

FURTHERING THE LEGACY OF BENJAMIN B. FERENCZ:
AMENDING THE ROME STATUTE'S JURISDICTION OVER
THE CRIME OF AGGRESSION

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Benjamin B. Ferencz, who I was privileged to know and work with, was a tireless champion of the rule of law, and, particularly, an advocate for prosecuting the crime of aggression. Yet, his vision was not completed in 2010 at the Review Conference on the Rome Statute¹ of the International Criminal Court (ICC) in Kampala, Uganda. While States Parties took the historic decision at the Review Conference of adopting an amendment defining the crime and providing conditions for the ICC's exercise of jurisdiction over it, Ben was deeply distressed by the limited jurisdiction the ICC would have over the crime. The Kampala Amendments on the crime of aggression created a weak jurisdictional regime, leaving the ICC with a diminished ability to create deterrence and very little ability to enforce the crime.

States Parties to the Rome Statute now stand in a position to fix this lacuna in the ICC's jurisdiction over the crime at a 2025 upcoming

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¹ Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

review.² States Parties should adopt an amendment of the Rome Statute (amending the Kampala crime of aggression amendments) and harmonize the ICC's jurisdiction over all four of its crimes. This would represent a hugely significant step forward, reducing double standards and selectivity, with the potential to close impunity gaps. As Russia's invasion of Ukraine demonstrates, the current situation—i.e., the ICC's inability to prosecute aggression when committed by nationals of states not parties to the Rome Statute (non-States Parties), even in the face of a seemingly blatant violation of the UN Charter³—is not a tenable one.

This Essay will discuss the ICC's current jurisdiction over the crime of aggression, the gaps in the jurisdictional regime, and how States Parties to the Rome Statute could remedy the situation. While this Essay is written in remembrance of Ben, it primarily will not focus on his impressive achievements. Were Ben still with us, he would no doubt say not to waste time writing accolades about him but focus on what needs to be done—strengthening the rule of law. The amendment is what Ben would have wanted.

I. BEN'S SCHOLARSHIP ON, AND CONVICTION OF, THE NEED TO PROSECUTE THE CRIME OF AGGRESSION

Decades of Ben's life were devoted to writing on the crime of aggression and the imperative of prosecuting the crime.⁴ His views were shaped by the horrors he witnessed serving in World War II and later traveling from concentration camp to concentration camp in territory formerly occupied by Nazi Germany. In his 1988 book, *PlanetHood*, Ben wrote:

² See Int'l Crim. Ct., *Strengthening the International Criminal Court and the Assembly of States Parties*, ¶ 163, ICC-ASP/23/Res.1 (Dec. 6, 2024), https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-23-Res.1-ENG.pdf [<https://perma.cc/VU5K-KKTH>] (scheduling a special session for July 7-9, 2025).

³ Whether Russian nationals are implicated in the crime of aggression and whether Russia has committed an act of aggression are issues that would need to be adjudicated.

⁴ See, e.g., BENJAMIN B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION, THE SEARCH FOR WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS* (1975); BENJAMIN B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARDS WORLD PEACE – A DOCUMENTARY HISTORY* (1980). For the website of Benjamin Ferencz, see <https://benferencz.org> [<https://perma.cc/LY36-WWQP>] (last visited May 19, 2025).

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Indelibly seared into my memory are the scenes I witnessed while liberating these centers of death and destruction. Camps like Buchenwald, Mauthausen, and Dachau are vividly imprinted in my mind's eye. Even today, when I close my eyes, I witness a deadly vision I can never forget—the crematoria aglow with the fire of burning flesh, the mounds of emaciated corpses stacked like cordwood waiting to be burned . . . I had peered into Hell.⁵

He would later prosecute Nazi crimes as chief prosecutor in the *Einsatzgruppen* case, one of the subsequent trials prosecuted at Nuremberg.⁶ The case focused on mass killing by Nazi mobile execution squads in Nazi-occupied Eastern Europe. Ben used to say that when he had found enough documentation to demonstrate that a million people had been murdered, he stopped looking for additional evidence; he had enough to prove the case.⁷

From witnessing these horrors and possessing a tenacious belief in the rule of law, Ben became *the* champion of the need to prosecute the crime of aggression.⁸ His work followed on the heels of luminaries such as Rafael Lemkin, who coined the term “genocide”⁹ and insisted

⁵ BENJAMIN B. FERENCZ & KEN KEYES JR., *PLANETHOOD: THE KEY TO YOUR SURVIVAL AND PROSPERITY*, at xxxiii-xxxiv (1988).

⁶ *United States of America v. Otto Ohlendorf, et al. (Case No. 9)*, in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUREMBERG, OCTOBER 1946 – APRIL 1949, (“GREEN SERIES”) (“EINSATZGRUPPEN CASE”), <https://www.legal-tools.org/doc/74e839> [<https://perma.cc/HQC4-JXQ2>]. The subsequent trials were held in the same room as the trials by the International Military Tribunal at Nuremberg, but were not before that tribunal; rather, they were trials before U.S. military courts.

⁷ The author’s recollection of Ben’s statements. Ben spent the next eight years working to ensure reparations for Holocaust survivors. For an account of this work, see Gregory S. Gordon, *Benjamin Ferencz and the Treatment of Victims in International Criminal Law: Mapping out Lex Lata and Lex Ferenda (Ferencza?) in an Emerging Field*, 23 INT’L CRIM. L. REV. 239 (2023).

⁸ For biographies, see TOM HOFMANN, *BENJAMIN FERENCZ: NUREMBERG PROSECUTOR AND PEACE ADVOCATE* (2013); GREGORY S. GORDON, *NUREMBERG’S CITIZEN PROSECUTOR: BENJAMIN FERENCZ AND THE BIRTH OF INTERNATIONAL JUSTICE* (forthcoming 2025). See also Roger S. Clark, *In Memoriam: Benjamin Berell Ferencz 1920–2023*, 34 CRIM. L.F. 141 (2023).

