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**A DETAILED ANALYSIS OF
THE PROBLEMS AND PITFALLS
FACING THE INTERNATIONAL
CRIMINAL COURT WITH REGARDS
TO ITS JURISDICTION OVER THE
CRIME OF AGGRESSION**

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SHONA GRUNDY

MASTER OF JURISPRUDENCE

2009

23 JUN 2009



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Peace Treaties Advisory Opinion (1950) ICJ Reports, p71.

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The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind, (1996)

The Rome Statute of the International Criminal Court (1998)

The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)

Statute of the Higher Iraqi Criminal Court, Law No. (10) (2005), (previously called the Iraqi Special Tribunal)

Table of Abbreviations

AJIL	American Journal of International Law
ASP	Assembly of States Parties
BYUJPL	Brigham Young University Journal of Public Law
CCL. No. 10	Control Council Law No. 10
CLF	Criminal Law Forum
Draft Code	Draft Code of Crimes Against the Peace and Security of Mankind
Draft Statute	Draft Statute for an International Criminal Court
ECHR	European Convention on Human Rights
EJIL	European Journal of International Law
FILJ	The Fordham International Law Journal
GA	General Assembly
GLJ	German Law Journal
HRLJ	Human Rights Law Journal
ICC	International Criminal Court
ICJ	International Court of Justice
ICLR	International Criminal Law Review
ICLQ	International Comparative and Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IGO	Inter-Governmental Organisation
ILC	International Law Commission
IMT	International Military Tribunal

IMTFE	International Military Tribunal for the Far East
JACL	The Journal of Armed Conflict Law
JCSL	Journal of Conflict and Security Law
JICJ	The Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
LLAICLR	Loyola Los Angeles International and Comparative Law Review
NAM	Non-Aligned Movement
NGO	Non-Governmental Organisation
NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law
NYLSCJICL	New York Law School Journal of International and Comparative Law
PILR	Pace International Law Review
PrepCom	Preparatory Committee
PrepComm	Preparatory Commission
Rome Statute	Rome Statute of the International Criminal Court
SC	Security Council
<i>SC Report</i>	Report of the Special Committee on the Question of Defining Aggression
SDILJ	San Diego International Law Journal
STLR	Suffolk Transnational Law Review
SWGCA	Special Working Group on the Crime of Aggression
TILJ	Texas International Law Journal
TMA	Draft Treaty of Mutual Assistance

TMC	Temporary Mixed Commission for the Reduction of Armaments
UDHR	Universal Declaration of Human Rights
UN	United Nations
VJTL	Vanderbilt Journal of Transnational Law
WLR	The Wayne Law Review
WGCA	Working Group on the Crime of Aggression

Book titles and their abbreviations as used in the text

Politi, M and Giuseppe, N. (eds), *The International Criminal Court and the Crime of Aggression* (Ashgate, UK, 2004): Politi & Guiseppe, *The Crime of Aggression*.

B. SIMMA, ed. *The Charter of the United Nations: A Commentary*. 2nd ed. (Oxford, 2002): Simma, *The Charter of the United Nations*.

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CHAPTER 1:

INTRODUCTION:

On 17 of July 1998, the Statute of the International Criminal Court was adopted at the United Nations Diplomatic Conference of Plenipotentiaries.¹ Four years later it obtained the 60 ratifications required for its entry into force,² and as a result, the first permanent International Criminal Court (ICC) now sits in The Hague. What was considered for so long to be a “dream of a few visionaries”³ has finally become a reality for all.

The Court has jurisdiction over the “most serious crimes of concern to the international community as a whole”.⁴ Whilst the crime of aggression is formally included within this category, the Court is currently prevented from initiating prosecutions involving this crime unless and until the parties to the Rome Statute agree upon a suitable definition and the conditions under which the Court may exercise jurisdiction. The fact that negotiations on the crime of aggression at the Rome Conference almost derailed the entire project demonstrates just how hard this task is.⁵ Although progress has been made through the work of both the Preparatory Committee (PrepCom) and the Preparatory Commission (PrepComm), there is still no firm agreement amongst States Parties on the fundamental aspects of the crime.

¹ *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (17 July 1998) (hereinafter Rome Statute). The Statute was adopted by 120 votes to 7 (US, Libya, Israel, Iraq, China, Syria & Sudan), with 21 abstentions.

² As of 1 January 2007, 104 countries have ratified this Statute, see: <http://www.icc-cpi.int/statesparties.html> (visited 1 June 2007). The Statute entered into force on the 1 July 2002.

³ Editor's Preface, In: Politi & Nesi, *The Crime of Aggression*. Prof. Schabas professes a ‘guardian angel’ theory about the ICC, believing that something mysterious seems to be driving its rapid success. Schabas, W., 2001. *International Criminal Court: The Secret of Its Success*. CLF. Vol.12, p417.

⁴ Article 5(1) Rome Statute.

⁵ Schuster, M., 2003. *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword*. CLF. Vol.14, p1, notes that the negotiations on the crime of aggression culminated in a “codified impasse” See also: Broomhall, B., 1997. *Looking Forward to the Establishment of an International Criminal Court: Between State Consent and the Rule of Law*. CLF. Vol.8, p325

The intention of this thesis is to provide a detailed analysis of the problems that present themselves when trying to incorporate the crime of aggression within the jurisdiction of the Court. Chapter 2 begins by providing a thorough analysis of the history of the term aggression as well as the creation and development of the crime. As Carpenter notes, the simplicity of the term 'aggression' "disguises its long and sordid past".⁶ Attention then turns to the specifics required for a definition of the crime, as well as the various proposals that have been submitted. Following detailed discussion of the aspects of the crime and the various options that have been put forward, a conclusion of the most suitable definition of the crime of aggression that should be incorporated into the Rome Statute is given. Chapter 4 addresses the complex problem of the conditions under which the Court will exercise its jurisdiction over the crime and the necessary evaluation of the relationship between the ICC and the Security Council that this entails. Chapter 5 addresses some procedural issues that may affect the crime's implementation as well as the overall conclusions on the substantive arguments surrounding the likelihood of the ICC gaining *de facto* jurisdiction of the crime of aggression, both in the short-term and the long-term.

From the outset, it is recognized that this is no easy task. As Meron stipulates, "the mission is more sensitive, the precedents fewer, the implications for the integrity of international law and the UN Charter deeper and broader, and national security interests more directly involved".⁷ One thing that is essential is that the crime of aggression must be comprehensively defined in compliance with customary international law and must meet the highest standards of codification. Meeting such standards is necessary to protect the fundamental integrity of the ICC.

⁶ Carpenter, A.C., 1995. *The International Criminal Court and the Crime of Aggression*. NJIL. Vol.64, p223.

⁷ Meron, T., 2001. *Defining Aggression for the International Criminal Court*. STLR. Vol.25, No.1, p1.

As a provisional note, it should be made clear that this thesis is up to date as of 1 June 2007. This means that conclusions of the recent meeting of the Special Working Group of the Crime of Aggression are not taken into consideration.

CHAPTER 2:

HISTORICAL OVERVIEW:

1. The League of Nations and the Inter-War Period:

(a) The Development of the Limitations on the Right to Use Force:

The universal prohibition on the use of force that exists today⁸ is historically speaking, a relatively new phenomenon. For centuries moralistic and theological limitations have existed on a State's right to use force, but they have often been ineffective and vague. One such limitation was the 'just war' or *bellum justum* doctrine.⁹ Although its roots can be found in the foreign policy of the Roman Empire, it is predominately a Christian and, in particular, a Catholic doctrine.¹⁰ The basic idea was that a State could only go to war when it was just or right to do so. However, the lack of any fixed criteria and the fact that such determinations were subjectively taken by the State intending to use the force, meant that almost every military campaign could be deemed as legitimate under *bellum justum*.

By the late 19th century this doctrine had virtually disappeared from the international plane. The demise of religious influences and the creation of international law as we know it today led to the conviction that every State had a sovereign right to "embark upon war whenever it pleased".¹¹ Instead of needing religious justifications, States

⁸ Article 2(4) UN Charter.

⁹ For a detailed history of the use of force see: Brownlie, I., 1963. *International Law and the Use of Force by States*. Oxford: Clarendon Press; Dinstein, Y., 1994. *War, Aggression and Self-Defence*, 2nd ed, GB: Cambridge University Press; Gray, C., 2004. *International Law and the Use of Force*, 2nd ed, USA: Oxford University Press. For an excellent in-depth review of the historical developments with regard to aggression, see the paper that was prepared by the Secretariat for the Preparatory Commission's Working Group on the Crime of Aggression at its Ninth Session: "*Historical Review of Developments Relating to Aggression*", UN Doc. PCNICC/2002/WGCA/L.1, (Hereinafter *Historical Review*).

¹⁰ The Crusades of the Middle Ages were originally Roman Catholic Holy Wars to recapture Jerusalem and the Holy Land from the Muslims and as such, were sanctioned by the Papacy

¹¹ Dinstein, *supra* note9, p72.

could now “resort to war for a good reason, a bad reason, or no reason at all”.¹² The lack of any restrictions or regulations on the behavior of States’ in this field and the rearmament that was taking place throughout Europe, led the Czar of Russia to convene the Hague Peace Conferences of 1899 and 1907. Although the right to wage war was slightly curtailed at these conferences,¹³ their principle achievement was agreement on regulating certain methods and means of warfare. As Benjamin Ferencz stated in 1995; “What emerged ... was not a plan to prevent war but some rules on how the States could go about killing respective nationals in a more gentlemanly manner”.¹⁴ These attempts at disarmament however, were not enough to prevent the outbreak of the First World War in August 1914.

(b) The Creation of the League of Nations:

When conflict ceased in 1919, the horrors that had been witnessed led various nations to call for the creation of an international system capable of preventing such conflicts from ever reoccurring. American President Woodrow Wilson became the most articulate spokesman for such an organization, claiming that it would “guarantee peace and justice throughout the world”.¹⁵ In order to create such an establishment, as well as deal with the defeated nations, the Allied and Associated Powers gathered at the Paris Peace Conference in January 1919. It was at this conference that the first substantial steps were taken in establishing aggression as an international crime. During the conference it was concluded that the War had been declared “in pursuance of a policy of aggression”.¹⁶ This led to the inclusion of Article 227 in the Versailles

¹² Briggs, H.W., 1952. *The Law of Nations*, 2nd ed. (quoted in Dinstein, *ibid*).

¹³ The contracting parties to Article 2 of the Hague Convention for the Specific Settlement of International Disputes, (No. I of both 1899 and 1907) agreed that before making “an appeal to arms” they would first resort to the good offices and mediation of friendly States.

¹⁴ Ferencz, B.B., *The United Nations Consensus Definition of Aggression: Seive or Substance*. From the Washington Conference on Law and the World, October 1995. Available at: <http://members.aol.com/benferen/unconsen.htm>.

¹⁵ Ferencz, B.B., 1975. *Defining International Aggression: The Search for World Peace. A Documentary History and Analysis*. Vol. I, New York: Oceana Publications, p6.

¹⁶ German White Book Concerning the Responsibility of the Authors of the War, 15-24. Carnegie Endow, (1924).

Treaty,¹⁷ which called for the prosecution of the German Kaiser, Wilhelm II for “a supreme offence against the international morality and the sanctity of treaties”.¹⁸ This was the first time that a policy of aggression had entailed the criminal responsibility of an individual, and was certainly an action not free from controversy. Not only has the clause attracted academic criticism,¹⁹ but it also clearly violated the criminal principle of *nullum crimen sine lege*.²⁰ The Netherlands, who had granted asylum to the Kaiser, believed that aggression had not been recognized as a crime for which an individual could be held responsible for prior to the outbreak of the War, and subsequently refused to hand custody of him over to the Allies for prosecution.²¹ Taking into account the valid criticisms made about the legitimacy of the charge contained in Article 227, the important point to note is that it is “it’s existence, rather than it’s content, [which] speaks volumes”.²²

In respect of the development of the history of the use of force, the more significant act of the Paris Peace Conference was the creation of the Covenant of the League of Nations, adopted on 28 April 1919. The League of Nations was intended “to promote international co-operation and to achieve international peace and security” by accepting the obligation “not to resort to war”.²³ Article 10 of the Covenant

¹⁷ Article 231 of the Versailles Treaty also explicitly linked the concept of aggression with a declaration of war.

¹⁸ The word supreme was to reappear in connection with the crime of aggression in Justice Jackson’s speeches at the Nuremberg tribunal, where he referred to the crime of aggression as the ‘supreme international crime’. See: Chap2(2)(a)(iii).

¹⁹ Prof. Schabas refers to Article 227 as something which “lacks substantial judicial character”; Schabas, W., 2004. *Origins of the Criminalisation of Aggression: How Crimes Against Peace Became the “Supreme International Crime”*. In: Politi & Nesi, *The Crime of Aggression*. p24. Richard Griffiths calls it a “meaningless statement”, Griffiths, R., 2002. *International Law, The Crime of Aggression and the Jus Ad Bellum*. ICLR. Vol.3, p303.

²⁰ This comes from the maxim “*Nullum crimen, nulla poena sine praevia lege poenali*”, which translates as; ‘No crime (can be committed), no punishment (can be imposed) without a previous penal law’. *Nullum crimen sine lege* prohibits the creation of *ex post facto* laws, and prevents the prosecution of individuals under such laws. See Chapter 3(1)(a).

²¹ This line of argument was later adopted by German and Japanese defendants of the IMT and IMTFE, who claimed that the charge of ‘crimes against peace’ violated the principle of *nullum crimen sine lege*. See Chapter 2(2)(b)(iii)-(v).

²² Griffiths, *supra* note19, p303.

²³ Preamble of the Covenant.

represented the first real effort to qualify the right to go to war, declaring that: “The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League.”

At first glance, Article 10 appears to be a general prohibition on the right to go to war.²⁴ However, it is essentially an abstract statement which must be read in conjunction with Articles 12, 13 and 15 of the Covenant. Although Article 12 requests Members to submit any dispute to arbitration or inquiry by the Council, this is qualified by the right to resort to war after three months. Furthermore, Article 15(7) provides that, in the absence of unanimity within the Council, the parties to the dispute retain their freedom to engage in war.²⁵ In reality, the Covenant only obligated Members to refrain from engaging in military action for a certain period of time, rather than prohibiting the right to resort to war altogether.

Another “gap”²⁶ in the Covenant’s provisions on the use of force was that it only bound Members of the League of Nations. Crucially, and despite all the efforts of the passionate President Wilson, the American Congress voted to reject the Covenant, refusing to become a League Member. The failure of the world’s richest and most powerful nation to accept the League played a significant role in its ineptitude and inaction. Moreover, the Soviet Union, Germany, Japan and Italy were only Members for a short time.²⁷

In conclusion, the Covenant did not actually prohibit the right of states to resort to war. Instead, it subjected the right to specific limitations. The powers prescribed to

²⁴ Randelzhofer, A., 2002. Article 2(4). In: Simma, *The Charter of the United Nation*, p155.

²⁵ National interests and political considerations meant that unanimous decisions by the Council were a rare event.

²⁶ Dinstein, *supra* note9, p79.

²⁷ Randelzhofer, *supra* note24, p115.

this new international institution were only nominal, and the lack of international consensus and acceptance of the League meant that it was fruitless in its efforts to maintain international peace and security. Although the Covenant recognised the concept and role of aggression in the developing system of international law, its lack of any definition or clarification as to its meaning meant that the Council of the League of Nations was unable to clearly determine when it had occurred, let alone act in the face of it. However, the establishment of the League of Nations did provide a platform for international debate and development, and almost immediately after the Covenant was signed, efforts began to strengthen and qualify the developing prohibition on the use of force.

(c) Efforts to Strengthen the Developing Prohibition on the Use of Force:

One theme that continued to dominate international debate during the inter-war period was that of disarmament.²⁸ Initially, disarmament efforts focused on the need for a specific definition of the act of aggression, in order to assist the Council in any decision it may have to make regarding its commission. The Temporary Mixed Commission for the Reduction of Armaments (TMC) was established by the League in 1922 to address and submit plans on the issues of disarmament and security. A Special Committee of the Commission was created to look at the feasibility of defining aggression. However, it concluded that “no simple definition of aggression can be drawn up, and that no simple test of when an act of aggression has actually taken place can be devised”.²⁹ The result was that all matters concerning the commission and existence of aggression were left to the complete discretion of the Council. Work on a crime of aggression entailing individual criminal responsibility

²⁸ Johnson notes that “in the days of the League, it was discovered that the question of Disarmament was inextricably bound up with the question of Security, whilst the latter was intimately connected with the specific settlement of disputes” arguing that the League would either “find a general solution or ... if unresolved, [it] would overwhelm the League”. Johnson, D.H.N., 1955. *The Draft Code of Offences Against the Peace and Security of Mankind*. ICLQ, Vol.4, p448.

²⁹ *Commentary on the Definition of a Case of Aggression by a Special Committee of the Temporary Mixed Commission*, League of Nations, Official Journal, Spec. Supp. No 26. Records of the Fourth Assembly, Minutes of the Third Committee, pp183-185.

ceased. Furthermore, a proposal by the Committee of Jurists to establish an international criminal court capable of prosecuting individuals for international crimes was rejected, primarily because of the general view that there was not, as yet, an international penal code to which individuals were bound.³⁰ Instead disarmament efforts turned to strengthening the developing prohibition on the use of force, although this included references to the act of aggression.

(i) The 1924 Protocol for the Pacific Settlement of International Disputes:

In 1923 a draft Treaty of Mutual Assistance (TMA), sponsored by the League of Nations and based upon the discussions and proposals of the TMC was drawn up. Article 1 of the draft Treaty declared “aggressive war is an international crime”, without defining the concept of ‘aggressive war’. However, disliked by the Committee of Jurists and rejected by national governments, this treaty was never adopted – one of the contentious points being its undefined reference to aggression.³¹ In 1924, an American group sought to amend the draft TMA, by drawing up a protocol that declared aggressive war as an “international crime”.³² Again, however, this proposal was never accepted. As a compromise, the French and the British decided to merge the aborted draft TMA with the American Proposal, drawing up The Protocol for the Pacific Settlement of International Disputes,³³ who’s preamble declared that “a war of aggression ... is an international crime”. Although the Protocol was unanimously adopted by the Assembly of the League of Nations it did not receive the requisite number of ratifications and so never came into force.

³⁰ Ferencz, *supra* note 15, p8.

³¹ *Ibid*, pp10-14.

³² Article 2, *Draft Prepared by an American Group*, League of Nations, Official Journal, Spec. Supp. No 26. Records of Fifth Assembly, Minutes of Third Committee, pp169-172.

³³ *Protocol for the Pacific Settlement of International Disputes*, League of Nations, Official Journal, Spec. Supp. No. 26. Records of the Fifth Assembly, Minutes of the Third Committee, pp189-194.

Although efforts at a regional level continued to limit the right to use force,³⁴ the question of aggression fell silent within the League until 24 September 1927, when the Assembly unanimously adopted Resolution 14 declaring that “all wars of aggression are, and always shall be, prohibited”, as well as denouncing wars of aggression as “an international crime”.³⁵ However, it must be remembered that Resolution 14, as well as the Protocol, possessed no binding authority within the international community as it existed in the inter-war period and can therefore really only be regarded as statements of aspiration.

(ii) The 1928 General Treaty for Renunciation of War as an Instrument of National Policy:

“The decisive turning-point in the development away from the freedom to wage war and towards a universal and general prohibition”³⁶ came in the form of the General Treaty for the Renunciation of War or, as it is better known, the Kellogg-Briand Pact of 1928.³⁷ Although the document was initially an agreement between the French and the Americans mutually outlawing war as an instrument of national policy, it quickly became one of the most prominent prohibitions on the use of force, ratified by almost every member of the international community as it existed in 1928.³⁸ The Kellogg-Briand Pact consisted of only two brief articles. Article I condemned “recourse to war for the solution of international controversies”, and renounced the use of force as “an instrument of national policy”. Article II stipulated that the peaceful resolution of disputes was the only avenue available to contracting parties. However, two major failings of the Pact meant that it had little impact on the actual behavior of States

³⁴ For example, Article 2 of the Locarno Treaty of 1925 between France, Germany and Belgium proscribed that any attack, invasion or war was not available to the parties as a method of settling disputes.

³⁵ *Declaration Concerning Wars of Aggression*, September 24, 1927. League of Nations, Official Journals, Spec. Supp. No. 53, p22.

³⁶ Randelzhofer, *supra* note24, p116.

³⁷ *United Nations Treaty Series*, No. 796.

³⁸ Prior to the outbreak of the Second World War, 63 States had ratified the Treaty. Randelzhofer, *supra* note24, p116.

during the inter-war period. Firstly, the Pact only referred to 'war', and not the broader notion of 'use of force'. This meant that certain States avoided the prohibition by disguising their actions and not explicitly declaring 'war'.³⁹ Furthermore, the Pact was qualified by the fact that war remained lawful if it was a war of self-defence, a justification which many States used to explain their actions. Secondly, the prohibition was not supported by the possibility of sanctions against the State in breach, effectively being regarded as an empty threat. That being said, the Pact did represent a significant step forward in the collective consciousness of the States that adopted it, in restricting their right to wage war, and paved the way for the current universal prohibition.

(iii) The 1933 Soviet Definition of Aggression:

The first real attempt to define aggression was made by the Soviets in 1933. On 6 February, at the Geneva Disarmament Conference, the Soviet delegate Mr. Litvinoff submitted an enumerative definition of the act of aggression consisting of three brief articles. The definition was based on the four bilateral non-aggression treaties the USSR signed with Finland, Latvia, Estonia and Poland in 1932. The Soviets intended the definition to act as a guide to any international organ called upon to determine the commission of an act of aggression. As the only communist superpower, Mr. Litvinoff made it clear that the Soviets feared political bias in any consideration of questions relating to aggression by an international body composed of individuals hostile to the communist system.⁴⁰ In the Soviet's view, a pre-existing agreement on the elements of aggression was an essential aspect of receiving a fair and impartial review.

³⁹ This is exactly what China and Japan did in 1931 during the Manchuria conflict.

⁴⁰ Ferencz, *supra* note 15, p68.

The Soviet definition was based on the “principle of *priority*”,⁴¹ which stipulated that the aggressor in an international conflict was the first State to commit one or more of the five prohibited acts of aggression that were provided in Article 2. Furthermore, the draft Treaty provided that “no considerations whatsoever of a political, strategic or economic nature” could serve as a justification for the action taken. After some debate, the draft definition was given to the Disarmament Conference’s Committee on Security Questions. Mr. Politis, Chairman of the Committee, produced a slightly reworded version of the Soviet draft in May 1933,⁴² which, although it did not receive international acceptance, formed the basis of a multilateral non-aggression treaty the USSR signed with its regional neighbors in July 1933.⁴³ Again, the important point to note here is that although the draft definition received international consideration and debate, it had no legal impact on the actions of States.

Despite all the efforts of the inter-war period to establish a general prohibition on the right to wage war, as well as the first attempt to define aggression, the 1930s saw the tide change from disarmament to rearmament. By 1939, Europe had once again descended into war, beginning the greatest and most horrific global conflict mankind has ever witnessed.

2. The Aftermath of the Second World War:

Following the collapse of Nazi Germany and the surrender of the Japanese in 1945, the Allies took a “two-pronged approach to ensure lasting peace”.⁴⁴ On the one hand the international community created the United Nations (UN), a global institution

⁴¹ Goma, M., 2004. *The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime*. In: Politi & Nesi, *The Crime of Aggression*, p68.

⁴² For a detailed analysis of the Politis Report and a copy of the draft definition see: Butler, W.E, 1973. Chapter III: AGGRESSION. Section 2. Soviet Concepts of Aggression. In: C. BASSIOUNI & V.P. NANDA, ed. *A Treatise on International Criminal Law*. Vol. I, Ripo Fagnano Alto: Editrice il Sirente, p182-197.

⁴³ Romania, Poland, Afghanistan, Persia, Latvia, Estonia, Turkey and Finland. *Ibid*, p187.

⁴⁴ Ferencz, *supra* note15, p37.

designed to “save succeeding generations from the scourge of war”⁴⁵ through the maintenance of international peace and security. On the other the Allies established two International Military Tribunals⁴⁶ in order to prosecute the leaders of the defeated nations. This included, for the very first time, prosecutions of certain individuals for the crime of aggression or, as it is referred to in the IMT and IMTFE Charters, “Crimes against Peace”.⁴⁷

(a) The Creation of the United Nations and the Universal Prohibition on the Use of Force:

The San Francisco Conference of 1945, beginning on April 25, was attended by delegates from over 50 nations and concluded on June 26 with the signing of the UN Charter. Like the League of Nations, the primary purpose of the UN is the maintenance of international peace and security.⁴⁸ One of the principle aims of the Conference was to rectify the shortcomings of the League and so the *travaux preparatoir* gave the Security Council the power and authority to enforce its own decisions through Chapter VII of the Charter. There was serious debate at San Francisco as to whether or not an explicit definition of aggression should be included within the Charter. Whilst countries such as Egypt and Iran supported the idea of incorporating a definition⁴⁹ others, such as Bolivia actually presented a draft definition for the Conference to consider.⁵⁰ Although the proposals were given a degree of consideration, strong opposition led by the US and the UK⁵¹ forced the debate from the

⁴⁵ Preamble UN Charter.

⁴⁶ One in Nuremberg (hereinafter the IMT) and one in Tokyo (hereinafter the IMTFE).

⁴⁷ Article 6(a) & Article 5(a) respectively.

⁴⁸ Article 1(1) UN Charter.

⁴⁹ *Documents of the United Nations Conference on International Organisation*, (UNCIO), San Francisco, 1945, Vol. III, 538

⁵⁰ *Ibid*, at 585. These proposals were supported by Colombia, Egypt, Ethiopia, Guatemala, Honduras, Iran, Mexico and Uruguay.

⁵¹ The principle reasons the US and the UK objected to a concrete definition of aggression being incorporated into the Charter was the fact that they did not want to see the powers of the Security Council restricted and they felt that an enumerative list of the acts of aggression could never be exhaustive.

table, resulting in no definition being incorporated into the Charter.⁵² The conclusion reached was that any determination of whether there had been a “threat to the peace, breach of the peace or act of aggression,”⁵³ would be left to the sole discretion of the Security Council. As stated above, one of the primary aims at San Francisco was to rectify the flaws of the League. However, the composition of the Security Council, with its five permanent members being awarded the veto, has enabled some of these old flaws to creep into the new system, representing a significant weakness in the enforcement measures and collective security regime of the UN. It means that the permanent five and their allies some of the most powerful nations in the world are very often provided with the opportunity to escape condemnation by the Security Council for their actions. Ferencz clarified this problem when he stated that “the Council was composed primarily of those States which had the capacity, and therefore the temptation, to commit aggression ... it was like asking the fox to guard the chicken coop”.⁵⁴

The Charter did, however, contribute to the criminalization of aggression⁵⁵ in that it included a comprehensive and universal prohibition on the use of force by States.⁵⁶ Article 2(4) stipulates that: “All members shall refrain in their international relations from 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

⁵² Carpenter, *supra* note 6, p227, notes that aggression was purposefully not defined by the delegates at San Francisco. See: *Security Council Enforcement Arrangements*, Doc. 881, UNCIO Vol. III, 505. The Committee charged with deliberating on the question of aggression rejected an *a priori* definition, stating as its reasons:

That a preliminary definition of aggression went beyond the possibilities of this Conference and the purpose of the Charter. The progress of the technique of modern warfare renders very difficult the definition of all cases of aggression ... the Council would have a tendency to consider of less importance the acts not mentioned therein: these omissions would encourage the aggressor to distort the definition [and] delay action by the Council.

⁵³ Article 39 UN Charter.

⁵⁴ Ferencz, *supra* note 14. See also: Chapter 4.

⁵⁵ Griffiths, *supra* note 19, p308.

⁵⁶ However, the Charter contains two explicit exceptions to the prohibition; firstly the right of self-defence enshrined in Article 51 and secondly the notion of collective security found in Article 42.

the United Nations.”⁵⁷ The prohibition encompassed in the Charter is much broader than that found in the Kellogg-Briand Pact, as it refers to ‘the threat or use of force’ whereas the focus beforehand had purely been on the notion of ‘war’. Cherif Bassiouni believes that this change from ‘war’ to ‘use of force’ was deliberate,⁵⁸ as encompassing a broader notion of force under the prohibition would prevent states from justifying their actions by claiming that they were not ‘at war’.

(b) The Establishment of the International Military Tribunals at Nuremberg and Tokyo:

The “second prong” in the Allies’ approach to ensuring lasting peace was the creation of the IMT & IMTFE. These prosecutions represent the first and only time that senior political and military officials have been held accountable for the crime of aggression. The inclusion of a charge of crimes against peace within the jurisdiction of the Tribunals was a highly controversial move, and as such, has received severe criticism.⁵⁹ That being said, the prosecutions represent the only international precedent available to the recently established ICC and therefore are of great importance to the present analysis of the crime of aggression.

(i) The United Nations War Crimes Commission of 1943:

Prior to the end of the War in 1945, a UN Diplomatic Conference was convened in London to address the issues surrounding the investigation and prosecution of various war crimes. To deal with these matters, a United Nations War Crimes Commission (UNWCC) was created on June 29 1943, with representatives from 17 Allied nations

⁵⁷ This prohibition is now regarded as customary international law and arguably, a *jus cogens* principle. The ICJ recognised the customary nature of the prohibition in its *Nicaragua* decision when it held that the US had been in breach of its “obligation under customary international law not to use force against another State”. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits)*, ICJ Reports (1986), p147, para.292(4),(6).

⁵⁸ Bassiouni, C, 1973. Chapter III: AGGRESSION. Section 1. The Definition of Aggression in International Law: The Crime Against Peace. In: C. BASSIOUNI & V.P. NANDA, ed. *A Treatise on International Criminal Law*. Vol. I. Ripo Fagnano Alto: Editrice il Sirente, p163.

⁵⁹ Schick, F.B. 1947. *The Nuremberg Trial and the International Law of the Future*. AJIL. Vol.41, No.4, pp770-794.

participating in the deliberations and debates of the Commission.⁶⁰ As well as being expected to assist in the preparation of indictments and the collection of evidence, UNWCC was also instructed to establish the substantive law which the planned IMT would apply. As the Commission's title suggests, the primary focus was the clarification of the law on war crimes. However, as deliberations progressed into 1944 experts within the Commission began to turn their attention to the overarching war crime of 'waging aggressive war' and the question of whether it was within the remit of the Commission's mandate.⁶¹ This question was passed to the Commission's Legal Committee, which concluded that aggression was a crime in international law.⁶² Referred back to the Commission, the Legal Committee's conclusions were debated by the represented nations but no agreement was reached, as delegates feared that "Governments would be reluctant to go so far".⁶³ This lack of agreement meant that the matter was then passed to a subcommittee for further deliberation.⁶⁴ With the Czechoslovakian representative Bohuslav Ecer⁶⁵ dissenting, the subcommittee's majority concluded that "acts committed by individuals merely for the purpose of preparing for and launching aggressive war, are, *lege lata*, not 'war crimes'," although they felt that "it is desirable that (for the future) penal sanctions should be provided for such grave outrages against the elementary principles of international law".⁶⁶ This clear statement shows that in 1944 two of the 'Big Four',⁶⁷ America and the UK, did

⁶⁰ The Commission was composed of representatives from the occupied nations as well as Australia, Canada, China, India, New Zealand, South Africa, the UK and the US. The USSR did not join but co-operated with the group in spirit.

⁶¹ Documentation on the history of the UNWCC stipulates "the most important issue of substantive law to be studied by the Commission ... was the question of whether aggressive war amounts to a criminal act". UNWCC, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationary Office, 1948, pp.107-118.

⁶² Minear, R.H., 1971. *Victor's Justice: The Tokyo War Crimes Trial*, Princeton, New Jersey: Princeton University Press, p. 49.

⁶³ UNWCC, *supra* note61, p181.

⁶⁴ The subcommittee was composed of representatives from the UK, the US, Czechoslovakia and the Netherlands.

⁶⁵ Ecer was a strong supporter of the existence of the crime of aggression. For a more detailed analysis of both his work and the work of UNWCC, *see*: Schabas, *supra* note19.

⁶⁶ UNWCC, *supra* note61, p182.

⁶⁷ The Allied States (the UK, the US, the USSR and France) were also known as the 'Big Four'.

not believe that the crime of aggression was a war crime for which individuals could be held criminally responsible. This opinion was to experience a rapid u-turn within the 18 months that followed. Although UNWCC continued to assist with investigating war crimes until 1949, international focus shifted to the meeting of the 'Big Four' in London in the summer of 1945.

