Crime of Aggression Activated at the ICC: Does it Matter?

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The International Criminal Court’s Assembly of States Parties agreed late last week that the ICC can now prosecute crimes of aggression, making it the fourth crime (after war crimes, crimes against humanity, and genocide) to fall within the Court’s jurisdiction. The decision will become [effective](https://www.icc-cpi.int/Pages/item.aspx?name=pr1350) on July 17, 2018. This development is enormously significant because it is the first time since Nuremberg’s Nazi trials that an international tribunal has been able to prosecute this crime, but given how narrowly they defined the crime, and the scope of the ICC’s jurisdiction, its significance may be largely confined to its declarative and symbolic force, though this is a value that should not be underestimated.

Although today we often think of the Nuremberg prosecutions as being about Holocaust crimes, the reality is that the lead charge was crimes against peace. The first line of Justice Robert Jackson’s [opening statement](https://www.roberthjackson.org/nuremberg-event/justice-robert-h-jacksons-opening-statement/) was, “The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility,” and the [judgment](https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf) in that case concluded that, “To 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.”

After Nuremberg, there were no international criminal tribunals until the establishment of the International Criminal Tribunal for the former Yugoslavia in 1993, which then sparked a succession of tribunals for Rwanda, Sierra Leone, and Cambodia, among other places. In 1998, the establishment of the International Criminal Court was agreed to in the Rome Treaty, and it became operational on July 1, 2002.

Although the crime of aggression was the top charge at Nuremberg, it was the one crime that was conspicuously left out of the mandate of all of the tribunals that came after it, which focused instead on war crimes, crimes against humanity, and genocide. The possibility of the crime of aggression was included in the Rome Statute of the ICC, but only in theory. The statute specified that it would become part of the Statute only after the Assembly of States Parties (ASP) of the Court agreed to a definition and a ratification process, which it did at its review conference at Kampala in 2010. There, it was agreed that it would require 30 States Parties to ratify the amendments to the Statute defining the crime, followed by a vote to activate the crime by at least a two-thirds majority of States Parties at an ASP meeting after January 1, 2017. Those ratification conditions were achieved last week, thus making the ICC the first international court since Nuremberg to have the crime of aggression in its statute.

But don’t expect to see aggression prosecutions anytime soon. The crime and the Court’s jurisdiction are narrowly defined. First, the crime only applies to “manifest” violations of the U.N. Charter, measured by character, gravity and scale. Second, the crime targets only persons in senior leadership, defined as those “in a position effectively to exercise control over or to direct the political or military action of a State.” Third, absent a Security Council referral, the Court will have jurisdiction only when a State Party commits the crime of aggression against another State Party. Fourth, as the result of a last-minute compromise last week, the Court’s jurisdiction is further narrowed to only those States Parties that have ratified the aggression amendment, presently just [35](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en) of the [123 States Parties](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx). Finally, even those States Parties that ratify the aggression amendment can elect at any time to opt out of the aggression jurisdictional regime.

Given all of these limitations, it is difficult to imagine an aggression prosecution at the ICC involving States Parties, at least for the time being. At the same time, as noted above, the aggression amendment also allows for the UN Security Council to refer non-States Parties for prosecution to the ICC, and of course there is no possibility of an opt out in this circumstance. In fact, this may be the most likely scenario for an aggression prosecution to arise at the Court: the major powers on the UN Security Council band together to target a rogue state committing an act of aggression. That would be an ironic development because these days, the ICC is often criticized precisely because of a perception that it can only reach weaker states and not the major powers of the world.

At the end of the day, the principal significance of the ICC’s adoption of the crime of aggression lies, no doubt, simply in the articulation and establishment of the crime. To date, the international tribunals have made us more aware of individual criminal responsibility for atrocity crimes committed both in the context of war and outside of it. Such crimes are not just an inevitable result of conflict, but are caused by individuals who should be held responsible for them. Similarly, adoption of the crime of aggression at the ICC should force policymakers, military leaders, civil society, journalists, educators, and citizens to pay more attention to the question of the legality of war, and more specifically to the responsibility of individuals for wars that are illegal. Illegal wars don’t just happen, individual leaders make them happen, and now we will think harder about how they could be held accountable for their actions. Changing the conversation is the first step to changing conduct.

At the same time, adoption of the crime of aggression at the ICC is not without risk. It could burden the ICC with even more expectations that cannot be fulfilled. Already, the Court can prosecute only a tiny fraction of the atrocity crimes that occur in the world, even where it has jurisdiction, leaving many supporters and victims frustrated. Once the crime of aggression is formally activated next year, the Court might find itself spending a lot of time trying to explain why it is not prosecuting aggression cases, a dynamic that is never very good for a court’s overall reputation and legitimacy.

Further, there continues to be debate about the definition of the crime of aggression and what it means for a violation of the U.N. Charter to be “manifest.” Most pointedly, will interventions with a genuine humanitarian purpose count? Harold Koh and Todd Buchwald have [written](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6014&context=fss_papers) that activating the crime of aggression, in its present form, could have the paradoxical effect of discouraging military interventions to stop or prevent atrocity crimes. One can only hope that debates that will be spurred by the activation of the crime will help clarify these questions.

In sum, the significance of the inclusion of the crime of aggression within the ICC’s remit will not be in the prosecutions that result, but rather in the discussions that ensue, focused on illegal wars, their causes, and when to hold leaders individually responsible for them.