THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT OVER THE CRIME OF AGRESSION

[**Issue Number 42 - October 2002**](https://www.lebarmy.gov.lb/en/content/42-d)

**The Jurisdiction of the International Criminal Court Over the Crime of Agression**
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**I- INTRODUCTION**

The adoption of the Rome statute of the International criminal court on 17 July 1998 was a significant event in the history of mankind. To an extent, the International criminal court will complement the functions of the International court of justice by providing a criminal counterpart to the latter's civil jurisdiction, and by extending the reach of the adjudication of International law to individuals.

In contrast, by virtue of article 34 of its statue, the contentions jurisdiction of the International court of justice extends only to states.

Although the International criminal court will constitute an important step towards the completion of international adjudicative mechanisms, a full array of judicial remedies is still lacking in international law([[1]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_edn1%22%20%5Co%20%22)).

On April 2002, among the 139 states who signed the Rome statute, only 60 states ratified the statute, and that number is enough for the International Criminal Court to be reality.

Following the 60th ratification, the Assembly of states parties will meet to discuss the following items:

    1) The relationship between the International Criminal Court and
        the Security Council.
    2) The definition of the crime of aggression.

**II- The Nuremberg Precedent.**

In his opening address before the International Military Tribunal at Nuremberg in 1945, Robert Jackson, chief of counsel for the United States, declared: "This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against their neighbors."

Jackson, on leave from the United States Supreme Court, was convinced that domestic tyranny and war could only be curbed "when we make all man answerable to the law". He appealed for judicial action to assure that those who start a war will be held to personal account. He made it explicitly clear that the law of peace had to apply to all nations "including those who sit there now in judgment".

After reviewing the precedents and the existing law, the learned judges on the International Tribunal concluded: "the charges of the indictment that the defendants planned and waged aggressive war are charges of the utmost gravity.. 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".

Germany's illegal acts were spelled out in detail but neither in Nuremberg charter nor in the judgment was the crime of aggression specifically defined. Five Nazi leaders were sentenced to death for planning plus supporting Germany's aggressions.

The Nuremberg precedent was followed by many similar tribunals and its judgment was unanimously affirmed by the First General Assembly of the United Nations. UN committees were appointed to codify International Criminal Law based on the approved Nuremberg principles and to create a new International Criminal Court to enforce the code (Resolution number 95(I), 11 December 1946). The Soviet Union proposed a simple test: The nation that fired the first shot should be branded the aggressor. The United States insisted that subversion and assistance to foreign-armed bands that threatened US interests should also be criminalized. Diplomats from both sides of the ideological divide argued that as long as there was no agreed definition of "the supreme crime" , no code would be complete and until there was a code there was no basis for a new criminal court. Definitions, in addition to a code and a court were thus linked and put on ice by the "cold war". Powerful nations were not ready to yield vital sovereign rights to an untried security system based on the rule of law. While committees quibbled, the world went back to customary killing. It seemed easier to commit aggression than to define it(1').

**III- The 1974 Consensus Definition of Aggression**

The charter of the International Military Tribunal spelled out, to a certain extent, the elements of the crime against peace, which was tantamount to aggression. The tribunal considered the following acts as crime against peace, namely: "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"([[2]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_edn2%22%20%5Co%20%22)).

These guidelines have enlightened both jurists and politicians who, eversince the League of Nations, have been engaged in finding a generally agreed upon definition of aggression, especially that the charter of the U. N. which is virtually considered the constitution of international relations since the end of World War Two referred to aggressions and combating aggression through authorizing the Security Council under chapter VII to determine the existence of "Act of aggression".([[3]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_edn3%22%20%5Co%20%22))

And after almost 30 years of wrangling, with the political freeze beginning to thaw, a definition of aggression was reached by consensus and approved by the General Assembly on 14 December 1974 as resolution 3314 (XXIX). Its imprecision was a product of compromise: Consensus was reachable because the definition was laced with clauses of such delicate ambiguity that nations might interpret the text to serve their own political purposes. The preamble merely called upon states to refrain from aggression and other uses of force, and recommended that the Security Council, "table account of that definition as guidance...." Nations seemed to have forgotten, or have chosen to overlook, the fact that 1946 General Assembly mandate was to draft a definition, not merely to serve as a guide to the council, but as the most important provision of a new criminal code that would legally bind everyone and serve the cause of world peace.