⁹ *Raphael Lemkin and the Genocide Convention*, *FACING HIST. & OURSELVES* (Aug. 2, 2016), <https://www.facinghistory.org/resource-library/raphael-lemkin-genocide-convention> [<https://perma.cc/J3LX-6T4W>].

that the crime be codified in the Genocide Convention,¹⁰ and Hersch Lauterpacht, who ensured that crimes against humanity would be among the crimes prosecuted before the International Military Tribunal at Nuremberg.¹¹

Ben's opportunity came with the decision that the crime of aggression would be included as one of the four crimes in the ICC's Rome Statute.¹² Yet, agreement was not reached during the 1998 Rome Conference on the definition of the crime and the conditions for the ICC's exercise of jurisdiction over it, thus leaving these matters to be concluded through later negotiations.¹³ Ben actively participated in these negotiations during meetings of the Preparatory Commission for the International Criminal Court (1999-2002) and, later, the Special Working Group on the Crime of Aggression (SWGCA) (2003-2009).¹⁴

Many details needed to be worked out during the negotiations, in part because the Nuremberg Tribunal's definition of the crime is fairly minimal and rather circular.¹⁵ There were, of course, times when deliberations bogged down. It was in those moments that the importance of Ben's presence cannot be overstated. It was he who would remind the assembled states' representatives of the tremendous importance of the task in which they were engaged.¹⁶ He knew that what was at stake was no ordinary drafting process but one of great

¹⁰ Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

¹¹ *See* Charter of the International Military Tribunal art. 6(c), *adopted* Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter London Charter] (crimes against humanity). For an account of the contributions of both scholars, see PHILIPPE SANDS, *EAST-WEST STREET: ON THE ORIGINS OF "GENOCIDE AND "CRIMES AGAINST HUMANITY"* (2017).

¹² *See* Rome Statute, *supra* note 1, art. 5, ¶ 1.

¹³ *See id.* ¶ 2 ("The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime . . .") (since agreed to be deleted).

¹⁴ The author was present during most of the negotiations, so writes based on her own first-hand memories. *See also* Clark, *supra* note 8, at 146 ("Ben's energy and enthusiasm would continue to help drive the Preparatory Commission for the Court and then the Special Working Group on the Crime of Aggression . . .").

¹⁵ *See* London Charter, *supra* note 11, art. 6, ¶ a (defining "crimes against peace" as "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 . . ."). The Charter contains no definition of "a war of aggression."

¹⁶ The author's own recollection of the negotiations.

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historical importance. The definition of the crime would need to stand the test of time, and, ultimately, it was hoped, help rein in aggressive war-making and other acts of aggression. And, if aggression was not deterred, the ICC would at least be in a position to prosecute individuals responsible for it.

As a former prosecutor at Nuremberg, Ben possessed tremendous credibility. When he spoke, delegates paid rapt attention.¹⁷ When he chastised participants to stop quibbling about some minor drafting point and get on with the task facing them, delegates were chastened and complied.¹⁸ He would remind those present of the horrors inflicted by Nazi Germany, the aftermath of which he had witnessed, and remind the delegations that most of those horrors would never have occurred without the initial crime of aggression.¹⁹

II. THE KAMPALA COMPROMISES

Not all of what needed to be achieved was achieved before the SWGCA and in Kampala at the 2010 Review Conference. States Parties reached an extremely important agreement, by consensus, on the definition of the crime—a definition that is well-grounded in historical precedent.²⁰ The real difficulty, however, concerned the agreement, reached by the same consensus, on the ICC's ability to exercise jurisdiction over the crime.

During earlier meetings of the SWGCA, states focused on whether there needed to be some outside body involved—such as the UN Security Council, UN General Assembly or the International Court of Justice—that would act as a “jurisdictional filter.”²¹ This

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ The definition of the act of aggression in Article 8 *bis*(2) takes its text almost entirely from Article 2(4) of the UN Charter and UNGA Resolution 3314; the definition of the crime in Article 8 *bis*(1) takes its conduct words from the Nuremberg Charter. *See also* Astrid Reisinger Coracini, *The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression – at Last ... in Reach ... Over Some*, 2 GÖTTINGEN J. INT'L L. 745, 756 n.59 (2010) (“Delegations voiced particular strong support [at the Review Conference] for the definition and Elements of Crimes of the crime of aggression. The United States delegation's attempts to spread doubts about the existence of a consensus on issues of substantive law were univocally rejected.”).

²¹ *Id.* at 751 (“Negotiations on the conditions [for the exercise of jurisdiction] have been dominated by defining an appropriate filter for the exercise of jurisdiction over the crime of aggression with a view to the determination of a State act of aggression.”); *id.* at 757 (“Omitting reference to the General Assembly and the

outside body could adjudicate whether a state had committed an *act of aggression* before the ICC would exercise jurisdiction and determine whether, as a result of the state's act of aggression, there were individuals implicated in the *crime of aggression*. Other states took the view that the ICC could examine the question of state conduct itself (i.e., whether there had been an act of aggression) without the need for any such outside body or filter,²² which some feared could undermine the ICC's independence.²³ Unlike the definition, which was agreed on by 2009,²⁴ the issue of jurisdiction was not resolved until the 2010 Review Conference.²⁵

By the Review Conference, focus shifted to (a) having a role for the UN Security Council,²⁶ and (b) allowing the ICC to act without the involvement of any external body. While there were other issues

International Court of Justice mark[ed] the end of a lengthy process that had gradually decreased support for the use of alternative external filters.”).

²² Remarks of Ambassador Christian Wenaweser, Permanent Representative of Liechtenstein to the United Nations, (July 18, 2024); THE PRINCETON PROCESS ON THE CRIME OF AGGRESSION, MATERIALS OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION 11 (Stefan Barriga, Wolfgang Danspeckgruber & Christian Wenaweser eds., 2009).

²³ Email from Roger Clark, Professor of L. Emeritus, Rutgers Univ., to author (Aug. 14, 2024) (on file with author); email from Jutta Bertram-Nothnagel to author (Sept. 4, 2024) (on file with author).

²⁴ Assembly of States Parties, Int'l Crim. Ct., *Annex II Report of the Special Working Group on the Crime of Aggression*, ¶ 13, ICC-ASP/7/20/Add.1, (Jan. 19-23, Feb. 9-13, 2009) (reflecting on negotiations from February 2009 meetings of the SWGCA: “The suggested wording of draft article 8*bis* found generally strong support. It was stressed that the text was the result of years of negotiation and many compromises, and some delegations recalled that they had preferred different solutions for certain parts of the text, but supported the draft as a balanced compromise”).

²⁵ Coracini, *supra* note 20, at 747 (“The main unresolved issues to be addressed by the review conference concerned the determination of an act of aggression as a (procedural) prerequisite for the exercise of jurisdiction over the crime of aggression and the appropriate activation procedure for a provision on aggression.”). For the Review Conference resolution, see Assembly of States Parties, Int'l Crim. Ct., *Review Conference, Annex I Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, ICC Doc. RC/Res.6 (June 11, 2010) [hereinafter *Review Conference Resolution*], <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf> [<https://perma.cc/J64C-E984>].

