

Revisiting the History of the Crime of Aggression in Light of Russia's Invasion of Ukraine

Introduction

Russia's 2022 invasion of Ukraine calls for renewed attention to the crime of aggression. Yet, while the crime is within the Rome Statute of the International Criminal Court (ICC),¹ the ICC lacks jurisdiction in the present situation. This *Insight* will briefly explore the history of the crime, why the ICC lacks jurisdiction in this situation, and possibilities for prosecution and increasing ICC jurisdiction over the crime.

Historical Overview

The crime was first prosecuted by the Allies before the International Military Tribunal at Nuremberg,² with former U.S. Supreme Court Justice Robert H. Jackson leading the prosecution on behalf of the United States. Indeed, the crime was the central focus of the Nuremberg trial, which charged "crimes against peace" (as the crime was then called) in Count 1 of the Indictment and conspiracy to commit crimes against peace in Count 2.³ The crime was similarly central to the prosecutions before the International Military Tribunal for the Far East (Tokyo),⁴ led by the United States.

On December 11, 1946, the UN General Assembly unanimously adopted Resolution 95(1) affirming the principles of international law recognized in the Nuremberg Charter and Judgment.⁵ The crime was thereafter included in the Draft Code of Crimes against the Peace and Security of Mankind by the International Law Commission (ILC),⁶ adopted

into the domestic criminal codes of various states,⁷ and included in the ILC's early drafts of what would become the ICC's Rome Statute.⁸

During the 1998 negotiations of the Rome Statute, it was agreed, in Article 5(1), that there were four crimes within the jurisdiction of the Court as these were "the most serious crimes of concerns to the international community." However, while the definitions of genocide, crimes against humanity, and war crimes were agreed on, something of a "placeholder" was left for the crime of aggression. Rome Statute Article 5(2)—since agreed to be deleted⁹—stated that before the ICC could exercise jurisdiction there would need to be agreement on (1) a definition, and (2) conditions for the ICC's exercise of jurisdiction over the crime. This opened the way for the crime's jurisdictional regime to differ from that of the ICC's other three crimes.

Negotiations on these topics first occurred in meetings of the Preparatory Commission for the International Criminal Court in 1999–2002, and, between 2003–2009, before the Special Working Group on the Crime of Aggression (SWGCA). All states, not only states parties, were invited to attend the SWGCA negotiations (and the Russian Federation attended).¹⁰

The Definition of the Crime

By 2009, states parties agreed on the definition of the crime. The basic premise behind the crime is to enforce the core norm in the UN Charter, Article 2(4)—namely, prohibiting use of force unless authorized by the Security Council acting under Chapter VII or permitted under Article 51 as the exercise of individual or collective self-defense.¹¹ Prevention of the scourge of aggressive war is, of course, one of the central "Purposes" of the United Nations, as reflected in the preamble to the UN Charter, as well as Article 1(1).

The definition of the crimes, now Rome Statute Article 8*bis*, contains two parts. Paragraph 1 defines the crime and paragraph 2 defines the state's act 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 aggression¹²

There is then a list of covered acts of aggression from General Assembly Resolution 3314.

As to the “act” of aggression (paragraph 2), the definition closely tracks the language of Article 2(4) of the UN Charter and General Assembly Resolution 3314. Significantly, one of the listed acts of aggression is “(a) [t]he invasion or attack by the armed forces of a State on the territory of another State,” relevant to the Russian Federation’s invasion of Ukraine. Another is “(f) [t]he 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,” relevant to the conduct of Belarus.

The definition of the crime (paragraph 1) is conservative. First, in line with the Nuremberg prosecutions, the crime only covers a limited number of perpetrators, namely, political or military leaders “in a position effectively to exercise control over or to direct the political or military action of a State.” Second, the crime only covers “manifest” violations of the UN Charter. This threshold is in line with the ICC’s “gravity” requirement, and with the mandate in the Rome Statute’s preamble to prosecute “the most serious crimes of concern to the international community.” Debatable cases or ones of insufficient scale or gravity are excluded.¹³ For example, there is arguably enough legitimacy to something that resembles a “bona fide” “humanitarian intervention” that it would be excluded from the definition.¹⁴ Russia’s invasion, by contrast, does not fall in such a “grey area.”¹⁵

Conditions for the Exercise of Jurisdiction

Agreement on conditions for the ICC’s exercise of jurisdiction over the crime was reached at the Review Conference held in May–June 2010 in Kampala, Uganda. While many issues had previously been debated related to jurisdiction,¹⁶ in Kampala it was the U.S. delegation, supported by a few other states, that insisted that the nationals of states not party to the Rome Statute and crimes committed on those states’ territories be completely carved out of crime of aggression jurisdiction, now Article 15*bis*(5). (By contrast, there is jurisdiction over genocide, crimes against humanity, and war crimes committed by the nationals of a non-state party in the territory of a state party or a state that has accepted the ICC’s jurisdiction, as Ukraine has.)¹⁷ The U.S. carve-out therefore excludes ICC

jurisdiction over the crime of aggression committed by the nationals of Russia and Belarus (as neither country is a state party).