The eight sustentation articles began with a generic declaration: "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 U.N." The first use of armed force would be "prima facie evidence of an act of aggression". But the council should have concluded that it should not be characterized as aggression "in the light of other relevant circumstances".

Illustrations of flagrant forms of aggression, such as invasion, military occupation, bombardment, blockade, or attacks were listed, but the list was not exhaustive and the council should have determined that other acts were also aggression. In effect, the decision whether aggression by a state had taken place was left to the Security Council acting "in confronting with the charter([[4]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_edn4%22%20%5Co%20%22)).

**IV- Proposals for Definition of the War Crime Aggression**

After the (July - August) 1999 session of the preparatory commission, some coalition members suggested that the ICC secretariat undertake to summarize the various proposals on aggression that were compiled and distributed at the end of the session by the United Nations secretariat.

These proposals range in time from the sessions of the preparatory committee, through the Rome Diplomatic conference, and into the sessions of the preparatory commission. It is clear that they have evolved in response to the development of the Rome statute. This should be kept in mind while comparing them. Furthermore, it is worth noting that most proposals more obviously focus on the definition of aggression, and less obviously on how the courts jurisdiction over aggression should be triggered, or on the court's relationship with the United Nations Security Council.

Appended to this document are additional references to the crime of aggression, the charter of the International Military Tribunal (Nuremberg charter), the control council number 10, an excerpt from the 1996 Draft code of crimes against the peace and security of Mankind wich is also adopted by the International Law Commission, and a proposal for the definition of aggression prepared for publication by a former Nuremberg prosecutor, Ben Ferencz([[5]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_edn5%22%20%5Co%20%22)).

**A- Definition of Aggression:**
      1- Persons who incur criminal responsibility (i.e.a person who is in position to exercise control, capable of directing political /military actions in his or her state).

             The crime of aggression is committed:
                a- By a person who is in a position to exercise control or capable of  directing political / military actions in his state against another state.
                b- By an individual who is in a position of exercising control or capable of directing political or military  action of a state.
                c- By a person who is in a position of exercising control or is capable of directing political / military actions in his state.
                d- By an individual who is in a position of exercising control or capable of directing or guiding the political or military action of a state.
                e- By a person who is in a position of exercising control or capable of directing political / military actions in his  state.
                f- By an individual who is in a position of exercising control or capable of directing the political or military action of a state.

     2- Legal Conditions Governing the Definition of Aggression:

                a- For the purposes of the statute of the International Criminal Court.
                b- For the purposes of the present statute, and subject to the role performed by the Security Council with regard to aggression in accordance with article 10 of the resent statute.
                c- For the purposes of the present statute, and subject to   a prior determination by the United Nations Security Council of an act of aggression by the state concerned.

     3- Legal Conditions under which Aggressions is Committed:

                a- In contravention to the charter of the United Nations.

     4- Means of Committing Aggressions:
               a- By resorting to armed force.
               b- By making an armed attack directed by a state.
               c- By using armed force.

     5- Purpose of Committing Aggression:
               a- To threaten or violate state sovereignty, territorial  integrity, or political independence.
               b- Against another state or to deprive other peoples of  their rights to self-determination, freedom, and independence.

     6- Establishing the List of Acts which constitute Aggression.
               a- Acts constituting aggression [included] are the following  A/AC/.249/1997/WG.1/DP.6)
               b- The crime of aggression means either of the following acts ...
               c- Acts constituting aggression include the following, whether receded by a declaration of war or not.
               d- The crime of aggression means any of the following acts ...

     7- Acts which Constitute Aggression:
               a- Invasion or attack, The invasion or attack by the armed forces of a state of
                   a territory of another state.
               b- Occupation, Any military occupation, however temporary, resulting from such invasion or attack -With the object or result of establishing a [military]  occupation of the territory of such other state or part thereof by armed forces of the attacking state.