²⁶ The permanent members of the UN Security Council had been arguing for the Security Council to act as a filter and pre-determine whether or not a state had committed an act of aggression before the ICC would be able to adjudicate whether the crime of aggression had occurred. What was ultimately agreed on in Kampala was Security Council referrals, similar to the Security Council's ability to refer the other Rome Statute crimes. See Rome Statute, *supra* note 1, art. 13, ¶ b.

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involved,²⁷ these in fact became the ways that the crime of aggression can reach the ICC. Namely, as agreed on at the 2010 Review Conference, Rome Statute Article 15^{ter} provides the ICC with jurisdiction over the crime where the Security Council has made a referral, and Rome Statute Article 15^{bis} addresses the ICC's jurisdiction over the crime where there has been a State Party referral or the Prosecutor has acted *proprio motu* (on his or her own cognizance).²⁸ To safeguard the ICC's independence, the amendment text also provides that "[a] determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute."²⁹

However, the price of reaching agreement on the ICC's jurisdiction over the crime of aggression and definition of the crime³⁰ was that the United States, along with a few aligned states,³¹ insisted that the nationals of non-States Parties and crimes committed on their territory should be excluded from the ICC's jurisdiction when a case is initiated under Article 15^{bis}. As it appeared impossible to reach consensus on adopting the amendment without acquiescing to this position, States Parties (many with great reluctance) agreed at the Review Conference to this carve out for non-States Parties.³² It is now

²⁷ Other issues that needed to be resolved in Kampala included whether to use the amendment provisions of Article 121(4) or 121(5) and, if under Article 121(5), precisely which States Parties would need to ratify the amendment—the aggressor State Party, the victim State Party, or both. For the dispute that developed as to the last issue, see *infra* text accompanying notes 44-48.

²⁸ See Rome Statute, *supra* note 1, art. 15 *bis-ter*. Under Article 15 *bis*, there is also a waiting period of six months to ascertain whether the Security Council has made a determination of an act of aggression. *Id.* art. 15 *bis*, ¶¶ 6–8. Furthermore, where the Prosecutor acts *proprio motu* or there is a State Party referral, if no Security Council determination has been made, there is an additional requirement that the full Pre-Trial Division must authorize the commencement of the investigation. *Id.* ¶ 8.

²⁹ *Id.* ¶ 9; art. 15 *ter*, ¶ 4.

³⁰ The definition is now found in the Rome Statute's Article 8 *bis*. *Id.* art. 8 *bis*.

³¹ According to Carrie McDougall, "[t]he US was the prime mover, but the exclusion of non-States Parties was a unanimous position of the P5 and some of their closest allies." Email from Carrie McDougall, Senior Lecturer, Univ. of Melb., to author (Aug. 17, 2024) (on file with author).

³² The rumor went around at the Review Conference that the U.K. and France would block consensus activation if the United States did not obtain the carve-out for non-States Parties. The author's own recollection of the Review Conference negotiations.

reflected in Article 15*bis*(5).³³ After non-States Parties obtained this exemption, States Parties then also negotiated to have the ability to “opt- out” of the ICC’s jurisdiction over the crime of aggression when cases are initiated under Article 15*bis*. This is now reflected in Article 15*bis*(4).³⁴

While the jurisdictional regime agreed upon struck many as problematic in 2010 if there was to be consistent application of the rule of law, the ramifications—particularly the exemption from the ICC’s crime of aggression jurisdiction of the nationals of non-States Parties—became starkly apparent with the Russian Federation’s February 2022 invasion of the territory of Ukraine.³⁵ While the ICC possesses jurisdiction over genocide, crimes against humanity, and war crimes if committed in the territory of Ukraine or by Ukrainian

³³ It states: “In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.” Rome Statute, *supra* note 1, art. 15 *bis*, ¶ 5.

³⁴ It states:

The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

Id. ¶ 4. This procedure has not seen significant use. Only Guatemala and Kenya have exercised such opt- outs. *See Referrals and Declarations*, INT’L CRIM. CT.: RES. LIBR., <https://www.icc-cpi.int/resource-library#referrals> [<https://perma.cc/5PRQ-PLG3>] (last visited Feb. 15, 2025).

³⁵ On the invasion, see for example Frans Osinga, *Putin’s War, a European Tragedy: Why Russia’s War Failed and What it Means for NATO*, in *REFLECTIONS ON THE RUSSIA-UKRAINE WAR* 123 (Maarten Rothman, Lonneke Peperkamp, & Sebastiaan Rietjens eds., 2024.). Russia’s aggression dates to its 2014 illegal annexation of Crimea. For a detailed timeline of the invasion of Crimea, see MICHAEL KOFMAN, KATYA MIGACHEVA, BRIAN NICHIPORUK, ANDREW RADIN, OLESYA TKACHEVA & JENNY OBERHOLTZER, *LESSONS FROM RUSSIA’S OPERATIONS IN CRIMEA AND EASTERN UKRAINE* 85-94 (2017).

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nationals,³⁶ the crime of aggression committed by Russian nationals³⁷ is not within the ICC's jurisdiction because of the carve-out regarding non-States Parties.

Ben realized long before 2022 the damage inflicted in Kampala on the ICC's jurisdiction over the crime of aggression. Between the non-State Party carve-out and the State Party opt-out, Ben realized the weakness of the jurisdictional regime. After the 2010 Review Conference, he started saying to forget about the crime of aggression and just prosecute murder as a crime against humanity.³⁸ When his son, Don Ferencz, helped found The Global Institute for the Prevention of Aggression (GIPA),³⁹ Ben's attitude was basically "why bother"—the ICC's jurisdiction over the crime has been eviscerated.⁴⁰

³⁶ Jurisdiction exists by virtue of Ukraine having ratified two declarations under Article 12(3) accepting the ICC's jurisdiction. For Ukraine's Article 12(3) declarations, see *Situation in Ukraine*, INT'L CRIM. CT., <https://www.icc-cpi.int/situations/ukraine> [<https://perma.cc/PJ5W-WX9P>] (last visited Sept. 26, 2024). Ukraine also later ratified the Rome Statute. See *Ukraine's Parliament Passes Amendments to Criminal Law Following Rome Statute Ratification*, THE NEW VOICE OF UKR. (Oct. 9, 2024), <https://english.nv.ua/nation/ukraine-s-parliament-passes-amendments-to-criminal-law-after-ratifying-rome-statute-50457137.html> [<https://perma.cc/WPN9-VHLT>]. Ukraine's deposit of its instrument of ratification in October 2024 means its ratification took effect on January 1, 2025. Rome Statute, *supra* note 1, art. 126 ("The Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.").

³⁷ The same is true of the nationals of Belarus and North Korea, as both states are also non-States Parties to the Rome Statute. The leadership in Belarus permitted Russian forces to use its territory as a staging ground for the invasion. On the involvement of North Korean troops, see *infra* note 79.

