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The International Criminal Court and the Crime of Aggression

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Summary

The Rome Statute of the International Criminal Court (Rome Statute) was signed 17 July 1998. It will be a permanent court that will have jurisdiction over crimes in potentially all States. The defendants will not be States, but individuals. Among the four crimes listed in Rome Statute the crime of aggression was the most contentious. The issue of aggression and efforts to deter the use of force has been raised in various treaties, resolutions and cases in history, not least in the twentieth century. States have been found to commit acts of aggression and in some cases the international community has reacted in joint efforts, as against Iraq in the previous decade. However, only at one time in history individuals have been tried for a similar crime, during the Nuremberg and Tokyo trials in the aftermath of the Second World War.

The informal consultations of the Rome Conference did not bring the delegations to an agreement on how to include the crime in the statute. Several States from the non-aligned movement advocated that the Security Council should not have any role in relation to the crime of aggression. The permanent members of the Security Council regarded the involvement of the Security Council as a necessary condition for the inclusion of the crime in the statute. Article 5 of the Rome Statute of the International Criminal Court states: "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with article 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." The issue is currently under discussion between States in the Preparatory Commission of the International Criminal Court.

The objective of the thesis is to describe the different solutions and to provide a proposal on how to define the crime of aggression and solve the issue of jurisdiction. The solution chosen with low involvement of the Security Council and high thresholds for its application has been measured against three interests; to what degree it fulfils the requirement of fair trial and respect for human rights, how coherent it is with the surrounding legal system, and if it is close enough to the opinion of the States.

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Table of Abbreviations

FRD	Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (1970); UN General Assembly Resolution 2625
FRY	Federal republic of Yugoslavia
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of the International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal for the Trial of the Major War Criminals at Nuremberg
Kellogg Briand Pact	General Treaty for Renunciation of War as an Instrument of National Policy
London Charter	Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis
Nicaragua Case	Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America
Nuremberg	The International Military Tribunal at Nuremberg created by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis
Definition of Aggression	Definition of Aggression (1974); UN General Assembly Resolution 3314
Rome Conference	United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court
Rome Statute	Rome Statute of the International Criminal Court
UN	United Nations
UN Charter	Charter of the United Nations

1. Introduction

1.1 Objective of the Thesis

If and how the crime of aggression will be included under the jurisdiction of the International Criminal Court is an open question. The objective of the thesis is to illustrate the tensions between different views on how the crime should be dealt with. There are several different State positions, as well as multiple scholarly opinions. In legal sources such as treaties, resolutions and custom there is also support for more than one view. A considerable part of the thesis will thus be of a descriptive nature, an evaluation of different legal sources. The thesis will also elaborate on different normative considerations. Lastly there will be a constructive attempt to formulate a definition of the crime of aggression and conditions for the exercise of jurisdiction in the form of draft articles. In this effort which may seem "mission impossible" to define the crime and solve the issue of jurisdiction three different interests will be considered; first, that the requirements of fair trial is fulfilled and human rights are respected, second, that the solution will be coherent with international law, and third, that the proposal is acceptable to a vast group of States, so as not to be considered utopic.

1.2 Approach to the Problem

Nine questions will be addressed in the thesis:

1. How has the crime been defined previously and how could it be used in the context of the International Criminal Court?
2. Should there be a generic definition, a list of examples or a combination of both?
3. A closely related question is what kind of acts are to be included in the definition of the crime.
4. Who is the addressee of the crime, can anyone be accused of the crime or is the potential group of violators limited?
5. Is a threat of use of force enough or is there a need to show that an act of aggression has been completed?
6. Should there be a threshold regarding the purpose and consequences of the crime? Is it necessary to show some kind of intent of the perpetrator?
7. The possibility for an alleged perpetrator to vindicate him- or herself. Can the act of aggression be justified by referring to self-defence or a humanitarian intervention?
8. Is a decision by the Security Council a necessary condition for establishing responsibility? If the answer is yes, what implications does this have for the concept of fair trial and relevant human rights provisions?

