

Crime of Aggression Fact Sheet

The International Criminal Court (ICC) has jurisdiction over genocide, war crimes, and crimes against humanity. The “**crime of aggression**” is also included in the Rome Statute of the ICC. However, the Court cannot prosecute aggression until the ICC’s governing body, the Assembly of States Parties (ASP), amends the Statute to define the crime and to set out the conditions for the Court’s exercise of jurisdiction. This may occur at the 2010 ICC Review Conference in Kampala, Uganda.

Waging a war of aggression, when a state unlawfully uses force against another, is a war crime under customary international law. After World War II, the military tribunals in Nuremberg and Tokyo held individuals accountable for the crime of aggression for the first time; prosecuting individuals responsible for state sponsored acts of aggressive war. Two decades later a definition of aggression was agreed upon and adopted by the United Nations General Assembly (UNGA) in Resolution 3314 of 1974.¹

The Inclusion of Aggression

Arguments in favor of adopting the current crime of aggression often focus on the need to deter aggression and to avoid impunity for individual perpetrators. Former Prosecutor at the Nuremberg Tribunals, Benjamin Ferencz, believes that any failure to allow the ICC to punish aggression would be a repudiation of Nuremberg and would be taking a step backward in the development of international criminal law.

In contrast, other commentators believe that this move would effectively create an inter-state court out of a court that initially was agreed should have jurisdiction only over individuals. Some, like Professor Michael Glennon argue that the inclusion of aggression in the Rome Statute would bring in a higher risk of discriminatory enforcement and politicized prosecution.

Aggression at the International Criminal Court

In the absence of agreement at the Rome Diplomatic Conference in 1998, a Special Working Group was set up on the Crime of Aggression (the Working Group) to develop a proposal on the definition of the crime. The Working Group was open to all UN Member States on an equal footing. The United States chose not participate in the negotiations. It was the only permanent member of the UN Security Council which did not participate. The working group proposed a definition in line with UNGA Resolution 3314.

One of the prominent outstanding debates surrounds the role of the United Nations Security Council (UNSC) in determining the crime of aggression. Some argue that any dealings with aggression ought to be initiated, and/or filtered through the Security Council due to its primary role in determining act of aggression in the United Nations Charter. On the other hand, the “primary” role of the UNSC is not listed as an exclusive one in the UN Charter. The UNSC is a political body and some argue its involvement could politicize a judicial ruling and, additionally, give the five permanent members effective immunity over the crime.

¹ The definition states: “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.”