(ii) The London Conference of 1945:

During the July and August of 1945, delegates from the four Allied States met in London to discuss the intended prosecution of the leaders of the European Axis. The London Agreement, to which the Charter of the IMT was annexed, was adopted on the 8th of August.⁶⁸ A variety of opinions and intentions were expressed at this Conference. Whilst Churchill proposed that "enemy leaders should simply be executed when they were caught",⁶⁹ the Americans wanted a credible IMT capable of prosecuting the most serious offenders with a set of crimes reflecting the atrocities that had been committed, including the waging of an aggressive war.⁷⁰ The French, the only Ally to have been occupied by the Germans, were strong supporters of the proposed tribunal, but were unimpressed with the adoption of a common law system over the Roman principles of civil law. The Russians were also supportive of the idea of a trial, but for vastly different reasons. The 'show-trials' of the 1930s had taught them of the importance of being seen to administer justice. According to them, the true purpose of the Tribunal was not to determine the responsibility of the defendants, but rather to approve the appropriate punishment for them: "The fact that the Nazi leaders are criminals has already been established. The task of the tribunal is only to

⁶⁸ *Agreement for the Prosecution and Punishment of the Major Criminals of the European Axis*, United Nations Treaty Series, Vol.82, p.279.

⁶⁹ Overly, R., 2003. *The Nuremberg Trials: International Law in the Making*. In: P. SANDS, ed. *From Nuremberg to The Hague: The Future of International Criminal Justice*. UK: Cambridge University Press, p3.

⁷⁰ Robert H. Jackson, the special representative of the US President to the London Conference, was America's most prolific supporter of an IMT. He later became the US Chief Prosecutor at Nuremberg.

determine the measure of guilt of each particular person and mete out the necessary punishment - the sentences”⁷¹

Once the delegates agreed that the most appropriate forum for dealing with the defeated leaders was an international Tribunal, they turned their attention to the substantive law that would be applied. However, when it came to the question of aggression, opinion was extremely divided. What emerged was a compromise between the two principle positions, forced by the pressures of time and politics.

The French delegates saw the inclusion of a crime of waging aggressive war as an imposition of *ex post facto* law. They were adamant that prior to 1939, there had been no such crime, and moreover, they firmly believed that the London Conference was not a competent body capable of legislating such a crime.⁷²

We do not consider as a criminal violation the launching of a war of aggression. If we declare war a criminal act of individuals, we are going farther than the actual law. We think that in the next years any state which will launch a war of aggression will bear criminal responsibility morally and politically; but on the basis of international law as it stands today, we do not believe these conclusion are right ... We do not want criticism in later years of punishing something that was not actually criminal, such as launching a war of aggression.⁷³

⁷¹ *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, Department of State Publication No.3080. Washington: US Government Printing Office, 1949, p303 (hereinafter *Jackson Report*). This is not to say that the USSR was the only nation whose primary intention was the successful prosecution of the Nazi leaders, it is just that other nations appeared to pay more attention to the criminal principles that guided their domestic systems.

⁷² The French highlighted the fact that even the San Francisco Conference had felt that defining aggression was beyond its capabilities, leaving the decision to the competencies of the Security Council.

⁷³ Minear, *supra* note62, p61.

Furthermore, the French concluded that there was no principle in international law that allowed individuals to be held accountable for the acts of a State.⁷⁴

The Russians were also weary about incorporating such a charge within the Tribunal's jurisdiction. For them, however, the objection was not out of respect for criminal principle or policy, but more for personal protection. They feared that the inclusion of such a crime would lead to the defense of *tu quoque*⁷⁵ being raised. Guilty of its own aggression against Finland and Poland,⁷⁶ Russia was more concerned about the impunity of its own leaders, and only agreed to the proposal of including crimes against peace after receiving reassurances that the trials would take place before an *ad hoc* Tribunal with jurisdiction limited to the crimes committed by the European Axis.⁷⁷ Furthermore, it also rejected the definition of aggression tabled by the US.⁷⁸ The Russian delegate, General Nikitchenko, felt that it was unnecessary, as the purpose of the trials was not to determine guilt, but to administer sentence.⁷⁹ In agreement with the French, the Russians also stated "that the conference was not a competent body to prepare [a definition] in any event".⁸⁰

The Americans held a contrasting view. They fully supported the inclusion of an overarching crime of aggressive war in the IMT Charter. Jackson, in his report to the US State Department, stressed the need for incorporating the crime of aggression, stating that it would "make war less attractive to those who have governments and the

⁷⁴ "It may be a crime to launch a war of aggression on the part of a State that does so, but that does not imply the commission of criminal acts by individual people who have launched a war. ... [It may] be morally and politically desirable [for there to be such a crime] but ... it is not international law." Jackson Report, *supra* note 71, p297.

⁷⁵ *Tu quoque*, (Latin for 'You, too') is a defence that asserts that a particular charge cannot be brought against the defendant, as those prosecuting are guilty of perpetrating the same offence.

⁷⁶ Dawson, G.M., 2000. *Defining Substantive Crimes Within the Subject-Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression?* NYLSICL, Vol.19, p423.

⁷⁷ Aide-Memoire from the Soviet Government, June 14, 1945, Jackson Report, *supra* note 71, pp61-63.

⁷⁸ Butler, *supra* note 51, p189, notes that this was an abrupt change for the Soviets from their previous position, as the draft definition proposed by the Americans was largely based on their 1933 proposal.

⁷⁹ Dawson, *supra* note 76, p423.

⁸⁰ Butler, *supra* note 42, p189.

destinies of people in their power”.⁸¹ In response to the French argument that the crime did not exist under international law, Jackson relied on “the common sense of mankind that a war of deliberate and unprovoked attack deserves universal condemnation”.⁸² Furthermore, Jackson strongly argued that the crime of aggression must be sufficiently and comprehensively defined. He believed that a precise definition would prevent defence arguments questioning the applicability of a crime that lacked precise elements, by claiming that it breached the criminal principle of *nullum crimen sine lege*.⁸³ Jackson further argued that if the IMT was to have any legitimate judicial authority, the definition must be a general principle that applied equally to all nations.⁸⁴ For him, restricting the definition to the leaders of the Axis countries would deprive the Tribunal “of all standing and fairness as a judicial principle”.⁸⁵

After much negotiation, a compromise was reached: Crimes against Peace would be included within the substantive law of the Charter, but it would contain no explicit definition of the notion of aggression, nor would the Tribunal’s jurisdiction extend beyond the crimes of the Axis countries. Instead, Article 6(a) referred to the conduct of the individual in the crime of aggression:

⁸¹ Jackson Report, *supra* note 71.

⁸² Quoted in Ferencz, B., 1972. *Defining Aggression: Where it Stands and Where it's Going*. AJIL. Vol.66, No.3, p492.

⁸³ Jackson’s dismay at being unable to incorporate an explicit definition was evident in his opening speech to the Nuremberg Tribunal:

It is perhaps a weakness of this Charter that it fails itself to define a war of aggression.

Abstractly, the subject is full of difficulty, and all kinds of troublesome hypothetical cases can be conjured up. It is a subject that if the defence should be permitted to go a-field beyond the very narrow charge in the indictment, would prolong the trial and involve the Tribunal in insoluble political issues.

Opening Speeches, 21 Nov. 1945, p40.

⁸⁴ Jackson Report, *supra* note 71, p 330.

⁸⁵ *Ibid.*

ARTICLE 6: The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES 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.

The inclusion of crimes against peace within the IMT Charter clearly established that aggression was not just “morally ... but also legally wrong”.⁸⁶ Furthermore, the Charter also represented a significant step forward in the development of international law because for the first time an individual could be held criminally responsible for his or her actions at the international level. This was viewed by some as a highly controversial move, in particular with regards to crimes against peace, as Article 6(a) declared that individuals could be held criminally accountable for what is essentially a State act, (*i.e.* the waging of a war of aggression). As a result, a significant amount of the Tribunal’s focus was spent on establishing the charge of crimes against peace and the principle of individual criminal responsibility.

(iii) The Trial of the Major German War Criminals at the Nuremberg Tribunal, 1945 – 1946:

The trial of the senior military and political officials of the Nazi regime that took place at Nuremberg sat from 14 November 1945 to 1 October 1946.⁸⁷ Of the 24 defendants⁸⁸ charged with Count One and/or Count Two of the Indictment, 8 were convicted on both counts;⁸⁹ 4 were acquitted of count one and convicted of count

⁸⁶ Ferencz, *supra* note 14.

⁸⁷ For a detailed analysis of the Nuremberg Trials see: Historical Review, *supra* note 9.

⁸⁸ Two defendants did not stand trial; Ley committed suicide in prison on 25 October 1945 and Gustav could not be tried because of his physical and mental condition, by decision of the Tribunal dated 15 November 1945.

⁸⁹ Goring, Hess, von Ribbentrop, Keitel, Rosenberg, Raeder, Jodl and von Neurath.

two;⁹⁰ 4 were acquitted of both counts;⁹¹ and 6 were acquitted of count one and not charged with count two.⁹² All the defendants entered a plea of not guilty. Count One contained charges regarding the ‘common plan or conspiracy’, and Count Two related to committing specific crimes against peace by planning, preparing, initiating or waging wars of aggression against 12 identified countries.⁹³ The defendants were charged with using their positions in the Nazi party, government, military and industry, as well as in several instances, their relationship with the Fuhrer, to commit the crimes.⁹⁴

The Judgment of the IMT began with a review of the pre-war law relating to aggression, in order to determine exactly what it meant to initiate and/or wage a war of aggression.⁹⁵ In rejecting the argument that the provisions of Article 6(a) amounted to an *ex post facto* criminalization of the acts of the defendants, and therefore in breach of the principle *nullum crimen sine lege*,⁹⁶ the Tribunal asserted that Article 6(a) was declaratory of modern international law, proclaiming that the Charter did nothing more than codify the law up to that point in history.⁹⁷ To support this

⁹⁰ Frick, Funk, Donitz and Seyss-Inquart.

⁹¹ Schacht, Sauckel, von Papen and Speer.

⁹² Kaltnbrunner, Frank, Streicher, von Schirach, Fritzsche and Bormann.

⁹³ Poland (1939); The UK & France (1939); Denmark & Norway (1940); Belgium, The Netherlands & Luxembourg (1940); Yugoslavia & Greece (1941); Soviet Union (1941); and The US (1941). Historical Review, *supra* note9, p14.

⁹⁴ For a detailed account of the charges laid against each of the 24 defendants *see*: Historical Review, *supra* note9, p15.

⁹⁵ For a detailed overview of Tribunal's judgment, *see*: *ibid*, pp29-44. Schabas, *supra* note19, p29, questions the attention the Tribunal gave to the charge of crimes against peace, claiming that it was not an independent decision taken by the Judiciary but instead was a direct consequence of the prosecutorial strategy and the evidence laid before the Tribunal: “The Judges did not invent the focus on aggressive war, they were pointed in that direction by Jackson, by the London Conference and by politics”. This view is also shared by Andreas Paulis, who argues that the primacy shown to crimes against peace over the other crimes “permeates the whole judgment and also much of the opening and closing statements” and concludes that the intentions and agendas of the Prosecuting States ultimately cultivated the Tribunal’s Judgment. Paulis, A.L., (2004). *Peace Through Justice? The Future of the Crime of Aggression in a Time of Crisis*. WLR, Vol. 50, No.1, p11.

⁹⁶ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg*, 14 November 1945-1 October 1946. Published in Nuremberg, Germany 1947 (hereinafter Nuremberg Judgment), p219.

⁹⁷ *Ibid*, pp219-223.

conclusion the Tribunal cited various declarations as evidence of the existence of crimes against peace.⁹⁸ The Tribunal paid particular attention to the Kellogg-Briand Pact of 1928 stating that: “All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal.”⁹⁹

In other words, the Tribunal concluded that prior to 1939, resort to a war of aggression had been deemed to be against the law of nations, and if a State acted in such a manner, it committed an internationally wrongful act entailing State responsibility. It was at this point that the Tribunal uttered its now infamous characterization of the notion of a war of aggression:

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. 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.¹⁰⁰

The conclusion by the Tribunal that aggression was “the supreme international crime” has attracted some academic criticism. Detailed as such because of the fact that crimes against peace required a State act – an act committed by the collective rather than by

⁹⁸ Article I of the Draft TMA; the Preamble of the 1924 Protocol for the Pacific Settlement of International Disputes; Preamble to Resolution 14, 1927; and the Resolution adopted unanimously by 21 nations at the Pan-American Conference in 1928, declaring that “war of aggression constitutes an international crime against the human species”. *Ibid*, pp221-222.

⁹⁹ *Ibid*, p41.

¹⁰⁰ *United States of America et al v. Goering et al*, IMT Judgment (1946), reprinted in (1947) AJIL, Vol.41, p172.

an individual –it was argued by some¹⁰¹ that international law had not yet reached the stage where the principle of individual criminal liability could be attributed to participation in a State act. Although Schabas agrees with the Tribunal’s conclusion that aggression as a prohibited act of State existed prior to 1939, he questions the motives of the IMT, pointing to the final Judgment in which the IMT essentially conceded the fact that punishing crimes against peace amounted to retroactive prosecution:

To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.¹⁰²

By way of an explanation Schabas offers the suggestion that “at the time, it appeared the criminal principle of *nullum crimen* did not have the sacred, non-derogable status that it would come to take on”.¹⁰³ This is a valid argument and one that has, post Nuremberg, influenced the codification of other crimes and criminal principles. That being said, the Judge’s at Nuremberg proceeded with the prosecutions on the basis that aggression was a crime that could attract individual criminal responsibility.

Having established that Nazi Germany had initiated¹⁰⁴ and waged wars of aggression *prime facie*, the Judges felt that it was “unnecessary to consider in detail whether the wars also violated international treaties, agreements or assurances”, as stipulated in

¹⁰¹ As demonstrated by the discussions of UNWCC and the London Conference.

¹⁰² Schabas, *supra* note 19, p30.

¹⁰³ *Ibid.* See also: Article 4(2) ICCPR (1976).

¹⁰⁴ In explaining the element of ‘initiation’, the Tribunal stated that Germany’s initiation of aggression was an act that was “premeditated, deliberate, planned, carefully prepared and timed as part of a preordained plan and as a deliberate and essential part of Nazi foreign policy”. Historical Review, *supra* note 9, p18.

Article 6(a).¹⁰⁵ This meant that the Judge's had to then turn their attention to the culpability of the 22 defendants on trial, which involved addressing the controversial principle of individual criminal responsibility. The Tribunal, again relying heavily on the Kellogg-Briand Pact as an instrument establishing the illegality of war, inferred from it that "those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in doing so".¹⁰⁶ This conclusion was strengthened by the now infamous characterization of the principle of individual criminal responsibility in international law: "Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."¹⁰⁷

In cementing this principle, the Judges drew an analogous inference from Hague Convention (IV) of 1907.¹⁰⁸ In conceding that the Kellogg-Briand Pact did not expressly stipulate war as an international crime,¹⁰⁹ the Tribunal argued that Hague Convention (IV), in which certain practices of warfare are prohibited,¹¹⁰ also did not specify that these acts amounted to war crimes, but that the international community had viewed them as such since 1907.¹¹¹ The Tribunal considered "the criminality of war as analogous and even more compelling".¹¹² The Tribunal cited evidence such as the 1923 draft TMA, and the Protocol for the Specific Settlement of International

¹⁰⁵ Nuremberg Judgment, *supra* note96, p26.

¹⁰⁶ *Ibid*, p220. The Tribunal went on to state that:

... the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact.

¹⁰⁷ *Ibid*, p223.

¹⁰⁸ Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land, *Hague Conventions* 100.

¹⁰⁹ Nuremberg Judgment, *supra* note96, p220.

¹¹⁰ As examples, the Tribunal cited the maltreatment of prisoners of war, the employment of poisoned weapons and the improper use of flags of truce. *Ibid*.

¹¹¹ *Ibid*, pp220-1.

¹¹² *Ibid*, p221.

Disputes,¹¹³ as proof that aggression had been recognized as an international crime; “finding in them evidence of the dynamic development of customary international law”.¹¹⁴

Furthermore, the Tribunal rejected defence counsel arguments that the accused were immune from prosecution under the ‘Act of State’ doctrine. The traditional understanding of this doctrine stipulates that senior State officials cannot be held accountable for acts performed in the discharge of their official duties.¹¹⁵ With regard to an individual’s involvement in the commission of war crimes, crimes against humanity and crimes against peace, this traditional understanding became obsolete at Nuremberg. The Tribunal held that:

The principle of international law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment

...¹¹⁶

The Tribunal did however, severely restrict the scope of crimes against peace to the leadership of the aggressive State. Although the wording of the IMT Charter would have allowed for far-reaching prosecutions with regards to the circle of responsible persons, the Judges explicitly restricted the scope to individuals at a policy-making level. Furthermore, the Tribunal stipulated that those at the policy-making level had to have played an active role in the construction, development and implementation of the policy. The Tribunal identified as crucial to the issue of planning the wars of aggression, a defendant’s attendance and participation in the 4 secret, high-level meetings held on 5 November 1937 as well as 23 May, 22 August and 23 November

¹¹³ Both of which were non-binding documents that never came into force.

¹¹⁴ Nuremberg Judgment, *supra* note 96, pp221-222.

¹¹⁵ Cassese, A., 2003. *International Criminal Law*. USA: Oxford University Press, p264.

¹¹⁶ Nuremberg Judgment, *supra* note 96, p221.

1939, at which Hitler outlined his aggressive plans for the future and reviewed the progress already achieved.¹¹⁷ Absence from these meetings led the Tribunal to conclude that the identified individual would not have been in a position to influence the policy of aggressive war. Finally, with regards to the 'Common Plan or Conspiracy' charge contained in Count 1, the Tribunal rejected the defence argument that common planning cannot exist where there is a complete dictatorship: "Hitler, could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and businessmen".¹¹⁸

In conclusion, it is clear that the IMT proceedings form the principle source of reference for any future prosecution of the crime of aggression. The inclusion of the Article 6(a) within the IMT Charter was the first time that such a crime had actually been qualified, and the resulting prosecutions dramatically developed the law relating to international crimes of war and the criminal responsibility of the individuals at the senior military and political level. That said, valid criticisms made of the methodology used by the Tribunal in its prosecution of this 'supreme crime' flag up the particular difficulties such a prosecution will necessarily entail. The lessons learnt in 1945 must be recognized in the construction of the crime that is to be included within the Rome Statute.

(iv) Tribunals established Pursuant to Control Council Law No. 10:

Utilizing the momentum created by the IMT, the Control Council for Germany adopted Law No. 10¹¹⁹ on 20 December 1945. This law gave effect to the Moscow

¹¹⁷ *Ibid*, pp188-192.

¹¹⁸ *Ibid*, p226.

¹¹⁹ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, reproduced in *Trials of War Criminals before the Nuremberg Military Tribunals*, United States Government Printing Office, 1951, Vol.III, p18, (Hereinafter *Trials of War Criminals*).

Declaration of 1943,¹²⁰ and the London Agreement of 1945. It also provided “a uniform legal basis in Germany for the prosecution of criminals other than the major criminals dealt with by the Nuremberg Tribunal”.¹²¹ Pursuant to Control Council Law (CCL) No. 10, the Americans established several military Tribunals as part of its administration of the American Zone of Occupation in Germany. Between 1946 and 1949, these tribunals conducted 12 trials, 4 of which included charges of crimes against peace; namely, the *I. G. Farben* case,¹²² the *Krupp* case,¹²³ the *High Command* case,¹²⁴ and the *Ministries* case.¹²⁵ France also established the General Tribunal of the Military Government for the French Zone of Occupation. This Tribunal conducted the *Roechling* trial,¹²⁶ which involved charges of crimes against peace.

The IMT Charter and Judgment played an integral part in the CCL trials. CCL No. 10 contained a definition of crimes against peace very similar, although slightly more expansive, to the definition contained in Article 6(a). Firstly, Article II(1)(a) of CCL

¹²⁰ The Declaration on German Atrocities (*Moscow Declaration*) of 1943 was an agreement between Stalin, Roosevelt and Churchill stating that those persons responsible for the atrocities committed by Nazi Germany would be punished for their crimes.

¹²¹ Historical Review, *supra* note 9, p44. For a detailed analysis of the trials conducted under CCL No. 10 see: pp44-85.

¹²² *United States of America v. Carl Krauch et al.* (the *I. G. Farben* case). This case concerned the prosecution of industrial individuals for their efforts to assist the commission of the crime of aggression. All 24 defendants were acquitted on grounds of insufficient evidence.

¹²³ *United States of America v. Alfred Felix, Alwyn Krupp von Bohlen und Halbach, et al.* (the *Krupp* case). This case also involved industrial individuals. The defendants were 12 officials who held high-level management positions within the Krupp firm. The charges were dismissed because of insufficient evidence.

¹²⁴ *United States of America v. Wilhelm von Leeb et al.* (the *High Command* case). This case involved 14 officers who held high-level positions in the German Military. The Tribunal acquitted all the accused of the charges of crimes against peace after finding that they “were not of the policy level”, (Judgment, 27, 28 October 1948, *Trials of War Criminals, supra* note 128, 1951, Vol. XI, p491).

¹²⁵ *United States of America v. Ernst von Weizsacker et al.* (the *Ministries* case). The 21 defendants were high-level officials in the Government and the Nazi Party. They were charged with crimes against peace, war crimes and crimes against humanity. Of the 21 defendants, 14 were charged with specific acts relating to the crime of aggression. The Tribunal initially convicted 5 and acquitted 9, although on appeal 2 of those 5 convicted had their convictions overturned.

¹²⁶ *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Hermann Roechling et al.* (the *Roechling* case). The defendants were directors of the Roechling firm. During the course of the trial however, all the charges were dropped except those relating to Hermann Roechling. He was convicted of committing crimes against peace in the General Tribunal, but this was reversed by the Supreme Military Government Court of the French Occupation Zone in Germany.

No. 10 expressly included ‘invasion’¹²⁷ as well as ‘war’ in the definition, and secondly, it highlighted the non-exhaustive nature of the definition by using the phrase “including but not limited to”.¹²⁸

The principle problem the CCL Tribunal’s experienced when it came to prosecuting crimes against peace was the fact that the IMT Judgment had explicitly restricted the *ratione persona* of the crime to senior State officials capable of influencing Hitler’s policies of aggressive war. Whilst the IMT had been intended for the prosecution of the major war criminals, the Tribunals established pursuant to CCL were designed for other, less senior war criminals. In the *I.G. Farben* case, the Tribunal began by addressing this particular problem. The Judgment noted that the IMT had exercised great caution in approaching the charges of crimes against peace, requiring conclusive evidence of active participation by individuals in the planning and leading of a nation in a war of aggression for a conviction, and concluded that criminal responsibility should not extend to followers:¹²⁹

Strive as we may, we are unable to find, once we have passed below those who have lead a country into a war of aggression, a rational mark in dividing the guilty from the innocent ... We leave the mark where we find it, well

¹²⁷ By including the notion of ‘invasion’ within the definition, the trials conducted under CCL No. 10 were able to include Germany’s conduct towards Austria and Czechoslovakia, which had been considered outside the jurisdiction of the IMT. The IMT Charter made it necessary for the Tribunal to distinguish between ‘aggressive acts’ and ‘aggressive war’, (Nuremberg Judgment, *supra* note 96, p186). Only aggressive war constituted a crime under the Charter. Prosecutions of individuals relating to aggression against the 12 identified countries were allowed because it was determined that their respective governments had resisted Hitler’s demands. However, the annexation of Austria and the imposition of German administration on parts of Czechoslovakia were considered as steps “in furthering the plan to wage aggressive wars against other countries”, [*Ibid*, pp192-196] because the respective governments had submitted to Hitler’s demands

¹²⁸ Article II provided as follows:

1. Each of the following acts is recognized as a crime:

(a) **Crimes against peace**; Initiation or invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging of wars 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.

¹²⁹ Judgment, 29, 30 July 1948, *Trials of War Criminals*, *supra* note 119, 1952, Vol. VIII, pp1126-1127.

satisfied that individuals who plan and lead a nation into and in an aggressive war should be held guilty of crimes against peace, but not those who merely follow the leaders ...¹³⁰

In the *Ministries* case, the Tribunal found that even though Ernst von Weizsaecker had been diplomatically active in 'aiding and abetting' Germany's war plans, he had not been part of the actual policy planning and was therefore acquitted. Likewise, in the *High Command Case* the Tribunal formulated that a person could only be held responsible if he had "actual power to shape and influence the policy of the nation".¹³¹

Although the primary focus of the CCL trials was the prosecutions of lesser war criminals primarily for the commission of war crimes and crimes against humanity and as such, can have only a limited application to the precedent for prosecuting crimes against peace, there is one key point that these trials highlighted; that the CCL trials strongly endorsed the specific *ratione persona* limitations which the IMT had placed on crimes against peace, emphasizing the special and unique characteristic of this crime as a leadership crime.

(v) The Trial of the Major Japanese War Criminals at the Tokyo Tribunal, 1946-1948:

The Potsdam Declaration, announcing the Allies intention to prosecute leading Japanese officials for crimes perpetrated during Japan's wartime occupation of large parts of South-East Asia, was issued on the July 26 1945, with the IMTFE Charter¹³² being approved on January 19 1946.¹³³ With the trial lasting over two years, the IMTFE's Judgment was finally delivered between 4 - 12 November 1948. The

¹³⁰ *I. G. Farben Case*, supra note 122. See also: *The Roehling Case*, supra note 126.

¹³¹ *Supra* note 124, p380.

¹³² For a detailed analysis of the IMTFE, see: Historical Review, supra note 9, pp85-115.

¹³³ *Special Proclamation: Establishment of an International Military Tribunal for the Far East*, annexed to the Judgment of the IMTFE, 4-12 November 1948, (Hereinafter Tokyo Judgment).

Indictment contained three groups of charges consisting of 55 counts against 28 accused, with 52 of the counts relating to crimes against peace.¹³⁴ With regards to the definition of crimes against peace the IMTFE Charter was effectively the same as the IMT Charter, with only a few terminological differences. In particular Article 5(a) added the word's "declared or undeclared" before "wars of aggression" to prevent arguments that Japan had not technically been at war.¹³⁵

In passing Judgment on the 25 standing trial, the IMTFE upheld the Nuremberg criminalization of aggressive war¹³⁶ and rejected defence council arguments that the waging of aggressive war was not a crime under international law to which individual criminal responsibility could be attached.¹³⁷ Unlike Nuremberg however, the IMTFE bench was not universal in its endorsement of crimes against peace. In particular, Justice Pal of India and Justice Roling of the Netherlands provided stinging criticisms on both the criminality of aggressive war and the concept of individual responsibility for crimes against peace. Justice Pal categorically denied that aggressive war was a crime under international law in 1939:

No category of war became a crime in international life up to the date of commencement of the world war under our consideration. The Pact of Paris did not affect the character of war and failed to introduce any criminal responsibility in respect of any category of war in international life ... No customary law developed so as to make any war a crime.¹³⁸

¹³⁴ The Tribunal did not render a verdict against 3 of the 28 accused. Matsuoka and Nagano died during proceedings and Okawa was declared unfit to stand trial. *Ibid*, p12.

¹³⁵ UNWCC concluded that the differences in the definitions contained in the two charters were "purely verbal and that they did not affect the substance of the law governing the jurisdiction of the Far Eastern Tribunal over crimes against peace in comparison with the Nuremberg Charter". UNWCC, *supra* note61, p259.

¹³⁶ Tokyo Judgment, *supra* note133, pp23-24.

¹³⁷ *Ibid*, p356, pp362-3.

¹³⁸ Dissenting Opinion published as *International Military Tribunal for the Far East. Dissenting Judgment of Justice Pal* (1953) p70.

Furthermore, he felt that individuals constituting the government and functioning as its agents could not be held criminally responsible under international law for their acts.¹³⁹ Although Justice Roling did not provide the same explicit criticisms as Justice Pal in his Dissenting Opinion, Minear suggests that his phraseology indicated his personal antipathy to the charge of aggression.¹⁴⁰ Roling concluded that, although aggressive war was perhaps the subject of moral condemnation at the time, it was: “not considered a true crime before and in the beginning of ... [the] war and could not be considered as such for lack of those conditions in international relations on which such a view could be based”.¹⁴¹

(vi) Criticisms of the Tribunals and Conclusions on the Prosecutions:

One of the primary criticisms of the IMT and IMTFE prosecutions has been that they were an act of ‘victor’s justice’;¹⁴² being essentially politically motivated rather than fair and impartial trials.¹⁴³ Not only has the drafting process of the two Charters been criticized,¹⁴⁴ but the decisions and orchestration of the Tribunals¹⁴⁵ have also suffered heavy scrutiny by both professionals and academics alike.¹⁴⁶ However, the dilemma

¹³⁹ *Ibid*, pp71-105.

¹⁴⁰ Opinion of Justice B. Roling, quoted in Minear, *supra* note62, p.63.

¹⁴¹ Quoted in Brownlie, *supra* note9, p173. Furthermore, Schabas *supra* note19, p29, notes that post 1945 Roling clarified his position on the charge of crimes against peace in an interview with Prof. Cassese: “[I]n my view, aggressive war was not a crime under international law at the beginning of the war”.

¹⁴² Minear, *supra* note62.

¹⁴³ Overy, *supra* note69, p7, notes “the preparation of the tribunal exposed the extent to which the trial was in effect a ‘political act’ rather than an exercise in law”.

¹⁴⁴ For example, the fact that Allied Parties were immune from prosecution, even though acts such as the fire-bombing of Dresden by British Forces, the use of the atomic bomb by the Americans and the aggression by the USSR against Poland and Hungary clearly violated the laws and customs of war.

¹⁴⁵ In that the defendants had no say in the construction of the Tribunal or the election of the Judges. Justice Pal, who summoned the *nullum crimen sine lege* principle to the aid of the IMTFE defendants, held that;

Victory does not invest the victor with ... unlimited and undefined power ... International laws of war define and regulate the rights and duties of the victor over the individuals of the vanquished nationality. In my judgment, therefore, it is beyond the rules of international law, as they exist, given new definitions of crimes, and then punishes the prisoners for having committed offences according to this new definition. *Supra* note147, p30.

¹⁴⁶ *See in particular*: Minear, *supra* note62.

of prosecuting the vanquished by the victors was not lost on the participants.¹⁴⁷ In his opening speech, Justice Jackson argued that “[u]nfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foe ... Either the victors must judge the vanquished or we must leave the defeated to judge themselves”.¹⁴⁸ Furthermore, Ferencz argues that “contrary to popular misconceptions, war-crimes trials were never intended as victor’s vengeance over a vanquished foe”.¹⁴⁹ Jackson reaffirmed this in his opening speech, when he made the case that: “Four great nations, flushed with victory and stung with injury, stay the hand on vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason”.¹⁵⁰

Despite the criticisms leveled at both the procedure of the Tribunals and their interpretation of the existing law, the Second World War prosecutions are very important in many respects. For the first time they took criminal prosecution out of the domestic sphere and onto the international arena. Furthermore, the Charter and Judgments significantly advanced the fledgling notion of international criminal law, giving the idea of a permanent international penal code some real teeth.¹⁵¹ Thirdly, the various cases developed “new legal norms and standards of responsibility which advanced the international rule of law, for example the elimination of the defence of ‘obedience to superior orders’, and the accountability of Heads of State”.¹⁵²

¹⁴⁷ Paulis, *supra* note95, p12.

¹⁴⁸ Nuremberg Judgment, *supra* note96, p101.

¹⁴⁹ Ferencz, B., 1999. *Can Aggression be Deterred by Law?* PILR, Vol.11, p344.

¹⁵⁰ Ferencz, *supra* note15, p437.

¹⁵¹ Cassese, *supra* note115, p333.

¹⁵² *Ibid.*

Regarding the crime of aggression, the IMT and IMTFE case-law represent the only precedent available to any future prosecutions of this most serious of offences.¹⁵³

Although the critics are right in arguing that prior to 1939 the crime of aggression did not exist under international law and therefore the subsequent prosecutions were an application of retroactive law disregarding the criminal principle of *nullum crimen sine lege*,¹⁵⁴ it is also fair to argue that in the 60 years that have passed, the crime has been established as a crime under customary international law.¹⁵⁵ As a result, it can comprehensively be concluded that under current international law, the Nuremberg precedent of waging a *war of aggression* constitutes a crime against international peace and means that the leaders and organizers of such wars can be held criminally responsible for their actions.

