by the armed forces of another State, or any military occupation, even if temporary, resulting from such invasion or attack, or the annexation by force of the territory, as a whole or in part, of another State;
- b) The bombardment of the territory of a State by the armed forces of another State, or the use of any weapons by a State against the territory of another State;
- c) The blockade of ports or coasts of a State by the armed forces of another State;
- d) Attacks by the armed forces of a State against land, sea or air forces, or against the merchant navy and civil aviation of another State;
- e) The use of the armed forces of a State, which are in the territory of another State with the consent of the receiving State, in violation of the conditions foreseen in the relevant agreement, or the extension of its presence in that territory after the end of that same agreement;
- f) The fact that a State allows its territory, which it has made available to another State, to be used by the latter to perpetrate an act of aggression against a third State;

- g) The dispatch by a State, or on its behalf, of bands or armed groups, irregular forces or mercenaries who carry out against another State acts of armed force of a gravity comparable to that of the acts described in the previous subparagraphs, or who participate substantially in these acts.

Universal jurisdiction

Portugal does not exercise universal jurisdiction over the crime of aggression.

SLOVENIA

Definition, Art 103 of the Penal Code

- (1) An official or other person in a position effectively to exercise control over or to direct the political or military action of the state, who plans, prepares, initiates or executes an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations, shall be sentenced to at least fifteen years in prison.
- (2) An act of aggression means the use of armed force 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 qualify as an act of aggression:
 - 1) invasion of or an armed attack on the territory, sea, aircrafts, ports or vessels of another state, or any military occupation, temporary or permanent, or any annexation by the use of force of the territory of another state or part thereof;
 - 2) bombardment of or the use of any weapons against the territory of another state;
 - 3) blockade of the ports or coasts of another state;
 - 4) 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;

- 5) the action of the Republic of Slovenia 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;
- 6) the sending of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force of such gravity as to amount to the acts listed above.

SLOVAKIA

Slovak criminal law only criminalises instigation or incitement of aggression.

Definition in §417 (Threats to peace) in the Slovak Criminal Code

- (1) Whoever, with the intention of disturbing the peace in any way, incites war, promotes war or otherwise supports war propaganda, shall be punishable by imprisonment for between one and ten years.
- (2) Imprisonment for ten to twenty-five years or imprisonment for life shall be punishable if the offender commits an act referred to in paragraph 1:
 - a) in connection with a foreign power or a foreign agent,
 - b) as a member of a dangerous grouping, or
 - c) in a crisis situation.

FINLAND

Section 4a of Criminal Code (30.12.2015/1718)

Crime of aggression

If a person in a position to effectively exercise control over or to direct the political or military action of a State commits an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations (Finnish Treaty Series 1/1956), the person shall be sentenced for a crime of aggression to imprisonment for at least four years or for life.

An attempt is punishable.

An act of aggression means the use of armed forces 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 following acts committed by a State or the armed forces of a State, regardless of a declaration of war, shall, in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as acts of aggression:

- (1) the invasion or attack of the territory of another State, any military occupation resulting from such invasion or attack, and any annexation of the territory of another state or part of it;
- (2) bombardment against the territory of another State and the use of any weapons against the territory of another State;
- (3) the blockade of the ports or coasts of another state;
- (4) an attack on the land, sea or air forces, or marine and air fleets of another state;
- (5) 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;
- (6) 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;
- (7) the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts against another state of such gravity as to be comparable to the acts referred to in paragraphs 1-6, or its substantial involvement in the sending of these.

Section 4b of Criminal Code (1718/2015)

Preparation of a crime of aggression

A person referred to in section 4a, subsection 1 who, for the purpose of committing a crime of aggression referred to in section 4a:

- 1) agrees with another person to commit a crime of aggression, or
- 2) prepares a detailed plan to commit a crime of aggression,

shall be sentenced for preparation of a crime of aggression to imprisonment for at least 4 months and at most 4 years.

SWEDEN

Definition in Section 11a of the Act on Criminal Responsibility for certain International Offences (2014:406)

Crime of aggression

Anyone who can exercise control or direct over a state's political or military actions and who plans, prepares, initiates or carries out an act of aggression which, by its nature, severity and extent, constitutes an obvious violation of the United Nations Charter is convicted of the crime of aggression.

An act of aggression refers to the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other way inconsistent with the Charter of the United Nations.