-With the object or result of establishing a military  occupation of the territory of such other state or part  thereof by armed forces of the attacking state.
               c- Annexation, Any annexation by the use of force of the territory of another state or part thereof.
                     -with the object or result of annexing the territory of such other state or part thereof by armed forces of  the attacking state.
               d- Bombardment or use of weapons. 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.
               e- Blockade: The blockade of the ports or coasts of a state by the armed forces of another state([[6]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_edn6%22%20%5Co%20%22)).
               f- Attacks on the land, sea, or air forces. An attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another  state.
               g- Use of armed forces in contravention of conditions of the agreement between states. The use of armed forces of one 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.
               h- Actions of state in allowing its territory to be used for perpetrating aggression against a third state.The action of a state in allowing its territory, which it as placed at the disposal of another state, to be used by that another state for perpetrating an act of aggression against a third state.
               i- Involvement of armed bands, groups, irregulars, or mercenaries. 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.

       8- Direct and accessory liability (planning, preparation,ordering,  conspiracy)
              a- Initiating or carrying out and planning, preparing or ordering (where linked to crimes committed as listed in section 7(b) and (c)
              b- Initiating, planning, preparing, ordering, or launching.
              c- Planning, preparing, initiating, carrying out a war of aggression([[7]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_edn7%22%20%5Co%20%22)).

**B- Conditions which trigger jurisdiction:**
     1- Independence of the court In the context of the court of the proposed inclusion and the definition of a crime of aggression, a new paragraph (3) should be added after existing paragraph (2) of the international law commission (ILC) draft, which would read as follows: " The determination by the Security Council under paragraph (2) above shall not be interpreted as in any way affecting the independence of the court in deciding on the commission of the crime of aggression by a given person." The existingparagraph (3) of the article 23 of ILC draft would be deleted.([[8]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_edn8%22%20%5Co%20%22))

     2- Relationship of the International Criminal Court to the UN Security Council.
             a.   That the definition not lead to frivolous accusation of a political nature against the leadership of a member state. That it must avoid that the definition somehow negatively affects the legitimate use of armed force in conformity with the charter of the United Nations. That the inclusion of the crime of aggression should leave unimpaired the primary responsibility of the security council for the maintenance of international peace and security in accordance with the formulation "as determined by the security council", from the formulation proposed in February 1999 (UN Doc. A/AC. 249/1997/L.5, p.14) not be included, as it would ruin the concept of a self-sustained and autonomous definition of the crime of aggression.
             b.  The court shall prosecute and punish the crime of aggression as defined in paragraph (1) of this article without prejudice to the powers exercised by the Security Council with regard to aggression under chapter VII of the charter of the United Nations.([[9]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_edn9%22%20%5Co%20%22))
            c.   Since this definition of the crime of aggression necessarily involves the relationship between the court and the security council , a new formulation for article ([[10]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_edn10%22%20%5Co%20%22)) appears to be necessary (relationship between the security council and the court, based on article 10 of the  preparatory committee report).

         1- The Security council shall determine the existence of
aggression in accordance with the pertinent provision of the
charter of the United Nations before any proceedings are
false placed in the court with regard to a crime of
aggression.

         2- The security council may determine the existence of aggression in accordance with paragraph (1) of this article:
                  a- On its own initiative.
                  b- At the request of a state which considers itself the victim of aggression.
                  c- At the request of the court when a complaint relating to a crime of aggression has been submitted to it.
                  d- At the request of any other of the United Nations which, under the charter, is able to draw the attention of the security council to a situation likely to endanger the maintenance of international peace and security.

         3- When a complaint relating to a crime of aggression is submitted to the court, it shall suspend its deliberation and refer the matter to the security council for a declaration, in accordance with the pertinent provisions of the charter which decide whether agression does or does not exist.

A letter from the president of the Security Council shall convey the Security Councils' finding to the prosecutor of the court, accompanied by all supporting material available to the council with regard to the aggression whose existence it has determined. (N.B. This sentence is a repetition of article 10, paragraph 2).

         4- Notwithstanding the provisions of paragraph (1) of this article, the court may commence an investigation for the purpose of establishing whether the meaning of the present statute exists, if the security council, having had the matter of the present statute exists, if the security council, having had the matter referred to it by the court under paragraph (3) of the present article, does not reply within a reasonable time.