Although the law, in theory, is clear, its application (or lack thereof) by States post 1945 tells a different story. Even though the world has consistently been plagued by a multitude of armed conflicts, not one single prosecution of a military or political leader for the crime of aggression has occurred. One of the many reasons for this blanket of impunity is the fact that for many years States could not agree on the definition that was to be applied to the act of aggression committed by the State, despite the efforts of, in particular, the UN.

3. The United Nations Era:

¹⁵³ Carpenter *supra* note6, p225, notes that “the IMT Trials present the most significant historical nexus between the crime of aggression and the drive to hold individuals accountable for the commission of this international crime”.

¹⁵⁴ Dinstein, *supra* note9, p109, notes that “it seems only fair to state that when the London Charter was concluded, Article 6(a) was not really declaratory of pre-existing customary international law”. Although Werle agrees with this conclusion, he offers an explanation to the IMTs actions: “The Nuremberg Tribunal justified the critical step from prohibiting aggressive war to criminalizing it with substantive arguments. The Tribunal thus concluded, from the fact that waging an aggressive war deserved and needed punishment, that it was in fact criminal”. Werle, G., 2005. *Principles of International Criminal Law*. GB: Cambridge University Press, p392.

¹⁵⁵ Carpenter, *supra* note6, p225; Griffiths, *supra* note19, p314; Schuster, *supra* note5, p10.

(a) Post-war Efforts to Codify the Developing Notion of International Criminal

Law:

In order to build on the dynamic steps taken at Nuremberg and Tokyo in developing the field of international criminal law, the UN initiated a “quest to establish more permanent and impartial mechanisms for dispensing international criminal justice”¹⁵⁶ by mandating various organizations to codify a set of international crimes and develop a Statute for a permanent ICC. Although some suggest that it was the criticisms of the IMT and IMTFE as little more than expressions of victor’s justice¹⁵⁷ that spurred the UN to act so quickly and with such vigor, the impetus with which it did reflected the wider community’s desire to never again witness such horrific atrocities. However, it would be a serious understatement to suggest that the road to consensus and agreement was a smooth one. It is not the intention of this thesis to give a complete account of the attempts to codify the crime of aggression from 1946 to the present day, but rather to provide an overview of the steps taken within the UN, accompanied by reference to certain global events that shaped the development of this path, in an attempt to provide a basic understanding of how we got to the situation we are in today regarding the crime of aggression.¹⁵⁸

(i) General Assembly Action:

It was the General Assembly, the largest and most representative body of the UN that initiated efforts to codify certain international crimes and draft a statute for an ICC. At its first session on December 11 1946, it passed a unanimous resolution affirming “the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal”.¹⁵⁹ In paying lip service to the results of the IMT¹⁶⁰

¹⁵⁶ Cassese, *supra* note 115, p333.

¹⁵⁷ Antonopoulos, C., 2001. *Whatever Happened to Crimes Against Peace?* JCSL. Vol.6, No.1, p38

¹⁵⁸ For a comprehensive review of all the efforts and initiatives made by the UN with regard to the definition of aggression, see: Ferencz, *supra* note 15, Vol.II; Stone, J., 1977. *Conflict Through Consensus: United Nations Approaches to Aggression*. USA: The John Hopkins University Press, Baltimore, Maryland.

¹⁵⁹ *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*. GA Res. 95(I), (Dec. 11, 1946).

the General Assembly accepted the Tribunal's Judgment *prima facie*, without acknowledging the criticisms made or the dissenting opinions of the IMTFE. That being said, it is generally acknowledged that this affirmation crystallized the Nuremberg precedent as authoritative principles of international criminal law. The General Assembly also directed the newly established International Law Commission (ILC) to "formulate the principles of international law" recognized by the Charter and Judgment of the IMT and to "prepare a draft code of offences against the peace and security of mankind".¹⁶¹

Other notable steps taken by the General Assembly included the codification of the crime of genocide¹⁶² and the adoption of the Universal Declaration of Human Rights (UDHR), which confirmed the principle of *nullum crimen sine lege* that had been so controversially ignored by the constructors of the London Charter and the Judgments of the IMT and IMTFE.¹⁶³ Furthermore, the General Assembly also adopted Resolution 377(A) - the 'Uniting for Peace' Resolution in 1950, in response to a stalemate in the Security Council concerning the Korean War as a result of tensions between the Americans and the Russians.¹⁶⁴ Fearing that the Security Council was being prevented from fulfilling its role, the General Assembly assumed a greater role

¹⁶⁰ Paulis, *supra* note95, p14.

¹⁶¹ GA Res. 177(II). Johnson, *supra* note28, p446, queries what the GA actually meant by this, as it seemed to set the ILC rather overlapping tasks. Johnson asks whether the Code of Offences was envisaged as being equivalent to an international criminal code or whether it was merely regarded as the first step towards a more elaborate and comprehensive codification of international criminal law. He concludes that by not properly clarifying its intentions, the GA provided the ILC with a highly confusing and complex task that today, in theory, is still not complete.

¹⁶² The Convention on the Prevention and Punishment of the Crime of Genocide was unanimously approved by the General Assembly on December 9 1948, GA Res. 260(III). Recently, argument has been put forward to suggest that it is genocide and not aggression, that is the 'supreme international crime', or 'crime of crimes'. See: Schabas, W., 2000. *Genocide in International Law: The Crime of Crimes*. GB: Cambridge University Press.

¹⁶³ GA Res. 217(III). See: Article 11(2) UDHR.

¹⁶⁴ Following the surrender of the Japanese, Korea was divided between the in two: North to the Russians and South to the Americans. As a consequence, the resulting conflict immediately went to the SC, where the situation was declared to be a 'breach of the peace'. However the Russians, who were boycotting the UN at the time, have never accepted the UN SC resolution; "the USSR has consistently maintained that the Korean Resolution [was] invalid because of its absence." Harris, D., 2004. *Cases and Materials on International Law*. 6th ed., London: Sweet&Maxwell, p987.

in the maintenance of international peace and security than originally envisaged by the UN Charter.¹⁶⁵ The Resolution provided that:

If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

This resolution has been regarded by some as a *de facto* revision of the Charter.¹⁶⁶ In the words of Ferencz, its adoption gave the General Assembly the “power to make recommendations regarding an act of aggression and thereby became involved in the problem of trying to clarify what was meant by that elusive term”.¹⁶⁷ Furthermore, growing tensions between the Americans and the Russians meant that a lack of unanimity between the permanent members was not only a possibility, but rather a reality that prevented the Security Council from taking any meaningful action.

(ii) Definition of Aggression before the General Assembly and a Draft Code of Crimes Against the Peace and Security of Mankind:

¹⁶⁵ Under Article 11(2) of the Charter, the GA may discuss questions relating to the maintenance of international peace and security, as well as make recommendations. However when action is necessary discussion has to be referred to the SC. Article 12, designed to prevent a clash between the two bodies, states that whilst the SC is exercising its functions with regard to a particular dispute or situation the GA shall not make any recommendations unless the SC so requests. Gray, *supra* note9, p196, notes that when the SC has made a determination under Chapter VII, it has rarely specified the Article under which it is making its determination.

¹⁶⁶ Carpenter, *supra* note6, p227.

¹⁶⁷ Ferencz, *supra* note15, p493.

Both the events of 1950 and the *de facto* expansion of the General Assembly's powers led the Russians, on the impetus of Yugoslavia's initial efforts,¹⁶⁸ to present the First Committee of the General Assembly¹⁶⁹ with a draft definition of aggression based on its 1933 proposal.¹⁷⁰ American, France and Canada rejected the idea of a fixed definition however, maintaining that a determination of aggression should be left to the sole discretion of the Security Council. Syria provided a temporary compromise by suggesting that the issue be handed to the ILC, to be considered in conjunction with the other issues on its mandate. On November 17 1950 the Russian draft was passed to the ILC, with a request by the General Assembly that some conclusions be drawn on the problem of defining aggression.¹⁷¹

However, the ILC already had its hands full. Beyond formulating the Nuremberg Principles,¹⁷² it was also trying to construe the nature and content of a Draft Code of Offences Against the Peace and Security of Mankind (Draft Code) as well as reconciling the many conflicting views on the possibility and desirability of an international criminal jurisdiction.¹⁷³ It would do well to note here the difference between the notion of aggressive war within the context of the Draft Code and the

¹⁶⁸ Yugoslavia initially attempted to direct the GA's attention towards the question of a definition of aggression under the Agenda Item entitled "*Duties of States in the Event of Outbreak of Hostilities*".

¹⁶⁹ The Political and Security Committee.

¹⁷⁰ UN Doc A/C.1/608, (November 6 1950).

¹⁷¹ GA Res. 378(V)B, (November 17 1950). On the day this subject was passed to the ILC, the GA solemnly reaffirmed that:

"Whatever the weapons used, any aggression, whether committed openly, or by fomenting civil strife in the interest of a foreign Power, or otherwise, is the gravest of all crimes against peace and security throughout the world."

GA Res. 380(V), (November 17 1950).

¹⁷² At its 2nd Session in 1950, the ILC completed its formulation of the Nuremberg principles, which were subsequently adopted by the GA. *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Report of the ILC, Yearbook of the ILC, 1950, Vol. II, p364, p374, p376.* The text of the Draft Code effectively mirrored the text used in Article 6(a) of the IMT Charter.

Principle VI: The crimes hereinafter set out are punishable as crimes under international law:

Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

¹⁷³ *Report of the ILC, 5-29 June 1950, pp11-17.* UN Doc. A/1316.

question of a definition of the act of aggression referred to the ILC separately by the General Assembly. Like Nuremberg, the crime of aggressive war referred to the criminal acts of the individual whereas the question of a definition of aggression represented the State act. Although the two issues are clearly inter-related, they did and still do, require independent assessment.

After considering the referral regarding the act of aggression, the ILC reported back to the General Assembly that no enumeration could be completely comprehensive and advised that it was undesirable to try to catalogue a list of the illustrative cases of aggression.¹⁷⁴ As a result, the issue was passed back to the General Assembly and attention within the ILC re-focused on completing the Draft Code. At its 3rd Session in 1951 the ILC adopted a provisional text of the Draft Code, with a second, not substantially different text, being adopted in 1954.¹⁷⁵ Whilst Article 1 stipulated that the offences incorporated within the Draft Code “are crimes under international law, for which the responsible individuals shall be punished”,¹⁷⁶ Article 2(1) characterized as an offence “any act of aggression”.¹⁷⁷ The Draft Code did not however, qualify what it meant by “any act of aggression”.¹⁷⁸

¹⁷⁴ Leanze notes that the ILC sought the opinion of the Special Rapporteur of the Draft Code, Mr Spiropoulos, when considering the feasibility of defining aggression. He concluded that “a judicial definition of aggression would be an artificial device, which could never be complete enough to include all possible cases of aggression.” Leanze, U., 2004. *The Historical Background*. In: Politi & Nesi, *The Crime of Aggression*. p5.

¹⁷⁵ *Draft Code of Offences Against the Peace and Security of Mankind*, Yearbook of the ILC, 1954, p149. UN Doc. A/CN.4/72. For a substantial review of both drafts, see Johnson, *supra* note37.

¹⁷⁶ *Ibid* p150.

¹⁷⁷ *Ibid* p151. Whilst Article 2(1) stipulated that “Any act of aggression, including the employment by authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations”, Article 2(2) criminalized “any threat” to resort to an act of aggression. This is a much broader interpretation of the notion of crimes against peace than that applied at Nuremberg.

¹⁷⁸ This poses a problem if the Draft Code was ever intended to form part of the substance of the developing body of international criminal law. By not defining the act of aggression, the Draft Code cannot be reconciled with the fundamental criminal principle of *nullum crimen sine lege*, which the GA affirmed in such express terms when it adopted Article 11(2) UDHR.

In tandem with the work on the Draft Code, the ILC also formulated a provisional Statute for a future ICC (Draft Statute). In 1953, the Committee on the Creation of an International Criminal Jurisdiction that had been established by the ILC to consider the feasibility of a permanent ICC tabled a *Draft Statute for an International Criminal Court*.¹⁷⁹ However, it was at this point that the apparent progress that was being made stalled. Central to the problem was the definition of aggression. It was constantly argued that without a clear definition of the crime of aggression, no criminal code would be complete and as long as there was no code, there was no need for a court to enforce it.¹⁸⁰ In recognizing this situation the General Assembly decided “to postpone further consideration of the draft Code of Offences against the Peace and Security of Mankind until the Special Committee on the question of defining aggression has submitted its report”.¹⁸¹ Furthermore, the connection between the Draft Code and the question of an international criminal jurisdiction meant that the General Assembly decided to defer any further consideration of the Draft Statute as well.¹⁸²

Cassese concludes that “the 1940s and 1950s were characterized by work by a variety of international bodies on tasks that, while designed to be complementary and interlocking, were nevertheless poorly co-ordinated”.¹⁸³ He argues that this made it easy for the General Assembly to postpone discussion of these important texts, aided by the lack of political will and the frequent risk of war. The political stagnation that was being caused by the Cold War and the impact it was having on the functioning of the UN, meant that agreement was rare and action impossible. As Paulis notes, “...the Cold War ended all attempts to establish a workable international criminal justice

¹⁷⁹ *Report of the Committee on International Criminal Jurisdiction*, UN Doc. A/2645 (1954).

¹⁸⁰ Ferencz, B., 1981. *The Draft Code of Offences Against the Peace and Security of Mankind*. AJIL. Vol.75, p675.

¹⁸¹ GA Res. 245 (1954).

¹⁸² GA Res. 898(IX), (December 14 1954).

¹⁸³ Cassese, *supra* note 115, p334.

system”.¹⁸⁴ This included work on the Draft Code, the Draft Statute and a Definition of Aggression.

(b) United Nations Efforts to Define the Act of Aggression, 1952-1974:

After the ILC declared that a judicial definition of aggression would be an “artificial device”,¹⁸⁵ the matter came back to the General Assembly. From that date on successive Special Committees on the Question of Defining Aggression were established, with regular input from debates held within the Sixth Committee of the General Assembly.¹⁸⁶ However, it took 22 years before until a definition suitable to Member States was able to be adopted.

The 1950 ILC Report was deliberated on by the Sixth Committee in January 1952. In contrast to the ILC’s conclusions, the Committee decided that it was “... possible and desirable ... to define aggression by reference to the elements which constitute it”¹⁸⁷ and subsequently requested that the General Assembly gage the opinions of Member States on the matter, which it did.¹⁸⁸ The General Assembly was overwhelmed with the various proposals and draft resolutions that it received back¹⁸⁹ and decided that the only course of action available to it was to establish a Special Committee on the Question of Defining Aggression to study the proposals and submit “draft definitions of aggression or draft statements of the notion of aggression ... on the assumption of a definition being adopted by a resolution of the General Assembly”.¹⁹⁰

¹⁸⁴ Paulis, *supra* note 195, p14.

¹⁸⁵ UN Doc. A/2645

¹⁸⁶ There were certain delegates within the Sixth Committee, in particular Bolivia, Egypt, Iran, Iraq, Lebanon, Mexico, Panama, Paraguay, Peru, Syria & Yemen and the USSR, who were determined to construct a definition and were the driving force in keeping the whole project going, even in the face of constant opposition by the US and its allies, including the UK. In 1956 the US urged the GA to postpone its work on the definition of aggression *indefinitely*. *Report of the Special Committee on the Question of Defining Aggression* (hereinafter *SC Report*), UN Doc. A/C.6/L, p402, (1956). The UK made the same suggestion in 1965. *SC Report*, UN Doc. A/AC.91/5 (April 16 1965)

¹⁸⁷ GA Res. 599(VI) (January 31 1952)

¹⁸⁸ *Ibid.*

¹⁸⁹ *SC Report*, UN Doc. A/2211, pp17-81, pp81-86.

¹⁹⁰ GA Res. 688 (VII) (December 20 1952)

(i) The Four Special Committees on the Question of Defining Aggression:

The first Three Committees on the Question of Defining Aggression, meeting between 1952-1967, made very little progress on a definition of aggression largely due to an inability to reach agreement on key issues.¹⁹¹ In addition, several states considered that the time was not right to address the question.¹⁹² As a result, a decision on a definition was deferred on several occasions.¹⁹³ When the Third Special Committee finally met again in 1967, there had been little improvement in international relations. India and Pakistan had accused each other of aggression in 1965, whilst the Russians accused the Americans of aggressive acts in both the Dominican Republic and Vietnam. In June, Israel launched what it called a defensive strike, seizing large areas of the United Arab Republic, Syria and Jordan and the 'Six-Day War' ensued. Moreover, the political stalemate of the Cold War meant that the UN, and in particular the Security Council, was unable to take any meaningful action to attempt to maintain international peace and security. As Ferencz comments, "the word 'aggression' was on everyone's lips, but there was no agreement on what it meant".¹⁹⁴ Against this background some debate, although superficial, occurred.¹⁹⁵ The discussion however, was again deferred to a fourth and final Committee.¹⁹⁶

¹⁹¹ In particular, opinion was split on whether a definition should include the notions of 'economic' and 'ideological' aggression or whether it should just refer to 'armed aggression'. Furthermore, debate on the format and substance of the definition, as well as whether it was "possible and desirable" also took place. For a further in depth discussion, see: Ferencz, *supra* note 15.

¹⁹² Supporters, led by Bolivia, France, Iran, Mexico, Poland, the Dominican Republic, Syria & the Soviet Union, argued that a definition was essential to furthering international peace and security. Strong opposition, led by the UK and Greece, argued that not only was a definition impossible, but that it would actually be a danger to maintaining international harmony. *SC Report*, UN Doc. A/3576. Furthermore, opposition to the establishment of a third special committee was led by the US, the UK, Japan, China and Canada.

¹⁹³ Yearbook of the UN 1953, p681. *SC Report*, UN Doc. A/2638, (August 24 – September 21 1953) *SC Report*, UN Doc. A/3574. Stone, *supra* note 158, p62, states that "the 1956 Committee is remembered for its deadlock on the major theoretical and political issues, rather than its developments with regards to aggression". See also: *SC Report*, UN Doc. A/AC.91/2, (April 24 1959); *SC Report*, UN Doc. A/AC.91/3, (April 9 1962); *SC Report*, UN Doc. A/AC.91/5, (April 16 1965).

¹⁹⁴ Ferencz, *supra* note 15, Vol.II, p8.

¹⁹⁵ *SC Report*, UN Doc. A/6988.

¹⁹⁶ GA Res. 2330 (XXII) (December 18 1967)

The Fourth Special Committee sat between 1968-1972. During its first session, the debates produced four distinct proposals,¹⁹⁷ which were formulated into three the following year.¹⁹⁸ The first draft was prepared by Russia, who introduced a very wide definition of aggression together with an overt statement that it would not be possible to recognize the sovereignty of territories that had been acquired and/or were occupied through the use of force.¹⁹⁹ The second draft was prepared by the 'Thirteen Power' coalition.²⁰⁰ The third draft, submitted by a group that had previously been exceedingly skeptical about the whole initiative, reflected the specific interests of that group²⁰¹ and in particular their desire to protect the 'inherent right to individual and collective self-defence'.²⁰² As the drafts were compared and debated the major areas of contention began to emerge, such as the acts to be listed as well as the consequences that an act of aggression would entail.²⁰³ Although progress had been made, it took a further four years of debate before the Special Committee was able to pass a definition of aggression to the Sixth Committee, who in turn had to review it before recommending its adoption to the General Assembly.

(c) The Definition of Aggression – General Assembly Resolution 3134 of 1974:

On 14 December 1974 the General Assembly adopted Resolution 3314, to which the Definition of Aggression was annexed.²⁰⁴ This is an important document for any analysis of aggression although it does possess certain limitations in its application to the *crime* of aggression. For the purpose of this thesis, analysis is only required of the definition's major provisions, the attention that the International Court of Justice (ICJ)

¹⁹⁷ *SC Report*, UN Doc. A/7185/ Rev.1.

¹⁹⁸ *SC Report*, UN Doc. (A/7620). For a detailed analysis of these proposals, see Bassiouni, *supra* note58, p176-7.

¹⁹⁹ Leanze, *supra* note174, p4.

²⁰⁰ Columbia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Mexico, Spain, Uganda, Uruguay and Yugoslavia. The wide diversity of this group meant that agreement was hard to accomplish, resulting in a rather broad and vague proposal.

²⁰¹ Australia, France, Italy, Japan, the UK and the US.

²⁰² *SC Report*, UN Doc. A/7620.

²⁰³ Ferencz, *supra* note15, Vol.II, pp9-13.

²⁰⁴ See Annex I

has given to Article 3(g) and the academic criticisms that have been leveled at the Resolution.

Coined a “Consensus Definition”²⁰⁵ Resolution 3314 is full of compromise on almost every point that it includes.²⁰⁶ The consensus process began with the most basic issue of the definition – the format it should take. Whether it should be a generic statement of the concept of aggression or an enumeration of certain, specific acts that could be classified as aggression was a principle issue of disagreement that plagued the various Special Committees. The result was a compromise – a combination of the two techniques.²⁰⁷ Whilst Article 1²⁰⁸ contains an abstract definition, (essentially repeating the core wording of Article 2(4) of the UN Charter, with a few minor alterations),²⁰⁹ Article 3 contains seven specific cases where the use of armed force qualifies as aggression.²¹⁰

However, like the UN Charter, the Resolution leaves the final authority on determining acts of aggression in the hands of the Security Council. This is clearly reflected in both Article 2 and Article 4.²¹¹ The *priority principle*²¹² set forth in Article

²⁰⁵ Stone, J., 1977. *Hopes and Loopholes of the 1974 Definition of Aggression*. AJIL, Vol.71, No.2, p224.

²⁰⁶ *Ibid.*

²⁰⁷ Termed a ‘mixed’ definition, this is essentially a combination of the previous two proposals, in that it is an abstract definition accompanied by a list of concrete situations to assist in the understanding of the general formula. Stone, *supra* note158, p80, however, has criticised this module arguing that:

If the abstract definition in the general clause could be self-applying, the list of acts or situations would be unnecessary; and it is not, in any case, really a part of the definition. Its inclusion manifest doubt as to the adequacy of the definition in the general clause and seeks to ensure that it will at least extend to the list of acts or situations.

²⁰⁸ In an explanatory note to this Article, the framers of the Definition note that the term ‘State’ is used “without prejudice to questions of recognition or to whether a State is a member of the UN” and that it can also refer to “groups of States” where appropriate.

²⁰⁹ Dinstein, *supra* note9, p127, identifies certain differences, noting that “the cardinal divergence from Article 2(4) is ... [that] the threat of force per se does not qualify as aggression” since the actual use of armed force is required.

²¹⁰ Article 4 however, makes it clear that this list is by no means exhaustive.

²¹¹ Under Article 4 the SC has the prerogative to determine that other acts may also be tantamount to aggression. Furthermore, it is made clear in the preamble that Resolution 3314 was intended to *act only as a guide* to the SC in any decisions it may have to make regarding the commission of aggression (emphasis added). Carpenter, *supra* note6, p231, concludes that because the Security Council is not

2 is qualified by a wide margin of appreciation that enables the Security Council to “conclude that a determination that an act of aggression has been committed would not be justified in light of other relevant consequences”. This apparently includes both the intent and purpose of the acting State.²¹³

Article 5 is of particular interest to the *crime* of aggression. As previously noted, Resolution 3314 possess certain limitations in its application to the criminal prosecution of individuals. The principle limitation is the fact that the Definition solely focuses on the role of the State in the commission of the act of aggression.²¹⁴ Article 5(2) provides a statement however, which some argue represents a clear distinction between the international responsibility of the State and an individual’s criminal responsibility: “A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.”

For example, Wilmshurst believes that Article 5(2) clearly differentiates between ‘aggression’ that gives rise solely to the international responsibility of States and a ‘war of aggression’, which constitutes a crime against peace and thus entails individual criminal responsibility.²¹⁵ Furthermore, she argues that this distinction was

bound to apply the Resolution, the designation of acts of aggression are “rendered purely a function of procedure and politics”.

²¹² See: Chapter 2(1)(c)(iii). As well as being qualified by the role of the Security Council, the priority principle is also restricted by the insertion of the maxim *de minimis non curat lex*, (which literally translates as ‘the law does not concern itself with trifles’, and is generally referred to as the threshold condition). Article 2 states that one of the reasons the Security Council may reject the presumption that an act of aggression has been committed, is that the act is “*not of sufficient gravity*”, and as Dinstein *supra* note 9, p128, notes, the *de minimis* clause clarifies that “a few stray bullets across a boundary’ cannot be invoked as an act of aggression”.

²¹³ Ferencz, *supra* note 15, Vol. II, p31. Stone, *supra* note 158, p68, noting that from the earliest UN and League of Nations discussions the question of the relevance of intention and purpose to the commission of aggression was a main obstacle to an agreed definition, criticises the fact that Article 2 is qualified by such an ambiguous statement.

²¹⁴ As a result, Carpenter, *supra* note 6, p232 argues that this resolution can offer no, or only limited assistance to the prosecutions of individuals under the Rome Statute.

²¹⁵ Wilmshurst, E., 2004. *Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?* In: Politi & Nesi, *The Crime of Aggression*. pp93-96. Furthermore, GA Res. 2625(XXV) (1970), entitled *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*

also clearly recognized by a number of delegates in the statements they made when the Resolution was adopted.²¹⁶ This interpretation of Article 5(2) is supported by other academics, who hold the belief that this distinction between simple ‘aggression’ and the graver notion of a ‘war of aggression’ reflects the customary international law status of crimes against peace.²¹⁷ This is the view that I also subscribe to, and as Chapter 3 demonstrates, this approach is of particular significance to the current debate of the construction of the definition of the crime of aggression under the Rome Statute.

Following its adoption, Resolution 3314 received a considerable amount of international attention and in particular from the ICJ in the *Nicaragua Case*.²¹⁸ For the purpose of this thesis, the principle point to note regarding the ICJ’s review of this Resolution is that it explicitly clarified the status of the Definition in international law. In 1986 the ICJ declared that certain provisions of Resolution 3314 reflected customary international law. Firstly, the ICJ held that Article 2 of the Definition reflected custom. This was rather an uncontroversial statement to make as much of Article 2 reflects Article 2(4) of the UN Charter, which the ICJ had already explicitly declared as a provision of customary international law.²¹⁹ The Court then singled out Article 3(g) for comment, declaring it also to be reflective of customary international

proclaimed that a ‘war of aggression constitutes a crime against peace, for which there is responsibility under international law’.

²¹⁶ *Ibid*, p94.

²¹⁷ See: Muller-Schieke, I., 2001. *Defining the Crime of Aggression Under the Statute of the International Criminal Court*. LJIL. Vol.97, No.1, pp132-147; Dinstein, *supra* note9; Brownlie, *supra* note9. However, Paula Escameia argues that Article 5(2) was not addressing individual criminal responsibility, but was instead solely addressing state criminal responsibility. She draws this conclusion from the fact that Resolution 3314 was intended to be a guide to the SC, as the organ which reviews States’ actions, as well as the fact that no where in the Resolution is the notion of individual criminal responsibility alluded to, Escameia, P., 2004. *The ICC and the Security Council on Aggression: Overlapping Competencies? In: Politi & Nesi, The Crime of Aggression*, p138. This interpretation is supported by Randelzhofer, *supra* note24, p127. Wilmshurst, *supra* note215, p94 rejects this conclusion, arguing that the concept of State crimes was extremely controversial and “the Resolution would not have been adopted by consensus if there had been a reference in it to State crimes”.

²¹⁸ *Supra* note57, p14.

²¹⁹ *Ibid*.

law.²²⁰ The ICJ concluded that “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” amounted to an act of aggression under customary international law. The argument has been made that because paragraph (g) was pronounced as declaratory of customary international law, it is then also possible to infer that the other subparagraphs of Article 3 are of an equal status. Goma, in identifying Article 3(g) as an example of indirect aggression,²²¹ stresses the fact that this clause happened to be one of the most problematic provisions debated in the Special Committee. This only adds to the argument that it would be illogical to conclude that whilst one of the most problematic provisions of Article 3 is representative of customary international law, others, which are universally accepted and far less controversial, are not. As Goma concludes, “the Court, by referring to that particular paragraph, wanted to say that it had the same status as the others which were already reflective of custom”.²²²

However, the suggestion that the Definition of Aggression is reflective of customary international law has not been universally accepted. Certain States, and in particular permanent members of the Security Council, maintain that the sole purpose of Resolution 3314 is to act as a guide to the Security Council. This is wishful thinking. The General Assembly Definition of Aggression is clearly reflected in customary international law and is the only definition of the act of the State in the commission of aggression that currently exists.

That being said, the Definition annexed to Resolution 3314 has also received some severe criticism. The most prominent critic has been Julius Stone, who argues that

²²⁰ *Ibid*, p104. The facts of the case lead the Court to examine this particular provision, *see*: Harris, *supra* note164, pp893-916.

²²¹ Leanze, *supra* note174, p8, notes that this is still a highly controversial aspect of aggression, along with the idea of economic aggression.

²²² Goma, *supra* note44, p74. Shukri, M., 2004. *Will Aggressors Ever be Tried Before the ICC? In: Politi & Nesi, The Crime of Aggression*, p37, notes that “to divide it into parts, some with customary value and some with not, is an unacceptable intellectual exercise.”

instead of narrowing them, the resolution codified all the major judicial loopholes available to potential aggressors: “Ambitions of delegates to narrow some major loopholes were usually balanced by the inclusion of provisions demanded by the other states which efficiently neutralized the clarification proposed and often produced new obscurations to boot”.²²³

Stone has also reviewed the work of Benjamin Ferencz, who is a strong supporter of the Definition. Stone comments that “they have been notable for their important insights, as well as for an optimism which verges sometimes on wishfulness”.²²⁴ Furthermore, the majority of his criticism focuses on the 3 points that Ferencz concedes as potential failings of the Definition. Firstly, “consensus” does not signify “agreement”, but merely that States “have refrained from voicing their doubts and their objections”. Secondly, “the ambiguities, omissions, and internal inconsistencies of the definition make it subject to conflicting interpretations on very critical matters”, and finally “any guidance which it might provide has, in any case, no binding effect on the Security Council”.²²⁵

In conclusion, there are some important factors regarding the Definition of Aggression that need addressing. Firstly, the Definition is the only universally agreed definition of the act of aggression. Furthermore, the recognition that certain provisions received from the ICJ support the argument that the Definition is also a provision of customary international law. That being said, there are factors that limit the impact this Definition can have on the construction of the *crime* of aggression, not least the fact that the resolution only refers to the act of the State. Because of this, it can only have a limited application to the criminal prosecution of individuals and therefore its

²²³ Stone, *supra* note 205, p231.

²²⁴ *Ibid*, p242.

²²⁵ *Ibid*.

usefulness to the ICC is questionable.²²⁶ Secondly, it must be remembered that this document takes the form of a General Assembly Resolution and according to the UN Charter²²⁷ such a document has no binding authority over Member States or other UN bodies. In the same vein, a third point of interest is the fact that the General Assembly adopted Resolution 3314 so that it could serve as a guidance tool to the Security Council in any determination that it might have to make under Article 39 of the Charter. This limitation has severely curtailed the effectiveness and impact this Definition may have had.²²⁸ Finally, it is important to note that this Resolution is over 30 years old, and is by no means an exhaustive definition of every act of aggression. Therefore, one has to advise a cautious approach considering the impact that this Definition has on the construction of the crime of aggression.

(d) The Road To Rome:

The end of the Cold War in 1989 was instrumental in enabling the UN to finally exercise the full range of powers and responsibilities afforded to it by the Charter. As Cassese notes, “the animosity that had dominated international relations for almost half a century dissipated – in its wake, a new spirit of relative optimism emerged”.²²⁹ Such optimism enabled projects such as the Draft Code and the Draft Statute to be re-ignited, with the Draft Code being completed in 1996.²³⁰ Article 16 of the Draft Code “was drawn from the relevant provision of the Nuremberg Charter as interpreted and applied by the Nuremberg Tribunal”,²³¹ and detailed the crime of aggression as:

An individual who, as leader or organizer, actively participated in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.

²²⁶ Paulis, *supra* note95, pp15-16, concludes that “without the appropriate cross-reference to the act of the individual it is of no use whatsoever for the purposes of criminal law”.

²²⁷ Article 10 UN Charter.

²²⁸ Dinstein, *supra* note9, p129, states that “in actuality, after existing for three decades, the Definition of Aggression has had ‘no visible impact’ on the deliberations of the Security Council”.

²²⁹ Cassese, *supra* note115, p335.

²³⁰ *Draft Code of Crimes against the Peace and Security of Mankind, Report of the ILC, 48th Session, (1996). Yearbook of the ILC, Vol.II(2), p17.*

²³¹ 1996 Draft Code, UN Doc. A/51/10 (1996), Article 16 commentary, para(4).