The penalty is imprisonment for a certain period, minimum four and maximum eighteen years, or for life.

Universal jurisdiction

Sweden may exercise jurisdiction over the crime of aggression:

- a) if it was committed in Sweden;
- b) if it was committed abroad by a Swedish citizen, a Swedish resident or on a Swedish flagged ship/ aircraft or if the act was committed against a Swedish interest;
- c) in cases where the act of aggression was committed by a State that has implemented the 2010 Kampala amendments (and the regulation had come into force at the time of the act).

REMAINING MEMBER STATES

The following EU Member States have not ratified the Kampala amendments: **Bulgaria, Denmark, Greece, France, Hungary and Romania.**

However, in the case of **Bulgaria**, national law contains relevant provisions applicable to the crime of aggression.

Chapter 14, Section I, Arts. 407, 408 and 409 of the Criminal Code (Crimes against peace)

Article 407

A person who in any way makes propaganda for war, shall be punished by imprisonment for up to eight years.

Article 408

A person who, directly or indirectly, through the press, by speech, over the radio or in any other way,

strives to provoke an armed attack by one state on another, shall be punished for abetment to war by imprisonment for three to ten years.

Article 409

(Amended, SG No 153/1998)

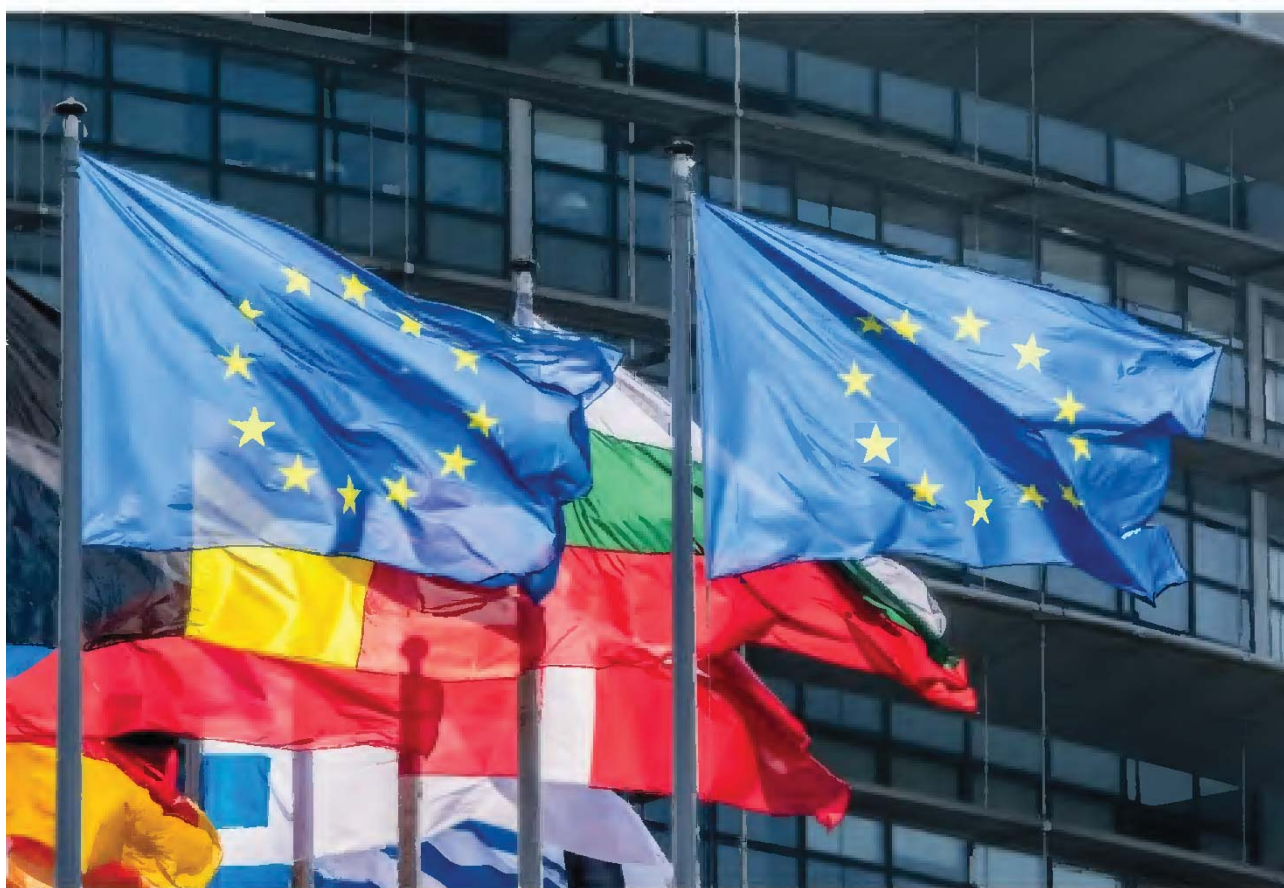
A person who plans, prepares or wages an aggressive war, shall be punished by imprisonment for a term of fifteen to twenty years, or by life imprisonment without a chance of commuting.