9. What relationship exists between the choice of definition and the role of the Security Council in order to have an acceptable solution from a legal viewpoint and from the interests of the State parties?

1.3 Limitations

The matter of the thesis relates to several areas of international law, thus it has to be delimited. One line of delimitation is towards the definition of the crime of aggression. The issue of the definition will be elaborated to the extent that it relates to the crime of aggression and individual criminal responsibility. The same applies to discussions about the concepts of self-defence, humanitarian intervention and the Security Council's role in determining acts of aggression. All of these areas could in themselves be the matter of a thesis. The focus here remains on the role of the International Criminal Court over the crime of aggression. There are numerous interesting aspects of the Rome Statute of the International Criminal Court, but not all of the provisions relate specifically to the crime of aggression. Therefore the thesis will only elaborate on the provisions that are closely related to the crime of aggression.

1.4 Method

In the descriptive part of the thesis the method will be traditional with a review of different legal sources in a chronological order. Already in this part there will be efforts made to show the essences of the problem, potential contradictions and conceivable solutions. It is in the normative part of the thesis that, from a jurist's viewpoint, somewhat more unorthodox methods will be used. In order to describe the interaction between the choice of definition and the conditions for jurisdiction a table with two dimensions and four different solutions will be used. These different solutions will be measured against three interests as described above; first that the requirements of fair trial is fulfilled and human rights are respected, second that the solution will be coherent with international law, and third that the proposal is acceptable to a vast group of States, it should not be considered utopic.

Already at this stage a background to the notion of coherence will be given and what potential relevance it could have for the thesis. Legal thinkers and philosophers such as Ronald Dworkin and Aleksander Peczenik advocate that one important role of jurists is to promote coherence in the legal

system.[1] Aleksander Peczenik defines the level of coherence in a legal system after three criterias; (1) consistency (2) the different parts are supportive of each other, and (3) the legal system should have a connection to reality.[2] It should avoid being utopic.

This objective and model of coherence has been questioned by other scholars, for example the school Critical Legal Studies, with the former diplomat Martti Koskenniemi as one if its advocates.[3] The Critical Legal Studies school claims that international law is either a justification for previous actions (apology) or it is utopic moral system without power (utopia), international law does not work and the concept of coherence can not be used.[4] Every legal coherent conclusion may be attacked from a contrasting perspective:[5] ”in fact, every coherence is of course non-coherence from another standpoint”.[6] In analysing legal arguments the Critical Legal Studies school is highly useful. Thus, some of the notions that Martti Koskenniemi elaborates on such as utopia will be used in the thesis.

The points of criticism voiced against the concept of coherence by Martti Koskenniemi and others are valid from a strictly logical and philosophical viewpoint, one could argue that law is nothing more than a tool for legitimising policy choices and that international law does not work. This perspective is not very helpful when trying to reconcile different interests in international law. Thus, this thesis is built on the concept of coherence and the assumption that it is possible to find some degree of consistency, that different parts in law support each other and that legal system relates to the reality. Consequently, the concept of coherence will be used as means for resolving the conflict connected to the incorporation of the crime of aggression in the Rome Statute.

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[1] Simmonds, Nigel E., *Juridiska principfrågor: rättvisa, gällande rätt och rättigheter*, Stockholm: Norstedts, 1988, 107-108
Peczenik, Aleksander, *Juridikens teori och metod: en introduktion till allmän rättslära*, Stockholm: Norstedts, 1995, 1995, 92 [Peczenik (Juridikens teori och metod)]
Peczenik, Aleksander, *Vad är rätt?: Om demokrati, rättssäkerhet, etik och juridisk argumentation*, Stockholm : Norstedts, 1995, 628-629
[2] [Peczenik (Juridikens teori och metod)], 86-91
[3] Bring, Ove; Mahmoudi, Said, *Sverige och folkrätten*, Stockholm: Norsteds Juridik, 1998, 36-37 [Bring & Mahmoudi]
[4] [Bring & Mahmoudi], 36-37
Koskenniemi, Martti: *From Apology to Utopia: the Structure of International Legal Argument*, Helsinki: Finnish Lawyers' Publishing Company, 1989, 149-151 [Koskenniemi]
[5] [Koskenniemi], 460-461
[6] Koskenniemi, Martti: e-mail regarding *From Apology to Utopia*, 2000-05-19, 2