In its commentary on Article 16, the Commission recognized the fact that Draft Code related to individual criminal responsibility rather than State responsibility and, therefore felt that it was unnecessary to attempt to define aggression, as this had been sufficiently dealt with by the General Assembly.²³²

Although their material jurisdiction does not include the crime of aggression, the creation of the two *ad hoc* Tribunals by the Security Council in the aftermath of the massive human rights violations in the Former Yugoslavia and Rwanda provided a further incentive to such projects. Although the two *ad hoc* Tribunals were limited both temporally and geographically, their overall successes provided a final spur to the emergence of the ICC.

(i) The 1994 Draft Statute for a permanent ICC:

Whilst efforts began in 1981 on the Draft Code,²³³ work on an international penal code was not revived until 1989 when the General Assembly requested the ILC “to address the question of establishing an international criminal court”.²³⁴ By 1993 the Commission had prepared a Draft Statute, under the direction of Special Rapporteur James Crawford,²³⁵ which was modified in 1994 before it went before the General Assembly.²³⁶ Although aggression was included within the Draft Statute²³⁷ it was not comprehensively defined. Furthermore, a separate procedure for acquiring jurisdiction meant that the crime of aggression was set apart from the other crimes under the Statute.

²³² See: Hogan-Doran, J., & Van Ginkel, B., 1996. *Aggression as a Crime under International Law and the Prosecution of Individuals by the Proposed International Criminal Court*. NILR Vol.43, p335.

²³³ GA Res. 36/106 (1981).

²³⁴ GA Res. 44/89 (Dec. 4 1989). This Resolution was initiated by Trinidad and Tobago who, plagued by narcotics problems and trans-national crime issues, desired the establishment of a permanent ICC. Schabas, W., 2004. *An Introduction to the International Criminal Court*. 2nd ed., GB: Cambridge University Press, p9.

²³⁵ See: Crawford, J., 1994. *The ILC's Draft Statute for an International Criminal Tribunal*. AJIL. Vol.88, No.1, pp140-152.

²³⁶ *Report of the ILC to the GA on the Work of its Forty-Sixth Session*, UN Doc. A/49/355 (1994).

²³⁷ *Ibid*, p72, para.6, the ILC concluded that:

“It would ... seem retrogressive to exclude individual criminal responsibility for aggression (in particular, acts directly associated with the waging of a war of aggression) 50 years after Nuremberg”.

Article 23 of the Draft Statute imposed the precondition that before the Court could prosecute an individual for aggression, the Security Council must have determined “that a State has committed the act of aggression which is the subject of the complaint”.²³⁸ In other words, the Security Council became the exclusive initiator for prosecutions of alleged aggression by an individual. In so doing, the Draft Statute echoed the failings of both the UN Charter and Resolution 3314 to separate ‘aggression’ from the political determinations of the Security Council: “Whether to gain acceptance by the permanent members, or to impose a legitimate limit on the types of cases to be brought before the Court, the Security Council hoop is a reflection of political reality.”²³⁹

Even though aggression was tentatively included in the Draft Statute, disagreement on the crime’s format, the jurisdictional trigger mechanisms to be applied and even whether it should be included at all, meant that the matter was by no means settled as subsequent negotiations demonstrated. What is clear however, is the fact that both the Draft Code and the Draft Statute played a pivotal role in the construction of the Rome Statute. At its 49th session in 1994, the General Assembly decided to establish an ‘Ad Hoc Committee on the Establishment of an ICC’, to review the Draft Statute.²⁴⁰ As a result of the Report submitted by this Committee²⁴¹ the General Assembly convened the PrepCom, comprised of representatives from Member States, Non-Governmental Organizations (NGO) and various international organizations.²⁴² The PrepCom met from 1995 to 1998, submitting its substantially reworked draft to the Rome Conference that convened in the summer of 1998.²⁴³

²³⁸ Draft Article 23(2). For a detailed analysis of Draft Article 23, see Gowlland-Debbas, V., 1998. *The Relationship between the Security Council and the Projected International Criminal Court*. JACL. Vol.3, pp97-119.

²³⁹ Carpenter, *supra* note6, p233.

²⁴⁰ The Committee met twice during 1994. For the drafting process generally, see: Bos, A., 2002. From the International Law Commission to the Rome Conference (1994-1998). In: A.CASSESE, P.GAETE & J.JONES, ed., *The Rome Statute of the International Criminal Court: A Commentary*, US: Oxford University Press, pp35-64.

²⁴¹ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN Doc. A/50/22.

²⁴² Schabas, *supra* note234, p14.

²⁴³ *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum*, UN Doc. A/CONF.183/2/Add.1. Article 5 of the 1998 Draft provided 3 options for a definition of aggression. Cassese, *supra* note115, p342, notes that this mammoth document consisted

(ii) The Rome Conference, the Assembly of State Parties and the Various Bodies Established to Codify the Crime of Aggression:

Even though 160 States and numerous NGO's attended the Rome Conference,²⁴⁴ the negotiations on the crime of aggression could not result in agreement on a provision suitable for the Court. Whilst America argued that the inclusion of the crime of aggression "could fatally compromise the ICC's future credibility",²⁴⁵ the two new nuclear powers of India and Pakistan were not inclined to subject themselves to possible charges of aggression. Strong support from the EU and about 30 nations united in the Non-Aligned Movement (NAM) insisted however, that without the inclusion of aggression as a crime they would be unable to support the new court. The eventual compromise was only adopted in order to secure the conclusion of the Conference in the successful adoption of the Statute, and is regarded as being the "main defect" of the Statute.²⁴⁶

Whilst Article 5(1) lists the crime of aggression as one of the four core crimes within the jurisdiction of the Court, Article 5(2) states that:

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. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

of "116 articles contained in 173 pages of text with some 1,300 words in square brackets". For a general analysis of the Rome Conference, see: Kirsch, P., & Holmes, J.T., 1999. *The Rome Conference on an International Criminal Court: The Negotiating Process*. AJIL. Vol.93, No.1, pp2-12

²⁴⁴ 17 IGO's and 124 NGO's attended the conference, Goma, *supra* note44, p55.

²⁴⁵ Peirce, R., 2001. *Which of the Preparatory Commission's Latest Proposals for the Definition of the Crime of Aggression and the Exercise of Jurisdiction Should Be Adopted into the Rome Statute of the International Criminal Court*. BYUJPL, Vol.15, p282

²⁴⁶ Goma, *supra* note44, p56. Upon realising that the issue of aggression had the potential to sink the entire project, the Bureau for the Committee of the Whole, (see: Kirsch, P., & Holmes, *supra* note243, p2) set a deadline for delegations to produce a broadly acceptable solution, failing which the crime would be addressed at a later time by way of a protocol or review conference. *Bureau Proposal*, UN. Doc. A/CONF.183/C.1/L.59 (1998), Article 5.

The Final Act of the Rome Conference established the PrepComm²⁴⁷ and gave this newly formed body the task of preparing “proposals for a provision on aggression, including the definition and Elements of Crimes of aggression” as well as “the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime”.²⁴⁸ In the course of the 10 sessions that were held between 1999 and 2002, the PrepComm agreed to establish the Working Group on the Crime of Aggression (WGCA).²⁴⁹ Although the debates held by the WGCA yielded valuable work on the crime of aggression, it was unable to complete its mandate by the time the Assembly of State Parties (ASP) was established.²⁵⁰ Upon its demise however, it did recommend that the ASP establish a Special Working Group on the Crime of Aggression (SWGCA).²⁵¹ This group has been meeting regularly for the past five years. Although it has managed to forge consensus on certain aspects of the crime, it is still a long way from completing its mandate.

CHAPTER CONCLUSIONS:

This chapter has substantially reviewed the history and development of the notion of aggression, the codification of the crime of aggression and the relationship this has to the current international penal code. It is argued here that as the law currently stands, criminality for an act of aggression can only be attributed to an individual when he or she has participated in the leading and/or organizing of a *war of aggression*. This is the necessary threshold condition that customary international law and the precedents

²⁴⁷ See generally: Clark, R., 2002. *Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court*. LJIL. Vol.15, No.4, pp859-890; Fernandez de Gurmendi, S., 2002. *The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*. FILJ. Vol.25, pp589-605; Pierce, *supra* note245; Trahan, J., 2002. *Defining “Aggression”: Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum*. LLAICLR. Vol.24, pp439-474.

²⁴⁸ *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Resolution F, para.7*, UN Doc. A/CONF.183/10* (1998)

²⁴⁹ *Proceedings of the Preparatory Commission at its Second Session (26 July-13 August 1999)*, PCNICC/1999/L.4/Rev.1 (1999), at para8.

²⁵⁰ Stancu, I., 2004. *Defining the Crime of Aggression or Redefining Aggression? In: Politi & Nesi, The Crime of Aggression*. p88.

²⁵¹ UN Doc. PCNICC/2002/WGCA/L.2/Rev.1. The suggestion was also made that the SWGCA should be open to all nations and not just State Parties to the Statute, so as to facilitate maximum debate on the proposals formulated.

set by the IMT and IMTFE dictate as the appropriate level of gravity required. This is not a universally held opinion however, as the following Chapter indicates.

The challenge that the SWGCA faces is great. Political considerations and personal preferences mean that respecting customary international law when codifying the crime of aggression may not, in the end, occur. The next Chapter intends to provide an insight into the particular elements required to construct a provision suitable for the ICC and provides a suggestion as to what the final proposal should contain.

There are two principle documents that have been compiled following the recent debates on the crime of aggression. The first was put together in the closing days of the WGCA. The Coordinator's Discussion Paper of 2002²⁵² is a consolidated text of the various proposals that had been made and has formed the basis of the discussions of the SWGCA. Following the fifth session of the ASP in January 2007, the Chairman of the SWGCA published a revised version of the 2002 Discussion Paper, which took into account the developments of the past five years of debate and updated the relevant provisions accordingly.²⁵³ These two documents are invaluable to any analysis of the crime of aggression and are the main focus of the following discussions.

²⁵² UN Doc. PCNICC/WGCA/RT.1/Rev.2 (July 11th 2002). *See*: Annex II. Clark, *supra* note 247 provides a thorough analysis of this Discussion Paper.

²⁵³ ICC-ASP/5/SWGCA/2, Fifth Session of the ASP, 29th Jan – 1st Feb 2007. *See*: Annex III

CHAPTER 3:

THE DEFINITION OF THE CRIME OF AGGRESSION:

1. Introduction of the Issues:

By including the crime of aggression within the Rome Statute, the Diplomatic Conference firmly entrenched the idea of criminal responsibility for waging aggressive war in contemporary international law. However, by not completing its mandate the Conference left the *de facto* jurisdiction of the crime²⁵⁴ suspended until State parties (and those non-State parties to the Statute participating in the debates of the SWGCA) agree upon a suitable and acceptable formula for the crime of aggression. Although the SWGCA has imposed upon itself the condition of preparing a proposal in time for the intended Review Conference in 2009,²⁵⁵ there is no guarantee that such a deadline will be met. The task before the SWGCA is not an easy one and although much progress has been made over the past decade with regards to formulating the crime of aggression, the project is by no means near reaching a conclusion suitable to all parties. Kress, who respectfully disagrees with suggestions that the crime of aggression will not materialize in the foreseeable future²⁵⁶ claims that:

The ICC Statute will suffer from a serious legitimacy gap as long as it fails to incorporate what the IMT at Nuremberg termed the 'supreme crime under international law'. This gap must be filled sooner rather than later by a

²⁵⁴ Muller-Schieke *supra* note 217, p410, questions how the 'supreme international crime' could be included in the Rome Statute *de jure*, but not *de facto*.

²⁵⁵ According to the 'roadmap', the SWGCA intends to complete its work 12 months prior to the Review Conference to allow time for domestic consultation. *Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, United States, from 13 to 15 June 2005*, ICC-ASP/4/SWGCA/INF.1 (hereinafter 2005 Princeton Report), para(90).

²⁵⁶ See: Schuster *supra* note 5, and Boevig, J.N., 2005. *Aggression, International Law and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute*. CJTL. Vol.43, pp557-611, who advocate for the removal of the crime from the Court's jurisdiction.

definition which is both conceptually sound and solidly grounded in customary international law.²⁵⁷

This Chapter intends to assess the work that has recently occurred within the various bodies that have been established to formulate a proposal on the definition of the crime of aggression, whilst the following Chapter will address the equally challenging problem of the circumstances in which the Court will acquire jurisdiction over the crime. Even though each element of this incredibly complex and political question deserves its own lengthy discussion, space limitations accommodate only an overall assessment of the factors involved and the role they play in establishing the crime within the working jurisdiction of the Court. Prior to beginning this analysis, there are two important factors – as identified by Kress above – that must be initially addressed: firstly, respect for the fundamental criminal principle of legality and secondly, acknowledgment of the customary international law that exists regarding this crime. Adherence to these basic principles will ensure the credibility and success of the crime of aggression in the Rome Statute.

(a) The Principle of Legality:

Any definition of the crime of aggression must be in accordance with the fundamental criminal principle of legality, derived from the maxim *nullum crimen sine lege* and enshrined in Article 22 of the Rome Statute.²⁵⁸ The principle of legality determines that no one is to be accused, tried or convicted on the basis of conduct which did not constitute a criminal offence at the time of its commission. In order to satisfy this principle, the definition of a crime must be specific enough to inform potential perpetrators as to which particular conduct is prohibited.²⁵⁹ This means that the identification of the prohibited conduct must be clear and unambiguous.²⁶⁰ To ensure

²⁵⁷ Kress, C., 2004. *The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq*. JICJ Vol.2, p264.

²⁵⁸ Article 22(1) states that:

A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the times it takes place, a crime within the jurisdiction of the Court.

See: Catenacci, M., 1998. *Nullem Crimen Sine Lege*. In: F. LATTANZI, ed. *The International Criminal Court: Comments on the Draft Statute*. Naples: Editoriale Scientifica, pp159-170.

²⁵⁹ Bassiouni, *supra* note58, p33.

²⁶⁰ *Ibid.*

that possible ambiguities do not facilitate extensive interpretation, the Rome Statute states that:

The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.²⁶¹

This is particularly important when addressing the crime of aggression, as the unique nature of this offence and its intrinsic relationship with the foreign policy conduct of States means that agreement as to its constitutive elements will not be easily ascertained. As Kaul states, the definition of the crime of aggression “must be as clear, precise and as well-defined as possible” in order to ensure its successful adoption into the Rome Statute.²⁶² This requirement applies both to the illegal conduct of the State as well as the role of the individual in that act.

(b) The Need for the Definition of the Crime to be based in Customary International Law:

Unlike the other crimes under the Court’s jurisdiction, there is no international treaty that defines the crime of aggression or dictates its principal elements.²⁶³ The scope of the offence must be determined on the basis of the only precedents available to date²⁶⁴

²⁶¹ Article 22(2) Rome Statute.

²⁶² Kaul, H-P., 2004. The Crime of Aggression: Definitional Options for the Way Forward. In: Politi & Nesi, *The Crime of Aggression*. p103

²⁶³ Whilst the Convention on the Prevention and Punishment of the Crime of Genocide (1948) codified the crime of genocide, the Geneva Conventions I-IV (1949) are the primary sources of reference for War Crimes legislation. Although there is scope to suggest that the ICC Statute is the first instrument to codify Crimes Against Humanity, they were included in both the ICTY and ICTR Statutes.

²⁶⁴ *Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held in the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States of America, from 8 to 11 June 2006*, ICC-ASP/5/32, Annex II (hereinafter 2006 Princeton Report), para(13), suggested that a comprehensive definition would only be achieved by reference to all the relevant precedents: “The Nuremberg Charter, as affirmed by GA Res. 95(I); Principle VI of the Nuremberg Principles adopted by the ILC in 1950; GA Res. 3314; and the 1996 Draft Code of Crimes.” Whilst all these sources clearly play a role in the construction of the crime, it is argued here that the only precedent for attributing criminal responsibility to individuals is the proceedings of the IMT, the IMTFE and under CCL. No.10.

– the IMT, the IMTFE and the CCL. No.10 trials – which are clearly established principles of customary international law.²⁶⁵

There are two principal components of customary international law– state practice and *opinio juris*.²⁶⁶ However, there has been little relevant State practice since the Second World War²⁶⁷ and only a minority of States have adopted national legislation in respect of the crime of aggression.²⁶⁸ Whilst Werle concludes that the tough negotiations on the Rome Statute indicated no general *opinio juris* in this area,²⁶⁹ Kress views the proceedings in a more positive light:

²⁶⁵ See: Chapter 2(2)(b)(iii)-(v). Furthermore, commentary on Article 16 of the 1996 Draft Code states that “(5) ... The Charter and Judgment of the Nuremberg Tribunal are the main sources of authority with regards to individual criminal responsibility for acts of aggression”.

²⁶⁶ Article 38(1)(b) ICJ Statute. See: *North Sea Continental Shelf Cases*, ICJ Reports 1969, p3.

²⁶⁷ Recently, the UK’s House of Lords ruled that the crime of aggression was an established crime under customary international law (*R. v. Jones* [2006] UKHL 16). Villa writes that the House of Lords decision makes three significant points regarding the crime of aggression in international law; “(i) it constitutes the most straightforward endorsement of the crime of aggression by a judicial organ outside the context of World War II; (ii) it explicitly upholds that the customary definition of this crime complies with the principle of legality, and; (iii) it comes from the highest judicial instance of one of the States that forged the very concept of crimes against peace”. Villa, C., 2006. *The Crime of Aggression before the House of Lords – Chronicle of a Death Foretold*. JICJ Vol.4, p874. For a comprehensive review of recent incidents at a national level involving the crime of aggression, see: Paulis, *supra* note95, pp25-32.

²⁶⁸ The most notable provision is Sec.80 of the German Criminal Code, which states that it is a criminal offence to “prepare a war of aggression”. Sec.80 recognizes the distinction made in Nuremberg that only wars of aggression are criminal, not mere acts of aggression. However, it does not require that a war actually takes place, nor does it limit the *ratione persona* to persons of a policy-making level. For an account of the particularities of the crime of aggression under German law, see Kress, *supra* note257 & Schultz, N., 2005. *Was the War on Iraq Illegal? – The German Federal Administrative Court’s Judgment of 21st June 2005*. GLJ. Vol.7, No.1, pp25-44. Similar provisions can also be found in the legislation of Russia and certain eastern European countries, see Villa, *ibid*, p876 at note51. Although the crime of aggression was not included *prima facie* in the Statute of the Supreme Iraqi Criminal Tribunal, Article 14(c), which refers to violations of stipulated Iraqi law, includes “[t]he abuse of position and the pursuit of policies that may lead to the threat of war or the use of force of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended”. See: Kress, C., 2004. *The Iraqi Special Tribunal and the Crime of Aggression*. JICJ. Vol.2, pp347-352; Zolo, D., 2004. *The Iraqi Special Tribunal: Back to the Nuremberg Paradigm?* JICJ. Vol.2, pp313-318; Alvarez, J., 2004. *Trying Hussein: Between Hubris and Hegemony*. JICJ. Vol.2, pp319-329.

²⁶⁹ In *R v Jones at al.*, 4 All England Law Reports (2004), p. 956, the Court of Appeal held that the international definition of the crime of aggression lacked the requisite precision and certainty to be translated into a criminal offence under UK domestic law, because of the fact that as yet no consensus has been reached on both the definition of aggression and the conditions under which the ICC will eventually exercise its jurisdiction over this crime. The Court’s finding as to this second point is questionable as the debate over the role of the Security Council relates to the exercise of jurisdiction by the ICC and not the question of whether aggressive war is a crime under current international law. See: Cryer, R., 2005. *Aggression at the Court of Appeal*. JCSL. Vol.10, No.2, pp209-230.

While they have yet to reach agreement on its definition, no State questioned the existence of the crime of aggression under international law during the negotiations of the ICC Statute.²⁷⁰

There are two primary conclusions that can be drawn here: firstly, the crime of aggression is an accepted international crime, and secondly, its components are found in the judgments of the IMT and IMTFE, which are clearly recognized principles of customary international law.²⁷¹

There is also strong academic support for grounding the definition of the crime of aggression in customary international law. Zimmermann notes that it was a generally accepted principle during the Rome Conference to focus on codification of rules of customary international law, rather than venture into the uncertain world of creating new criminal offences.²⁷² The same approach should be adopted when defining the substantive aspects of the crime of aggression. Griffiths believes that the attempt by some delegates in the WGCA to legislate rather than codify the crime is fundamentally wrong and “is an attempt to re-invent the wheel”.²⁷³ He argues that “the crime of aggression is a child of customary international law” and therefore the ICC definition should be a “codification of existing law rather than a negotiated creation”.²⁷⁴ Meron puts forward the argument that if customary international law is not followed, the definition will not meet the requirements demanded by criminal justice:

²⁷⁰ Kress, *supra* note 257, p348, argues that the inclusion of the crime in the Rome Statute “can be seen as confirmation of aggression as a crime under international law”. See also: Gaja, G., 2002. The Long Journey Towards Repressing Aggression. In: A. CASSESE, P. GAETE & J.R.W.D. JONES, ed. *The Rome Statute of the International Criminal Court: A Commentary*. Vol. I, USA: Oxford University Press, p431.

²⁷¹ GA Res. 95(1).

²⁷² Zimmermann in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1999, p99.

²⁷³ Griffiths, *supra* note 19, p302. Meron, *supra* note 7, p8, who also supports the need for the definition to be grounded in customary international law, notes that questions have been raised about the argument that the WGCA should be *bound* to apply customary international law. Some delegates have suggested that because Articles 7 & 8 of the Rome Statute went beyond customary law, the WGCA could therefore legislate rather than codify the definition of the crime of aggression.

²⁷⁴ *Ibid.*

To create a new crime by treaty and follow a legislative approach would open the door to governments and individuals contesting the ICC's legitimacy in the future – this can and should be avoided by basing our work on the firm foundations of customary law.²⁷⁵

2. The Act of Aggression – Defining the Conduct of the State for The Purposes of the Rome Statute:

(a) The Act of Aggression and the Crime of Aggression:

Unlike the other crimes under the Rome Statute, the crime of aggression ‘has the collective act by a State as the point of reference for any description of what the individual perpetrator does’.²⁷⁶ This is the conduct element²⁷⁷ of aggression and is the conduct by which the individual concerned is linked to the State's act of aggression – otherwise known as the collective act.²⁷⁸ The starting point for any analysis of the crime of aggression is the necessary distinction between the *act of aggression* as committed by the State, and the *crime of aggression* as perpetrated by the individual.²⁷⁹ Although these two factors are intrinsically and inextricably linked, maintaining a clear distinction between them makes the enormous task of codifying

²⁷⁵ Meron, *supra* note 7, p12. In addition, it is also important for the crime of aggression to be based in customary international law with regards to the fact that its inclusion in the Rome Statute would mean that the provision on aggression would not only be applicable against parties that have explicitly accepted the jurisdiction of the Court, but also non-state parties who may be subject to a referral from the Security. If the definition does not reflect customary international law, it will ultimately be harder to argue that such states should be bound by the provisions of the Court. (For a discussion of the procedure of implementation, see: Chapter 5.)

²⁷⁶ Cryer, R., Friman, H., Robinson, D., & Wilmschurst, E., 2007. *An Introduction to International Criminal Law and Procedure*. UK: Cambridge University Press, p272,

²⁷⁷ This term is found in Article 30(2)(a) Rome Statute.

²⁷⁸ *Discussion Paper 1 – The Crime of Aggression and Article 25, paragraph 3, of the Statute*. ICC-ASP/4/32, Annex II.B (hereinafter, Discussion Paper 1)

²⁷⁹ The need for this distinction was recognised by certain delegates of the WGCA (Proposal submitted by Bosnia, Herzegovina, New Zealand and Romania, UN Doc. PCNICC/2001/WGCA/DP.2) and was central to the 2002 Coordinator's Discussion Paper. See also: 1996 Draft Code, Article 16 commentary, para(4):

The rule of international law, which prohibits aggression, applies to the conduct of a State in relation to another State. Therefore, only a State is capable of committing aggression by violating this rule of international law which prohibits such conduct. At the same time, a State is an abstract entity which is incapable of acting on its own. A State can commit aggression only with the active participation of the individuals who have the necessary authority or power to plan, prepare, initiate or wage aggression.

the crime of aggression more straightforward. There is also strong academic support for theoretically separating these two aspects of the offence. Antonopoulos states that they “are two different acts by different actors, with the act committed by the State standing as a pre-requisite for the criminal responsibility of individuals”,²⁸⁰ and Griffiths makes it explicitly clear that this distinction must be maintained in order to effectively qualify the crime of aggression:

The definition of the Crime of Aggression is the enumeration of the circumstances in which an individual will be held criminally responsible for the commission of an Act of Aggression by a State; the definition of the Act of Aggression is the enumeration of those acts which, when committed by a State, constitutes an Act of Aggression in international law.²⁸¹

Although I do not intend to explore in any great detail the notion of *State* criminal responsibility, which is a highly controversial proposition and one that has been explicitly rejected by States,²⁸² reference should be made to the recent attention that the ICJ gave the relationship between individual and State responsibility in the context of international crimes in its 2007 *Bosnia Genocide Case* decision.²⁸³

²⁸⁰ Antonopoulos, *supra* note 157, p37.

²⁸¹ Griffiths, *supra* note 19, p310.

²⁸² The idea of a State being held criminally responsible for the commission of certain international crimes was first introduced by Robert Ago, Special Rapporteur to the ILC on the question of State Responsibility. (*Yearbook of the ILC*, 1976, Vol.II(1), 24 at paras.72-155.) Draft Article 19 of the ILC's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* was drafted in 1976, and stated at paragraph (3)(a) that “a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression”, may result in the commission of an international crime for which a State may be held criminally responsible. However, the idea of international crimes as expressed in Draft Article 19 was extremely controversial and highly divisive amongst Member States. As a result, Draft Article 19 was deleted from the ILC's Draft Articles in 2001. For a comprehensive analysis of the work of the ILC in this area see: Crawford, J., 2002. *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*. UK: Cambridge University Press. For particular discussion of Draft Article 19, see: Bowett, D.W., 1998. *Crimes of State and the 1996 Report of the International Law Commission on State Responsibility*. *EJIL*. Vol.9, No.1, pp163-173. For a general discussion of the notion of State responsibility for international crimes see: Jorgensen, N., 2000. *The Responsibility of States for International Crimes*. US: Oxford University Press.

²⁸³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*. Judgment delivered on 26th February 2007, available at <http://www.icj-cij.org/docket/files/91/13685.pdf>

Asked to determine whether the Respondents were responsible for violations of the Genocide Convention,²⁸⁴ the Court looked at the notion of the State criminal and civil responsibility and the obligations of States under the Genocide Convention. Whilst both the Court and the Applicant agreed with the Respondent's argument that "as a matter of principle, international law does not recognize the criminal responsibility of the State",²⁸⁵ the Court disagreed with the Respondents suggestion that the Genocide Convention dealt exclusively with individual criminal responsibility, instead emphasizing the existence of what it called "the duality of responsibility... [as]... a constant feature of international law".²⁸⁶ Furthermore, the Court rejected the Respondent's argument that the ICJ could not make a finding of genocide by the State in the absence of a prior conviction of an individual for genocide by a competent court. Instead, it declared that "State responsibility can arise under the Convention for genocide... without an individual being convicted of the crime".²⁸⁷ Furthermore, the Court, in controversially interpreting a State's obligations under the Genocide Convention, held that the Convention did not deny that international responsibility of a State – even though different in nature from criminal responsibility – could be engaged though the act of genocide or the others enumerated in Article III.

Article IX stipulates that the ICJ is the appropriate organ to deal with disputes concerning the "interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide ...". Although the operative articles of the Convention reference the actions and responsibilities of

²⁸⁴ See note 162

²⁸⁵ Judgment, *supra* note 283, p64, para. 170

²⁸⁶ *Ibid*, p65, para. 173. In support of its proposition, the Court cited both Article 25(4) of the Rome Statute as well as Article 58 of the ILC's Draft Articles. Furthermore, the Court directly quoted the ILC's commentary on Article 58:

Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. Even so, the question of individual responsibility is in principle distinct from the question of State responsibility. The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out.

It should be noted that whilst Article 25(1) of the Rome Statute states that "the Court shall have jurisdiction over natural persons pursuant to the State", Article 25(4) makes it clear that "no provision of this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law".

²⁸⁷ *Ibid*, p68, para. 182

individuals,²⁸⁸ the Court concluded that the obligation on States to prevent and punish genocide under Article I also incorporates the implicit and unstated obligation to refrain from committing genocide itself. This controversial interpretation of Article I drew strong criticism from a number of Judges, as it was generally felt that it went beyond the scope of the Court's powers, beyond the scope of applicable international law and in particular beyond the scope of the provisions of the Convention itself. Those dissenting felt that the Convention did not afford the ICJ the power to determine that a State had committed the crime of genocide:

We entertain more than serious doubts regarding the interpretation given to the Genocide Convention in the Judgment to the effect that a State can be held directly to have committed the crime of genocide. This interpretation is not only highly questionable but also inconsistent with the object and purpose of the Convention, as well as its wording and plain meaning. As an international criminal instrument, the Convention envisages the trial and punishment of individuals for the crime of genocide. It does not impose criminal responsibility on the State as a State. Indeed, it could not have done so at the time it was adopted given that the notion of crime of State was not part of international law and even today general international law does not recognize the notion of the criminal responsibility of the State.²⁸⁹

Moreover, by determining that it had the competence to conclude as to whether a State had committed a crime of genocide or not, and coupled with its rejection of the Respondent's argument that a previous determination of an individual's guilt by a competent tribunal was not required for the Court to consider the question of State responsibility, the Court effectively awarded itself the authority to determine the

²⁸⁸ See: Articles 4, 5 and 6 Genocide Convention

²⁸⁹ *Joint Declaration of Judges Shi and Koroma*, p1, para.1. See also: *Separate Opinion of Judge Tomka* and *Separate Opinion of Judge Owada*. Furthermore, in the *Declaration by Judge Skotnikov*, he explicitly stated (at p4) that "a State's responsibility is engaged when a crime of genocide is committed by an individuals whose acts are legally attributable to it. No "unstated obligation" for States not to themselves commit genocide is needed for this responsibility to be incurred through attribution", whereas Judge *Ad Hoc Kreca* declared in his *Separate Opinion* (at p73) that "it appears that none of the substantive provisions of the Convention provides for any form of responsibility in legal terms for genocide except the criminal responsibility of the individual". Please note however, that the *Separate Opinion of Judge Ranjeva*, the *Declaration of Judge Bennouna* and the *Dissenting Opinion of Judge Ad Hoc Mahiou* are only available in French and as a result have not been analysed by this author.

existence and commission of a crime of genocide in any context. This extension of the Court's competence came under fire in the Separate Opinion of Judge Tomka when he stated that:

The Court has no criminal jurisdiction. One may wonder how a Court conceived as a judicial organ for the adjudication of inter-State disputes, with no criminal jurisdiction, whose procedure (Rules of Court) is not tailored to the requirements (or needs) of a criminal case, and which has no Rules of Evidence, could determine that a crime (i.e., genocide, requiring specific intent (*dolus specialis*)) has been committed. Is it possible for the commission of a crime to be established within a procedure which provides for no appeal? These are, in my view, important considerations which militate against construing Article IX of the Convention so as to enable charges by one State that another has committed genocide to be brought within the Court's jurisdiction.²⁹⁰

The conclusions of the Court coupled with the numerous dissenting and separate opinions demonstrate just how divisive and controversial the notion of State criminal responsibility still is today. Whilst the debate is extremely interesting, it is this author's understanding that the ICJ's ruling does not confuse the current approach to the relationship between a State's responsibility for the act of aggression and the individual's responsibility for the crime. The ICJ declared that it was not bound by the need for a finding of guilt of an individual for the crime of genocide to be given before it could rule on the responsibility of a State under the Genocide Convention. Although viewed as controversial, this determination does not directly impact upon the findings of State and individual responsibility with regards to aggression. As Antonopolous recognizes, a determination that the State is responsible for an act of aggression is a pre-requisite to an individual being judged upon his or her alleged criminal responsibility for the crime. There is no similar statutory provision in international law declaring that a State can be held criminally responsible for breaching the prohibition on committing the *crime* of aggression, and until the

²⁹⁰ *Separate Opinion of Judge Tomka*, p25, para.60

international community dramatically reverses its currently held opinion on the existence of State criminal responsibility, such a provision is unlikely to ever exist.