³⁸ Recollection of the author. As explained by Don Ferencz: "My dad's disappointment with [the] Kampala [conference] prompted him to advocate for prosecution of the illegal use of force as a crime against humanity . . ." Email from Don Ferencz to author (Nov. 29, 2024, 6:33 AM) (on file with author); see WILLIAM A. SCHABAS, *THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW* 233-43 (2016) (Ben Ferencz' part of a joint essay on the illegal use of force).

³⁹ See *The Global Institute for the Prevention of Aggression*, GLOB. CAMPAIGN FOR RATIFICATION & IMPLEMENTATION OF THE KAMPALA AMENDS. ON THE CRIME OF AGGRESSION, <https://crimeofaggression.info/the-campaign/the-global-institute-for-the-prevention-of-aggression> [<https://perma.cc/MAS7-CUQW>] (last visited Feb. 5, 2025).

⁴⁰ Email from Don Ferencz to author, *supra* note 38.

III. THE 2017 COMPROMISE (OR PURPORTED COMPROMISE)

Because the ICC's exercise of jurisdiction over the crime of aggression did not activate at the time of the Review Conference,⁴¹ the issue of jurisdiction arose again in 2017 when the decision on activating jurisdiction took place. While States Parties at the December 2017 meeting of the ICC's Assembly of States Parties (ASP) reached the historic decision, by consensus, to activate the ICC's jurisdiction over the crime of aggression, effective July 17, 2018,⁴² they added further restrictions on the ICC's ability to exercise jurisdiction over States Parties. Or, they arguably did so, because there is some dispute about whether the attempted limitations are effective.⁴³

Most States Parties after the 2010 Review Conference believed, due to the existence of the State Party "opt-out" in Article 15*bis*(4), that all States Parties were "in" the ICC's jurisdictional regime regarding the crime of aggression if they failed to opt-out. More specifically, a majority considered that the ICC would have jurisdiction over a crime of aggression exclusively involving ICC States Parties so long as the aggressor *or* the victim state had ratified

⁴¹ A delay of activation of the ICC's jurisdiction over the crime was provided for in the Kampala crime of aggression amendments. Before the ICC could begin to exercise jurisdiction, there first needed to be: (1) ratification or acceptance of the amendments by thirty States Parties; (2) one year's delay thereafter; and (3) a decision after January 1, 2017, by the ASP to activate jurisdiction. Rome Statute, *supra* note 1, art. 15 *bis*, ¶¶ 2-3.

⁴² See Assembly of States Parties, Int'l Crim. Ct., *Activation of the Jurisdiction of the Court Over the Crime of Aggression*, ICC-ASP/16/Res.5 (Dec. 14, 2017) [hereinafter *Activating Resolution*].

⁴³ For an argument about the invalidity of the modification made in the Activating Resolution of the amendment text agreed on in Kampala, see 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); Carrie McDougall, *Expanding the ICC's Jurisdiction Over the Crime of Aggression*, 22 J. INT'L CRIM. JUST. 543 (2024) [hereinafter McDougall, *Expanding the ICC's Jurisdiction*] (arguing that the Activating Resolution does not amount to a "subsequent agreement" under the Vienna Convention on the Law of Treaties and that if the resolution is only a "supplementary means of interpretation," it would be of lesser weight when interpreting the Kampala amendments); CARRIE MCDUGALL, *THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (2d ed. 2021) [hereinafter MCDUGALL, *THE CRIME OF AGGRESSION*] (setting forth the arguments in detail). For the Vienna Convention on the Law of Treaties, see Vienna Convention on the Law of Treaties, *adopted* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

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or accepted the aggression amendments (assuming the aggressor state had not opted-out of jurisdiction).⁴⁴

By 2017, however, the U.K., France, and several aligned states were insisting on a different reading. Namely, they took the view that all States Parties were “out” of the ICC’s jurisdiction over the crime of aggression unless *both* the aggressor and victim state had ratified the Kampala crime of aggression amendments and the aggressor state had not opted-out of jurisdiction.⁴⁵ The U.K. and France then insisted on including their interpretation in the Activating Resolution that activated the ICC jurisdiction over the crime of aggression.⁴⁶ However, many other States Parties were not convinced by this reading and, in a last ditch attempt to at least preserve the possibility of judicial review of the question, added language to the resolution emphasizing that the ICC is the final arbiter of its own jurisdiction.⁴⁷ They hoped thereby to leave open the alternative reading that ratification by the aggressor *or* the victim state of the Kampala crime of aggression amendments could suffice to establish jurisdiction over the crime of aggression where neither has opted-out of jurisdiction.⁴⁸

If the British and French reading is correct, it would mean that the ICC’s jurisdiction over the crime of aggression became *even more limited* in 2017. Jurisdiction would only exist under Article 15*bis* where an aggressor State Party that has ratified the crime of aggression amendments attacks a victim State Party that has also ratified the crime of aggression amendments, where neither State Party has filed an opt-out declaration. There are only forty-seven states that have ratified the crime of aggression amendments.⁴⁹ Thus, instances where one of those

⁴⁴ See McDougall, *Expanding the ICC’s Jurisdiction*, *supra* note 43, at 4 (noting that the “broad interpretation” of the agreement reached in Kampala was that *one* of either the aggressor or victim state would need to ratify the amendments).

⁴⁵ *Id.* at 4–5 (citing the “narrow interpretation” being supported by the U.S., U.K., France, Canada, Norway and Japan).

⁴⁶ *Activating Resolution*, *supra* note 42, ¶ 2.

⁴⁷ *Id.* ¶ 3.

⁴⁸ See McDougall, *Expanding the ICC’s Jurisdiction*, *supra* note 43, at 10 (“Proponents of the broad interpretation clearly hoped [Operative Paragraph 3] would provide a hook for the ICC’s judges to look beyond [Operative Paragraph 2 of the Activating Resolution].”).

⁴⁹ See *Amendment on the Crime of Aggression to the Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION (Dec. 29, 2024), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en [<https://perma.cc/5C6V-ASQZ>].

forty-seven states commits an act of aggression against another of the forty-seven states will be relatively rare.⁵⁰

A larger question beyond the scope of this Essay is why states were drafting these carve-outs, opt-outs, and other limitations on the ICC's jurisdiction over the crime of aggression. They were seemingly reserving the ability for their own political and military leaders to cause their states to manifestly violate⁵¹ the UN Charter and ensure that no criminal responsibility before the ICC would follow. Simultaneously, they were denying their own populations (should their states fall victim to the crime of aggression) from seeing justice done vis-à-vis the political and military leaders of the aggressor state. They were also denying their own populations (should their state commit the crime of aggression) from seeing justice done at the ICC vis-à-vis their own political and military leaders, should there, for example, be a later change of government. States are already obligated under the UN Charter not to commit aggression (i.e., use of force contrary to the UN Charter).⁵² Thus, a commitment for a state to refrain from *manifestly* violating the UN Charter's use of force provisions (which is what the crime of aggression covers)⁵³—or have its leaders incur potential criminal responsibility—should not be that difficult of a commitment for states to make.⁵⁴

⁵⁰ Many of the ratifying States Parties are also not geographically near each other. See *id.* Jurisdiction would increase as additional States Parties ratify the crime of aggression amendments.