1.5 Material

Article 5(2) of the Rome Statute concerning the crime of aggression, does to a very limited degree, elaborate on the how the crime should be defined and its relation to other parts in the system of international law. Thus in the efforts to define the crime and to elaborate on the role of the Security Council the thesis will go through various legal sources such as conventions, international custom, and general principles of law. The United Nations (UN) General Assembly Resolutions may be one important element in the effort to determine international custom. The thesis will also consider subsidiary sources such as judicial decisions, the Nuremberg judgement, the Nicaragua Case, and legal doctrine.[7] Documents from the work of preparatory commission for the International Criminal Court and its working group on the crime of aggression, as well as material from the NGO Coalition for an International Criminal Court are also used as sources

1.6 The State of the Art

Scholars have done significant work during the last decades to in their attempts to determine the definition of aggression. Some of them have touched upon the issue of individual criminal responsibility, mostly in connection with comments about the Nuremberg Trials. A few scholars have focused specifically on this issue and even fewer have done in the context of the International Criminal Court. One of them is Allegra Carroll Carpenter in the article "The International Criminal Court and the Crime of Aggression".[8] Others include Benjamin B. Ferencz, Justin Hogan-Doran, and Bibi T. Van Ginkel. Noting that all of these texts except for one, were written before the Rome Conference.[9] Roy S. Lee, has edited the work *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results* which contains several useful articles written after the Rome Conference on the crime of aggression.[10] Also M. Cherif Bassiouni has in various

[7] The legal sources has been listed as in the hierarchy provided in the Statute of the International Court of Justice, San Francisco 26 June 1945, 1 UNTS XVI, Article 38 [ICJ]

[8] Carpenter, Allegra Carroll, "The International Criminal Court and the Crime of Aggression" in *Nordic Journal of International law*, 64, 1995, [Carpenter]

[9] Ferencz, Benjamin B. "Getting Aggressive about Preventing Aggression", *The Brown Journal of World Affairs*, Winter/Spring 1999 Volume VI, Issue 1, 87 - 96, also available at <http://www.iccnow.org/html/ferencz199907.html> 2001-01-09 [Ferencz (1999)]
Ferencz, Benjamin B., *Can aggression be deterred by law?* available at <http://www.derechos.org/nizkor/doc/articulos/ferencz1.tml> 2001-01-09, [Ferencz, (*Can aggression be deterred by law*?)]

[10] Lee, Roy S. (editor), *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, The Hague : Kluwer Law International, 1999

books either written on the topic or edited the work of other scholars.[11] Scholars who have written texts on the state act of aggression provide valuable inspiration as well. The field of the thesis appears to be quite unexplored.

1.7 Outline

Methodological issues are addressed in the first chapter. Thereafter a brief background to the Rome Statute will be presented. The third chapter will focuses on the definition of crime of aggression. I will briefly chronicle different resolutions, cases and other legal sources that have had an impact on the elaboration of a definition of the crime of aggression in the Statutes of the International Criminal Court. In the fourth chapter some contentious issues on a more thematic basis will be related to the definition. The fifth chapter discusses the conditions for jurisdiction and if the Security Council has a monopoly role in determining if an act of aggression has occurred. The sixth chapter is closely related to chapter five discussing the notion of fair trial and respect for human rights in a court process with respectively without the Security Council being involved. The seventh chapter is an attempt to make some preliminary conclusions and to interrelate all of the previous chapters, it also provides a model on how to evaluate four different solutions. The eighth chapter provides a more normative perspective where the thesis elaborates on what would be a desirable solution on the basis of three different interests. The conclusions drawn in the last chapter will present a proposal on Draft Articles on the definition of the crime of aggression and conditions for jurisdiction.