Turning to the next section of this thesis, there are a variety of elements that make up the formula for the collective act of the State. It is the aim of the following analysis to detail what these elements are. Firstly, what an act of aggression actually encompasses must be clearly ascertained. Secondly, and more importantly, it has to be established at what point individual criminal responsibility is triggered. In other words, one must ascertain whether participation by an individual in every act of aggression committed by a State constitutes a crime against peace by that individual? To answer these questions, and to successfully establish the crime within the Court's jurisdiction, one must turn to customary international law.

(b) A Generic versus an Enumerative Definition:

Prior to an analysis of the substantive aspects of the offence, attention must be given to the debate that has occurred on the format the definition should adopt. Whilst most of the discussion within the SWGCA has focused on whether the definition should be generic or enumerative, suggestions have been made that support a mixed format like that found in Resolution 3314.²⁹¹ Although the generic approach to defining the collective act has various advantages and disadvantages, the emerging majority view seems to believe that the latter outweighs the former.²⁹² The generic approach is beneficial because it will not restrict or limit determinations to any specific instances, but will provide an overall framework that will be applicable to varying circumstances.²⁹³ This is particularly important for the ICC. Unlike the previous

²⁹¹ 2006 Princeton Report, para(11) states that "reference was made in this context to the example of article 7 of the Rome Statute dealing with crimes against humanity which combines a generic chapeau with a specific but open-ended list", ("other inhumane acts", Article 7(1)(k)).

²⁹² *Discussion Paper 3 – Definition of Aggression in the context of the Statute of the ICC*. ICC-ASP/4/32, Annex II.D (hereinafter Discussion Paper 3). Part 1 of this paper questions the format that the definition should take, assessing the various arguments that have been put forward. It concludes by recognising that the general opinion in Princeton seems to prefer a generic approach to the definition.

²⁹³ Griffiths, *supra* note19, p313, concludes that a declaratory definition is the most appropriate: "It follows that an autonomous determination of the existence of the Act of Aggression could legitimately be made without a written enumeration of Acts of Aggression merely by reference to the accepted law". See: Article 7(2) ECHR & Article 15(2) ICCPR.

international criminal Tribunals that have been created,²⁹⁴ the ICC is designed to punish those acts that have not yet occurred, and therefore must be flexible enough to incorporate new, and as yet undetermined, methods of warfare.²⁹⁵ The argument against adopting a generic format is that any definition it formulates would not provide the defendant with sufficient notice of the acts covered by the crime, and therefore fails to satisfy the principle of *nullum crimen sine lege*. Not only can the same argument be leveled at an enumerative definition,²⁹⁶ but even the SWGCA has recognized that a generic definition can be specific enough to satisfy the principle of *nullum crimen sine lege*.²⁹⁷

Although the enumerative approach has its supporters, adopting such a format would severely hamper the chances of achieving consensus on a definition suitable for the ICC. So as not to invoke the principle of *in dubio pro reo*, the enumerative list would have to include all acts of aggression that could achieve the threshold of war.²⁹⁸ Those supporting this approach take the list contained in Article 3 of Resolution 3314 as the starting point. As already noted, not every act referred to in Article 3 amounts to a war of aggression, even though they have been recognized as principles of customary international law. By adopting this formula, one is entering a debate that is not one the WGCA, and by default the SWGCA, is specifically mandated to have – in that they were asked to define the crime of aggression, not debate what examples classify as acts of aggression.

²⁹⁴ Both the ICTY and the ICTR were created after the atrocities they covered had been committed and as a consequence they were able to be specific to the types of crimes committed in the particular conflicts.

²⁹⁵ Dascalopoulou-Livada believes that a generic approach is the most appropriate, for the very practical reason that it would present better chances to succeed in rallying consensus: “A generic definition would simply spare us the rancour’s of having to decide on each one of the specific cases mentioned”. Dascalopoulou-Livada, P., 2004. Aggression and the ICC: Views on Certain Ideas and their Potential for a Solution. In: M. POLITI & G. NESI, ed. *The Rome Statute of the ICC - A Challenge to Impunity*. Great Britain: Ashgate, p80.

²⁹⁶ Muller-Schieke, *supra* note 217, p415, who favours a general definition, argues that “an enumeration could never take into account all possible ways in which the crime could occur and would therefore prove to be too vague and lack the necessary rigour and precision”.

²⁹⁷ 2006 Princeton Report, para(12), In this context it was pointed out that the principle of legality allows for some flexibility according to Article 15(2) ICCPR, “which was drafted with the Nuremberg crimes, including the crime of aggression, in mind”.

²⁹⁸ Griffiths, *supra* note 19, p313 states that “no enumeration will ever be conclusive and will quickly be outdated”.

In conclusion, and despite suggestions that in the face of such seemingly irreconcilable differences, “a case-by-case approach [is] preferable over an ‘all-sweeping and pre-existing’ formulation”,²⁹⁹ it is submitted here that the emerging majority opinion of the SWGCA is correct. For the purposes of Rome Statute, the definition of the crime of aggression should take a generic, and not an enumerative, format.

Furthermore, by adopting a generic definition the Court will not be prevented from referring to the acts listed in Article 3.³⁰⁰ Article 21 of the Rome Statute provides that the court may, under certain circumstances, refer to “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”. Although it is disputed as to whether this would include Resolution 3314 or not,³⁰¹ it seems likely that the Court will make use of the principles and scenarios that are referred to in that Definition. Having determined the principles of law that are to be applied and the format that the definition is to take, the following sections address the substantive issues of the collective act of the definition. Firstly, it must be clarified as to what actually constitutes an act of aggression. Then attention will be given to the specific instances of aggression that give rise to a war of aggression, and consequently, individual criminal responsibility.

(c) Does Every Violation of the UN Charter Amount to an Act of Aggression?

As detailed in Chapter 2, the prohibition on the use of force that is contained in Article 2(4) of the UN Charter is considered to be a principle of customary international law.³⁰² However, Article 2(4) does not use ‘aggression’ in its terminology, but instead the broader notion of ‘use of force’.³⁰³ Furthermore, the Charter does not answer the question of whether every violation of Article 2(4) constitutes an act of aggression as referred to in Article 39. Instead, this question is

²⁹⁹ Antonopolous, *supra* note157, p40.

³⁰⁰ Dascalopoulou-Livada, *supra* note295.

³⁰¹ Muller-Schieke, *supra* note217, p416, argues that it cannot be sufficiently established that Resolution 3314 constitutes an “applicable treaty or even a principle of the law of armed conflict”.

³⁰² See: Chapter 2(2)(a).

³⁰³ Griffiths, *supra* note19, p317, provides a detailed commentary to the term ‘force’ in article 2(4), arguing that it actually refers to the concept of ‘armed force’, (*see also*: Randelzhofer, *supra* note24, at pp117-118) which is a phrase that appears elsewhere in the Charter, (Preamble; Article 41 & 46).

left to the competences of the Security Council.³⁰⁴ In an attempt to clarify the term ‘aggression’, the General Assembly adopted Resolution 3314.³⁰⁵ As previously established, Article 2 of that resolution defines an act of aggression in very much the same terminology as the prohibition contained in Article 2(4), save for the reference to the ‘threat’ of aggression, which is absent from the former but present in the latter. From this, the following conclusion can be drawn: to constitute an act of aggression under international law, a particular instance of inter-State force must actually violate the prohibition contained in Article 2(4) (in that a threat to use force does not constitute an act of aggression).

That being said, to fully answer the above question one also needs to take account of the certain exceptions to the general prohibition, which exists under contemporary international law. The UN Charter contains two explicit exceptions: the use of force in self-defence (as specified by Article 51), and the notion of collective security authorized by the UN under Chapter VII. Recently however, arguments have been put forward to justify the use of force in other situations as well, such as the notion of humanitarian intervention or intervention for the protection of nationals abroad.³⁰⁶ Whilst I do not intend to give a full account of the history or role of these methods of using force, there are a few points of interest that need to be addressed.

(i) Self-Defence.³⁰⁷

Article 51 of the UN Charter states that:

Nothing in this present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nation ...

Disagreement has arisen over whether State’s are justified in using force by way of *anticipatory* self-defence.³⁰⁸ Whilst some commentators believe in a literal

³⁰⁴ Griffiths, *ibid*, is critical of this fact, fearing “competence of a political organisation [to determine] an essentially legal question”.

³⁰⁵ See: Chapter 2(3)(c).

³⁰⁶ See: Gray, *supra* note9, pp75-78.

³⁰⁷ See generally: Dinstein, *supra* note9, Chap.7-9; Gray, *ibid*, Chap.4-5.

interpretation of Article 51, in that the right to self-defence applies *only* once an armed attack has begun,³⁰⁹ others take the view that States have a right to act in order to avert the threat of an imminent attack. The latter argument is not only supported by customary international law,³¹⁰ but also the fact that Article 2(4) incorporates the notion of ‘threat’ to use force in its prohibition on the conduct of States. This view is further supported by the practical argument that it is “unrealistic in all cases, for example with respect to nuclear weapons, to await an actual attack”.³¹¹

Recently however, arguments have been put forward that attempt to assert the right to act in ‘pre-emptive self-defence’ in the face of an emerging threat.³¹² This interpretation stretches the limits of recognized international law too far. This is not a legal extension of the right to self-defence. Any use of force in such a manner constitutes a violation of the prohibition contained in Article 2(4) and consequently, is an act of aggression. With regards to criminal prosecutions for the crime of aggression, restricting the interpretation of Article 51 to what customary international law stipulates will also prevent controversial defences of complicated questions concerning public international law from being raised before the ICC.

(ii) Authorization under Chapter VII:³¹³

Under Article 42 of the Charter, the Security Council is allowed to take such action “as may be necessary to maintain or restore international peace and security”. The regime under Chapter VII for collective security measures is generally regarded as

³⁰⁸ Higgins, R. 1994. *Problems and Process: International Law and How We Use It*, Oxford: Clarendon Press, p242.

³⁰⁹ Brownlie, *supra* note9, pp275-8. Simma, B., *In: Simma, Charter of the United Nations*, p118, stipulates that “use of armed force is lawful only in those cases that are explicitly specified in the Charter as exceptions to Article 2(4)”.

³¹⁰ The customary right stems from the *Carolina* case of 1837, where it was determined that self-defence could be used legitimately where the threat was “instant, overwhelming, leaving no choice of means and no moment for deliberation”. *See: Harris, supra* note164, p921.

³¹¹ Cryer *et al.*, *supra* note276, p269.

³¹² National Security Strategy, (Sept. 2002), available at www.whitehouse.gov/nsc/nss.html. *See generally: Greenwood, C.*, 2003. *International Law and Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*. SDILJ. Vol.4, No.7, pp7-37; Sapiro, M., 2003. *Iraq: The Shifting Sands of Pre-emptive Self-defence*. AJIL. Vol.97, No.3, pp599-607.

³¹³ *See generally: Dinstein, supra* note9, Chap.10; Gray, *supra* note9, Chap.7-9; Higgins, *supra* note308, Chap.15.

relatively uncontroversial,³¹⁴ with the UN playing a highly active and very vital role in peace-keeping and peace enforcement throughout the world. Such actions are clearly beyond the scope of criminal punishment for the crime of aggression.

(iii) Humanitarian Intervention:³¹⁵

The notion of legitimate military intervention with the objective of preventing a humanitarian disaster without the authorization of the Security Council is today still a controversial one. Whilst the conservative view believes such actions violate Article 2(4) and are not supported by international law,³¹⁶ more liberal-minded thinkers argue that there is an emerging norm of customary international law implementing a responsibility to protect upon States. This began with the justifications offered by the UK, along with France and America, for its operations in Iraq to protect the Kurds and Shi'ites after the 1991 Iraq/Kuwait conflict.³¹⁷ Further expansion came in 1999 when NATO decided to take action in Kosovo in response to the mass repression of ethnic Albanians by the Federal Republic of Yugoslavia.³¹⁸ Although it is clear that it is by no means a settled aspect of public international law, there is one important point that it addresses. It raises the issue of whether the objective or intention of the military action assists in the determination of the (il)legality of the use of force, a point which is given greater consideration in due course.³¹⁹ An initial observation would argue

³¹⁴ There is an argument to be made that recent legal justifications put forward by the UK and the US concerning their intervention in Iraq in 2003 push the boundaries of this power beyond what they truly are. The argument put forward in favour of intervention interpreted SC Resolution 1441(2002) as reviving the authorization given in SC Resolution 978(1991) (which authorised military action to counter Iraq's invasion of Kuwait) without the need for a further decision by the Security Council. See: Lowe, V., 2003. *The Iraq Crisis: What Now?* ICLQ. Vol.52, p859.

³¹⁵ See generally: Higgins, *supra* note308, pp245-248; Gray, *supra* note9, Chap.2.

³¹⁶ Commentators point to GA Resolution 2625(1970), which excludes the right to intervene and makes no provision for humanitarian intervention, as well as Article 5(1) of GA Resolution 3314(1974), which includes the provision that "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression".

³¹⁷ Gray, *supra* note9, p33.

³¹⁸ See: Simma, B., 1990. *NATO, the UN and the Use of Force: Legal Aspects*. EJIL. Vol.10, p1. Yugoslavia tried to challenge the legality of the action taken by NATO at the ICJ in the *Legality of Use of Force Case (Yugoslavia v. US et al.) (Provisional Measures)*, ICJ Reports 1999, p916. The case never made it to the merits stage of proceedings, and although the ICJ did not pronounce on the legality of NATO's action, it did indicate that it had some concerns. Whilst the Court declared that it was "deeply concerned with the human tragedy, the loss of life and the enormous suffering in Kosovo", it felt that it was also necessary to emphasize that "all parties appearing before it must act in conformity with their obligations under the UN Charter", (p950).

³¹⁹ See: Chapter3(2)(d)(ii)

however that, from a humanitarian perspective, if such actions were to be criminalized, States would cease to undertake such missions, at the expense of the suffering and oppressed peoples of this world.

The fact that the use of force is not a settled area of public international law will prove troublesome for the ICC. With respect to the principle *in dubio pro reo*³²⁰ such ambiguity will mainly serve the alleged offenders. Furthermore, it cannot be the objective of a criminal statute to resolve these issues, nor is it the function of the ICC to promulgate rules of public international law. This is something that States have to address themselves. Until such time as there is agreement on these principles however, the ICC may well have to pass judgment on controversial instances of the use of force by States.

For the purposes of this thesis it is my conclusion that an act of aggression constitutes the following:

A use of armed force by a State against another or other States, which violates the prohibition contained in Article 2(4) of the UN Charter and cannot be justified as an act of self-defence under Article 51 or customary international law, or as something authorized by the UN under Chapter VII. Furthermore, instances of controversial uses of force, such as humanitarian intervention, whilst strictly speaking constitute an act of aggression, cannot be made the subject of criminal proceedings because they lack the requisite aggressive aim.

(d) Does Every Act of Aggression Result in the Crime of Aggression Being Committed?

Having concluded as to what constitutes an act of aggression; the second question to address is whether every act results in the commission of the crime of aggression. The precedents set at the IMT and IMTFE and the *opinio juris* of member states – as demonstrated by the adoption of Resolution 3314 – clearly demonstrates that this is

³²⁰ See: Article 22(2) Rome Statute.

not the case.³²¹ The question that actually needs to be asked therefore, is at what point does an act of aggression trigger the crime of aggression? Where does the threshold lie for criminal responsibility? This is the crux of the matter, and is pivotal to the definition that is to be adopted.³²² It is one that still clearly divides opinion within the SWGCA however.³²³ The following discussion provides an assessment of both what the law is as well as the various proposals and suggestions that have been made in the WGCA and the SWGCA.

(i) The Crime of Aggression: Limiting Jurisdiction to Acts Amounting to a 'War of Aggression':

As previously stated, effective prosecution of the crime of aggression can only be guaranteed if the scope of the offence is firmly grounded in customary international law. The only precedents available for attributing criminal responsibility to individuals are the criminal proceedings that took place subsequent to the Second World War. There the applicable law spoke of a “*war of aggression*” as the criteria that needed to be satisfied.³²⁴ The Tribunals also thoroughly discussed the crime of aggressive war, making it perfectly clear that lesser forms of violence would not be enough to satisfy the threshold criteria for this ‘supreme’ crime.³²⁵ Furthermore, there has been no subsequent prosecutions post 1945 to suggest that the criteria for the crime of aggression is anything less.³²⁶

It is my belief therefore that the law is this: under customary international law only wars of aggression acquire the requisite international criminal responsibility

³²¹ Cryer *et al*, *supra* note 276, p273, argues that “not every unlawful use of force by a State gives rise to individual criminal responsibility”.

³²² Muller-Schieke, *supra* note 217.

³²³ 2006 Princeton Report, para(7)-(50).

³²⁴ Werle, *supra* note 154, p395, highlights that whilst Article 6(a) of the IMT Charter may give rise to the impression that two different, subsidiary offences make up the crime, (wars of aggression *or* wars that violate international treaties), Article 2(1) of CCL No.10 clarified that aggressive war is the violation of international law *and* treaties.

³²⁵ See: Chapter 2(2)(b)(iii).

³²⁶ Werle, *supra* note 154, p394, states that “there is no evidence that acts of aggression not reaching the level of intensity of aggressive war are criminal under customary international law”. Cassese, *supra* note 115, p113, holds a different, much broader view.

attributable to an individual.³²⁷ The IMT case of *Kaltenbrunner*, who was leader of the SS in Austria and State Secretary for Security after the *Anschluß*,³²⁸ clearly illustrates this fact.³²⁹ Although he had been involved in the seizure of Austria, the Tribunal found him not guilty as there was no evidence of his involvement in plans to wage aggressive war on any other front.³³⁰

This is not a universally accepted interpretation of what the law is however, as demonstrated by the debates that have occurred in the WGCA and the SWGCA. Those favoring the more restrictive definition³³¹ argue that the Nuremberg precedent was based on a ‘war of aggression’, something which was clearly accepted by Member States in General Assembly Resolution 95(I). Furthermore, the Declaration on Friendly Relations stipulates that “a war of aggression constitutes a crime against the peace”.³³² The argument concludes that to use a broader definition would take the scope of the offence beyond that which is stipulated by customary international law. Dinstein (amongst others) supports this interpretation. He argues that acts of aggression ‘short of war’ do not result in individual criminal responsibility, although they would bring about the application of general rules of State responsibility.³³³ However, Dinstein does make note of what he calls the tendency in international law to expand the scope of this crime beyond the notion of a war of aggression. In particular, he points to the work of the ILC on the Draft Code, and the fact that Article 16 of the 1996 Draft defines crimes against peace as “any act of aggression”.³³⁴ This is clearly a dramatic departure from the Nuremberg precedent.

³²⁷ Muller-Schieke, *supra* note217, p417, who argues that all other forms of coercive interference, although deplorable, must be left to the field of political condemnation.

³²⁸ The ‘accession’ of Austria to the Third Reich

³²⁹ See: Historical Overview, *supra* note9, pp41-42.

³³⁰ Nuremberg Judgment, *supra* note96, p291. The Court held that the *Anschluß*, “although it was an aggressive act, is not charged as an aggressive war, and the evidence against Kaltenbrunner under Count One does not, in the opinion of the Tribunal, show his direct participation in any plan to wage such a war”.

³³¹ Cryer *et al.*, *supra* note276; Kress, *supra* note257, p249; Werle, p391, argues that “only aggressive war, as a particularly grave and obvious form of aggression, is criminalized under customary international law”. See also: Griffiths, *supra* note19, p308; Muller-Schieke, *supra* note217, p414.

³³² Article 1(3) GA Resolution 2625(1970).

³³³ Dinstein, *supra* note9, p109. See: Horgan-Doran and Ginkel, *supra* note232, p335.

³³⁴ Whilst Dinstein, *ibid*, notes that the ILC, in its commentary on Article 16 of the 1996 Draft Code, admittedly held that individual criminal responsibility for the crime of aggression is contingent on ‘a

The alternative argument favors a broader definition of the crime of aggression. Those supporting this view,³³⁵ whilst recognizing the importance of the Nuremberg precedent, argue that it fails to take into account subsequent developments. In particular, proponents of the broader definition point to the trials under CCL No.10, and in particular the *Ministries Case* where the Court held that the invasions of Austria and Czechoslovakia gave rise to individual criminal responsibility even though the IMT had declared that they did not.³³⁶ The argument continues by relying on the provision of crimes against peace in the Draft Code and the enumerative list in Article 3 of Resolution 3314, both of which refer to acts of aggression that do not reach the threshold of ‘war’,³³⁷ but have been recognized as principles of customary international law.³³⁸ As mentioned before, however, caution has to be advised when one attempts to make a criminal law argument using Resolution 3314. The Definition was adopted as a guide to the Security Council, a political body responsible for passing judgment on acts committed by States.³³⁹ It has already been established that the act of aggression is an act of State. The General Assembly Definition was only ever intended to be a definition of a *State* act for the purpose of determining *State* responsibility. It was not designed to be applicable to criminal institutions determining the criminal responsibility of individuals. It is therefore an incorrect assumption to argue that because Resolution 3314 incorporates acts of aggression ‘short of war’, the threshold of the individual crime has also, in some way, been lowered so as to incorporate similar acts. Finally, supporters of the broader definition argue that whilst the WGCA, and now the SWGCA, are obliged to take customary international law into account, they are not bound to apply it. They argue that the SWGCA is also in the position to codify the law, and that therefore aggressive acts previously not within the scope of war could be included in the definition. Whilst this approach may be

sufficiently serious violation of the prohibition contained in Article 2(4) of the Charter of the UN’, he argues that even a serious violation of the Charter’s prohibition may still constitute an act of aggression ‘short of war’.

³³⁵ Griffiths, *supra* note 19, pp303-4; Cassese, *supra* note 115, p114.

³³⁶ *Supra* note 125.

³³⁷ Wilmshurst, *supra* note 215, p94 notes that “not all acts listed in Article 3 can be classified as necessarily constituting a war”. *See*: Werle, *supra* note 154, p394.

³³⁸ *See*: Chapter 2(3)(c).

³³⁹ Schuster, *supra* note 5, p30, notes that it was not designed for criminal purposes. *See also*: Carpenter, *supra* note 6, p228.

acceptable for procedural issues concerning the crime of aggression, it cannot be so for the substantive provisions.

Although some of the arguments for broadening the crime are interesting and merit debate, there are clearly serious problems with expanding the scope of the offence. The definition of the crime of aggression has to reflect what established law stipulates it to be. Therefore, the conduct element of the collective act for the crime of aggression has to be a war of aggression. Werle makes the point that whilst “one may deplore this narrow limitation of the offense from the standpoint of international legal policy ... the international community lacks both the *opinio juris* and the State practice necessary for a broader criminalization under customary international law”.³⁴⁰ Moreover, such a high threshold will also meet the requirement of Article 5(1) of the Rome Statute, in that the jurisdiction of the Court shall be limited to the “most serious crimes of concern to the international community as a whole”. Having established what the collective act is, the next question to address is what qualifies a use of force as a ‘war of aggression’ and what are the elements of such behavior?

(ii) The Meaning and Elements of a War of Aggression:

It is generally acknowledged that a war of aggression must be something greater than an act of aggression.³⁴¹ The Nuremberg Judgment characterized a war of aggression as “an essentially evil thing”. This is not a helpful characterization as this abstract statement does not meet the modern standards of legal clarity and certainty. For the Rome Statute, something more concrete than “an evil thing” must be described.

Firstly, the gravity and scale of the action must reach a certain degree of intensity in order to qualify as a war of aggression.³⁴² Werle argues that the offense of aggressive war requires the use of force to be of a similar degree as that witnessed by the German attacks on neighboring States, which “were generally waged by large armies on broad fronts”.³⁴³ Secondly, the action must be committed with an aggressive aim, intention

³⁴⁰ Werle, *supra* note 154, 401. He does however, allude to the fact that criminal liability may well be expanded in the course of the negotiations.

³⁴¹ Cryer *et al.*, *supra* note 276, p273, states that “mere citation of Article 2(4) is not enough”.

³⁴² Griffiths, *supra* note 19, p319.

³⁴³ Werle, *supra* note 154, p319.

or objective in mind. Werle suggests that, based on the Nuremberg precedent, there must be an aggressive aim to the conduct, such as total or partial annexation and/or occupation of the victimized State or a desire to “use its resources for the benefit of the attacking State”.³⁴⁴ As previously noted actions such as humanitarian intervention, by virtue of their very aims, would not come within the scope of the crime of aggression.³⁴⁵

Although hostilities of a certain intensity are required for war to be present, an express declaration of war is not.³⁴⁶ Wilmshurst highlights the fact that formal ‘wars’ are rarely declared in modern times.³⁴⁷ This is important. Those favoring a broader definition make the argument that because modern warfare rarely occurs in a manner recognized by the traditional understanding of war, maintaining such a criterion would disconnect the crime from what actually occurs in contemporary international relations. This justification for the abandonment of a ‘war’ threshold is flawed though. Just because formal wars are no longer declared by States, it does not mean that the contemporary acts of violence no longer achieve the severity or gravity of a war. This is not stable ground upon which to make the argument that the crime of aggression has in any way changed or expanded to include lesser forms of violence. If explicit

³⁴⁴ *Ibid*, p395. He goes on to argue that the aggressive aims of the State can usually be proven through statements of the political leadership - the Nuremberg IMT held that Hitler’s “Mein Kampf” contained an “unmistakable attitude of aggression”, (Nuremberg Judgment, *supra* note96, p422). There is, however, considerable debate about whether the intention and objective of the use of force is part of the conduct element of the collective act, (2006 Princeton Report, para(25)-(31)). *See*: Kress, *supra* note257, p256; Cassese, *supra* note115, pp115-6. However, Clark, *supra* note247, p878 argues that by including the intention or aim of the act as part of the criteria, the definition would exclude acts which might be regarded as properly coming within the criminal category, such as aggressive wars to extract economic or political advantages.

³⁴⁵ Although Werle, *ibid*, believes it is doubtful that the actions of the US and the UK in Iraq in 2003 could be justified under international law as interventions to eliminate a regime that violated human rights, he does conclude that it was not a criminal war of aggression, even if one views the action as contrary to international law:

The war lacked the specific aggressive element necessary under customary international law for a war to be one of aggression.

³⁴⁶ The Tokyo Charter expressly provided that a declaration of war was irrelevant, thus abandoning the traditional concept of war.

³⁴⁷ Wilmshurst, *supra* note215. As a supporter of the restrictive view, she argues that if the new definition of aggression is to keep to international law as it stands, “it should be confined to participation in wars of aggression whether the term ‘war’ is used expressly or whether an attempt is made to describe the essential elements of a war”. (p95)

reference to the term 'war' is considered to be unhelpful,³⁴⁸ then the definition adopted should refer to the elements of aggressive war that are found in customary international law.

Recent discussions on whether the definition of the collective act should incorporate the phrase 'war of aggression' indicate that there is still no consensus over this issue.³⁴⁹ Whilst support has been shown for the concept of limiting jurisdiction to acts amounting to a 'war of aggression', there appears to be a predominant view that the inclusion of such a high threshold would make the definition too restrictive.³⁵⁰ In addition, when the view was expressed that the acts in question should be *tantamount* to a 'war of aggression' in order not to deviate from customary international law, dispute ensued as to what exactly amounted to this under customary international law.³⁵¹

It is my conclusion, and in spite of a lack of consensus in the SWGCA, the law is clear in this area. As stipulated by customary international law, the threshold for the crime of aggression is a war of aggression. The evidence suggests that a war manifests itself when the use of force is of a severe intensity, and when the intention behind the act is aggressive in nature. This is a high threshold that produces a restrictive definition, but one cannot ignore the law for the sake of international policy.

That being said, I am acutely aware of the fact that incorporating such a high threshold will not be acceptable to many members of the SWGCA. As seems to be the way with provisions relating to aggression, a consensus might have to be forged to ensure that the crime becomes operational under the Court's jurisdiction. Any consensus will have to begin with the one thing that is agreed by all members of the SWGCA – that a qualifier of some sort is required for the definition of the crime of

³⁴⁸ Clark, *supra* note 247 believes that 'wars of aggression' are an unhelpful concept, but recognizes that it has a following amongst Member States.

³⁴⁹ 2006 Princeton Report, para(21)-(24).

³⁵⁰ *Ibid*, para(23).

³⁵¹ *Ibid*, para(24).

aggression.³⁵² The following discussion provides an overview of the suggestions that have been made in the WGCA and the SWGCA regarding the definition of the collective act, as well as the most suitable formula from the current proposals that should be adopted.

(e) The Threshold Condition – Proposals from the PrepComm and Debate

Within the SWGCA:

Although there is general agreement that a qualifier needs to be incorporated into the definition, the various suggestions made demonstrate that where the threshold should be placed is a matter still up for debate.³⁵³

In 1997, a proposal submitted by Egypt and Italy suggested that acts of a “sufficient gravity” could suffice for the imposition of criminal responsibility.³⁵⁴ This is an abstract and unqualified statement that would have caused serious difficulties had it been adopted. The proposal went on to suggest that a rather vague generic definition accompanied by a non-exhaustive enumeration of acts constituting aggression, taken from Resolution 3314, should be adopted.³⁵⁵ For reasons already explained, such as proposal would not be acceptable.

The latter stages of the WGCA saw more workable proposals put forward. Greece and Portugal suggested that the definition of the collective act should reflect the prohibition found in Article 2(4) of the UN Charter.³⁵⁶ The principle difficulty with

³⁵² Dascalopoulou-Livada, *supra* note 295, p82, argues that despite the fact that the application of the notion of ‘war of aggression’ seems to be neither workable nor desirable, “we have to admit that there is a need for some qualifier so as to criminalize acts which are of a certain importance”.

³⁵³ Trahan, *supra* note 247, p449 states that the greatest problem that the debates faced was the “conceptual difference concerning the extent to which the State’s act of aggression would be addressed”.

³⁵⁴ UN Doc. A/AC.249/1997/WG.1/DP.6. This idea was taken up by the revised Greek-Portuguese proposal. UN Doc. PCNICC/1999/DP.13. *See also*: UN Doc. PCNICC/2000/WGCA/DP.5, which contains the same proposal as well as an Explanatory Note prepared by the Greek delegate.

³⁵⁵ A proposal submitted by a group of Arab States added to this, suggesting a reference to the “right to self-determination, freedom and independence” alongside the State’s sovereignty, territorial integrity or political independence. This proposal reflects the long-held, although controversial view that colonialism implies permanent aggression.

³⁵⁶ UN Doc. PCNICC/1999/WGCA/DP.1. This was revised in November 2000 to include the qualifier ‘manifest’ before “violation of the Charter of the United Nations”. UN Doc. PCNICC/2000/WGCA/DP.5. *See also*: Proposal submitted by Colombia at the fourth session of the WGCA, UN Doc. PCNICC/2000/WGCA/DP.1.

this suggestion is that it would make almost every use of force severe enough to instigate criminal proceedings. Not only does this not reflect customary international law, but it ignores the principle aim of the Court, which is to prosecute the most serious crimes of international concern.³⁵⁷ A revised proposal based on this format was submitted by Bosnia and Herzegovina, New Zealand and Romania in 2001,³⁵⁸ which suggested that by including the notion of ‘attacking’, the definition would only cover conduct sufficiently serious enough so as to require accountability in a criminal court. This was a positive improvement, although it still did not meet the standards required by customary international law.

Two proposals of particular interest are those submitted by the Russian Federation³⁵⁹ and Germany.³⁶⁰ The Russian proposal, based on suggestions advanced by the UK, limited jurisdiction to that required by customary international law – a war of aggression. However, the terminology employed reflected that found in Article 6(a) of the IMT Charter,³⁶¹ which has been heavily criticized for not explicitly stipulating what a war of aggression entails. The proposal submitted by Germany made more of an attempt to search for the essential element of aggressive war. The proposal purported to restrict the definition to acts that had the aim of military occupation or annexation of the territory of an invaded State,³⁶² thereby making the intention of the aggressor State one of the conditions of the collective act.³⁶³

The 2002 Coordinator’s Discussion Paper attempted to make a clear separation between the ‘act’ and the ‘crime’ of aggression. Paragraph 1 set out how and by

³⁵⁷ Meron, *supra* note 7, p11, states that this proposal “devalues the crime of aggression”.

³⁵⁸ UN Doc. PCNICC/2001/WGCA/DP.2

³⁵⁹ UN Doc. PCNICC/1999/DP.12.

³⁶⁰ UN Doc. PCNICC/1999.DP.13.

³⁶¹ The Russian proposal states that “... the crime of aggression means any of the following acts: planning, preparing, initiating, carrying out a war of aggression”

³⁶² According to the German proposal, aggression would consist of:

- (a) initiating, or (b) carrying out an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.

