



## The crime of aggression

The **crime of aggression** concerns the individual criminal responsibility for a prohibited **act of aggression** committed by one State against another State.

### • Historical development

- after Thirty-Years-War: notion of State sovereignty; war was considered legitimate tool, “the continuation of political activity by other means” (von Clausewitz)
- 19<sup>th</sup> century: regulation of *ius in bello* (war crimes) begins but **not** of *ius ad bellum*
- 1899 and 1907: Hague Peace Conferences do not succeed in outlawing right to wage war but require State parties to settle conflicts through mediation – however, **only if possible**
- 1919: Versailles Treaty also establishes **League of Nations**
  - **Covenant** contains some provisions on conflict resolution
  - but no **coherent system** to prevent and sanction aggressive wars
- 1923 and 1924: two **draft treaties** declare aggression to be an international crime (with financial penalties for a State but **without** mentioning personal liability) – both treaties were never ratified
- 1928: Treaty Providing for the Renunciation of War as an Instrument of National Policy (**Kellogg-Briand-Pact**) outlawed war as an instrument of national policy – treaty was ratified by almost all States (with some reservations); however, it did not contain any sanctions for the case it was breached
- 1936 **Italian** invasion of Ethiopia and 1940 **Soviet** action against Finland both condemned as acts of aggression by the League of Nations, however, decisions **were not based** on Article 10 of the Covenant
- 1945 London Agreement includes Charter of the International Military Tribunal: Art. 6 stipulates **individual criminal responsibility** for crimes against peace
- 1946: **Judgment at Nuremberg**; several convictions for crime against peace but **no definition** as to what constitutes the crime
- 1946: Charter of the International Military Tribunal for the Far East has **similar wording**
- 1951-1974 several U.N. commissions try to define the crime
- 1974: General Assembly resolution adopts a **consensus definition** of aggression

### • Current Status

- United Nations Charter mentions “aggression” twice (Art. 1 [1] and Art. 39), other norms are closely related
  - Art. 2 (4): Charter prohibits “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”
  - Art. 39: allows the Security Council to take action under Chapter VII in the case of an act of aggression
  - Art. 51: recognizes the right of member States to defend themselves against armed attack
- Statutes of the ICTY and the ICTY **do not contain** provisions on aggression



- Statute of the ICC declares that it shall exercise jurisdiction over the crime of aggression **only once definition is found** that is in accordance with the Charter of the U.N.
- **Material elements of the crime under customary international law**
  - **very disputed** – what is an aggressive war?
  - Nuremberg Charter criminalized “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 [...]”
  - wars in accordance with the U.N. Charter are **thus not** aggressive wars
  - apparently war needs to be **aimed at annexing or occupying** the territory (or parts thereof) of another State (“**aggressive element**”)
  - other acts of aggression?
- **Perpetrators**
  - “**leadership crime**” (effective control or leadership is required)
- **Criminal acts**
  - **planning, preparing, initiating, waging** a war of aggression
- **Mental element**
  - criminal acts must be committed **intentionally** and with *animus aggressionis*
- **The ICC and its problems with the crime of aggression**
  - Can an argument really be made that aggression needs to be included because of the Nuremberg **precedent**?
  - Is aggression truly the **supreme international crime**?
  - Could the crime’s inclusion be of **deterrent** value?
  - Can realistically be expected that a **compromise** will be found?
  - How is the crime to be **defined**?
  - What is the level of **involvement** by the **Security Council**?

**Recommended reading:** Gerhard Werle: *Principles of International Criminal Law*, Part Six, 2005; Kai Ambos: *Internationales Strafrecht*, 3. Teil § 7 B IV, 2006; Matthias Schuster: *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword*, 14 Criminal Law Forum (2003), pp. 1-57