[11] Bassiouni, M Cherif (editor), *International Criminal Law Vol. I Crimes*, New York: Transnational Publishers, 1999
Bassiouni, M Cherif (editor), *International Criminal Law Vol. III Enforcement*, New York: Transnational Publishers, 1999

2. Background to the Rome Statute

The Rome Statute of the International Criminal Court (Rome Statute) was signed 17 July 1998. Already in the late 1940s, the UN General Assembly had three important human rights projects to consider; a universal declaration of human rights, a convention to prevent genocide and an international criminal court. There was a belief that if an independent permanent court was set up before outrageous offences against human dignity were committed, it would enhance deterrence. Why did it take the General Assembly 50 years to create an international criminal court? The explanations are both political and legal. First prosecution and enforcement of law are guarded by sovereign prerogatives. Secondly, the subject-matter involves individual responsibility concerning serious crimes, and therefore it concerns people belonging to the government or the military who directly or indirectly may be involved in making or executing decisions that can be brought to the Court.[12]

The International Criminal Court (ICC) was established through the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference). This is in contrast to how the ad hoc tribunals for Yugoslavia and Rwanda were created (ICTY[13] and ICTR[14]). These Tribunals were created under UN Charter chapter VII as enforcement measures to deal with specific situations after crimes had been committed in those territories.[15] The ICC is set up by a multilateral treaty and not as the ad hoc tribunals through a Security Council resolution. The ICC is a permanent court that will have jurisdiction over crimes in potentially all States. In order for the Rome Statute to enter into force, sixty ratifications are

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[12] Lee, Roy S., "The Rome Conference and its Contributions to International Law" in *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, 1-41 (editor Roy S. Lee) The Hague: Kluwer Law International, 1999, 1ff [Lee]
[Ferencz (1999)], 3

[13] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, established by the Security Council acting under Chapter VII of the United Nations Charter, 25 May 1993, Security Council Resolution 827 (1993), United Nations Security Council Official Records, Forty-eighth Session, 3217th Meeting, S/RES/827 (1993), [ICTY Statute]

[14] Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of the International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994, established by the Security Council acting under Chapter VII of the United Nations Charter, 8 November 1994, Security Council Resolution 955 (1994), United Nations Security Council Official Records, Forty-ninth Session, 3253rd Meeting, S/RES/955 (1994), [ICTR Statute]

[15] [Lee], 4; 6

needed.[16] The process of ratification in order for the Rome Statute enter into force is halfway to completion. Andorra was the thirtieth country to ratify the Statute, on the 30 April, 2001.[17]

[16] Rome Statute of the International Criminal Court, Rome 17 July 1998, Article 126 [Rome Statute]
[17] United Nations, Ratification Status of the Rome Statute of the International Criminal Court as of 30 April 2001, available at <http://www.un.org/law/icc/statute/status.htm> 2001-05-09

3. Definition of the Crime

Kings and other rulers have during all periods of history concluded agreements with each other on how to prevent war. Since the Treaty of Westphalia one could observe an expanding practice of bilateral and multilateral non-aggression treatymaking. M. Cherif Bassiouni and Benjamin B. Ferencz lists six major treaties as more significant which all have some relevance on the definition of aggression:[18]

1. The Hague Conventions of 1899 and 1907 on the Pacific Settlement of International Disputes;[19]
2. The Treaty of Versailles of 1919;[20]
3. The Covenant of the League of Nations, 1919;[21]
4. The Kellogg Briand Pact, 1928;[22]
5. The 1945 London Charter;[23]
6. The United Nations Charter;[24]