One point of interest to note about this proposal is that included the qualifier “manifest” in an attempt to implement a threshold for the collective act.

³⁶³ As suggested by Werle, *supra* note 157.

whom the crime is committed, whilst paragraph 2 sought to define what actually constitutes an act of aggression. Using terminology found in the various suggested proposals, paragraph 1 stipulated that an act of aggression “by its character, gravity and scale, constitutes a flagrant violation” of the UN Charter. This was then followed by three options, the first of which suggested as an example, but did not limit it to, “a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof”, whereas the second option detailed the same examples, but declared that the action had to amount to them. The third option provided for neither of the above suggestions. Debate within the SWGCA has focused on the phrase “character, gravity and scale”, as well as the use of the word “flagrant” for the threshold condition.³⁶⁴ Whilst reiterating support for the existence of a threshold condition, discussions have revolved around whether ‘flagrant’ is the correct term to use, or whether ‘manifest’, which had been used in various WGCA proposals, is more appropriate. Even though it has been stressed that both terms are “uncertain and difficult to distinguish in substance”,³⁶⁵ there appears to be a general tendency to prefer the term ‘manifest’ over ‘flagrant’.³⁶⁶

Whilst the Chairman’s updated paper of 2007 attempts to follow the structure of the 2002 version, new options for the definition of the crime and reference to the collective act are of some note. Paragraph 1 now contains two options, although this reflects developments with regards to the role of the individual rather than the act of the collective.³⁶⁷ This is then followed by two alternative ways of describing the collective act:

which, by its character, gravity and scale, constitutes a manifest violation of
the Charter of the United Nations
OR

³⁶⁴ 2006 Princeton Report, para(18)-(20).

³⁶⁵ *Ibid*, para(18).

³⁶⁶ *Ibid*, para(20).

³⁶⁷ *See*: Chapter 3(3)(1)(c)(ii).

such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof.

It is the opinion of this author that the second alternative is the more appropriate formulation for the collective act of the crime of aggression. It clearly respects the precedents established in customary international law, and prevents the Court from being asked to investigate controversial instances of the use of force by States. That being said, this author is fully aware that this formulation is not acceptable to some States, and may never be so. If the first option is the formula chosen, it is better than some of the proposals that have been submitted to the WGCA. In my opinion however, it is still not good enough to satisfy the requirements of the Court. It is arguably an abstract definition that does not sufficiently satisfy the requirement of *nullum crimen sine lege*.

(i) Reference to General Assembly Resolution 3314 in the Court's Definition of the Crime:

Paragraph 2 of both the 2002 Discussion Paper and the revised 2007 version stipulated that Resolution 3314 is the source of reference for determining what 'acts of aggression' are. In the 2002 Paper, paragraph 1 used the term 'act of aggression' in its terminology describing the collective act, but the revised paper provided an option between either 'act of aggression' or 'armed attack'. This is a result of discussions that have taken place at the Inter-sessional meetings as to how the notion of use of force should be referred to in the definition.³⁶⁸ Unaided by the fact that even the UN Charter uses a variety of terms,³⁶⁹ no agreement or conclusion has, as yet, been reached. It is the suggestion here that the phrase 'act of aggression' should be retained. This would coincide with the reference to the General Assembly resolution in paragraph 2, which speaks of an 'act of aggression' rather than 'use of force'.

As previously mentioned, one has to be careful when using Resolution 3314 in the context of a criminal prosecution of an individual. By including a generic reference to

³⁶⁸ 2006 Princeton Report, para(14)-(17).

³⁶⁹ See: Articles 2(4), 39 and 51.

Resolution 3314,³⁷⁰ the definition of the crime of aggression is acknowledging the only universally accepted definition of the State act that exists in international law, to support the reference made to the notion in paragraph 1. This in no way alters the threshold of criminality nor supports the argument that lesser forms of violence may result in criminal prosecutions.³⁷¹

(f) Additional points about the Definition of the Collective Act:

There are two additional points that should be clarified before the attention of this thesis turns to the provisions detailing the role of the individual in the crime of aggression.

(i) The Role of Non-State Actors in Aggression:

Criticism has been made of the provisions detailing the crime of aggression because of the fact that they are not applicable to non-State actors. Schuster believes it is surprising that this class of potential criminals has been excluded from the Court's jurisdiction, "considering that aggressive actions of non-State forces possess the potential to threaten the political stability, if not the independence, of States just as much as those of traditional 'State actors' do".³⁷² He argues that even though international law traditionally deals with relations between States, the Court is a body that prosecutes individuals regardless of their official position. Although he views it as a potential shortcoming of the Statute, Dawson makes the point that actors such as terrorists, non-State parties and individuals that act contrary to the beliefs of the State itself,³⁷³ will be immune from prosecution because the crime of aggression only

³⁷⁰ The 2006 Inter-sessional meeting saw discussion over whether the reference to Resolution 3314 should be of a generic nature, including whether there should be reference to all or just parts of the Resolution, or whether an enumerative reproduction of certain parts should be included in the definition. The majority expressed a preference for the generic formulation, although the matter of whether it should refer to the entire Resolution or just parts of it still requires further debate. It is the opinion of this author that selecting only certain sections of the Resolution would not only go against the explicit sentiments of the Resolution (Article 8), but would also cause lengthy and complicated debates that are avoidable within the SWGCA.

³⁷¹ Stancu, *supra* note250 argues that for determining the existence of aggression, Resolution 3314 is the most appropriate tool.

³⁷² Schuster, *supra* note5, p23.

³⁷³ Peirce, *supra* note245, p289.

accommodates the prosecution of the ‘political and military’ leaders of a State.³⁷⁴

Schuster concludes that:

The “State” approach to the definitions is therefore extremely deplorable, especially when taking into account that a majority of the conflicts after the Second World War were not fought between States but were of an internal nature.³⁷⁵

Whilst these criticisms do make an interesting point, they ignore the fact that international law does not recognize the commission of aggression by non-State actors as a punishable aspect of the crime of aggression. The crime of aggression only constitutes participation in an act by one State against another State.

There is no evidence in customary law for extending the crime to acts committed by individual mercenaries not sponsored by a State, or committed by a State against minorities within its own territory, even though the devastation caused by such acts may be comparable to inter-State military intervention.³⁷⁶

(ii) An Attempt to Commit Aggression by the State:

The second point that has been the focus of some international debate is the question of whether an *attempt* to commit aggression by the State can be classified as a criminal act or not.³⁷⁷ The notion is rejected out of hand by the majority of commentators because of the common assumption that the crime of aggression

³⁷⁴ Dawson, *supra* note76, p444. He concludes that by not including this group of potential perpetrators, any potential ‘deterrent threat’ the definition might have had will be severely curtailed.

³⁷⁵ Schuster, *supra* note5, p23.

³⁷⁶ Cryer *et al.*, *supra* note276, p273. It is worth noting that just because the crime of aggression does not include non-State actors in its definition, it does not mean that such individuals will be afforded immunity for their actions. There is a high probability that the crimes they commit will be covered by other provisions of the Rome Statute.

³⁷⁷ The question of ‘attempt’ was not reflected in the 2002 Discussion Paper because it only arose out of the 2005 inter-sessional meeting’s discussions on whether an individual could attempt to commit the crime of aggression. *See*: Chapter3(3)(1)(c)(i).

requires the completed act of aggression.³⁷⁸ That being said, arguments have been put forward in the SWGCA in support of the proposal.³⁷⁹ It is advised here that to include attempts to commit an act of aggression would not only broaden the crime beyond that which is found in customary international law, but it could also potentially cause serious evidential problems for the Court – bar explicit evidence³⁸⁰ or a statement to the fact,³⁸¹ it would be exceptionally hard to prove that the ‘attempted’ aggression was exactly that, and not an attempted act of self-defence or other form of legitimate inter-State force.

3. The Crime of Aggression – Defining the Conduct of the Individual:

This next section focuses on the provisions of the definition that relate to the role the individual plays in the commission of the crime. Firstly, attention is given to the material or *actus reus* elements of the offence. This involves a review of the relevant provisions of the Rome Statute concerned with participation in a crime as well as provisions that are not compatible with the crime of aggression. Secondly, the question of the *mens rea* is addressed. Finally, attention is given to the proposed ‘Elements of Crimes’ provisions.

1. Material Elements of the Crime:

(a) The Nexus between the State act and the Criminal Responsibility of the Individual:

It has already been clearly established that the crime of aggression involves both an act of State and an act committed by an individual. However, the *actus reus* of the crime of aggression is not the act of aggression as committed by the State but rather the conduct of the individual in the unlawful use of force by the State.³⁸² Under the

³⁷⁸ Cryer *et al.*, *supra* note 276, p263. Furthermore, attempted aggression was not included in the IMT or IMTFE Charters, and Resolution 3314 does not contemplate an ‘attempted aggression’.

³⁷⁹ 2006 Princeton Report, para(37).

³⁸⁰ Clark, *supra* note 247, p884, provides the example of “troops [...] massed at the border but bombed into oblivion before they can move”.

³⁸¹ Such as Hitler’s ‘Mein Kampf’.

³⁸² Antonopolous, *supra* note 157, p61. He also provides an interesting discussion about exactly where criminality lies, whether it is the initial act of the State and therefore making the individual’s action just

IMT and IMTFE Charters, criminal liability was incurred through ‘planning, preparation, initiation or waging of a war of aggression’.³⁸³ Apart from replacing the word ‘waging’ with ‘executing’, the same formula has been adopted by the 2002 Coordinator’s Paper, as well as the 2007 Chairman’s Paper.³⁸⁴

The proscribed acts of the offence are essentially orientated towards the development stages of the crime (as required by the *ratione personae* limitations of the offence), from the planning to preparation to initiating and finally waging a war of aggression. The precedent established at Nuremberg makes it clear that participation after the war of aggression has begun suffices to establish criminal liability, under the notion of waging.³⁸⁵ Although Donitz’s conviction was criticized for the fact that the defendant had no opportunity to stop the war, the conviction was correct due to the fact that the defendant “was part of the overall plan of aggressive war at the highest levels and worsened the existing wrong”.³⁸⁶ Furthermore, because the crime of aggression requires the completed act, the ‘planning, preparation or ordering’ of an act of aggression should be criminalized only when the attack actually takes place.

(b) The Perpetrators of the Crime of Aggression:

A further unique characteristic of the crime of aggression is that it has a limited *ratione personae*. It was made explicitly clear at Nuremberg that the crime of aggression is a leadership crime, capable of being perpetrated only by the leaders and the high-level policy makers of the aggressive State.³⁸⁷ This is one of the most uncontroversial aspects of this crime and has been unanimously accepted by the delegates of the WGCA and SWGCA.³⁸⁸ The provisions relating to this aspect of the

complicity in what is already a criminal act, or whether the act of the State is a precondition to the individual committing a separate, albeit simultaneous, crime, pp36-40.

³⁸³ In addition, conspiracy to wage a war of aggression was criminalized but it was treated in very much the same way as ‘planning and preparation’ by the IMT, and has “gained no independent significance”, (Werle, *supra* note154, p391). Brownlie, *supra* note9, p201, is highly critical of the charge and even more so of the unsatisfactory manner in which the IMTFE handled it, (p203).

³⁸⁴ The charge of conspiracy does not appear in either document however.

³⁸⁵ The conviction of Donitz for crimes against peace was based on his participation in the waging of the war; he was not involved in its planning, preparation, initiation. Nuremberg Judgment, *supra* note96, p507. See Historical Overview, *supra* note9, pp36-37.

³⁸⁶ Werle, *supra* note154, p392.

³⁸⁷ See: Chapter 2(2)(b)(iii)

³⁸⁸ Muller-Schieke, *supra* note217, p419.

crime do not have to detail the exact positions that are to be held by the defendant within the State, but rather the actual role that he or she played in the direction and control of the relevant acts.³⁸⁹ This is clearly reflected in both the various proposals that were submitted to the WGCA³⁹⁰ as well as in paragraph 1 of the 2002 Coordinator's Paper, which criminalizes a person's behavior only if he or she was "in a position effectively to exercise control over or to direct the political or military action of a State". The same criterion is used in both Variant A and Variant B of the 2007 Chairman's Paper. The insertion of the word 'effectively' was a positive addition by the Coordinator, as it clarified that only those individuals who played an active role in the State act will be liable for criminal punishment, excluding those people who have no influence over the actual events, but who hold positions that come within the remit of the *ratione personae*, such as figureheads of State. Whether this phrase will incorporate the sorts of defendants that were tried under CCL No.10 will be a matter for the discretion of the judiciary at the ICC.³⁹¹

The above two conclusions are relatively uncontroversial and clearly supported by customary international law. For an individual to be held accountable for the crime of aggression, he or she must be a military or political leader, or someone in a position to influence the policy of the State, who actively takes part in the direction of that policy through planning, preparing, initiating or executing the collective act.

(c) Making the Crime of Aggression Compatible with the Provisions of the Rome Statute:

In departing from the Statutes of ICTY and ICTR as well as the 1994 Draft Statute, the Rome Statute contains a separate part dedicated to 'General Principles of Criminal

³⁸⁹ Gaja, *supra* note 270, p437. Critical of this approach, Schuster, *supra* note 5, p33, states that "unfortunately, this does not help in determining (in clear legal terms) who would fall under this category".

³⁹⁰ Based on the proposal submitted by Egypt and Italy in 1997, (UN Doc. A/AC.249/1997/WG.1/DP.6), the proposals made by Germany, (UN Doc. PCNICC/1999/DP.13) and Bahrain *and others*, (UN Doc. PCNICC/1999/DP.11) considered as criminally liable only individuals "in a position of exercising control or capable of directing the political or military action of a State". The ILC Draft Code of Crimes used the phrase "leaders or organisers", *see*: Chapter 2(3)(a)(ii).

³⁹¹ *See*: Chapter 2(2)(b)(iv)

Law’.³⁹² Part 3 was an attempt by the delegates at the Rome Conference to delimit the possible exercise of judicial discretion,³⁹³ as it directs the Court on issues such as criminal participation, the requisite mental elements and the availability of various defences. To maintain consistency throughout the Statute, the provisions relating to the crime of aggression have to be ‘fitted into’ the ICC regime with as little disturbance as possible to the overall working of the Statute.³⁹⁴ That being said, there are certain provisions that are not compatible with the crime of aggression. Paragraph 3 of the 2002 Coordinator’s Paper suggested excluding “the provisions of Articles 25, paragraph 3, 28 and 33 of the Statute” from being applicable, since they were not deemed to fit with the preliminary definition contained in paragraph 1. Whilst the exclusion of Article 28 and 33 has caused little controversy,³⁹⁵ the exclusion of Article 25(3) has resulted in lengthy debates within the SWGCA and resulted in the majority of the amendments seen in the 2007 Chairman’s Paper. They will now each be addressed in turn.

(i) Article 25(3) of the Rome Statute:

Article 25(3) of the Rome Statute states that:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

³⁹² The general principles of law contained in Part 3 of the Statute are default rules that apply unless expressly or impliedly excluded. See: Clark, *supra* note247, pp864-865.

³⁹³ Schabas, *supra* note234.

³⁹⁴ Clark, *supra* note247, p883

³⁹⁵ It was made clear at the 2004 inter-sessional meeting that Articles 28 & 33 are excluded because of the fact that the crime of aggression is a leadership crime and they do not fit with this material element of the crime. *Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 21 to 23 June 2004*. ICC-ASP/3/SWGCA/INF.1, p9, (hereinafter 2004 Princeton Report).

- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime:
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

1) Subparagraphs (a) – (d) of Article 25(3) – Degrees of Participation:

Article 25(3)(a) – (d) deals in quite complex detail with what is often called ‘accomplice’ or ‘secondary’ liability.³⁹⁶ Its clash with the crime of aggression arises over the fact that the suggested definition already uses its own set of verbs detailing the conduct of the individual – “orders” or “participates”.³⁹⁷ Accordingly, “trying to mesh the two would only be a recipe for confusion”.³⁹⁸

³⁹⁶ See generally: Werle, *supra* note 154, Part 2; Cassese, *supra* note 115, Chap.9; Cryer *et al.*, *supra* note 276, Chap. 15.

³⁹⁷ Paragraph 1 of the 2002 Coordinator’s Paper.

³⁹⁸ Clark, *supra* note 247, p884, advocates for Article 25(3)(a)-(d) to be excluded from the remit of the crime of aggression.

The 2002 Coordinator's Paper, by advocating for the removal of Article 25(3), adopted what has been termed the *monistic* approach to the crime of aggression.³⁹⁹ In following the Nuremberg precedent, the Coordinator's Paper adopted a straight forward approach to defining the individual conduct giving rise to international criminal responsibility for the crime of aggression, and consequently usurped the default rules of participation contained in Article 25(3). Whilst the 2004 inter-sessional in Washington saw a discussion of the relationship between Article 25(3) and the crime of aggression,⁴⁰⁰ it was not until the 2005 inter-sessional that serious debate on this point occurred.⁴⁰¹

A number of suggestions were made supporting the application of Article 25 to the crime of aggression. In particular, proponents of the idea felt that by doing so, the crime of aggression would be brought into line with the other crimes under the Statute.⁴⁰² Whilst the suggestion that the issue should be left to the 'Elements' was rejected,⁴⁰³ it was generally acknowledged that by not accepting the applicability of Article 25(3), one could potentially risk excluding a certain group of perpetrators.⁴⁰⁴ The meeting ended with the general agreement that instead of including the conditions for individual criminal responsibility within the definition itself, it might be preferable to keep the definition of the crime rather narrow.⁴⁰⁵ As a result, a proposal was introduced that amended the 2002 Coordinator's Paper to reflect the inclusion of the applicability of Article 25(3)(a)-(d).⁴⁰⁶ This proposal acknowledged that there were three principle components to what is called for convenience sake, the *differentiated* approach.⁴⁰⁷ The first component is the recognition that Article 25(3)(a)-(d) applies to

³⁹⁹ This approach has been termed the *monistic* approach because it doesn't distinguish between the *commission* of the crime on the one hand (25(3)(a)) and *ordering* etc (25(3)(b)) or *aiding* etc (25(3)(c)) such a commission on the other hand.

⁴⁰⁰ 2004 Princeton Report, para(37)-(53).

⁴⁰¹ 2005 Princeton Report, para(18)-(32).

⁴⁰² 2006 Princeton Report, para(84).

⁴⁰³ *Ibid*, para(28). It was felt that it was crucial to seek a solution in the primary text and not to leave it to the Elements.

⁴⁰⁴ *Ibid*, para(22). *See also*: 2005 Princeton Report, para(22).

⁴⁰⁵ *Ibid*, para(31).

⁴⁰⁶ Annex I, 2005 Princeton Report.

⁴⁰⁷ 2005 Princeton Report, para(19).

the crime of aggression, whilst the second qualifies this with a proposed new sub-paragraph (e) *bis*⁴⁰⁸ to be inserted into Article 25(3), which would read:

In respect of the crime of aggression, only persons being in a position effectively to exercise control over or to direct the political or military action of the State shall be criminally responsible and liable for punishment.⁴⁰⁹

The third component of the differentiated approach identifies the fact that the description of the *conduct* element of the crime in the crime's definition would have to be clarified.

Prior to the fourth session of the ASP, a Discussion Paper was published that attempted to explore these issues and highlighted the areas that needed further discussion.⁴¹⁰ Whilst this Paper begins by acknowledging the tendency at the 2005 inter-sessional to move away from the monistic approach, it makes it explicitly clear that debate has not yet reached the point where it could be abandoned.⁴¹¹

The first problem that the Discussion Paper addresses is that of the differentiated approach's third component, clarifying that "if Article 25, paragraph 3 (a) to (d) of the Statute is to apply to the crime of aggression, it must be defined what it means that an individual *commits* such a crime",⁴¹² and suggesting that once the notion of *commission* is defined, it will be possible to ascertain what it means when a person has *ordered*⁴¹³ or has *aided in*⁴¹⁴ the commission of such a crime. The person who commits a crime is often called the *principal perpetrator*. Therefore, to complete the differentiated approach, the definition of what a principal perpetrator of the crime of aggression actually does needs to be established. However, any definition of such conduct must take into account two aspects of the crime of aggression. Firstly, the

⁴⁰⁸ Modelled on sub-paragraph (e), which refers to the specific crime of inciting genocide.

⁴⁰⁹ Annex I of the 2005 Report, p19.

⁴¹⁰ Discussion Paper 1.

⁴¹¹ See: 2006 Princeton Report, para(84).

⁴¹² Discussion Paper 1, Part A(III)(1)(a), relating to the use of the term "commits" in Article 25(3)(a).

⁴¹³ Article 25(3)(b)

⁴¹⁴ Article 25(3)(c)

underlying collective act is not broken down in a list of possible individual types of conducts, as is the case with the crime of genocide and crimes against humanity. No individual perpetrator can commit an act of aggression without making use of other individuals belonging to the State apparatus, (the most obvious example being members of a country's armed forces). Following this understanding, the Discussion Paper proposes, "a principal perpetrator of the crime of aggression would be an individual who, in respect of the actual use of armed force, *acts through many other persons* under his/her control".⁴¹⁵ Secondly, due to the leadership characteristic of the crime of aggression *every* participant in the crime must "be in a position effectively to exercise control over or to direct the military action of a State" to incur criminal responsibility. The differentiated approach must therefore formulate a criterion to distinguish between two types of leaders: those who *commit* the crime (the principal perpetrator) and those who participate in the crime in one of the other forms of participation listed in Article 25(3)(b)-(d).⁴¹⁶

Incorporated into the 2005 proposal were two suggestions for describing the conduct of the principal perpetrator in the definition of the crime of aggression:

Proposal A:

For the purpose of the present Statute, a person commits a 'crime of aggression' when, being in a position effectively to exercise control over or to **direct** the political or military action of a State, that person participates actively in an act of aggression ...⁴¹⁷

Proposal B:

⁴¹⁵ Discussion Paper 1, Part A(III)(1)(a). It is noted that this type of principal perpetrator is not unknown to Article 25(3)(a) of the Statute.

⁴¹⁶ *Ibid.*

⁴¹⁷ An updated Proposal Paper was submitted at the 2006 inter-sessional meeting, (Annex 1, 2006 Princeton Report). Proposal A of the updated version contained a variety of alternative words and phrases for describing the conduct of the *principal* perpetrator such as "leads", "directs", "organizes and/or directs" and "engages in".

For the purpose of this Statute, ‘crime of aggression’ means **engaging** a State, when being in a position effectively to exercise control over or to direct the political or military action of that State, in ...⁴¹⁸

Both terms attempt to capture the specificity of the principle perpetrator of the crime of aggression, and although there is little difference in substance between the two of them, it is submitted here that the term ‘directs’ is preferential to ‘engages’. This is simply for the fact that ‘directs’ captures the essence of what the *principal* perpetrator does slightly more so than the notion of ‘engages’.⁴¹⁹ Debate at the 2006 inter-sessional also suggested that the conduct verb ‘lead’ be introduced, to underline the leadership role of the principal perpetrator. It was argued that this would be the most accurate description of the conduct of the leader, and that the verb ‘leads’ could ideally be combined with the existing phrase “the planning, preparation, initiation or execution of an act of aggression”.⁴²⁰ However, it was also noted that this option might be too narrow and only include a head of State or Government as principal perpetrator. Whilst ‘leads’ is still a better suggestion than ‘engages’, this author feels that ‘directs’ is still the most appropriate term, as it fully encompasses the conduct of the principal perpetrator in the crime of aggression.

There was also a discussion at the 2006 inter-sessional as to whether the phrase “planning, preparation, initiation or execution” should be retained or deleted. Those in favor of deletion put forward the argument that they are essentially contained in the forms of participation under Article 25(3), and retaining them might blur the

⁴¹⁸ Proposal B of the updated proposal suggested “directing”, “organizing and/or directing” and “engaging a State/the armed forces of other organs of a State in” as alternatives for the definition of the conduct element. During debate at the 2006 meeting it was argued that the terms “organize and direct”, “direct” and “order” were preferable, as it was language commonly found in counter-terrorism conventions, and therefore might be more established in the context of criminal law, over the less common term “engage”, (para(89)). Furthermore, Proposal B departed from the model adopted in the 2002 Coordinator’s Paper and the 2007 Chairman’s Paper in an attempt to bring the definition of the crime of aggression in line with the other crimes under the ICC Statute. Instead of using the phrase “For the purposes of the present Statute, a person commits a ‘crime of aggression’ ...”, Proposal B suggested that the definition of the crime of aggression should be “For the purposes of the present Statute, ‘crime of aggression’ means...” Although this is an interesting modification, for the purposes of conformity with the proposals put forward, the ‘traditional’ model is preferred by this author.

⁴¹⁹ The concern was raised at the SWGC that the phrase “engages” is not commonly used in international law adds further weight to this argument.

⁴²⁰ 2006 Princeton Report, para(91). Although there was initial support for this proposal, it was suggested that it needed being explored further.

distinction between the primary and other perpetrators.⁴²¹ However, other participants preferred to retain the phrase. It was noted that this phrase reflected the typical features of aggression as a leadership crime, and its retention in the text would highlight the criminalized conduct, respecting the principle of *nullum crimen sine lege*. In addition, the phrase is part of the recognized customary international law on the crime of aggression. Whilst it is clear that this is an area which requires greater attention and further debate in the SWGCA,⁴²² the lack of agreement about whether to retain or abandon the provision means that at the moment it should not be removed.⁴²³

The above discussion clearly shows that the crime of aggression *can* fit into the regime provided by the Rome Statute with regards to Article 25(3). Although this is an area that would benefit from further deliberation, the proposed differentiated approach can and should be applied in the definition of the crime of aggression. The proposal also has an immediate appeal because it supports that aim of equal treatment between all of the core crimes under the Court's jurisdiction.

2) Subparagraph (f) of Article 25(3) – Attempt to Commit a Crime:

As part of the debate over the applicability of Article 25(3), the question as to whether an *attempt* to commit aggression is a criminal offence or not was also raised.⁴²⁴ In reality however, this involves two sub-questions: firstly, regarding the act of the individual, whether actual participation in the collective act was needed or whether an attempt at participating could suffice,⁴²⁵ and secondly, in relation to the collective act, whether it was necessary for the collective act to have been completed or whether an attempt could also classify.⁴²⁶

It has already been established that an attempt to commit the collective act is not a criminal offence, because the crime of aggression requires the completed act. The

⁴²¹ 2006 Princeton Report, para(92).

⁴²² *Ibid*, para(85)-(86).

⁴²³ The principle difference between the two revised proposals included in Annex I of the 2006 Princeton Report was the inclusion of the phrase 'planning, preparation, initiation or execution' in proposal A and its deletion in proposal B.

⁴²⁴ 2005 Princeton Report, paras(33)-(43).

⁴²⁵ *Ibid*, para(35).

⁴²⁶ *Ibid*, para(34).

question of whether the individual act can be attempted, however, rests very much on one's choice of model for detailing the conduct of the individual. The exclusion of Article 25(3)(f) of the Statute is more appropriate with the 'monistic' approach due to the fact that *litterae* (b) to (d) of Article 25(3) all refer to the "attempted commission" of the crime, presupposing that the attempt to commit the crime is, in fact, criminalized. If Article 25(3)(a)-(d) are excluded from the Statute, Article 25(3)(f) would be without a point of reference. If the differentiated approach is adopted, however, then the question that has to be resolved is whether international law allows for an attempted individual act of participation in a completed collective act to be a criminal offence. Whilst such cases of attempt remain rather theoretical in nature, there appears to be a general acceptance for the retention of Article 25(3)(f).⁴²⁷ Whilst this issue would benefit from further discussion, the 2007 Chairman's Paper proposes that the provision does not apply to the crime of aggression.

(ii) Article 28 – Responsibility of Commanders and Other Superiors:

Article 28 of the Rome Statute⁴²⁸ introduces the notion of command responsibility, connecting military and other superiors to the actions of those under their control. However, the crime of aggression, universally recognized as a leadership crime, contains its own structure for assessing the relationship between the accused and the events in question in its very definition.⁴²⁹ Therefore, the general provisions of Article 28 are not applicable to the crime of aggression as they are trumped by the specific reference to such conduct in the crime's definition.⁴³⁰ Based on the debate within the SWGCA, the Chairman's Paper questions whether this needs to be explicitly referred to in the Court's definition.

(iii) Article 33 – Superior Orders and Prescription of Law:

⁴²⁷ Clark, *supra* note 247, p884, notes that whilst such cases for prosecution would be unlikely, the kind of attempts that would be contemplated are those where the actor tries to contribute to the 'planning, preparation, initiation or waging' of an aggression that takes place, but he or she fails in the effort to contribute. It is worth noting here however, that the 2007 Chairman's Paper advocates for Article 25(3)(f) not to be applicable to the crime of aggression.

⁴²⁸ See: Cassese, *supra* note 115, Chap. 10.4; 2004 Princeton Report, para(58)-(63); 2005 Princeton Report, para(44)-(46).

⁴²⁹ Clark, *supra* note 274, p885.

⁴³⁰ Article 28 is applicable to the other three crimes under the Court's jurisdiction because they do not contain such a provision in their definitions.

Article 33 of the Rome Statute relates to the defence of Superior Orders.⁴³¹ ‘Superior Orders’ is a defence in situations where the accused was under a legal obligation to obey, did not know the order was unlawful, and the order was not manifestly unlawful.⁴³² However, this defence appears to be limited to war crimes, as paragraph 2 states that “orders to commit genocide or crimes against humanity are manifestly unlawful”. Clark argues that there is no policy reason for extending this defence to aggression and adds that in the case of a genuine mistake on the part of the defendant, adequate protection is afforded under Article 32.⁴³³ Furthermore, the prevailing view of the SWGCA deems Article 33 to be inapplicable to the crime of aggression,⁴³⁴ and therefore the suggestion made in paragraph 3 of the 2002 Coordinator’s Paper should be maintained.⁴³⁵ It is also worth noting that the revised version of the 2002 Paper removes the explicit reference to Article 33 in its new paragraph 3.

2. Mental Elements of the Crime:

(a) Article 30 – Mental Element:

Customary international law makes it clear that the planning, preparation, initiation or waging of an aggressive war must be committed intentionally.⁴³⁶ This is also satisfied where the perpetrator had knowledge of the collective intent to initiate or wage aggressive war and continued to participate in the commission of the collective act.⁴³⁷ For proof of the mental element, the IMT relied primarily on the fact that the defendants had acted despite being thoroughly informed of Hitler’s plans.⁴³⁸

⁴³¹ See: Cassese, *supra* note 15, Chap. 13.1

⁴³² Article 33(1)(a)-(c).

⁴³³ Clark, *supra* note 247, p885.

⁴³⁴ 2005 Princeton Report, para(46).

⁴³⁵ An alternative possibility is suggested by Dinstein, *supra* note 9, p126, in that Article 33(2) should be amended to exclude the defence of superior orders for the crime of aggression as well. Doubts about this suggestion have been raised in the SWGCA however (2004 Princeton Report, para(61), arguing that an order to “commit aggression” would rarely be given in practice, as well as the suggestion that such an order might not necessarily be “manifestly unlawful”.

⁴³⁶ Dinstein, *supra* note 9, p124; The ILC in its commentary on Article 16 the Draft Code noted that:
(3) The mere material fact of participating in an act of aggression is, however, not enough to establish the guilt of a leader or organizer. Such participation must have been intentional and have taken place knowingly as part of a plan or policy of aggression.

⁴³⁷ Cryer *et al.*, *supra* note 276, p274.

⁴³⁸ Nuremberg Judgment, *supra* note 96, pp425; 489; 491; 495; 499; 507; 523; 526.

Regarding the defendant Schacht who had at relevant periods been President to the Reichsbank and the central figure in Germany's rearmament program, the Tribunal stipulated that "the case against Schacht ... depends on the inference that Schacht did in fact know of the Nazi aggressive plans".⁴³⁹ The same was said in the case against Bormann, who held a great influence over Hitler. He was acquitted of the charge of crimes against peace because the Court could not show that he knew of the Nazi's aggressive plans and the fact that he had not attended the four crucial planning meetings.⁴⁴⁰

Article 30(1) of the Rome Statute provides the default rule with respect to the mental element of crimes:

Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.⁴⁴¹

Commonly described as *animus aggressionis*, there is no substantive difference between the *mens rea* of the crime of aggression and that of the other crimes under the Rome Statute. Paragraph 1 of the 2002 Coordinator's Paper contained the phrase "intentionally and knowingly",⁴⁴² although this has now been deleted.⁴⁴³ There is no need to make an amendment here as it is generally felt that the default rule of Article 30 is enough to satisfy the *mens rea* requirements of the crime of aggression.⁴⁴⁴ Furthermore, this keeps to the preferred method of equal treatment for all the crimes under the Court's jurisdiction. Finally, lowering the threshold of the crime to the level

⁴³⁹ *Ibid*, p506. Schacht was acquitted because the Court could not find the evidence that he knew of the government's political plans, (p501). See: Cassese, *supra* note115, p115.