⁵¹ See Rome Statute, *supra* note 1, art. 8 *bis*, ¶ 1 (emphasis added) (stating the crime of aggression covers “an act of aggression which, by its character, gravity and scale, constitutes a *manifest* violation of the Charter of the United Nations”). Absent a “manifest” Charter violation, there is no crime. A June 2008 report of the Special Working Group on the Crime of Aggression (SWGCA) explains: “Delegations supporting this threshold clause noted that it would appropriately limit the Court’s jurisdiction to the most serious acts of aggression under customary international law, thus excluding cases of insufficient gravity and falling within a grey area [in terms of legality].” Assembly of States Parties, Int’l Crim. Ct., *Annex II Report of the Special Working Group on the Crime of Aggression*, ¶ 68, ICC-ASP/6/20/Add.1 (June 2008) [hereinafter *Annex II Report*]. For more on the “manifest” requirement, see THE CRIME OF AGGRESSION: A COMMENTARY (Claus Kreß & Stefan Barriga eds., 2016); McDOUGALL, THE CRIME OF AGGRESSION, *supra* note 43.

⁵² See U.N. Charter, art. 2, ¶ 4 (ban on the use of force); *id.* art. 51 (exception for the exercise by a state of individual or collective self-defense); *id.* Ch. VII (exception where the U.N. Security Council provides a force authorization).

⁵³ Rome Statute, *supra* note 1, art. 8 *bis*, ¶ 1 (stating that the crime of aggression covers “an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”).

⁵⁴ Admittedly there are “grey areas” as to aspects of the *jus ad bellum* law, such as certain issues as to what falls within Article 51 self-defense. Yet, because the

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IV. THE NEED TO AMEND THE KAMPALA CRIME OF
AGGRESSION AMENDMENTS AND HARMONIZE THE ICC
JURISDICTION OVER ALL FOUR OF ITS CRIMES

Between the carve-out and opt-out from the ICC's crime of aggression jurisdiction that were agreed on in 2010 and the jurisdictional limitations that may have been agreed on in 2017, it is clear that the ICC's jurisdiction over the crime of aggression is quite limited when compared with the Court's jurisdiction over its other crimes.

When one reflects on the extreme gravity of the crime, particularly when it takes the form of a full-scale invasion of a neighboring state, it is difficult to justify this extraordinarily limited jurisdiction. Nor can one rely on the crime of aggression reaching the ICC through UN Security Council referral.⁵⁵ Furthermore, due to certain immunities that attach to prosecutions at the national level, the crime is also one that may not be possible to prosecute domestically, at least vis-à-vis another state's high-level leaders.⁵⁶ Yet, those are the

crime of aggression requires a "manifest" UN Charter violation by its "character, gravity, and scale," anything of an unclear legal character cannot be prosecuted by the ICC. *See Annex II Report, supra* note 51 ("Delegations supporting this threshold clause [requiring a "manifest" Charter violation] noted that it would appropriately limit the Court's jurisdiction to the most serious acts of aggression under customary international law, thus excluding cases of insufficient gravity and falling within a grey area [in terms of legality]."). In this respect, the definition of the crime is fairly conservative and adheres to the principle of legality.

⁵⁵ Due to the veto power, permanent members of the UN Security Council and their allies will most likely be insulated against referral of situations involving their state, at least where they are the aggressor state. On abuse of the veto, see generally JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES (2020); Jennifer Trahan, *Legal Issues Surrounding Veto Use and Aggression*, 55 CASE W. RES. J. INT'L L. 61 (2023).

⁵⁶ High level leaders (the head of state, head of government, and minister of foreign affairs), while still in office, will be protected against prosecutions before another state's domestic courts by personal immunity; functional immunities could also prove an impediment to domestic prosecutions if the approach of the International Law Commission (ILC) is followed, and these would continue to apply after a person's term in office ends. On the application of personal immunities, see Astrid Reisinger Coracini & Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities*, JUST SEC. (Nov. 8, 2022), <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities> [<https://perma.cc/AJ6K-ZA6S>]. On functional immunity, see U.N. General Assembly, Draft Article on the Immunity of State Officials from Foreign Criminal Jurisdiction, art. 7, U.N. Doc. A/CN.4/L.969 (May 31, 2022). For states taking the view that the ILC erred in leaving the crime of

individuals who, in particular, should be prosecuted for the crime, as it is the leaders of a state who decide when a state will use force.⁵⁷

International law is designed to apply apolitically to nationals of all states. Admittedly, this goal is difficult to achieve, and the ICC has a way to go before it sees universal ratification of the Rome Statute.⁵⁸ Yet embedding a two-tiered system of justice into the Rome Statute when it comes to the Court's exercise of jurisdiction over the crime of aggression, as has been done,⁵⁹ entrenches selectivity and double-standards.

States Parties now have the ability and opportunity to change the situation. In the 2010 resolution adopting the crime of aggression amendments, a review was scheduled for seven years after the activation of the ICC's jurisdiction over the crime.⁶⁰ Because the activation of jurisdiction was effective in 2018,⁶¹ review is mandated to occur in 2025. Thus, States Parties have the opportunity at the upcoming July 2025 review to eliminate the carve-outs and limitations on jurisdiction that exist regarding the ICC's exercise of jurisdiction over the crime of aggression. The real question is whether they will have the political will to do so.

V. HOW TO ACCOMPLISH THE AMENDMENT

In terms of how to accomplish the amendment, it basically involves applying the ordinary ICC jurisdictional regime set forth in Article 12 of the Rome Statute. To achieve this, Rome Statute Article 15*bis*(4) and (5) would need to be deleted and the amendment should

aggression off its list of crimes as to which functional immunity does not apply, see Joana de Andrade Pacheco, *Where Do States Stand on Official Immunity under International Law*, JUST SEC. (Apr. 19, 2024), <https://www.justsecurity.org/94830/where-do-states-stand-on-official-immunity-under-international-law> [https://perma.cc/K7KD-MBME].