Furthermore, the Criminal Code of **Romania** contains the following provisions in relation to the offence of 'propaganda for war'.

Article 405

- (1) Propaganda for a war of aggression, as well as spreading tendentious or invented news, with the aim of provoking a war of aggression, shall be punishable by imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights.
- (2) The acts committed in para. (1), committed for the purpose of provoking a war of aggression against Romania or an internal armed conflict.

According to Art. 412 para. (1) of the Romanian Penal Code, attempted crime provided for in Art. 405 is punishable by law.



3.2. Criminalisation of the crime of aggression by Genocide Network Observer States

Among the Genocide Network Observer States, **Switzerland** is the only State to have ratified the Kampala agreements, but it has not yet implemented the crime of aggression in its national law. Neither **Bosnia and Herzegovina**, **Canada**, **Norway**, **the United Kingdom** ⁽⁵¹⁾ or **the United States** have implemented the crime of aggression in their national laws.

3.3. Criminalisation under Ukrainian domestic law

While **Ukraine** is not a State Party to the Rome Statute, and therefore has not ratified or accepted the Kampala amendments, Article 437 of its Criminal Code defines the crime of aggression as follows ⁽⁵²⁾.

1. Planning, preparation or initiation of an aggressive war or armed conflict, or conspiring for any such purpose, shall be punishable by imprisonment for a term of seven to twelve years.
2. Waging an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years.

Therefore, Article 437 contains two separate offences in relation to aggression, which are similar to the conduct contained in the IMT Charter and Rome Statute ⁽⁵³⁾: (i) the planning, preparation or initiation of the aggressive war and (ii) conducting the aggression. The precise elements of the crime are not defined, although existing Ukrainian jurisprudence has relied on international definitions of 'aggressive war' ⁽⁵⁴⁾, and the leadership element is not explicitly present in Article 437. Therefore, it

seems that individuals other than those belonging to the State leadership (e.g. lower-ranking officials or even foot soldiers) may be held criminally liable for the crime of aggression under Ukrainian domestic law.

To date, Ukrainian jurisprudence has unevenly settled this issue – with some domestic courts taking a broad approach as to who may be convicted for waging an aggressive war ⁽⁵⁵⁾, but some commentators have argued that in practice, the material elements of Article 437 (planning, preparing, initiating or waging an aggressive war) undoubtedly reflect the leadership nature of the crime ⁽⁵⁶⁾. Furthermore, in line with international humanitarian law principles, members of ordinary armed forces benefit from combatant immunity and should therefore be protected from prosecution for participating in combat, whether in the context of an aggressive war or not. They may only be held criminally liable for potential international humanitarian law violations (war crimes) ⁽⁵⁷⁾.

⁽⁵¹⁾ For a detailed analysis, see *Commentary*, pp. 938–958.

⁽⁵²⁾ *Criminal Code of Ukraine*, Law of 5 April 2001, No 2341-III, 2001.

⁽⁵³⁾ *Benchbook*, p. 376, para. 973.

⁽⁵⁴⁾ For an analysis of existing jurisprudence, see *Benchbook*, pp. 378–379, paras. 979–984.

⁽⁵⁵⁾ *Benchbook*, p. 379, paras. 989–990.

⁽⁵⁶⁾ *Benchbook*, pp. 379–380, paras. 985–993.

⁽⁵⁷⁾ *Benchbook*, p. 381, para. 992.



Publications Office
of the European Union

Print ISBN 978-92-9404-004-6 doi:10.2812/538401
PDF ISBN 978-92-9490-998-5 doi:10.2812/446599