

**INTERNATIONAL CRIMINAL COURT
AMENDMENT BILL 2014**

SAMOA

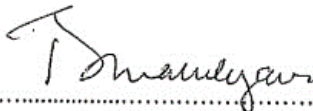
Explanatory Memorandum

Introduction

The Bill proposes to amend the International Criminal Court Act 2007 ('Principal Act') to domesticate the Kampala Amendments to the Rome Statute, which Samoa ratified on 25 September 2012, namely, the crimes of aggression and the weapons amendments.

Clauses:

- Clause 1:** - provides the short title and commencement of the amendment Act.
- Clause 2:** - amends the definition of "Statute" under section 3 of the Principal Act.
- Clause 3:** - provides for a new section 7A to the Principal Act, which creates the offence of aggression and definition of crimes of "crimes of aggression".
- Clause 4:** - provides consequential amendments relating to the new section 7A.
- Clause 5:** - provides for a new Schedule 2 to the Principal Act, relating to the Kampala Amendments to the Rome Statute of the International Court, namely the crimes of aggression and the weapons amendments.



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(Hon TUILAEPFA Fatialofa Lupesoliai Aiono
Neioti Sailele Malielegaoi)

MINISTER FOR FOREIGN AFFAIRS AND TRADE

**INTERNATIONAL CRIMINAL COURT
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SAMOA

Arrangement of Provisions

- | | |
|---------------------------------|-----------------------------|
| 1. Short title and commencement | 4. Consequential amendments |
| 2. Section 3 amended | 5. New Schedule 2 inserted |
| 3. New section 7A inserted | |

2014, No.

A BILL INTITULED

AN ACT to amend the International Criminal Court Act 2007 (“Principal Act”).

BE IT ENACTED by the Legislative Assembly of Samoa in Parliament assembled as follows:

1. Short title and commencement-(1) This Act may be cited as the International Criminal Court Amendment Act 2014.

(2) This Act commences on the date nominated by the Minister.

2. Section 3 amended - For section 3 of the Principal Act, in the definition of “Statute” after “this Act” insert:

“and includes the Amendments to the Statute set out in Schedule 2 of this Act.”.

3. New section 7A inserted - After section 7 of the Principal Act insert:

“7A. Crime of aggression-(1) A person who, in Samoa or elsewhere, commits a crime of aggression commits an offence and is liable on conviction to life imprisonment.

(2) For the purpose of this section, “crime of aggression” is an act specified in Article 8 *bis* of the Statute and includes any other act which at the time and in the place of its commission, constitutes crime of aggression according to customary international law or conventional international law or by virtue of it being criminal according to the general principles of law recognised by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.”.

4. Consequential amendments - In sections 9, 10, 11, 13, 14 and 16 of the Principal Act, for “or 7” wherever occurring substitute “, 7 and 7A”.

5. New Schedule 2 inserted - After Schedule 1 of the Principal Act insert:

**“SCHEDULE 2
(Section 2)**

**ROME STATUTE OF THE
INTERNATIONAL CRIMINAL COURT**

Part I - Amendment to Article 8

Resolution RC/Res.5

Adopted at the 12th plenary meeting, on 10 June 2010, by consensus.

RC/Res.5

Amendments to article 8 of the Rome Statute

The Review Conference,

Noting article 123, paragraph 1, of the Rome Statute of the International Criminal Court which requests the Secretary-General of the United Nations to convene a Review Conference to consider any amendments to the Statute seven (7) years after its entry into force,

Noting article 121, paragraph 5, of the Statute which states that any amendment to articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one (1) year after the deposit of their instruments of ratification or acceptance and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and confirming its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute,

Confirming that, in light of the provision of article 40, paragraph 5, of the Vienna Convention on the Law of Treaties, States that subsequently become States Parties to the Statute will be allowed to decide whether to accept the amendment contained in this resolution at the time of ratification, acceptance or approval of, or accession to the Statute,

Noting article 9 of the Statute on the Elements of Crimes which states that such Elements shall assist the Court in the interpretation and application of the provisions of the crimes within its jurisdiction,