⁴⁴⁰ *Ibid*, p527. See Chapter 2(2)(b)(iii)

⁴⁴¹ Article 31(2) and (3) clarify what 'intent' and 'knowledge' mean. See: Clark, R., 2001. *The Mental Element in International Criminal Law: The Rome Statute of The International Criminal Court and the Elements of Offences*. CLF. Vol. 12, pp291-334.

⁴⁴² See: Clark, *supra* note247.

⁴⁴³ 2004 Princeton Report, para(56).

⁴⁴⁴ Gaja, *supra* note270, p438.

of recklessness⁴⁴⁵ would broaden the scope of the offence beyond that which is stipulated by customary international law.

3. Elements:

Resolution F of the Rome Conference instructed the PrepComm to “prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression ...” The Elements of Crimes is one of the least discussed aspects of this task by both the WGCA and the SWGCA. At the tenth session of the WGCA it occurred to the Samoan delegation that the question of the Elements should not pass entirely unnoticed with the impending demise of the PrepComm, and submitted a comprehensive proposal which included a list of suggested Elements plus commentary.⁴⁴⁶ It was hoped that the proposal might shed some light on the technical aspects of the definition of the crime of aggression and the conditions for the exercise of jurisdiction.⁴⁴⁷ Whilst the Elements of Crimes are not intended to introduce new aspects of the crime, they are intended to stipulate and clarify the basic elements of the offence.

They are the building blocks of the ‘crime’. A prosecutor who fails to establish any one of those elements has failed to overcome the ‘presumption of innocence’.⁴⁴⁸

The 2002 Coordinator’s Paper contained a set of elements that were fundamentally based on the suggestions contained in the Samoan document.⁴⁴⁹ Discussion of these Elements has not occurred during the SWGCA’s deliberations, and therefore they have been reproduced without any change in the 2007 Chairman’s Paper.⁴⁵⁰

⁴⁴⁵ As invoked by Horgan-Doran and Ginkel, *supra* note232, p337. *See also*: pp348-9.

⁴⁴⁶ “Elements of the Crime of Aggression, Proposal Submitted by Samoa”, UN Doc. PCNICC/2002/WGCA/DP.2

⁴⁴⁷ *Ibid*, para(1).

⁴⁴⁸ Clark, *supra* note435, p312. The ‘presumption of innocence’ is found in Article 66(2) Rome Statute.

⁴⁴⁹ Although a footnote to the provision made it clear that they had not been thoroughly discussed by the WGCA. *See*: Schuster, *supra* note5, p32.

⁴⁵⁰ Footnote 6 of the Chairman’s Paper recognises the fact that these Elements have not been discussed and that reproducing them as they are leads to some obvious inconsistencies: “The Elements therefore mainly serve the purpose of a placeholder, at this juncture of the debate.”

A final point to note is the inclusion of a ‘Precondition’ in the 2002 Coordinator’s Paper, as replicated in the 2007 Chairman’s Paper. This clearly reflects the common understanding that a prior determination of an act of aggression, however determined, is required for a prosecution of the crime of aggression to commence, something which is discussed further in the following Chapter.

CHAPTER CONCLUSIONS:

Based on the above discussion, this author proposes the following definition of the crime of aggression for the purposes of the Rome Statute:

1. For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military act of a State, that person directs the planning, preparation, initiation or execution of an act of aggression, such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof.
2. For the purpose of paragraph 1, “act of aggression” means an act referred to in United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974.
3. The provisions of Articles 25(3)(f), [28] and [33] of the Statute do not apply to the crime of aggression.

The analysis undertaken in this Chapter explains in detail this author’s reasons for deliberately choosing the exact terminology for the proposed definition above. As argued at section 2(b) of this Chapter, a generic definition is preferred over an enumerative one because it provides “an overall framework that will be applicable to varying circumstances”. A generic definition provides the ICC, an organ designed to punish those acts which have not yet occurred, with the flexibility to effectively respond to new and as yet undetermined methods of war.

In recognizing the unique features of the crime of aggression, paragraph 1 of this author's proposed definition includes reference to both the collective act by the State and the actions of the individual. In accordance with both the 2007 updated Discussion Paper as well as clearly established customary international law (as detailed at section 2(e) of this Chapter), the correct formulation for the collective act of aggression by the State and the necessary threshold condition that must exist in any definition is that incorporated above, namely:

“such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof”.

Furthermore, although unacceptable to some delegates, such a threshold condition has the legitimate result of excluding from the Court's consideration those acts of force which, although potentially regarded as technical violations of the prohibition on the use of force, are in fact designed and instigated in order to protect civilians or prevent grave atrocities, such as the notion of humanitarian intervention. They, by their very nature, lack the aggressive aim required for the collective act of the crime of aggression.

In detailing the role that the individual is required to play in the commission of the collective act, paragraph 1 of this author's proposed definition uses the well established and uncontroversial phrase “planning, preparation, initiation or execution” to describe the *actus reus* elements of this offence (see section 3(1)(a) of this Chapter). Furthermore, the generally accepted understanding that the crime of aggression is a leadership crime necessarily dictates that the *ratione personae* should be limited to those leaders and high-level policy makers who play an actual role in the direction and orchestration of the relevant acts. Therefore, the notion that a person's behavior is criminal if he or she was “in a position effectively to exercise control over or to direct the political or military act of a State”, adequately represents the international understanding of this aspect to the crime (see section 3(1)(b)). Finally, in accordance with Proposal A as well as the arguments made in support of this linguistic choice (see section 3(1)(c)(i)), this author prefers the use of the word ‘directs’ when categorizing the manner in which an individual acts in the commission

of an act of aggression. This is because ‘directs’ captures the essence of what the principal perpetrator actually does more so than the other alternatives which have been suggested.

Paragraph 2 of the proposed definition includes a generic reference to Resolution 3314 for the purpose of understanding the reference to the term “act of aggression” in paragraph 1. Resolution 3314 contains the only universally acknowledged and accepted definition of the State act in international law, and is included here purely as a point of reference for the ICC when reviewing the existence of an act of aggression within a criminal prosecution for the crime (see section 2(e)(i)).

At section 3(1)(c)(i)-(iii) of this Chapter, I have laid out the arguments regarding the application of certain provisions of the Rome Statute to the definition of the crime of aggression. Whilst I firmly believe that each of the suggestions made could benefit greatly from further discussion and debate, I have still (tentatively) made a series of conclusions as to how the relevant provisions should, or should not, interact with the crime of aggression. I have preferred to adopt the *differentiated* approach as put forward in the 2005 Princeton Report to Article 25(3)(a)-(d) of the Rome Statute. It is my belief that these sections of the Rome Statute can accommodate the crime of aggression, as long as a qualifier reconfirming that the forms of participation as described in Article 25(3)(a)-(d) apply only to persons who satisfy the strict *ratione personae* limitations. This qualifier should be inserted as a new Article 25(3)(e)*bis* and take the following formation:

In respect of the crime of aggression, only persons being in a position effectively to exercise control over or to direct the political or military action of the State shall be criminally responsible and liable for punishment.

Finally, “attempt” as defined in Article 25(3)(f), the notion of command responsibility (Article 28) and the defence of superior orders (Article 33) are all, in this author's opinion, provisions in the Rome Statute that are incompatible with the present definition and understanding of the crime of aggression, and as such should not apply to any future case involving a charge of the crime of aggression. That being said, this

author also recognizes that these are definitely issues that would benefit from further discussion and debate.

In conclusion, the above analysis shows that even though it is a daunting task, a definition of the crime of aggression is possible. Like Roger Clark, “I do not arrive at Schuster’s drastic conclusion”.⁴⁵¹ However, I do caution that shortfalls in this definition at the drafting stage will significantly hamper its effective application in the context of an international prosecution. By adhering to customary international law and working with the existing structures already provided in the Rome Statute a suitable definition of the crime of aggression is achievable.

⁴⁵¹ Clark, *supra* note247. Schuster, *supra* note5 concludes “that it is favourable to completely remove the crime of aggression from the text of the Rome Statute”.

CHAPTER 4:

CONDITIONS FOR THE EXERCISE OF JURISDICTION OVER THE CRIME OF AGGRESSION:

1. Introduction:

By simply defining the crime that the individual commits, the task assigned to the WGCA, and by default the SWGCA, is not complete. Article 5(2) of the Rome Statute makes it clear that it is also necessary to establish the conditions under which the Court shall exercise its jurisdiction. However, this is an incredibly complex requirement that involves a detailed analysis of the controversial relationship between the political prerogatives of the Security Council and the judicial functions of the Court.⁴⁵² This inevitable relationship is the reason why some regard this requirement as the most troubling obstacle to completing the work on aggression.⁴⁵³

Under Article 13 of the Statute the Court can currently acquire jurisdiction over a 'situation' in three separate ways:⁴⁵⁴ Article 13(a) stipulates that the Court can exercise jurisdiction where a situation is referred to it by a State Party, in accordance with Article 14; Article 13(b) provides that the Security Council, acting under Chapter VII of the UN Charter, may refer a situation to the Prosecutor; and Article 13(c) allows the Prosecutor to initiate proceedings *proprio motu*, in accordance with Article

⁴⁵² Politi, M., 2004. *The Debate within the Preparatory Commission for the International Criminal Court*. In: Politi & Nesi, *The Crime of Aggression*. p48.

⁴⁵³ Shukri, M., 2004. *Will Aggressors Ever be Tried Before the ICC?* In: Politi & Nesi, *The Crime of Aggression*, p41, states that "the real problem to establishing the crime of aggression within the jurisdiction of the ICC is not the definition to be applied, but is the relations between the ICC and the SC if the ICC ever wants to exercise its functions regarding the crime of aggression".

⁴⁵⁴ See: Schabas, *supra* note234, Chapter3.

15. Under Article 16 however, the Security Council can temporarily suspend the Court's jurisdiction in a particular case for a renewable period of 12 months.⁴⁵⁵

The unique nature of the crime of aggression means that it does not easily fit within the alternative jurisdictional options under Article 13. This is because of the intrinsic relationship between the crime of aggression as perpetrated by the individual and the act of aggression as committed by the State. As made clear in Chapter 3, it is the State and not the individual that commits the act of aggression. It is widely acknowledged that to proceed with a case against an individual for the crime of aggression, it must first be established that an act of aggression has been committed by the State to which the individual is affiliated.⁴⁵⁶ In the 2002 Coordinator's Paper, this need for a prior determination was regarded as a precondition that, in addition to those contained in Article 12 of the Rome Statute, had to be established before the Court could act.

It is distinctly possible that this 'precondition' requirement has the potential to cause serious conflict between the Security Council and the Court. Article 39 of the UN Charter entrusts the Security Council with the responsibility of determining the existence of a "threat to the peace, breach of the peace or act of aggression" for the purposes of authorizing actions under Chapter VII. In addition, Article 24 of the UN Charter makes it clear that "in order to ensure prompt and effective action by the United Nations" the Security Council has *primary* responsibility for making this determination. However, the Security Council, as a political body of the UN, is not

⁴⁵⁵ Although it was initially perceived that Article 16 would only be invoked in the rare situation where the Court's investigation or prosecution interfered in the SC's efforts to maintain international peace and security, (Wilmschurst, E., 2001. *The International Criminal Court: The Role of the Security Council*. In: Politi & G. Nesi, ed. *The Rome Statute of the ICC - A Challenge to Impunity*. Great Britain: Ashgate, p39 "cannot envisage that the Council will often be asked for a deferral under Article 16") the provision has recently been used by opponents of the Court to protect their own nationals from international prosecution. See generally: Abass, A., 2005. *The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court*. TILJ. Vol.40, pp263-297; Zappala, S., 2003. *The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements*. JICJ. Vol.1, pp114-134; Zeidy, M.E., 2002. *The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422*. VJTL. Vol. 35, pp1503-1544; Fleck, D., 2003. *Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?* JICJ. Vol.1, pp651-670; Jain, N., 2005. *A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court*. EJIL. Vol.16, No. 2, pp239-254; Zappala, S., 2003. *Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC*. JICJ. Vol.1, pp671-678.

⁴⁵⁶ Discussion Paper 3 notes that it is on this assumption that the SWGCA has based its discussion and that it never seems to have been challenged.

bound to take issues of law and evidence into consideration when making its decisions. On the other hand, the ICC as a court of law is required to apply strict legal criterion to all aspects of its work, including establishing the existence of the necessary precondition for the crime of aggression. Forcing the Court to be dependent upon the political will of the Security Council would seriously impair the independence and impartiality of the Court, not to mention the detrimental effect that it could have on rights of the accused.⁴⁵⁷

Obtaining a solution that respects both the prerogatives of the Security Council and the independence and impartiality of the Court is not an easy task. The division of opinion in the SWGCA,⁴⁵⁸ and the improbability of a resolution being forged in the immediate future means that this issue has the potential to profoundly frustrate efforts to incorporate the crime of aggression within the *de facto* jurisdiction of the Court. The opinions expressed at Rome are clear examples of the conflicting views that persist with regards to this issue. Whilst permanent members of the Security Council were adamant that the crime could only be prosecuted once the Security Council had determined aggression had been committed, most Arab and developing countries argued that the Court had to act fully independently “with regard to the ascertainment of the presence of an act of aggression by a State”.⁴⁵⁹ These opinions reflect the two schools of thought that currently exist on this issue.⁴⁶⁰ On the one hand there are those that believe the Security Council is the only body capable of providing the Court with jurisdiction for prosecutions of aggression,⁴⁶¹ whilst, on the other hand there are those

⁴⁵⁷ Elaraby, N., 2001. The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections. In: M. POLITI & G. NESI, ed. *The Rome Statute of the ICC - A Challenge to Impunity*. Great Britain: Ashgate, p43, is sceptical of involving the Security Council as a “powerful over-politicized organ with an established record of sidelining legal considerations” in the proceedings of the ICC, and instead argues that the wide-ranging involvement the Security Council is already afforded under the Statute “casts a shadow on the credibility of the ICC as an independent Court of Law”.

⁴⁵⁸ 2006 Princeton Report, para(52).

⁴⁵⁹ Leanza, *supra* note174, p14.

⁴⁶⁰ 2005 Princeton Report, para(65) notes that there are two approaches apparent in the SWGCA debates: “one in favour of the exclusive competence of the Security Council and the other advocating such competence for other bodies as well”.

⁴⁶¹ Supporters of this view include Carpenter, *supra* note6, p234 and Muller-Schieke, *supra* note217, p423. See also: 2005 Princeton Report, para(66) & 2006 Princeton Report, para(57).

that feel that the Court, as an independent body separate from the UN system,⁴⁶² can make such a determination for itself.⁴⁶³ Whilst the compromise adopted at Rome was the deletion of an explicit requirement that the ICC should be subordinate to the Security Council, the inclusion of a rather ambiguous requirement that any amendment adopted had to be “consistent with the relevant provisions”⁴⁶⁴ of the UN Charter has provided no reconciliation to these conflicting views.

The focus of this Chapter is the issue of whether the Security Council solely and exclusively has the power to pronounce on the existence of aggression or whether the Court is able to exercise its jurisdiction independent of such a finding, or lack thereof. In an attempt to bridge the gap, the suggestion has also been made that other international bodies, such as the General Assembly and/or the ICJ are also capable of making the requisite determination and therefore satisfying the necessary precondition.⁴⁶⁵ For a variety of reasons, which are addressed in due course, these are unhelpful suggestions.

The structure of this Chapter is based on the Options provided in the 2002 Coordinator’s Paper under paragraphs 4 and 5. That being said, it is worth noting that although these complex issues deserve lengthy discussions, only introductory remarks to the problems are made here. Space limitations means that the following discussion focuses on the crucial factors involved, and only draws preliminary observations as to the jurisdictional options that the provision on the crime of aggression should adopt.

2. The 2002 Coordinator’s Discussion Paper:

(a) Paragraph 4 of the Coordinator’s Discussion Paper:

⁴⁶² Preamble to the Rome Statute

⁴⁶³ It is clear that such a determination can only be made for the purposes of the Court’s criminal proceedings. *See*: Chapter 4(20(b)(ii).

⁴⁶⁴ Article 5(2) Rome Statute. According to Zimmermann, *supra* note 272 p106, Article 5(2) implies that any amendment “must contain safeguards that the Court will not prosecute an individual for the crime of aggression without a prior determination by the SC under Chapter VII of the Charter that the underlying action by the State concerned amounted to an act of aggression”. This was also the understanding of the UK when the Statute was adopted, UN Doc. A/CONF.183/13, p124.

⁴⁶⁵ 2006 Princeton Report, para(58).

The Coordinator's options for jurisdiction start with the one point upon which the majority of delegates seem to be in agreement on. That is, the requirement that a prior determination of an act of aggression has to exist before the Court can proceed with a case involving aggression.⁴⁶⁶ In relation to this, paragraph 4 of the Coordinator's Paper respects the role that the Security Council has been awarded under the UN Charter by stating that where the Prosecutor intends to investigate a crime of aggression, "the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned". If no such determination exists, then the "the Court shall notify the Security Council of the situation before the Court so that the Security Council may take action, as appropriate".⁴⁶⁷ For the purposes of maintaining harmony between these two international organizations, as well as obtaining valuable political acceptance for a prosecution of the crime of aggression, this is a positive suggestion.⁴⁶⁸ By allowing the Security Council the opportunity to make such a determination, the Court is (potentially) relieved of the burden of having to assess complex questions concerning, more often than not, controversial instances of inter-State force.⁴⁶⁹ This would, in theory, allow the Court to proceed straight to questions of individual culpability of the defendant(s) that it may have in its custody. That being said, such a scenario generates further difficult questions as to the nature and legal effects which such a determination may have upon the procedure of the Court, as well as the rights of the accused. These will be addressed in due course.

The likelihood however, of the Security Council actually making such a determination and consequently investing the Court with jurisdiction over a situation involving aggression, is remote. Its composition, political influences and history infer that limiting the Court's jurisdiction to instances of a positive determination by the Council would effectively render the relevant provisions of the Rome Statute

⁴⁶⁶ See generally: 2005 Princeton Report, Part D.

⁴⁶⁷ The Coordinator's Paper provides two alternative options to be added to the end of para(4):
"Option 1: under Article 39 of the Charter of the United Nations" or
"Option 2: in accordance with the relevant provisions of the Charter of the United Nations".

⁴⁶⁸ Escarameia, *supra* note 217, pp141-143, discusses the need for harmonization between these two institutions.

⁴⁶⁹ Wilmshurst, *supra* note 455, p96 stresses that including such a provision will avoid the need for the Court to deal with highly political matters, such as the aggressive nature of controversial uses of force.

redundant. Paragraph 5 of the Coordinator's Paper recognizes this and provides a variety of alternative suggestions in which the Court may proceed in the face of inaction by the Security Council.⁴⁷⁰ For the sake of clarity and to assist in the understanding of the relevant arguments, I have chosen to analyse Option 2 first, as this will clearly demonstrate why the Security Council cannot be the sole gatekeeper to international prosecutions of aggression. I will then turn my attention to Options 1, 3, 4 and 5.

(b) Paragraph 5 of the Coordinator's Paper:

(i) Option 2: The Court shall dismiss the Case:

When the ILC included the crime of aggression within its Draft Statute, it predicted a problem with the proposed Court's ability to prosecute individuals in the absence of a finding that an act of aggression had been committed.⁴⁷¹ Consequently, Article 23 of the 1994 Draft declared that the Court could only proceed with a prosecution of aggression if and when the Security Council made such a determination.⁴⁷² Although this proposal was not adopted at Rome, it is still clearly the preferred option of certain States today.⁴⁷³

For a variety of reasons, making the Court's jurisdiction solely dependent upon positive action by the Security Council would be grossly inappropriate.⁴⁷⁴ Firstly, the

⁴⁷⁰ Apart from reducing options 3, 4 and 5 into just options 3 and 4, the 2007 Chairman's Paper does not alter the suggestions made by the Coordinator. This reflects the lack of progress made by the SWGCA in reconciling the conflicting views in this area.

⁴⁷¹ Crawford, *supra* note 235, p147.

⁴⁷² See: Chapter 2(3)(d). See also: 2006 Princeton Report, para(63)-(69).

⁴⁷³ Delegates in the PrepCom declared that the "Security Council has the exclusive power to determine whether an act of aggression declared that the has been committed", UN Doc. A/51/22, at 32. In the WGCA, the Russian Federation proposed a definition of aggression that was made "subject to a prior determination by the United Nations Security Council", UN Doc. PCNICC/1999/DP.12. A similar proposal was made by Germany, UN Doc. PCNICC/1999.DP.13. For statements to this effect in the SWGCA, see: 2005 Princeton Report, para(67).

⁴⁷⁴ See: Gaja G., 2004. *The Respective Roles of the ICC and the Security Council in Determining the Existence of an Aggression*. In: Politi & Nesi, *The Crime of Aggression*, pp121-124. This is also supported by the opinions of the ICTY Judges when they responded to the provisions on aggression in the Draft Statute:

The provision that the Court cannot proceed against an individual for a crime of aggression unless the Security Council has first ascertained that a State has committed the act of aggression should, however, be omitted ... it does not seem necessary to provide that the Court defer to the Security Council on the subject of aggression, the effect of which would be

composition of the Security Council with its five permanent members able to exercise the veto,⁴⁷⁵ means that America, France, China, the UK and Russia, as well as their political allies, would effectively be immune from prosecutions for the crime of aggression.⁴⁷⁶ This is unacceptable considering the fact that, as demonstrated by recent events, the majority of controversial instances of inter-State force are committed by members of this group.⁴⁷⁷ Furthermore the political hostility of certain permanent five members, in particular America, to the Court, means that the likelihood of the Security Council positively assisting the Court with prosecutions of aggression would be rare.⁴⁷⁸

Secondly, the history of the Security Council's practice with regards to instances of aggression provides another clear example of why such determinations would, at the very best, be "sporadic".⁴⁷⁹ In over 60 years of activity, the Security Council has been extremely reluctant to find that there has been an act of aggression, the sole exception being Resolution 387 of 1976 in which "South Africa's aggression against the People's Republic of Angola" was condemned.⁴⁸⁰ Even Iraq's invasion of Kuwait in 1990, which is generally regarded as an explicit act of aggression, was only defined as

to give the Security Council, and in particular the permanent members, exclusive rights of definition over the term "aggression", making it the "mouth of the oracle" for this category of crimes. The Tribunal's judges respectfully suggest that this would be an undesirable outcome. Ad Hoc Committee on the Establishment of an International Criminal Court, *Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of an International Criminal Court, Report of the Secretary-General*, 20 March 1995, UN Doc. A/AC.244/1, Part III, para(18).

⁴⁷⁵ Elaraby, *supra* note457 highlights that "the abuse of the *veto* has, for many years, frustrated all hopes to consider the Council as the custodian for the application of the rule of law". See also: 2005 Princeton Report, para(71)

⁴⁷⁶ Cryer *et al.*, *supra* note276, p276 argues that such a requirement would give the P5 an "effective veto over prosecutions relating to themselves and their allies".

⁴⁷⁷ For example, the military campaign in Afghanistan in 2001, the intervention in Iraq in 2003 by the US and the UK, and the actions by Israel in Lebanon in 2006.

⁴⁷⁸ Politi, *supra* note452, p50, believes that this is likely unless the American policy towards the Court changes rather dramatically. See generally: Wald, P., 2004. *Is the United States' Opposition to the ICC Intractable?* JICJ, Vol.2, pp19-25; Scheffer, D.J., 1999. *The United States and the International Criminal Court*. AJIL, Vol.93, No.1, pp12-22; Schabas, W., 2004. *United States Hostility to the International Criminal Court: It's All About the Security Council*. EJIL. Vol.15, No.4, pp701-720; Conso, G., 2005. *The Basic Reasons for US Hostility to the ICC in Light of the Negotiating History of the Rome Statute*. JICJ. Vol.3, pp314-322; Reisman, W., 2004. *Learning to Deal with Rejection: The International Criminal Court and the United States*. JICJ. Vol.2, pp17-18.

⁴⁷⁹ Fernandez de Gurmendi, *supra* note247, p603.

⁴⁸⁰ Although preamble paragraphs in SC Resolutions 418(1977) and 527(1982) referred to South Africa's 'aggressive acts' on its neighbouring States and on Namibia, the SC still failed to find that there was more than just a 'threat to the peace'.

a “breach of the peace”.⁴⁸¹ The Security Council’s tendency to understate its evaluation of the situation obviously finds its origin in the difficulty that it would otherwise have to reach the required majority for adopting such a resolution. Whilst downgrading the text of a resolution from an act of aggression to a breach of the peace or a threat to the peace does not affect the abilities of the Security Council to take action under Chapter VII, such a decision would clearly prevent the Court, if it were to be solely dependent upon Security Council action, from ever being able to exercise jurisdiction.⁴⁸²

Thirdly, as previously mentioned, the Security Council is not a court of law. It is a political organ of the UN and as such, when making its decisions does not have to follow the principles of due process.⁴⁸³ Judge Schwebel’s dissenting opinion in the *Nicaragua Case* alluded to this fact:

While the Security Council is invested with the authority to determine the existence of an act of aggression, it does not act as a court in making such a determination. It may arrive at a determination of aggression – or, as more often is the case, fail to arrive at a determination of aggression – for political rather than legal reasons ... In short, *the Security Council is a political organ, which acts for political reasons. It may take legal considerations into account, but, unlike a court, it is not bound to apply them.*⁴⁸⁴

⁴⁸¹ SC Resolution 661(1990). Gray, *supra* note9, pp197-8, notes that the SC has been only slightly more pro-active with regards to ‘a breach of the peace’, and that the majority of its resolutions have been passed under the guise of a ‘threat to the peace’.

⁴⁸² Gaja, *supra* note270, p438.

⁴⁸³ Muller-Schieke, *supra* note271, p421, highlights the fact that SC decisions “take into account aspects of a political, economic, moral and military nature”. Furthermore, Escameia *supra* note217, p137, argues that because the “Charter does not take into account the issue of individual criminal responsibility” that therefore, the “structure and mechanisms it set up do not have the question of the criminal punishment of individuals in mind”. Strong reservations have also been expressed in the SWGCA regarding the fact that such a necessary precondition to the crime is “going to be made by a body guided by political rather than legal considerations”, (2005 Princeton Report, para(68)).

⁴⁸⁴ Nicaragua case, *supra* note96, para(60) (emphasis added). This is also made clear in GA Resolution 3314, Article 4, where the Definition argues that the Council should take its operative paragraphs into consideration when considering the existence of aggression, but that it is not bound to apply them: *See*: Chapter 2(3)(c)

It is therefore clear that as a political decision, any determination by the Security Council must not bind the Court.⁴⁸⁵ If it did, it would seriously jeopardize the Court's independence and impartiality, and would effectively render the Court's role in prosecutions of aggression to a simple assessment of the participation and intention of the defendant(s) in its custody.⁴⁸⁶ In order to respect the principles of due process and the independence of the Court, the ICC must be able to make such a determination for itself, based on the law and evidence before it. As suggested by Carpenter, the Security Council's decision, if one were to be made, should solely be regarded as a 'procedural condition' that is capable of being reviewed,⁴⁸⁷ enabling the Court to establish for the purposes of the prosecution all the relevant aspects of the crime, including whether the commission of an act of aggression amounting to a war of aggression has actually taken place.⁴⁸⁸ That being said, this does raise the potential for conflicting findings on aggression between the two bodies. Whilst the Council may have determined that an act of aggression had occurred, the Court could reach the conclusion that on the merits of the case, the act did not amount to a war of aggression, or that the individual involved did not participate at the necessary policy-level or possess the requisite *mens rea*. Alternatively, the Court could determine the existence of aggression where the Council has failed to consider the situation amounts

⁴⁸⁵ This view is shared by Ntanda Nsereko, D.D., 2002. *Aggression under the Rome Statute of the International Criminal Court*. NJIL. Vol.71, pp497-521; Elaraby, *supra* note457. Yengejeh, S., 2004. *Reflections on the Role of the Security Council in Determining an Act of Aggression*. In: Politi & Nesi, *The Crime of Aggression*. p132, concludes that "it seems prudent to empower the Court to make a ruling in cases of failure of the SC in determining the aggressor".

⁴⁸⁶ Politi, *supra* note452, p49 states that "the Court would be left to decide only upon the degree of participation of the accused in the activity of the State. In this case, there would be no need for a definition of the crime of aggression, since aggression would simply be what the Security Council has determined as such".

⁴⁸⁷ In order to safeguard the defendant's right to due process, the Prosecutor must fulfil the burden of proof regarding all elements of the crime, including the existence of an act of aggression, (2006 Princeton Report, para(71)). Furthermore, the point has been made that, should it emerge, the Court must be able to take new evidence into account, (*ibid*). However, one does need to be aware of the implications of a review by the Court of a SC determination that an act of aggression had occurred. See: Martenczuk, B., 1999. *The Security Council, the International Court of Justice and Judicial Review: What Lessons From Lockerbie?* EJIL. Vol.10, No.3, pp517-547.

⁴⁸⁸ Carpenter, *supra* note6, p235. Schuster, *supra* note5, p40, argues this cannot happen however, for two reasons: firstly, SC determinations under Article 39 are materially binding on Members States and therefore, via the fact that State parties to the ICC are also UN Member States, cannot be *procedurally*, but are *substantially*, binding on the Court; and secondly, that the fallout from the Court finding that aggression had not taken place would seriously undermine the authority of the Security Council, with "drastic consequences for the integrity of the United Nations system as a whole".

to more than a breach or threat to the peace.⁴⁸⁹ Although it has been acknowledged that such a situation would be unhelpful,⁴⁹⁰ it may have to “be the price [that needs to be paid] for compliance with the requirements of a fair trial”.⁴⁹¹

A prior determination by the Security Council must not *a fortiori* bind a defendant charged with a crime of aggression.⁴⁹² As early as the proceedings of the *Ad Hoc Committee*,⁴⁹³ fears have been raised that involving the Security Council in the substantive proceedings of the Court could seriously infringe the due process rights of the accused – not only those guaranteed under the Rome Statute⁴⁹⁴ but also under human rights law in general.⁴⁹⁵ It would essentially usurp one of the “elementary procedural safeguards contained in the Rome Statute”⁴⁹⁶ – the presumption of innocence as detailed in Article 66. In essence, this principle stipulates that a criminal defendant cannot be required to prove his or her own innocence, but rather that it is the Prosecution that carries the burden of establishing the defendant’s guilt. It is difficult to see how the Court can observe this right of the accused in the case of aggression when the Security Council has already made the determination that an act of aggression had occurred. As Schabas observes, “an accused could arrive before the Court with the central factual issue in the charge already determined and not subject to change”.⁴⁹⁷ This cannot occur. The Court has to be able to do more than simply decide upon the participation and intent of the particular accused. The prosecution has to assert that, on the basis of the evidence before the Court, the State to which the accused is affiliated actually perpetrated an act of aggression that amounted to a war of aggression. Even the delegates of the SWGCA have acknowledged the fact that the rights of the defendant as foreseen in the Statute must be safeguarded under all

⁴⁸⁹ This issue is addressed in (2)(b)(ii) of this Chapter.

⁴⁹⁰ 2005 Princeton Report, para(62).

⁴⁹¹ Cryer *et al*, *supra* note276, p278.

⁴⁹² Ntanda Nsereko, *supra* note479, p514. *See*: 2005 Princeton Report, para(64).

⁴⁹³ *Ad Hoc Committee* Report, *supra* note474, para(70).

⁴⁹⁴ Article 67 Rome Statute

⁴⁹⁵ Article 14 ICCPR.

⁴⁹⁶ Schuster, *supra* note5, p46.