A further effort to narrow jurisdiction as to states parties occurred in 2017, at the insistence of the United Kingdom (UK) and France. While there is some dispute as to whether the narrowing was effective,¹⁸ the French/UK interpretation, contained in the 2017 resolution of the Assembly of States Parties (ASP) that activated the crime's jurisdiction,¹⁹ would only provide for jurisdiction when the crime of aggression is committed by the nationals, or on the territory, of states parties that have ratified the crime of aggression amendment (currently forty-three)²⁰—although the resolution also makes clear it is ultimately for the judges to interpret jurisdiction.

Possibilities for Prosecuting the Crime Going Forward

Two obvious questions emerge: (1) can aggression in the instant situation involving Russia (and potentially Belarus) be prosecuted, and (2) does the ICC's jurisdiction over the crime need to expand for there to be meaningful deterrence of such blatant (i.e., manifest) aggression in the future?

Ad Hoc Prosecution

Various proposals for prosecuting the crime in the instant situation have been suggested. One is a Nuremberg-style tribunal that would pool the jurisdictions of several countries, proposed by UK academics and political figures.²¹ Another is a hybrid tribunal, created by agreement between Ukraine and the United Nations, upon the request of Ukraine and recommended by the General Assembly.²² The hybrid tribunal could consist of a hybridized chamber within the Ukrainian court system (like the Extraordinary Chambers in the Courts of Cambodia) or a freestanding hybrid tribunal (like the Special Court for Sierra Leone). Additional variants would be a hybrid tribunal created by agreement between Ukraine and the Council of Europe, or Ukraine and the European Union.²³ Meanwhile, investigations have also been opened in some national jurisdictions.²⁴

There are good reasons to favor a multilateral approach modeled on the hybrid Special Court, but based in The Hague, with majority or all international judges (and therefore one might think of the tribunal as international).²⁵ Any ad hoc approach inherently raises concerns of selectivity; having the imprimatur of United Nations endorsement and a strongly internationalized tribunal would be crucial to bolster legitimacy. A hybrid or international tribunal of this type also avoids immunities issues that could otherwise exist at the national level²⁶ (and could carry over with the pooling of national jurisdictions).

Before the Special Court for Sierra Leone (a tribunal created through the UN), there was a clear ruling against the immunity of a sitting head of state, and this is true as well for any international tribunal.²⁷ Finally, given lingering questions of legality regarding the use of military force by the United States and UK in Iraq in 2003, having the UK spearhead a Nuremberg-style tribunal raises clear problems of optics.

Expanding ICC Jurisdiction

The tragic invasion of Ukraine simultaneously points to the importance of the crime of aggression, deemed at Nuremberg to be “the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”²⁸ As suggested in a recent statement by members of the Global Institute for the Prevention of Aggression,²⁹ as well as a letter by European Members of Parliaments,³⁰ the ICC’s jurisdiction over the crime should not differ so significantly from that of the ICC’s other three crimes.

There are two ways to expand ICC crime of aggression jurisdiction. First, additional states parties to the Rome Statute could (and should) ratify the crime of aggression amendment. Second, the crime of aggression’s jurisdiction is due for review by states parties in 2025.³¹ They could (and should) consider revisiting the jurisdictional regime and bringing it in line, or more in line, with the Rome Statute’s other crimes.

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¹ Rome Statute of the International Criminal Court, Arts. 8*bis*, 15*bis* 15*ter*, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

² Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, *amended* Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevens 20.

³ The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Goering et al., Indictment, International Military Tribunal, Trial of War Criminals, Counts 1 and 2 (Dept. of State Publication 2420, Washington, 1945), <http://digitalcollections.smu.edu/cdm/ref/collection/hgp/id/654>.

⁴ Indictment, International Military Tribunal for the Far East (IMTFE), Harry S. Truman Library Museum, The War Crimes Trials at Nuremberg, World War II File, [Indictment from the International Military Tribunal for the Far East | Harry S. Truman \(trumanlibrary.gov\)](http://www.trumanlibrary.gov/indictment-from-the-international-military-tribunal-for-the-far-east).

⁵ GA Res. 95(I), Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (Dec. 11, 1946).

⁶ Draft Code of Crimes Against the Peace and Security of Mankind (1996), Adopted by the International Law Commission at Its Forty-Eighth Session, in 1996, and Submitted to the General Assembly, [Draft Code of Crimes against the Peace and Security of Mankind \(1996\) \(un.org\)](http://www.un.org/dep/ilc/draft_code_of_crimes_against_the_peace_and_security_of_mankind_1996).

⁷ See Equipo Nizkor, *Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression*, <http://www.derechos.org/nizkor/aggression/doc/aggression105.html> (including listing of pre-Kampala domestic legislation).

⁸ Int'l L. Comm'n, Analytical Guide to the Work of the International Law Commission (includes early drafts of the Rome Statute).

⁹ Res. RC/Res.6*, Annex I, para. 1 (June 11, 2010) (adopted by consensus).

