

From Nuremberg to New York: The Final Stretch in the Campaign to Activate the ICC's Jurisdiction over the Crime of Aggression

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In his opening statement before the International Military Tribunal (IMT) in Nuremberg, Justice Robert Jackson, the Chief Prosecutor for the United States, recalled that common sense demanded that “the law’s condemnation of war reach deeper, and that the law condemn not merely uncivilized ways of waging war, but also the waging in any way of uncivilized wars—wars of aggression.”¹ The IMT set a precedent by prosecuting those most responsible for committing the crime against peace—which we now call the “crime of aggression,” and which Justice Jackson argued was the “supreme international crime.”² The decades following Nuremberg, however, did not live up to the expectations that the IMT had created for international justice. States fought for years to define an “act of aggression” before finally adopting UN General Assembly Resolution 3314 in 1974.³ The creation of ad hoc tribunals by the UN Security Council in the 1990s created renewed momentum for the international criminal justice project in general, but none of those courts were given jurisdiction over the crime of aggression.

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¹ See Robert Jackson’s opening statement at the IMT. Proceedings, Nov. 21, 1945, 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 145 (1947).

² Judgment, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 186 (1947) (“To initiate a war of aggression, therefore, 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.”).

³ Definition of Aggression, G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. No. 31, at 142, U.N. Doc. A/9631 (Dec. 14, 1974). Resolution 3314, adopted on December 14, 1974, defines aggression as “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.” In the definition, the term “State” “[i]s used without prejudice to questions of recognition or to whether a State is a member of the United Nations [and] [i]ncludes the concept of a ‘group of States’ where appropriate.”

Encouraged by the work of the ad hoc tribunals, in 1998, states succeeded in establishing the International Criminal Court (ICC), which was little more than a utopian dream just a few years earlier. Although the Rome Statute of the ICC included the crime of aggression within the Court's competence from the beginning, it took nearly twenty more years before the ICC would actually be given the opportunity to exercise its jurisdiction over the crime.⁴

Seventy years after the IMT delivered its judgment, we can finally fulfill the promise of Nuremberg by criminalizing aggressive war-making. In December 2017, States Parties to the Rome Statute of the ICC have the historic opportunity to activate the Kampala amendments and thus to enable the ICC to exercise its jurisdiction over the crime of aggression. An affirmative activation decision will make aggression prosecutable before an international court for the first time since the Nuremberg trials. Consequently, ICC States Parties will not only remedy the current lack of individual criminal liability for committing the crime of aggression, but they will also complete the Rome Statute as originally drafted, helping to deter aggressive war-making and enforce a key provision of the Charter of the United Nations: the prohibition on the illegal use of force.⁵

In spite of the prohibition on the illegal use of force in the UN Charter and the definition of an act of aggression by the UN General Assembly in 1974, the collective mindset of the international community has continued to treat war-making as unfortunate and undesirable, rather than as illegal. At the 1998 Rome Conference, states had different views about whether to include the crime in the founding treaty of the ICC. Against strong opposition, in particular from Permanent Members of the UN Security Council, the crime of aggression was included within the jurisdiction of the Court by way of compromise, due in no small part to the tireless advocacy of Ben Ferencz.⁶ But, in the absence of a definition of the crime, the Court's exercise of jurisdiction was put on hold. At the ICC Review Conference in Kampala in 2010, States Parties finally agreed both to a definition of the crime of aggression as well as to the conditions for exercise of jurisdiction.⁷ While the agreement by consensus in Kampala was regarded as remarkable and unexpected, it came again with a provision for delay: The exercise of the ICC's jurisdiction over the crime of aggression was conditioned on achieving thirty ratifications of the Kampala amendments and a one-time

⁴ Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), rev. 2010 [hereinafter Rome Statute].