⁵⁷ Under the Rome Statute's definition, the crime only applies to those "in a position effectively to exercise control over or to direct the political or military action of a State." See Rome Statute, *supra* note 1, art. 8 *bis*, ¶ 1. This requirement is known as the "leadership clause."

⁵⁸ Ukraine's ratification marks the 125th ratification of the Rome Statute. See U.N. TREATY COLLECTION, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf> [https://perma.cc/CF4F-Z35P] (last visited June 2, 2025).

⁵⁹ Doing so did not violate the Rome Statute as Article 5(2) clearly did leave it to States Parties to create a different jurisdiction regime regarding the crime of aggression. See Rome Statute, *supra* note 1, art. 5, ¶ 2.

⁶⁰ See *Review Conference Resolution*, *supra* note 25.

⁶¹ See *Activating Resolution*, *supra* note 42.

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provide for Article 12 to apply.⁶² Because ambiguities have been exploited in the past (e.g., the U.K. and France developing a new reading of what most states and experts thought had been agreed on in Kampala),⁶³ it is preferable to spell out *how* Article 12 would apply, rather than simply stating that it does, to avoid ambiguities that could otherwise undermine the desired result.⁶⁴ Such an amendment text has been proposed by GIPA,⁶⁵ which I have the honor to now convene.⁶⁶ GIPA's draft text has been incorporated as one of the options in a Discussion Paper proposed by Costa Rica, Sierra Leone, Vanuatu, Germany, and Slovenia, distributed to all States Parties.⁶⁷ The other option in the Discussion Paper is replacing Article 15*bis*(4) and (5) with text stating that "[t]he Court may, in accordance with Article 12, exercise jurisdiction over a crime of aggression."⁶⁸

GIPA's suggested amendment to Article 15*bis* is:

⁶² See Rome Statute, *supra* note 1, art. 12.

⁶³ See *supra* explanatory text accompanying note 45.

⁶⁴ Ambiguities could be exploited in the past in part due to language in the second sentence of Article 12(5). Given this provision remains, GIPA strongly believes the safer course of conduct—to ensure the second sentence of Article 12(5) is overridden—would be to spell out how the text of Article 12 would apply to the crime of aggression. For additional discussion, see McDougall, *Expanding the ICC's Jurisdiction*, *supra* note 43, at 544-45 ("Simple deletion . . . would be unwise, because such an approach could inadvertently result in a further narrowing of the Court's jurisdiction"); *id.* at 555 (stating that the second sentence of Article 12(5) would be clearly displaced if States Parties spell out in the amendment text how Article 12 would apply).

⁶⁵ For the amendment proposal of the GIPA, see GLOB. INST. FOR THE PREVENTION OF AGGRESSION (GIPA), PROPOSAL FOR THE AMENDMENT OF THE CONDITIONS UNDER WHICH THE INTERNATIONAL CRIMINAL COURT EXERCISES JURISDICTION OVER THE CRIME OF AGGRESSION (2023) [hereinafter GIPA AMENDMENT PROPOSAL], <https://crimeofaggression.info/wp-content/uploads/GIPA-model-amendment-proposal.pdf> [https://perma.cc/X9XR-6YY9]. For reasons to amend, see GIPA, THE NEED TO STRENGTHEN THE INTERNATIONAL CRIMINAL COURT'S JURISDICTION OVER THE CRIME OF AGGRESSION (2023), <https://crimeofaggression.info/wp-content/uploads/GIPA-Proposal-Short.pdf> [https://perma.cc/72LZ-CSY7]. While the GIPA Amendment Proposal was the product of a drafting group within GIPA, its primary drafter was Dr. Carrie McDougall.

⁶⁶ Don Ferencz served as the prior Convenor.

⁶⁷ See Letter from Samuel Žbogar, Ambassador, Permanent Mission of Slovn. to the United Nations, to the Permanent Representatives of State Parties to the Rome Statute (Nov. 8, 2024), https://crimeofaggression.info/wp-content/uploads/Letter-to-all-ICC-SPs_distribution-of-discussion-paper-on-review-of-Kampala-Amendments-on-the-Crime-of-Aggression_Nov-2024.pdf [https://perma.cc/J8RW-MXWW].

⁶⁸ *Id.*

1. *Article 15 bis, paragraphs (4) and (5) are deleted.*
2. *The following text is inserted after Article 15 bis, paragraph (3) of the Statute:*
4. The Court may, in accordance with Article 12, exercise jurisdiction over a crime of aggression if one or more of the following States have ratified or accepted the aggression amendments, or have accepted the exercise of the jurisdiction of the Court over the crime of aggression in accordance with paragraph 5:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
5. If the acceptance of a State that has not ratified or accepted the aggression amendments, or which is not a Party to this Statute, is required under paragraph 4, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court over the crime of aggression in accordance with Article 12, paragraph 3.⁶⁹

The amendment would create considerably more jurisdiction over the crime of aggression than presently exists. Subject to entry into force issues, addressed below, the effect of the proposed amendments would be to provide the ICC with jurisdiction whenever a crime of aggression is committed on the territory or by a national of a State Party, where the Kampala amendments, as amended, have entered into force for that state, regardless of whether the other State (or States) involved in the act of aggression is an ICC State Party. The amendment would also clarify that an Article 12(3) declaration (an ad hoc acceptance of the ICC's jurisdiction) could apply to the crime of aggression.⁷⁰ Thereby, the crime basically would be subject to the

⁶⁹ GIPA AMENDMENT PROPOSAL, *supra* note 65, at 2.

⁷⁰ Such a declaration should not go back in time vis-à-vis the crime prior to July 17, 2018, when the ICC's jurisdiction over the crime of aggression activated. See *Activating Resolution*, *supra* note 42.

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same jurisdictional regime that governs the Rome Statute's other three crimes.⁷¹

In addition to agreeing on the text of the amendment, the other issue for States Parties to consider is whether the amendment once agreed upon (i.e., adopted)⁷² would enter into force under the amendment procedure set forth in Rome Statute Article 121(4) or the one in Article 121(5). Under Article 121(4), seven-eighths of States Parties would need to ratify or accept the new amendment, and then it would enter into force for all States Parties one year after the instruments of ratification or acceptance have been deposited.⁷³ Under Rome Statute Article 121(5), the amendment would enter into force for each State Party one year after the State Party ratifies or accepts the new amendment and deposits its instrument of ratification or acceptance.⁷⁴ The text of the Rome Statute admittedly suggests the use of Article 121(4).⁷⁵ Yet, achieving ratification by seven-eighths of States Parties could take decades or might never be achieved. An argument can also be made for amending under Article 121(5). The Kampala crime of aggression amendments were done as a "package" under Article 121(5),⁷⁶ and the new amendment would fix the Kampala amendments. Thus, one could argue that it too should be effectuated following the process set forth in Article 121(5).⁷⁷

⁷¹ See Rome Statute, *supra* note 1, art. 12. With the amendment text that is proposed, minor variances would still exist, such as the role of the Pre-Trial Division (as opposed to a Pre-Trial Chamber) in authorizing the commencement of an investigation where the situation is initiated *proprio motu*, and the six-month waiting period to ascertain whether the Security Council has made a determination of an act of aggression. See *id.* art. 15 *bis*, ¶ 8.