⁴⁹⁷ Schabas, W.,1999. *The Follow-Up to Rome: Preparing for Entry Into Force of the International Criminal Court Statute*. HRLJ. Vol.20, pp157-166. As Cryer *et al*, *supra* note276, p279, concludes that to allow “a decision by a political organ [to] effectively constitute part of the judgment against the accused” would unacceptably infringe upon the principles of a fair trial”.

circumstances, “including in connection with a prior determination made by a body other than the Court”.⁴⁹⁸

Related to this issue is the question of whether the defendant can challenge such a determination.⁴⁹⁹ It is clear that, as an individual, the accused would be unable to defend his or her position before the Security Council. Therefore, the Court must provide this opportunity to the defendant. Any defendant must be allowed to raise any international law defences available with regard to the collective act.⁵⁰⁰ This is supported by the SWGCA who, from a procedural perspective, have acknowledged that there is nothing under the Statute to prevent the accused from raising or challenging such a finding during the proceedings of the Court.⁵⁰¹

Once again, I do not agree with Schuster’s conclusions.⁵⁰² Security Council involvement in the proceedings of the Court is not the only possibility available to the SWGCA. The above discussion has clearly stated why Security Council involvement beyond a procedural fulfillment of the precondition would be unacceptable to the principles of due process and the independence of the Court. As Ntanda Nsereko notes, such a condition would effectively “subordinate law and justice to power and politics”.⁵⁰³ That being said, where the Security Council does make a determination, the Court must as a matter of courtesy accord it the utmost respect, as it comes from the organ of the UN trusted with primary responsibility for matters pertaining to the maintenance of international peace and security.

(ii) Option 1: The Court may proceed with the Case:

⁴⁹⁸ 2005 Princeton Report, para(60).

⁴⁹⁹ Muller-Schieke, *supra* note217, p427.

⁵⁰⁰ At both Nuremberg and Tokyo, the Tribunals accepted without much ado that the accused were entitled to raise such issues. The defence claims were denied on the merits. *See*: IMT’s discussion of the invasion of Norway, summarized in Historical Overview, *supra* note9, pp22-23, and the IMTFE’s discussion of the Japanese claims to be acting in self-defence, *ibid*, p99.

⁵⁰¹ 2005 Princeton Report, para(61). Indeed, it was acknowledged that a prior determination by a body other than the Court would not relieve the Court of its responsibility.

⁵⁰² Schuster, *supra* note5, p39, in recognising that it is not perfect, still concludes that “as unfortunate as it is, the current legal situation prescribes the *absolute* primacy of the Security Council when it comes to the question of aggression”. *For a similar opinion see*: Carpenter, *supra* note6.

⁵⁰³ Ntanda Nsereko, *supra* note485, p513.

Option 1 of paragraph 5 provides the most acceptable solution to the problem of establishing jurisdiction over the crime of aggression. In connection with paragraph 4, this option essentially attempts to reconcile the prerogatives of the Security Council with the necessary action and independence of the Court. Based on the proposal submitted by Cameroon to the Rome Conference,⁵⁰⁴ and the joint proposal put forward by Greece and Portugal in the PrepComm,⁵⁰⁵ this option suggests that the Court is capable of making its own determination as to the existence of an act of aggression if the Council fails to do so.⁵⁰⁶ Although this directly challenges the assumption that the Security Council has exclusive competence to determine the existence of an act of aggression, it is asserted here that this is the most appropriate option available to the SWGCA with regards to the Court's exercise of jurisdiction over the crime of aggression. To draw such a conclusion, however, analysis of the prerogatives afforded to the Security Council under Chapter VII as well as the practice of other UN organs in this area is required.

Under Chapter VII the prerogative of the Security Council is confined to determining the existence of threat to the peace, breach of the peace or act of aggression for the sole purpose of authorizing 'sanctions' or 'actions though sanctions'.⁵⁰⁷ It does not extend to making a judicial determination concerning aggression for the purposes of individual criminal proceedings.⁵⁰⁸ Save for Israel and the permanent members of the Security Council, the majority of delegates that spoke at the sixth and seventh sessions of the PrepComm affirmed this understanding.⁵⁰⁹ Furthermore, the fact that other UN bodies have considered themselves capable of drawing conclusions upon matters that the Security Council has primary responsibility for supports the proposition that the ICC can determine the existence of aggression for itself. In the *Certain Expenses*

⁵⁰⁴ UN Doc. A/CONF.183/C.1/L.39.

⁵⁰⁵ UN Doc. PCNICC/2000/WGCA/DP.5.

⁵⁰⁶ 2005 Princeton Report, para(72).

⁵⁰⁷ Fernandez de Gurmendi, *supra* note247. In his Dissenting Opinion of in the *Lockerbie* case, Judge Weeramantry noted that "it would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation". *Lockerbie case, (Provisional Measures)*, ICJ Reports, p3 at p166.

⁵⁰⁸ 2006 Princeton Report, para(55); 2005 Princeton Report, para(69).

⁵⁰⁹ In particular, Angola, Austria, Bosnia-Herzegovina, Brazil, Colombia, Cuba, Egypt, Germany, Greece, Korea, Mexico, New Zealand, Peru, Philippines, Portugal, Romania, Senegal, Spain, Sweden, Syria, United Arab Emirates, and Venezuela.

*Case*⁵¹⁰ the ICJ explicitly rejected the assumption that Article 24 of the UN Charter affords the Security Council exclusive responsibility over matters under Chapter VII. The adoption of the 'Uniting for Peace' Resolution has enabled the General Assembly to seize itself of such matters in instances where the Security Council is prevented from discharging its duties under Chapter VII.⁵¹¹ When the Security Council failed to act during the Suez Canal crisis of 1956 (because of the British and French veto), the General Assembly was able to deal with the matter and implement peace-keeping forces accordingly.⁵¹² In addition, the ICJ has also considered itself capable of adjudicating on the legal aspects of matters of concern to the Security Council.⁵¹³ In the recent case between the Democratic Republic of Congo and Uganda,⁵¹⁴ the ICJ reiterated a very important statement concerning the relationship between these two organs of the UN:

While there is in the Charter a provision for clear demarcation of functions between the General Assembly and the Security Council ... there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. *The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.*⁵¹⁵

The fact that the ICJ as a judicial body has successfully addressed very political questions, often also involving issues of inter-State force, adds weight to the argument

⁵¹⁰ ICJ Reports (1962) p151.

⁵¹¹ See: Chapter2(3)(a)(i).

⁵¹² GA Res. 1000 (ES-1) (5 November 1956). For a list of GA resolutions concerning the use of force by States, see: Historical Overview, *supra* note9, pp405-429.

⁵¹³ See: *Nicaragua Case supra* note57; *United States Diplomatic and Consular Staff in Iran (United States v. Iran)* (1980) ICJ Reports, 3; *Questions on Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. USA: Libya v. UK) (Provisional Measures)* (1992) ICJ Reports, p114.

⁵¹⁴ *Case Concerning Armed Activities on the Territory of the Democratic Republic of the Congo (Democratic Republic of the Congo v. Uganda)* (Merits) 2005 ICJ General List 116. For a detailed analysis of this case with regards to the relationship between the SC and the ICJ, see: Ntanda Nsereko, *supra* note485, pp508-511.

⁵¹⁵ *Ibid.*, (emphasis added). This statement was originally made in the *Nicaragua Case*, *supra* note57, para(95).

that the ICC can concern itself with aggressive acts of States for the purpose of establishing the precondition to the crime of aggression. It has been asserted that the ICJ is a “trailblazer” in matters involving the relationship between the Security Council and the judicial organs of the international community, and that in this respect the jurisprudence of the ICJ is “valuable as a guide to the ICC”.⁵¹⁶ There is however, one major difference between these two judicial bodies that this assumption does not appear to acknowledge. The ICJ’s jurisdiction is fundamentally different to the ICC’s, in that whilst the ICJ is concerned with issues of State responsibility, the ICC is only mandated to evaluate the criminal responsibility of individuals. In this respect, the jurisprudence of the ICJ can only have a limited impact on the procedure of the ICC. If any comparison is to be drawn, it should therefore be made from an institution that has a mandate similar to that of the Court.

In this context, reference to the practice of the ICTY in the *Tadic* case⁵¹⁷ is more appropriate. When asked to consider the nature of the conflict (whether it was of an internal or an international character) the Tribunal treated the issue of State responsibility as a preliminary question that had to be settled for the purposes of establishing individual criminal responsibility in the case at hand.⁵¹⁸ Based on this practice, there is an argument to suggest that criminal institutions are capable of pronouncing on the actions of a State for the sole purpose of facilitating their criminal proceedings. This argument is something that appears to be supported by academics as well.⁵¹⁹ Finally, the fact that there is nothing in international law (in theory) from preventing an individual State from making an independent determination on the existence of an act of aggression, either for the purposes of invoking the right to self-defence or establishing criminal proceedings at the national level, adds weight to the argument that to subject the Court to the rare Security Council determination would appear to go against developing international practice.

⁵¹⁶ Ntanda Nsereko, *supra* note 485, p511.

⁵¹⁷ *Prosecutor v. Tadic* (Case No. IT-94-1).

⁵¹⁸ Lehto, M., 2004. *The ICC and the Security Council: About the Argument of Politicization*. In: Politi & Nesi, *The Crime of Aggression*, p148.

⁵¹⁹ Akande, D., 1998. *The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice*. EJIL. Vol.99, p446 argues that “action which promotes the effectiveness of an international organization in carrying out its given functions is in general considered to be within the competence of the organization as long as it is not expressly excluded in its constituent instrument”.

(iii) Option 3: The Court shall request that the General Assembly make a recommendation:

Option 3 suggests that where the Security Council fails to make a determination concerning the existence of an act of aggression, the Court may request the General Assembly make a 'recommendation'.⁵²⁰ If that does not occur within a set period (12 months), then the Court may proceed with the case. Whilst this proposal recognizes the political nature of a determination on the existence of aggression and accordingly tries to include the UN's other political organ in the decision making process, it is not a helpful suggestion for a number of reasons. Firstly, although the 'Uniting for Peace' resolution enables the General Assembly to seize itself of matters where the Security Council is prevented from acting,⁵²¹ the UN Charter makes it clear that the General Assembly plays a subordinate role to the Security Council on matters concerning the maintenance of international peace and security. By virtue of Article 103 of the Charter, the ICC as a treaty-based institution cannot ask the General Assembly to act in conflict with the Security Council where it is not being frustrated by the exercise of a veto.⁵²² This means that where the Security Council considers the situation to be a breach of the peace or threat to the peace, this suggestion would not be an option available to the Court. Secondly, the General Assembly, like the Security Council, is a political organ that makes its decisions for political reasons. Therefore, the arguments made above concerning the necessity to safeguard the independence and impartiality of the Court, as well as the rights of the accused, are also relevant here. Thirdly, there is also no guarantee that the General Assembly, with an even larger membership than the Security Council, would have more success in recognizing a situation as an act of aggression. Finally, the delay that would result if the General Assembly was to be involved in the process of establishing the Court's jurisdiction would allow potential defendants more time to continue their aggression, destroy crucial evidence or even escape capture. It is my conclusion therefore that the suggestion to involve the

⁵²⁰ 2006 Princeton Report, para(59). In connection with the GA's involvement, it was noted that further reflection was warranted as to the type of "recommendation" that would be sought (i.e., whether it would be a recommendation that the Court proceed with a particular prosecution or a recommendation that an act of aggression has occurred).

⁵²¹ Shuki, *supra* note222, advocates for the use of the Uniting for Peace Resolution in cases where the SC is blocked by a veto from a permanent member. *See also*: 2005 Princeton Report, para(70).

⁵²² Meron, *supra* note7.

General Assembly in the process of establishing jurisdiction is not a helpful solution to this incredibly complex problem.

(iv) Options 4 and 5: The Court may request the General Assembly/Security Council to Seek an Advisory Opinion from the ICJ:

I have decided to address Options 4 and 5 together as they both refer to the suggestion of involving the ICJ in the proceedings of the Court. Option 4 stipulates that the Court may request that either the General Assembly or the Security Council seek an advisory opinion from the ICJ on “the legal question of whether or not an act of aggression has been committed by the State concerned”, in accordance with Article 96 of the Charter and Article 65 of the ICJ Statute. Option 5 provides that the Court may proceed once such a finding is made. This suggestion is based on the proposal submitted by Bosnia and Herzegovina, New Zealand and Romania to the WGCA.⁵²³ This proposal over-complicates matters however, and should not be considered as an option for the ICC. The fears raised in the SWGCA accurately reflect the reasons for rejecting this suggestion. Firstly, doubts have been expressed about whether it would be desirable, from the legal perspective, to involve the ICJ, since it would apply different standards of proof than the Court.⁵²⁴ Secondly, questions have been raised about whether the ruling of the ICJ would bind the Court. As already explained, in the interests of the accused, a prior determination by an organ other than the Court cannot bind it. Thirdly, even though according to the jurisprudence of the ICJ⁵²⁵ a State’s consent is not necessary in advisory opinions, one wonders whether proceedings involving scenarios as serious as aggression would not essentially be “contentious proceedings against the named state”.⁵²⁶ Fourthly, there would be no possibility for the individual accused to appear before the ICJ and bring evidence.⁵²⁷

The multitude of questions raised concerning the ICJ’s involvement indicates just how complex this suggestion is. Although the proposal would benefit from further

⁵²³ UN Doc. PCNICC/2001/WGCA/DPI. The use of the SC was not envisaged in this proposal however.

⁵²⁴ 2006 Princeton Report, para(60).

⁵²⁵ *Peace Treaties Advisory Opinion* (1950) ICJ Rep. 71

⁵²⁶ Ntanda Nsereko, *supra* note485, p513.

⁵²⁷ Article 34(1) ICJ Statute

discussion, for the purposes of this thesis, it is considered to be an unhelpful suggestion. As a final point, it is worth noting that discussions in the SWGCA seem to suggest that the majority of delegates also favor the deleting of these options, although for different reasons.⁵²⁸

CHAPTER CONCLUSIONS:

The proposals concerning the manner in which the ICC will exercise jurisdiction over the crime of aggression are, in my opinion, the most troubling aspect of the SWGCA's task. Not only do the contrasting opinions appear to be irreconcilable, but also the dangerous possibility of involving the political motives of the Security Council in the judicial processes of the ICC has serious consequences for the independence of the Court and the application of fundamental due process principles. Although the above analysis is only a brief overview of the complex issues involved in this problem, a few initial observations can be made. Firstly, it is clear that the UN Charter affords the Security Council primary responsibility for determining the existence of acts of aggression with regards to measures under Chapter VII. However, the Security Council does not have the monopoly on making such determinations for the purposes of establishing criminal proceedings. The fact that paragraph 4 of the Coordinator's Paper accords the Security Council the due respect it deserves is a positive suggestion for the starting point for the proposals concerning the Court's jurisdiction over the crime of aggression. However, it is clear that should the Security Council make such a determination, it cannot bind the Court. To do so would violate the principles of due process and the independence of the Court. The Court must be able to review any determination made during the course of its proceedings. Furthermore, where no Security Council determination is made, the Court must be able to take such a decision for itself. Developing practice in this area would suggest that the Court has the competence to take such action. Involving the General Assembly and/or the ICJ in the process would, however, not be a suitable alternative. On a final note, the suggestion has been made that should the Court be afforded the ability to make a determination as to the existence of an act of aggression independent of the Security Council, that the Security Council's efforts to maintain international peace and security could be jeopardized, enabling hostilities to continue and potentially get even

⁵²⁸ 2006 Princeton Report, para(82).

worse.⁵²⁹ This suggestion does not take account of the options already afforded to the Security Council under the Rome Statute. Should the Security Council feel that the Court's investigation is interfering with its ability to carry out its duties the Security Council can legitimately defer the Court's jurisdiction under Article 16.

⁵²⁹ Cryer *et al*, *supra* note 276, 278.

CHAPTER 5:

THE WAY FORWARD:

The mandate of the SWGCA, awarded by default from the WGCA, makes it clear that there are two principle aspects to the crime of aggression. In order to present the ASP with a properly drafted proposal based on substantive legal provisions capable of actually impacting upon the day to day workings of the Court and the cases it handles, both of these proposals have to be comprehensively addressed and defined. Whilst the definition of the crime of aggression needs to be completed, it is the opinion of this author (as demonstrated by the conclusions presented in Chapter 3 of this thesis) that this is something which can, with relative ease and a little compromise, be accomplished. Moreover, it can be accomplished in accordance with the fundamental and non-derivable principle of *nullum crimen sine lege* as well as clearly established customary international law. Secondly, the conditions under which the Court is to exercise jurisdiction need to be stipulated. This, as is argued in Chapter 4, is something that is not as easy nor as straightforward as defining the elements of the crime, and potentially may be the issue which derails the entire project.

Whilst history might suggest that defining the substantive aspects of the crime of aggression would be the more disconcerting obstacle the SWGCA has to overcome, Chapter 3 has determined that this is not the case. A definition of the crime of aggression for the purposes of criminal prosecution under the Rome Statute is comprehensively attainable. Even though opinions amongst certain delegates may differ, the law in this area is clear. As long as the definition complies with stipulated customary international law and the stringent principle of legality, the elements of the crime of aggression are relatively effortless to identify. Other academics also share this conviction. Meron believes that “a definition of aggression that is tailored to reflect customary international law is not an impossible mission”,⁵³⁰ whilst Fernandez de Gurmendi concludes that “every effort should be made not to depart from the principle of legality, which should be perceived not only as a safeguard for the rights

⁵³⁰ Meron, *supra* note 7, p5.

of the accused but the best protection for the credibility of the Court as well”.⁵³¹

Furthermore, a stringent definition has the potential to silence some of Court’s more vocal critics, as well as strengthen the belief of both State Parties and non-State Parties alike, in the Court’s impartiality, independence and effective functioning capabilities. To enter uncharted waters and start legislating new aspects of this already controversial and difficult crime would not only go against the views of many of the Parties to the debate, but would ultimately cause such division that actually presenting the ASP with a provision capable of being adopted would become a remote and unlikely possibility.

The unique nature of the crime of aggression means that the definition must identify the underlying collective act that is committed by the State. It is generally recognized that the General Assembly’s Definition of Aggression is the principle document of reference for ascertaining which particular acts by the State amount to an act of aggression. The SWGCA is not mandated to re-open this issue, and although caution is advised when one refers to Resolution 3314 in the context of criminal proceedings against an individual, it is the principle source of reference for the Court when clarification or review is needed of a determination that an act of aggression has in fact occurred.

What the SWGCA is mandated to do is to prepare a definition of the crime of aggression that clearly identifies the instances in which an act of aggression when committed by the State can lead to the criminal prosecution of the leaders of that State. The only successful international prosecutions of aggression to have been conducted – namely those before the IMT, IMTFE and CCL No. 10 – are the only precedents available to the ICC, and whilst they should be approached with a degree of caution, attention should be given to the principles they established and the reasoning they provided. Of crucial importance is the fact that for an individual to be held accountable for his or her involvement in the illegal conduct of the State, the particular act of aggression must amount to a war of aggression or an action which, in its gravity and scale, reaches the same degree of intensity in order to qualify as a war of aggression. Whilst raising the bar to the magnitude of force witnessed during the

⁵³¹ Fernandez de Gurmendi, *supra* note247, p188.

Second World War may be too restrictive, it is clear that instances such as cross-border skirmishes constitute acts 'short of war', and as such, can only be the subject of political condemnation. Secondly, the action must also be accompanied by an aggressive aim, intention or objective. Based on the Nuremberg precedent, this aggressive conduct materializes as the total or partial annexation or occupation of the victim-State by the aggressor. In this author's proposed definition, the phraseology - "which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof" - has been chosen as it represents accepted customary international law on this aspect of the definition.

Regarding the second component of the crime, namely the involvement of the individual, the jurisprudence of the IMT, IMTFE and the CCL No. 10 trials makes it clear that only a limited number of people can satisfy the strict *ratione personae* requirements. The crime of aggression is a leadership crime, and as such, only those individuals who are in a position to "effectively exercise control over or to direct the political or military action of a State" can be held responsible for the State's aggressive acts. Although it would seem to be obvious that high-ranking military individuals, heads of State that actively participate in the policy of their country and decision-making politicians will almost always satisfy this criteria, the Judgment of the IMT also emphasized the fact that individuals such as industrialists, business men and diplomats can be held responsible for the crime of aggression when they have actively influenced the policy of an aggressive State. As long as it can be demonstrated that they were actively involved in the "planning, preparation, initiation or execution" of a war of aggression, then they are capable of being held responsible for their actions.

The conditions upon which the Court is to exercise jurisdiction, as detailed in Chapter 4 of this thesis, are a much more complex matter that is going to be much harder for the SWGCA to resolve. The inevitable relationship that exists between the political organ that is the Security Council and the judicial organ that is the Court has the potential to be highly disruptive. Like Shukri concludes:

The real problem to establishing the crime of aggression within the jurisdiction of the ICC is not the definition to be applied, but it is the relations between the

International Criminal Court and the Security Council if the International Criminal Court ever wants to exercise its functions regarding the crime of aggression.⁵³²

By virtue of Article 39 of the UN Charter, the Security Council is responsible for determining the existence of a “threat to the peace, breach of the peace or act of aggression”. Furthermore, Article 5(2) of the Rome Statute states that any provision on the crime of aggression must be “consistent with the relevant provisions” of the UN Charter. Although some suggest that this means that the ICC is bound to abide by the actions (or non-actions) of the Security Council with regards to aggression, it is my belief and the argument of this thesis that this is not and should not be the case.⁵³³

Firstly, it is proposed that the suggestion made at paragraph 4 of the 2002 Coordinator’s paper satisfies the conditions stipulated in Article 5(2), namely that should the Prosecutor wish to investigate an alleged crime of aggression, the Court should “first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned” (and if no such determination exists, should “notify the Security Council of the situation before the Court so that the Security Council may take action, as appropriate”).

Secondly, at section 2(b)(ii) of Chapter 4, this author argues that the ICC is capable of making its own determination as to the existence of an act of aggression, purely for the purpose of prosecuting an individual or several individuals for their role in the commission of an alleged crime of aggression. Both the ICJ and the ICTY have recognized their abilities to function as judicial organs alongside the political organ that is the Security Council in respect of the same events, so why should the ICC be prevented from doing the same? Whilst it may be argued that this is something which the ICC is capable of doing, the issue of whether this is something that members to the SWGCA will actually agree to allow the ICC to do is a totally different matter.

⁵³² *Supra* note453

⁵³³ In particular, *see*: section 2(b)(i) of Chapter 4 of this thesis, where the arguments are made as to why it is not appropriate for the Security Council to be the sole gatekeeper over the ICC’s jurisdiction with regards to aggression.

Thirdly, although it is important to establish and develop good relations with the Security Council as the primary body responsible for the maintenance of international peace and security, the Court should not be bound to its political will. As this author concludes at page 104 of this thesis, “forcing the Court to be dependent upon the political will of the Security Council would seriously impair the independence and impartiality of the Court, not to mention the detrimental effect that it could have on the rights of the accused”. Primarily, should the Security Council (or any other body for that matter) actually make a determination that an act of aggression has been committed – it is the strongly held belief of this author that such a determination should in no way bind the Court. In order to respect the principles of due process as well as the independence of the Court, the ICC must be able to make such a determination for itself, based on the law and evidence before it. Although this has the potential to give rise to the possibility of two bodies arriving at different and conflicting conclusions, this should not prevent the ICC from adhering to these fundamental principles. In conclusion, the Court has to be able to do more than simply decide upon the participation and intent of the particular accused and, as Cryer acknowledges, this might just have to “be the price [that needs to be paid] for compliance with the requirements of a fair trial”.⁵³⁴

Obtaining a solution that respects both the prerogatives of the Security Council and the independence and impartiality of the Court is not an easy task. The division of opinion within the SWGCA and the improbability of a resolution being forged in the immediate future means that this issue has the potential to profoundly frustrate efforts to incorporate the crime of aggression within the *de facto* jurisdiction of the Court. The Security Council’s composition, political influences and history infer that limiting the Court’s jurisdiction to instances of a positive determination by it would effectively render the relevant provisions of the Rome Statute redundant. The composition of the Security Council, with its permanent members being able to exercise their veto unrestrained, would allow America, France, China, the UK and Russia, as well as their political allies, to become effectively immune from prosecutions for the crime of aggression. The SWGCA must remain loyal to the fundamental principles of due process and preserve the independence, impartiality and integrity of the Court. Any

⁵³⁴ *Supra* note491

evidential provision adopted must, in the words of Ntanda Nsereko, avoid paying “homage to power and politics” and instead must “endeavor to accord primacy to law and justice”.⁵³⁵

⁵³⁵ Ntanda Nsereko, *supra* note 485, p521.

Annex I

United Nations General Assembly Resolution 3314 (XXIX), 14 December 1974. Definition of Aggression

The General Assembly,

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace and for the suppression of acts of aggression and other breaches of the peace,

Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

Recalling also the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice,

Bearing in mind that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations,

Considering also that, since aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences, aggression should be defined at the present stage,

Reaffirming the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial Integrity,

Reaffirming also that the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof,

Reaffirming also the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,

Convinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim,

Believing that, although the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, it is nevertheless desirable to formulate basic principles as guidance for such determination,

Adopts the following Definition of Aggression:

Article 1

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Explanatory note: In this Definition the term “State”:

- (a) Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations:
- (b) Includes the concept of a “group of States” where appropriate.

Article 2

The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapon by a State against the territory of another State;

- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) 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;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) 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.

Article 4

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.
2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.
3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Article 6

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Article 7

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.

Annex II

Discussion paper proposed by the Coordinator

I. Definition of the crime of aggression and conditions for the exercise of jurisdiction

1. For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations

Option 1: Add “such as, in particular, a war of aggression or an act which has the object of result of establishing a military occupation of, or annexing, the territory of another State or part thereof”.

Option 2: Add “and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof”.

Option 3: Neither of the above.

2. For the purpose of paragraph 1, “act of aggression” means an act referred to in the United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, which is determined to have been committed by the State concerned,

Option 1: Add “in accordance with paragraphs 4 and 5”.

Option 2: Add “subject to a prior determination by the Security Council of the United Nations”.

3. The provisions of articles 25, paragraphs 3, 28 and 33, of the Statute do not apply to the crime of aggression.

4. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. 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:

Option 1: under Article 39 of the Charter of the United Nations.

Option 2: in accordance with the relevant provisions of the Charter of the United Nations.

5. Where the Security Council does not make a determination as to the existence of an act of aggression by a State:

Variant (a) or invoke article 16 of the Statute within six months from the date of notification.

Variant (b) [Remove variant a.]

Option 1: the Court may proceed with the case.

Option 2: the Court shall dismiss the case.

Option 3: the Court shall, with due regard to the provisions of Articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make a recommendation within [12] months. In the absence of such a recommendation, the Court may proceed with the case.

Option 4: the Court may request

Variant (a) the General Assembly

Variant (b) the Security Council, acting on the vote of any nine members,

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, on the legal question of whether or not an act of aggression has been committed by the State concerned. The Court may proceed with the case if the International Court of Justice gives an advisory opinion that an act of aggression has been committed by the State concerned.

Option 5: the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.

II. Elements of the crime of aggression (as defined in the Rome Statute of the International Criminal Court)¹

Precondition

¹ The elements in part II are drawn from a proposal by Samoa and were not thoroughly discussed.

In addition to the general preconditions contained in article 12 of the present Statute, it is a precondition that an appropriate organ² has determined the existence of the act of aggression required by element 5 of the following Elements.

Elements

1: The perpetrator was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression as defined in element 5 of these Elements.

2: The perpetrator was knowingly in that position.

3: The perpetrator ordered or participated actively in the planning, preparation or execution of the act of aggression.

4: The perpetrator committed element 3 with intent and knowledge.

5: An “act of aggression”, that is to say, an act referred to in the United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, was committed by a State.

6: The perpetrator knew that the actions of the State amounted to an act of aggression.

7: The act of aggression, by its character, gravity and scale, constituted a flagrant violation of the Charter of the United Nations,

Option 1: Add “such as a war of aggression or an aggression which had the object or result of establishing a military occupation of, or annexing the territory of another State or part thereof”.

Option 2: Add “and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof”.

Option 3: Neither of the above.

8: The perpetrator had intent and knowledge with respect to element 7.

Note:

Elements 2, 4, 6 and 8 are included out of an abundance of caution. The “default rule” of article 30 of the Statute would supply them if nothing were said. The dogmatic requirement of some legal systems that there be both intent and knowledge is not meaningful in other systems. The drafting reflects these, perhaps insoluble, tensions.

² See options 1 and 2 of paragraph 2 of part I. The right of the accused should be considered in connection with this precondition.

Annex III

Discussion paper on the crime of aggression proposed by the Chairman

I. Definition of the crime of aggression and conditions for the exercise of jurisdiction

*Insert new article 8 bis (entitled “Crime of Aggression”) into the Rome Statute:*¹

*Variant (a):*²

1. For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person (leads) (directs) (organizes and/or directs) engages in) the planning, preparation, initiation or execution of an act of aggression/armed attack

Variant (b):

1. For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person orders or participates actively in,³ the planning, preparation, initiation or execution of an act of aggression/armed attack

continue under both variants:

[which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations] [such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State of part thereof].

¹ The question as to whether the amendments are adopted under article 121, paragraph 4 or 5, requires further discussion.

² Variant (a) reflects the “differentiated” approach, under which article 25, paragraph 3, *does* apply to the crime of aggression, with the exception of subparagraph(f). Further options for the wording of this paragraph under the differentiated approach are contained in the report of the 2006 Princeton meeting (see ICC-ASP/5/32, annex II, appendix I). Variant (b) represents the “monistic” approach, under which article 25, paragraph 3, in its entirety *does not* apply to the crime of aggression.

³ The proponents of the language “armed attack” (or alternatively “use of force”) for paragraph 1 advocate, along with this formulation, also the deletion of paragraph 2 as a whole.

2. For the purpose of paragraph 1, “act of aggression” means an act referred to in [articles 1 and 3 of] United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974.

under variant (a) above:

3. The provisions of articles 25, paragraph 3 (f), and [28] of the Statute do not apply to the crime of aggression.⁴

under variant (b) above:

3. The provisions of articles 25, paragraph 3, and [28] of the Statute do not apply to the crime of aggression.

4. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court.⁵

5. Where the Security Council does not make such a determination within [six] months after the date of notification,

Option 1: the Court may proceed with the case.

Option 2: the Court may not proceed with the case.

Option 3: the Court may, with due regard to the provisions of articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make such a determination within [12] months. In the absence of such a determination, the Court may proceed with the case.

Option 4: the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.

⁴ Under variant (a), which foresees that article 25, paragraph 3, *does* apply with the exception of subparagraph (f) (“attempt”), a new subparagraph could be added to article 25 which re-confirms that the forms of participation described in article 25, paragraph 3, subparagraphs (a) to (d), apply only to persons who are in a position effectively to exercise control over or to direct the political or military action of a State.

It is widely agreed that article 28 is not applicable by virtue both of the essence and the nature of the crime. However, there is not yet any agreement whether or not non-applicability needs to be specified.

⁵ It has been suggested that paragraphs 4 and 5 should be redrafted in order to differentiate between the trigger mechanisms reflected in article 13.

II. Elements of the crime of aggression (as defined in the Rome Statute of the International Criminal Court)⁶

Precondition

In addition to the general preconditions contained in article 12 of the present Statute, it is a precondition that an appropriate organ⁷ has determined the existence of the act of aggression required by element 5 of the following Elements.

Elements

- 1: The perpetrator was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression as defined in element 5 of these Elements.
- 2: The perpetrator was knowingly in that position.
- 3: The perpetrator ordered or participated actively in the planning, preparation or execution of the act of aggression.
- 4: The perpetrator committed element 3 with intent and knowledge.
- 5: An “act of aggression”, that is to say, an act referred to in the United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, was committed by a State.
- 6: The perpetrator knew that the actions of the State amounted to an act of aggression.
- 7: The act of aggression, by its character, gravity and scale, constituted a flagrant violation of the Charter of the United Nations,

Option 1: Add “such as a war of aggression or an aggression which had the object or result of establishing a military occupation of, or annexing the territory of another State or part thereof”.

⁶ The Elements in part II were not thoroughly discussed and have therefore been reproduced without any change from the 2002 Coordinator’s paper, even though this leads to some obvious inconsistencies. The Elements therefore mainly serve the purpose of a placeholder, at this juncture of the debate.

⁷ See options 1 and 2 of paragraph 2 of part I. The right of the accused should be considered in connection with this precondition.

Option 2: Add “and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof”.

Option 3: Neither of the above.

8: The perpetrator had intent and knowledge with respect to element 7.

Note:

Elements 2, 4, 6 and 8 are included out of an abundance of caution. The “default rule” of article 30 of the Statute would supply them if nothing were said. The dogmatic requirement of some legal systems that there be both intent and knowledge is not meaningful in other systems. The drafting reflects these, perhaps insoluble, tensions.

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School, Princeton University, New Jersey, United States, from 21 to 23 June 2004. ICC-ASP/3/SWGCA/INF.1

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Discussion Paper 1 – The Crime of Aggression and Article 25, paragraph 3, of the Statute. ICC-ASP/4/32, Annex II.B

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