¹⁰ Personal recollection of the author, who attended the meetings.

¹¹ U.N. Charter, art. 2(4), ch. VII, art. 51.

¹² Rome Statute, *supra* note 1, art. 8*bis*.

¹³ The definition excludes “seriously controversial cases . . . in order not to decide major controversies about the content of primary international rules of conduct through the back door of international criminal justice.” Claus Kreß, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus*, 20 EUR. J. INT'L L. 1129, 1142 (2009). For extensive background on the crime, see Claus Kreß and Stefan Barriga, (eds.), *THE CRIME OF AGGRESSION: A COMMENTARY* (Cambridge University Press 2017).

¹⁴ See, e.g., Jennifer Trahan, *Defining The “Grey Area” Where Humanitarian Intervention May Not Be Fully Legal, But Is Not The Crime of Aggression*, 2 J. USE OF FORCE & INT'L L. 42 (2015).

¹⁵ James A. Green, Christian Henderson & Tom Ruys, *Russia’s Attack on Ukraine and the Jus ad Bellum*, J. USE OF FORCE AND INT'L L. (2022) (all of Russia’s *jus ad bellum* claims fail, most of them on multiple levels). See also *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.)*, Order of March 16, 2022.

¹⁶ For example, an early proposal that was rejected would have required the Security Council to “predetermine” whether aggression had occurred before the ICC could hear a case. In the jurisdiction agreed on, the Security Council may make referrals, including the crime of aggression. Rome Statute, *supra* note i, Arts. 15*ter*.

¹⁷ Rome Statute, *supra* note i, Art. 12(2)(a); Art. 12(3). Ukraine has executed two Article 12(3) declarations accepting the ICC’s jurisdiction.

¹⁸ Jennifer Trahan, *From Kampala to New York—The Final Negotiations to Activate the Jurisdiction of the International Criminal Court Over the Crime of Aggression*, 18 INT'L CRIM. L. REV. 197 (2018) (arguing that the activating resolution may have been ineffective in changing a statutory amendment).

¹⁹ Activation of the Jurisdiction of the Court Over the Crime of Aggression, ICC-ASP/16/Res.5 (Dec. 14, 2017), https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf.

²⁰ UN Treaty Collection, Chapter XVIII, Penal Matters, 10.b. Amendments on the Crime of Aggression in the Rome Statute of the International Criminal Court, [UNTC](#).

²¹ Statement Calling For the Creation of a Special Tribunal for the Punishment of the Crime of Aggression Against Ukraine, [Combined-Statement-and-Declaration.pdf \(gordonandsarahbrown.com\)](#).

²² Jennifer Trahan, *UN General Assembly Should Recommend Creation of Crime of Aggression Tribunal for Ukraine: Nuremberg Is Not the Model*, JUST SECURITY (Mar. 7, 2002), [U.N. General Assembly Should Recommend Creation Of Crime Of Aggression Tribunal For Ukraine: Nuremberg Is Not The Model \(justsecurity.org\)](#).

²³ See, e.g., Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIO JURIS (Mar. 16, 2022), [The Best Option: An Extraordinary Ukrainian Chamber for Aggression - Opinio Juris](#) (discussing options).

²⁴ Lithuania, Poland and Ukraine are said to be investigating the crime of aggression.

²⁵ See Alexander Komarov & Oona Hathaway, *The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*, JUST SECURITY (Apr, 11, 2022) [The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law \(justsecurity.org\)](https://www.justsecurity.org/2022/04/11/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/).

²⁶ Democratic Republic of the Congo v. Belgium, Arrest Warrant of 11 April 2000.

²⁷ Prosecutor v. Charles Taylor, Case No.SCSL-2003-01-I, Decision on Immunity from Jurisdiction, Special Court for Sierra Leone (Mar. 31, 2005).

²⁸ IMT, Judgment of 1 October 1946, in *The Trial of German Major War Criminals*, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22, at 421 (Aug. 22, 1946 to Oct. 1, 1946).

²⁹ Statement on Russia's Invasion of Ukraine: A Crime of Aggression. The Need to Amend the Crime of Aggression's Jurisdictional Regime (Mar. 24, 2022), [GIPA-Statement_24-March-2022-7.pdf \(crimeofaggression.info\)](https://www.gipa.org/wp-content/uploads/2022/03/GIPA-Statement_24-March-2022-7.pdf).

³⁰ Appeal of MEPs in Support of the ICC Prosecutor to Proceed with Opening an Investigation into the Situation in Ukraine and to the States Parties to the Rome Statute of the ICC – Including all EU Member States – to Provide Effective Support to the ICC and Align the Jurisdiction on the Crime of Aggression to the Other International Crimes (Mar. 4, 2022), [Appeal of MPs in support of the ICC investigation into the Situation in Ukraine \(pgaction.org\)](https://www.pgaction.org/wp-content/uploads/2022/03/20220304-appeal-of-meps-in-support-of-the-icc-investigation-into-the-situation-in-ukraine.pdf).

³¹ Res. RC/Res.6*, *supra* note 9, ¶ 4.