⁵ Article 2(4) of the Charter of the United Nations (UN) prohibits the threat or use of force against the territorial integrity or political independence of any state. Two exceptions are made: First, individual or collective self-defense by states involving the use of force is authorized by article 51 of the Charter, and second, the use of force can be authorized by the UN Security Council as under Chapter VII of the UN Charter.

⁶ In 1947–1948, Ben Ferencz was chief prosecutor in Nuremberg for the Einsatzgruppen case, which involved twenty-two defendants who were charged with murdering over one million people. All defendants were convicted, and the press hailed it as the “biggest murder trial in history.” “*The Biggest Murder Trial in History*”, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007155> (last visited Mar. 15, 2017).

⁷ Rome Statute, *supra* note 4, arts. 8 *bis*, 15 *bis*, 15 *ter*.

activation decision, to be taken by ICC States Parties no earlier than January 1, 2017. In June 2016, the threshold of thirty ratifications was reached, allowing ICC States Parties to take the required activation decision in 2017.⁸

By activating the Court's jurisdiction over the crime of aggression, ICC States Parties will make it possible to hold individuals in leadership positions accountable for the most serious forms of the illegal use of force—for the first time since Nuremberg in an international court, but also in national courts.⁹ Equally as important, activation will afford legal clarity to domestic discussions on the use of force, as the Kampala decision, for the first time in history, provides a consensually agreed upon definition of the crime of aggression codified in an international treaty. National decision-makers will be given a legal basis for deciding if prospective actions are in accordance with international law and will understand the possible consequences of their decisions, if they are not. The ability to investigate and hold to account those responsible for the most serious forms of the illegal use of force will constitute a significant achievement for the rule of law at the international level, as it will allow the law to challenge the long-standing forces of power politics. Empowering the ICC to prosecute crimes of aggression will also provide judicial protection to states against acts of aggression and thus deter the illegal use of force against them. This protection, however, is somewhat limited, as the compromise reached in Kampala established a far more restrictive jurisdictional regime for the crime of aggression when compared with the regime governing the other Rome Statute crimes.¹⁰

The task of completing the legacy of Nuremberg is long overdue. An affirmative activation decision taken by ICC States Parties at the sixteenth session of the Assembly of States Parties (ASP) in New York in December 2017 will strengthen the international rule of law by providing clarity on the legality of the use of force and realizing the full intent of Rome Statute as originally drafted. Activation will also help deter illegal uses of force in the future, as leaders will

⁸ At the time of writing, thirty-two states have ratified the Kampala amendments on the crime of aggression.

⁹ States that choose to implement the Kampala definition into their domestic legislation will not only give full effect to the principle of complementarity contained in article 1 of the Rome Statute, but such domestic rules could also help deter the leaders of that country from committing aggression in the first place. It also remains to be seen whether states that have adopted implementing legislation will be able to exercise universal jurisdiction over the crime of aggression.

¹⁰ See Rome Statute, *supra* note 4, art. 15 *bis*. In the case of future state referrals or *proprio motu* investigations, particular conditions and procedures regarding the crime of aggression must be observed. First, acts of aggression that involve Non-States Parties to the Rome Statute—whether as victim or aggressor—are categorically excluded from the Court's jurisdiction. Second, acts of aggression involving States Parties to the Rome Statute come within the Court's jurisdiction under the following conditions: The amendments must have entered into force for at least one of the States Parties involved, whether as a victim or as an aggressor, because otherwise the Court would not be able to apply the amendments. And the aggressor State Party must not have made use of the possibility of opting out of the Court's jurisdiction. Such an opt-out declaration must precede the presumed act of aggression itself. In the case of a future referral of a situation by the Security Council, the Court can investigate all four of the ICC's core crimes, including the crime of aggression—consent is not required by the states involved.

have to consider the ICC's jurisdiction over the crime of aggression when making relevant decisions, and it will afford states legal protection from illegal war-making. We have watched the curve of international justice span from Nuremberg in 1946 to New York in 2017. The time has finally come to criminalize the most serious forms of the illegal use of force and to make the Nuremberg legacy complete.