Taking due account of the fact that the crimes of employing poison or poisoned weapons; of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or

devices; and of employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, already fall within the jurisdiction of the Court under article 8, paragraph 2(b), as serious violations of the laws and customs applicable in international armed conflict,

Noting the relevant elements of the crimes within the Elements of Crimes already adopted by the Assembly of States Parties on 9 September 2000,

Considering that the abovementioned relevant elements of the crimes can also help in their interpretation and application in armed conflict not of an international character, in that inter alia they specify that the conduct took place in the context of and was associated with an armed conflict, which consequently confirm the exclusion from the Court's jurisdiction of law enforcement situations,

Considering that the crimes referred to in article 8, paragraph 2(e)(xiii) (employing poison or poisoned weapons) and in article 8, paragraph 2(e)(xiv) (asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices) are serious violations of the laws and customs applicable in armed conflict not of an international character, as reflected in customary international law,

Considering that the crime referred to in article 8, paragraph 2(e)(xv) (employing bullets which expand or flatten easily in the human body), is also a serious violation of the laws and customs applicable in armed conflict not of an international character, and understanding that the crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law,

1. *Decides* to adopt the amendment to article 8, paragraph 2(e), of the Rome Statute of the International Criminal Court contained in annex I to the present resolution, which is subject

to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5, of the Statute;

2. *Decides* to adopt the relevant elements to be added to the Elements of Crimes, as contained in annex II to the present resolution.

Annex I

Amendment to article 8

Add to article 8, paragraph 2(e), the following:

(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

Annex II

Elements of Crimes

Add the following elements to the Elements of Crimes:

Article 8(2)(e)(xiii)

War crime of employing poison or poisoned weapons Elements

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8(2)(e)(xiv)**War crime of employing prohibited gases, liquids, materials or devices****Elements**

1. The perpetrator employed a gas or other analogous substance or device.
2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8(2)(e)(xv)**War crime of employing prohibited bullets****Elements**

1. The perpetrator employed certain bullets.
2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.
3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Part II - Crime of aggression**Resolution RC/Res.6**

Adopted at the 13th plenary meeting, on 11 June 2010, by consensus.

RC/Res.6
The crime of aggression

The Review Conference,

Recalling paragraph 1 of article 12 of the Rome Statute,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

Resolved to activate the Court's jurisdiction over the crime of aggression as early as possible,

1. *Decides* to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") 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;

2. *Also decides* to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;
3. *Also decides* to adopt the understandings regarding the interpretation of the abovementioned amendments contained in annex III of the present resolution;
4. *Further decides* to review the amendments on the crime of aggression seven (7) years after the beginning of the Court's exercise of jurisdiction;
5. *Calls upon* all States Parties to ratify or accept the amendments contained in annex I.

Annex I

1. *Article 5, paragraph 2, of the Statute is deleted.*
2. *The following text is inserted after article 8 of the Statute:*

Article 8 bis **Crime of aggression**

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one (1) 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.

3. *The following text is inserted after article 15 of the Statute:*

Article 15 bis

**Exercise of jurisdiction over the crime of aggression
(State referral, *propriomotu*)**

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 (1) year after the ratification or acceptance of the amendments by thirty States Parties.
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.
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 (3) 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.
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 (6) 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.

4. *The following text is inserted after article 15 bis of the Statute:*

Article 15 *ter*

**Exercise of jurisdiction over the crime of aggression
(Security Council referral)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one (1) year after the ratification or acceptance of the amendments by thirty States Parties.
 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.
 4. 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.
 5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.
5. *The following text is inserted after article 25, paragraph 3, of the Statute:*
 - 3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.
 6. *The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:*
 1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.
 7. *The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

Annex II

Amendments to the Elements of Crimes

Article 8 *bis*

Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression - the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations - was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

Annex III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one (1) year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one (1) year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

Other understandings

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the

circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three (3) components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one (1) component can be significant enough to satisfy the manifest standard by itself.”