Later in history, further attempts defined aggression, the major document in this context is the *Definition of Aggression* (1974); UN General Assembly Resolution 3314.[25]

3.1 The Interwar Period

The eruption of the First World War triggered the understanding that there was a need for a definition and a condemnation of unprovoked acts of war. When the League of Nations was formed 1919 aggression developed as a legal concept, but only as a vague synonym of unlawful use of force. The Covenant of the League of Nations defined aggression as an attack against the territorial integrity

[18] Bassiouni, M Cherif; Benjamin B. Ferencz, "The Crime Against Peace" in *International Criminal Law Vol. I Crimes*, 313-347 (editor M Cherif Bassiouni) New York: Transnational Publishers, 1999, 314-315 [Bassiouni & Ferencz]
[19] Convention for the Pacific Settlement of International Disputes, Hague July 29, 1899 (First Hague); Convention for the Pacific Settlement of International Disputes, Hague October 18, 1907 (Second Hague);
[20] Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles), Versailles June 28 1919
[21] The Covenant of the League of Nations, 1919
[22] General Treaty for Renunciation of War as an Instrument of National Policy, Paris August 27 1928, 94 LNTS 57 [Kellogg Briand Pact]
[23] Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London 8 August 1945, 82 UNTS 279 [London Charter]
[24] Charter of the United Nations, San Francisco 26 June 1945, UNTS XVI [UN Charter]
[25] *Definition of Aggression* (1974); UN General Assembly Resolution 3314 [Definition of Aggression]

and political independence of Member States.[26] The provision in the Charter of the League of Nations was perceived to have some legal gaps and the right to use force remained in some situations. This problem was addressed in the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg Briand Pact). The treaty had considerable effects in State practise more in a normative sense than creating binding legal regimes. It created a customary pattern that was broken by the Second World War but renewed through the establishment of the UN.[27]

3.2 The Nuremberg Trials

Already during the Second World War the allied countries were contemplating on what to do with and how to punish the leaders of Nazi Germany. The London Charter provided the legal framework for the Nuremberg trials. The London Charter was an agreement concluded by the USA, France, United Kingdom and the Soviet Union.[28] One of the crimes listed in the agreement was the crime against peace, encompassing the "war of aggression". The Charter of the Tokyo Tribunal also claimed individual responsibility for "war of aggression".[29] The trials were an expression of a will of the allied countries that the major war criminals of the axis powers should be tried and sentenced by a court. One could discuss if this was due to a sincere respect for the rule of law or the biased victor's justice under a legitimate, legal facade.

Allegra Carroll Carpenter comments on the Moscow Conference of October 1943, "World War II victors pledged their support to two enterprises that would significantly elevate the importance of 'aggression' in international law. These twin offspring were 1) the pledge to punish German and Japanese war criminals (the Nuremberg and Tokyo trials) and 2) the establishment of an international organization to maintain worldwide peace and security (the United Nations)."[30]

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[26] The Covenant of the League of Nations, 1919, Article 10
[27] [Kellogg Briand Pact]
Bring, Ove, *FN-stadgan och världspolitiken: Om folkrättens roll i en föränderlig värld,* Stockholm: Norsteds Juridik 1997, 69-71 [Bring]
[28] Gallant, Kenneth S., "Individual Human Rights in a New International Organization: The Rome Statute of the International Criminal Court" in *International Criminal Law Vol. III Enforcement*, 693-722 (editor M Cherif Bassiouni) New York: Transnational Publishers, 1999, 697 [Gallant]
[29] Rifaat, Ahmed M., *International Aggression: A Study of the Legal Concept: Its Development and Definition in International Law*, Stockholm: Almqvist & Wiksell International, 1979, 157f [Rifaat]
[30] [Carpenter], 224