⁷² Adoption of an amendment can be achieved either through a vote of two-thirds of States Parties or consensus. See *id.* art. 121, ¶ 3.

⁷³ *Id.* ¶ 4.

⁷⁴ *Id.* ¶ 5.

⁷⁵ Article 121(5) states that it governs "[a]ny amendment to articles 5, 6, 7 and 8 of this Statute" *Id.* Article 121(4) suggests that it governs all other amendments. Rome Statute, *supra* note 1, art. 121, ¶ 4. The current initiative is to amend Article 15 *bis*—which is not Articles 5, 6, 7, or 8.

⁷⁶ In Kampala, the amendments did not fit cleanly into either the amendment provisions of Article 121(4) or Article 121(5). Was Article 8 *bis* an amendment to Article 8? If so, it would fall under the amendment provisions of Article 121(5) as would the amendment to Article 5(2); however, the other amendments were not amendments to Articles 5, 6, 7, or 8, so they would fall under Article 121(4). Yet, no one wanted to make half of the amendments subject to one amendment procedure and the other half subject to the other procedure. Amending the amendment provisions to accomplish the amendment at a later date was also rejected.

⁷⁷ Article 121(5) would apply to the new jurisdictional provision—the amended Article 15 *bis*. See Rome Statute, *supra* note 1, art. 121, ¶ 5. The balance of the

The real question, however, is one of political will. The same motivations that caused states to truncate jurisdiction in 2010 and attempt to truncate it in 2017 still likely exist and could resurface during the 2025 negotiations. That is, the States Parties and non-States Parties—with the latter being able to exert pressure on States Parties from behind the scenes—that apparently wanted to provide escape valves to exempt their nationals from the ICC's jurisdiction over the crime of aggression⁷⁸ will still be present at the negotiations.

What has changed since 2010 and 2017, however, is Russia's invasion of Ukraine and the extensive media coverage of the crimes and harm being inflicted on the Ukrainian people and the killing of soldiers on both sides as well as other soldiers forced to fight.⁷⁹ The war has also necessitated European countries taking in massive numbers of Ukrainian refugees,⁸⁰ and both the United States and European countries spending significant sums to assist Ukraine's military.⁸¹ The harm that the crime has caused, including all of these related consequences, is impossible to ignore. Moreover, Russia's

existing crime of aggression amendments (e.g., Article 8 *bis*, Article 15 *ter*, etc.) would still need to be ratified by a State Party that has not yet ratified them, along with the amended Article 15 *bis*. States Parties that have ratified the crime of aggression amendments would only need to ratify the amended Article 15 *bis*.

⁷⁸ See *supra* notes 30-34 and accompanying text (exclusions from jurisdiction negotiated in 2010); *supra* notes 45-48 and accompanying text (restrictions on jurisdiction negotiated in 2017).

⁷⁹ Mersiha Gadzo, *Record High Deaths in the Russia-Ukraine War: What You Should Know*, AL JAZEERA (Oct. 16, 2024), <https://www.aljazeera.com/news/2024/10/16/russia-ukraine-wartime-deaths> [<https://perma.cc/R9H8-U7HJ>] (“[A]bout one million Ukrainians and Russians have been killed or wounded since the war began. The majority of dead are soldiers on both sides”); see also *Over 1,000 North Korean Casualties in Russia-Ukraine War, South Korea Says*, CBS NEWS (Dec. 23, 2024, 6:11 AM), <https://www.cbsnews.com/news/over-1000-north-korean-casualties-in-russia-ukraine-war-seoul-says> [<https://perma.cc/S6WM-CCNM>]. The killing of combatants is not a war crime as it is permitted under international humanitarian law. See, e.g., Rome Statute, *supra* note 1, art. 8, ¶¶ (2)(b)(i), (e)(i) (stating that it is a war crime to intentionally direct attacks against the civilian population, which excludes the targeting of combatants). However, soldiers are victims of the crime of aggression as they should not have to fight and/or die in an illegal war.

⁸⁰ See *Estimated Number of Refugees from Ukraine Recorded in Europe and Asia Since February 2022 as of July 2024, by Selected Country*, STATISTA, <https://www.statista.com/statistics/1312584/ukrainian-refugees-by-country> [<https://perma.cc/2H73-6BK5>] (last visited Jan. 21, 2025).

⁸¹ See Christopher Wolf & Elliott Davis Jr., *Countries That Have Committed the Most Aid to Ukraine*, U.S. NEWS (Feb. 23, 2024), <https://www.usnews.com/news/best-countries/articles/these-countries-have-committed-the-most-aid-to-ukraine> [<https://perma.cc/5H2Y-Y46Z>].

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invasion of Ukraine is only one example; there is no monopoly on the crime. The risk of states committing aggression, and their leaders being implicated in the crime, truly poses a global threat. Rwandan-backed forces in the DRC,⁸² Israeli forces in Syria,⁸³ Chinese threats to invade Taiwan⁸⁴ and incursions into the South China Sea,⁸⁵ Venezuela's threats to invade Guyana,⁸⁶ and, most recently, the U.S. President's threats of invading Greenland, Canada, and Panama⁸⁷ are a few added examples of the unlawful use of force or the threat of the unlawful use of force.

What is also different is the demand for accountability. As to the leaders who initiated Russia's aggression, approximately thirty to forty states have been participating in a "Core Group" that has been negotiating to establish a special tribunal for the crime of aggression in the situation of Ukraine.⁸⁸ While there is nothing definitively agreed yet, these states have made a commitment to prosecuting the crime's

⁸² *UN Report Shows Rwandan Army Intervened in DRC's Troubled East*, AFR. NEWS (Aug. 13, 2022), <https://www.africanews.com/2022/12/23/un-report-shows-rwandan-army-intervened-in-drcs-troubled-east/> [<https://perma.cc/8XET-UQVP>].

⁸³ *The IDF Struck Strategic Weapons Stockpiles in Syria*, ISRAELI DEF. FORCES (Dec. 12, 2024), <https://www.idf.il/en/mini-sites/idf-press-releases-israel-at-war/december24-pr/the-idf-struck-strategic-weapons-stockpiles-in-syria/> [<https://perma.cc/25QF-QWD7>].