         5- The security council, on the basis of a formal decision under chapter VI of the charter of the United Nations, may lodge a complaint with the prosecutor specifying that crimes referred to in article (5) appear to have been committed.

         6- The court may request the assistance of the security council in conducting investigations into cases submitted to it, in arresting persons who are being prosecuted or have escaped from custody, or in enforcing decisions.(10)

**V. Conditions for exercising of Jurisdiction over the crime of
    Aggression:**

    1.   The court shall exercise its Jurisdiction with respect to the crime of aggression in accordance with the statute and in a manner consistent with the charter of the United Nations, in particular, Articles 10, 24, and 39.

    2.   Where, in accordance with article 13 (b) of the statute, the Security Council presents to the prosecutor a situation in which the crime of aggression appears to have been committed, the prosecutor shall proceed with the case in accordance with the statute and the rules of procedure and evidence.

    3.   Where either:
          a- In accordance with article (14) of the statute, a state party presents to the prosecutor a situation in which a crime of aggression appears to have been committed; or

        b- In accordance with article (15) of the statute, if the prosecutor intends to proceed with an investigation (proprio motu) with respect to the crime of aggression, the court shall first ascertain whether the security council has made a determination under Article 39 of the charter as to the existence or other wise of aggression committed by the state concerned.

    4.   If the security council has made a determination that aggression has been committed by the state concerned, the prosecutor shall proceed with the case in accordance with the statute and the rules of procedure and evidence. If no security council determination exists, the court shall notify the Security Council of the situation before the court so that the security council may take action, as appropriate, under article (39) of the charter.

    5.    Where the security council does not make a determination under article (39) or invoke article (16) of the statute within six months from the date of notification, the court may request the General Assembly to seek an advisory opinion from the International court of Justice, in accordance with Article (96) of the charter and article (65) of the statute of the International Court of Justice, on the legal question of whether or not aggression has been committed by the state concerned.

    6.    In situation where no action is taken within the period specified in paragraph (5), the International Criminal court may proceed to exercise its Jurisdiction over the crime of aggression in accordance with the statute and the rules of procedure and evidence if the International court of Justice either:
             a-   Gives an advisory opinion that aggression has been committed by the state concerned;
             b-   Makes a finding in proceedings brought under chapter II of its statute that aggression has been committed by the state concerned.([[11]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_edn11%22%20%5Co%20%22))

[[1]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_ednref1%22%20%5Co%20%22) See Dr. Iain Scobbie , the Jurisdiction of International Criminal Court, a research paper submitted to the symposium of the ICC Damascus November, 2001 p. 1

[[2]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_ednref2%22%20%5Co%20%22) See U. N. treaty series 1951, page 228.

[[3]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_ednref3%22%20%5Co%20%22) Professor Mohamad Aziz Shukri, the crime of aggression between the Rome statute plus the preparatory commission, International Human law: Reality and ambition, Damascus, 2000, p.61

[[4]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_ednref4%22%20%5Co%20%22) - B.B. Ferencz, deterring aggression by law ... , p. 3

[[5]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_ednref5%22%20%5Co%20%22) www.globalpolicy.org/int/justice/icc/2001

[[6]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_ednref6%22%20%5Co%20%22) A/AC.249/1997, proposal submitted by Egypt plus Italy, 21 February 1997.

[[7]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_ednref7%22%20%5Co%20%22) Proposal submitted by Russian Federation, 29 July 1999.

[[8]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_ednref8%22%20%5Co%20%22) Proposal submitted by Egypt & Italy, 21 February 1977.

[[9]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_ednref9%22%20%5Co%20%22) Proposal submitted by Cameroon, 2 July 1988.

[[10]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_ednref10%22%20%5Co%20%22) Proposal submitted by Cameroon, 2 July 1988.

[[11]](https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression%22%20%5Cl%20%22_ednref11%22%20%5Co%20%22) PCNICC (preparatory commission for the international Criminal court), working group on the crime of aggression, New York, 24 Sept. 5 Oct. 2001, proposal submitted by Bosnia & Merzegovina New Zealand and Romania.

- See more at: https://www.lebarmy.gov.lb/en/content/jurisdiction-international-criminal-court-over-crime-agression#sthash.Q8sYxMug.dpuf