Two problems that faced the International Military Tribunal for the Trial of the Major War Criminals at Nuremberg (IMT) are illustrated by Carpenter: “first it was the general rule that municipal law governed individuals and no other entity could exercise authority over the nationals of a State without its consent. Second, it had to be established that the crime for which the defendants were charged existed in law at the time of their acts. Otherwise, the juridical postulate *nullum crimen sine lege, nulla poena sine lege*, prohibiting the punishment of a crime absent pre-existing law, would be violated. The Nuremberg tribunal overcame both hurdles by finding that Germany was a party to the General Treaty for Renunciation of War as an Instrument of National Policy".[31]

The IMT also found the existence of other instruments such as a number of unratified treaties, the Covenant and Resolutions of the League of Nations condemning war established the illegality of aggression as customary law. Thus, the German defendants were charged with committing crimes against the peace, war crimes and crimes against humanity or conspiracy to do so. Crimes against the peace included the "waging of war of aggression". [32] Crimes against peace as provided in Article 6(a) of the London Charter only addressed responsibility for war in Europe.[33]

Peter Malanczuk comments on the question of individual liability, that “pre-existing types of ‘international crimes’, such as war crimes, entailed individual responsibility, and it was therefore reasonable to apply the principle of individual liability by analogy to the new international crime of aggression”.[34] Carpenter comments that “the Nuremberg Tribunal was able to pierce the veil of the sovereign to hold individuals accountable."[35] The IMT used the following reasoning: "That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized." and "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[36]

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[31] [Carpenter], 224-225
[Kellogg Briand Pact]
[32] [Carpenter], 225
[33] [London Charter]
[34] Malanczuk, Peter, *Modern Introduction to International Law*, Routledge London 1997, 354 [Malanczuk]
[35] [Carpenter], 225

The historical assessment of the value of the Nuremberg principles differ in relation to the crime of aggression, at one end some claim that the London Charter and the following judgement is: "the expression of international law at the time of its creation; and to that extent is itself a contribution to international law".[37] This assessment advocates that the judgement was consistent with the existing law at the time. Benjamin B. Ferencz, one of the prosecutors at the Nuremberg trials claims that the intention during the trials was to respect the rule of law and that the London Charter was not arbitrary. The London Charter was an expression of existing law.[38] At the other end, a minority claims that the judgement on the criminality of aggressive wars was not a valid concept of international law at the time of adoption of the London Charter. The main point of criticism was the issue on legality, whether the acts committed crimes at the time of the trials or when they were committed.[39] In between there are two intermediary positions. One position claims that the trials are important precedents in international law, justifying the trials. The other position being more critical of the Nuremberg Charter and the judgement concerning crimes against peace, but still regarded it as a new rule of international law. The two more sceptical views have found the most support by legal commentators.[40]

As illustrated above, in the trials against the German leaders following the Second World War responsibility for the crimes against peace, including war of aggression was attributed to individuals. Even if the Nuremberg principles were not an expression of existing law at the time of the trials on could argue that the principles have been accepted subsequently by States. In 1946, the UN General Assembly adopted by unanimity Resolution 95(1) that affirmed "the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgement of the Tribunal". The General Assembly instructed the International Law Commission (ILC) to formulate these principles and draft a codification of offences against peace and security of mankind.[41] In 1950, the ILC adopted a text

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[36] Nazi Conspiracy and Aggression, Opinion and Judgement, Office of United States, Chief of Counsel for Prosecution of Axis Criminality, Washington: United States Government Printing Office, 1947, 52, 53 [Nuremberg Judgement]
[37] [Nuremberg Judgement], 48
[38] [Ferencz, (*Can aggression be deterred by law*?)], 1-2
[Ferencz (1999)], 1
[39] [Gallant], 698
[40] Hogan-Doran, J.; & Van Ginkel, B.T., "Aggression as a Crime under International Law and the Prosecution of Individuals by the Proposed International Criminal Court", 43 *Netherlands International Law Review*, 331-332 [Hogan-Doran & Van Ginkel]
[41] *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal (*1946); UN General Assembly Resolution 95(1)

where the legal regime of the Nuremberg charter was formulated in seven principles. Articles 6(a) and 7 deal with the international crime "crimes against peace" which by its wording in the London Charter includes war of aggression.[42] According to Carpenter, "despite their shortfalls, no government then or since has expressed dissent from these principles."[43] Thus, the Nuremberg trials provide an important legacy in establishing individual criminal responsibility for the crime of aggression.