⁸⁴ Christopher Bodeen, *China Reaffirms Its Military Threats Against Taiwan Weeks Before Its Presidential Election*, AP NEWS (Dec. 28, 2023, 7:55 AM), <https://apnews.com/article/china-taiwan-elections-military-threats-ea68fa11a0b172c31162c0ff128cabf7> [<https://perma.cc/8PVD-T6MJ>].

⁸⁵ *What is the South China Sea Dispute?*, BBC NEWS (July 7, 2023), <https://www.bbc.com/news/world-asia-pacific-13748349> [<https://perma.cc/4UBC-EL89>].

⁸⁶ Vasco Cotovio & Allegra Goodwin, *Venezuela Builds Forces Near Border with Guyana Despite Agreement to De-Escalate*, CNN (Feb. 10, 2024, 11:45 AM), <https://www.cnn.com/2024/02/09/americas/venezuela-guyana-border-troops-intl-latam/index.html> [<https://perma.cc/MJF7-NMUC>].

⁸⁷ Stephen Collinson, *Trump's Threats to Greenland, Canada and Panama Explain Everything About America First*, CNN, <https://www.cnn.com/2025/01/08/politics/trump-greenland-canada-panama-analysis/index.html> [<https://perma.cc/EC9X-LXC7>] (Jan. 8, 2025, 4:47 AM).

⁸⁸ Patryk Labuda, *Making Counter-Hegemonic International Law: Should a Special Tribunal for Aggression Be International or Hybrid?*, JUST SEC. (Sept. 19, 2023), <https://www.justsecurity.org/88373/making-counter-hegemonic-international-law-should-a-special-tribunal-for-aggression-be-international-or-hybrid/> [<https://perma.cc/B4GC-3BZ2>] (last visited Jan. 21, 2025) (listing, at that time, thirty-eight states in the Core Group).

commission in Ukraine, an endeavor endorsed by the Council of Europe.⁸⁹

It would be remarkably hypocritical for any of the states in the Core Group (having supported accountability when it comes to Russian aggression) to now negotiate to maintain carve-outs and opt-outs when it comes to the ICC's jurisdiction over the crime of aggression. These carve-outs and opt-outs are simply a way to entrench double standards and selectivity within the Rome Statute when it comes to jurisdiction. States in the Core Group can no longer credibly argue that the ICC's crime of aggression jurisdiction should be full of carve-outs and opt-outs to provide impunity in other similar situations and/or for their leaders.

States that have not backed an aggression-specific tribunal for the situation of Ukraine due to concerns about selective enforcement of justice—and there should not be only selective enforcement of justice⁹⁰—now have the chance to support broader accountability for the crime of aggression by remedying the weakness in the ICC's current jurisdictional regime.

⁸⁹ The current plan is to have the tribunal created by agreement between the Council of Europe and Ukraine. See Parliamentary Assembly of the Council of Eur., *Legal and Human Rights Aspects of the Russian Federation's Aggression Against Ukraine*, Res. No. 2482 (2023). A preferable alternative would have been creating a truly international tribunal. For one proposal presented to the UN Member States, see Letter from the Representatives of Lat., Liech. & Ukr. to the UN Secretary-General (Aug. 12, 2022), <https://digitallibrary.un.org/record/3985003?ln=en&v=pdf> [<https://perma.cc/N459-2TW8>]. See also *Frequently Asked Questions (FAQ): A Special Tribunal for the Crime of Aggression Against Ukraine*, JUST SEC., https://www.justsecurity.org/wp-content/uploads/2023/01/FAQ_Special-Tribunal-for-the-Crime-of-Aggression.pdf [<https://perma.cc/9D4H-USE6>] (last visited Jan. 21, 2025). For additional details, see *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Series) (Parts I, II, III, IV)*, JUST SEC., <https://www.justsecurity.org/tag/prosecuting-the-crime-of-aggression-against-ukraine> [<https://perma.cc/8A55-B9JG>] (last visited Jan. 21, 2025) (featuring contributions from Oona Hathaway, Astrid Reisinger Coracini, Jennifer Trahan, and David J. Scheffer).

⁹⁰ Some states in the Core Group have committed to a two-step process that both establishes a special tribunal in the situation of Ukraine and harmonizes the jurisdiction of all four Rome Statute crimes. The two steps are being pursued because it is unclear whether a Rome Statute amendment regarding the ICC's jurisdiction over the crime of aggression would come in time to cover the situation of Ukraine. Specifically, it is presently unclear: (a) if the amendment negotiations will be successful; (b) what the final form of the amendment text will be if adopted; (c) when the amendment would enter into force; (d) whether the amendment would have any retroactive application (if this is even possible); and/or (e) whether aggression against Ukraine will be ongoing when the amendment enters into force.

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VI. CONCLUSION

Ben explained his commitment to trying to ensure peace through law, including prosecuting the crime of aggression:

There is no magic formula for achieving world peace quickly. But it can and must be done if humankind is to survive on this little planet. Stimulated by trauma and despair and the prospect of imminent death at the age of fifty, I set about to do whatever I could to help create a more humane and tranquil world. After prodigious study, I concluded that the framework had to be built around law, courts, and enforcement. I embarked on a new career as an unpaid lobbyist for peace. The UN became my workshop. My weapon was my pen, and my tools were books, articles, public lectures, media interviews, and university courses where I spread my gospel. This is how one individual has tried to change the world.⁹¹

Ensuring the ICC has meaningful jurisdiction over the crime of aggression is needed to complete the Rome Statute and the legacy of Benjamin Ferencz.

There is no jurisprudentially supportable reason for the truncation of jurisdiction that exists before the ICC regarding the crime of aggression. The current situation increases selectivity and double-standards that are anathema to the rule of law and field of criminal accountability. The crime of aggression should not be selectively enforced and politically manipulated in this way. It is far too important. If the international community is to create a meaningful deterrent against the commission of aggressive war and other acts of aggression, harmonizing the ICC's jurisdiction over the crime with its jurisdiction over its other crimes is an imperative.

Ben spent decades writing about the urgent need to prosecute the crime of aggression and eloquently speaking about it whenever and

⁹¹ *A Visionary for World Peace*, BENFERENCZ.ORG, <https://benferencz.org/stories/#:~:text=There%20is%20no%20magic%20formula,more%20humane%20and%20tranquil%20world> [https://perma.cc/282S-SN5Y] (last visited Jan. 21, 2025).

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wherever he could. We have lost his eloquent voice, but his work must not stop.