3.3 UN Charter

The prohibition of the use of force is one of the prime foundations of the UN system.[44] The crime of aggression is intimately related to the enforcement branch of the UN, the Security Council. The notion of the act of aggression is included in the UN charter but without a definition. The determination of whether an act of aggression has occurred has been left to the Security Council. Article 39 of the UN Charter considers "aggression" a political question. The Cold War and the disagreement it caused between the permanent members caused a 40-year period of paralysis in the Security Council. Consequently, the General Assembly assumed some of the Security Council's role and its responsibilities for acting against aggression. As a consequence to the events in Korea in 1950, when the Security Council determined there had been only a "breach of peace", the General Assembly adopted the Uniting for Peace Resolution.[45] The Resolution provided that the General Assembly could make recommendations when the Security Council failed to act. Carpenter states that "although the General Assembly had no power of enforcement, the Uniting for Peace Resolution launched a new era in which the General Assembly became concerned with articulating a precise definition of aggression." [46]

3.4 UN General Assembly Resolutions

Before discussing individual UN resolutions there is need to establish their nature as legally binding instruments. The legal value of UN General Assembly resolutions depend on the extent to which they

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[42] Yearbook of the International Law Commission Vol II, 1950, 376
[London Charter], Article 6(a)
[43] [Carpenter], 226
[44] [UN Charter], Article 2(4)
[45] [Carpenter], 227
Uniting for Peace Resolution (1950); UN General Assembly Resolution 377
[46] [Carpenter], 227

reflect customary law, by themselves they are not legally binding. A resolution can be evidence of customary law because they reflect the views of the States voting for it. It may also find force as a part of the progressive development of law or a correct interpretation of the UN Charter.[47]

3.4.1 Friendly Relations Declaration

There is an attempt to clarify the meaning of the UN Charter on aggression in the UN Friendly Relations Declaration (FRD), as a means to reach a universal understanding of some basic principles of international law. Scholars seem to agree that it has contributed to the interpretation of the prohibition on the use of force stipulated by the UN Charter Article 2(4). [48] The FRD states the duty for States to "refrain in their international relations from the threat or use of force by States against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the Charter".[49]

The FRD states that: "a war of aggression constitutes a crime against the peace for which there is responsibility under international law..." and "every State has the duty to refrain from the threat of use of force to violate existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States."[50]

3.4.2 Definition of Aggression

During the period following the Second World War there have been various efforts to find a definition accepted by a wide range of States. The General Assembly approved the *Definition of Aggression* (1974); UN General Assembly Resolution 3314 (Definition of Aggression) on 14 December 1974, which was later considered by some as a "consensus definition".[51] In reality it is a an ambiguous compromise and this its original purpose to clarify what aggression is. The primary purpose of the Definition of Aggression is to define aggression in public international law rather than international criminal law. This does not imply that the definition has no value as an important and necessary basis of interpretation for international criminal law. The Definition of Aggression uses a

[47] [Malanczuk], 4; 52; 53-54, 378-379
[48] [Bring], 75
[Malanczuk], 32
[49] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* (1970);
UN General Assembly Resolution 2625 preamble (a) [FRD]
[50] [FRD]

principle of emuneration as well as a generic method to define aggression. The first use of armed force by a State in contravention with the UN Charter "shall constitute *prima facie* evidence for an act of aggression".[52] The Resolution lists seven specific acts as qualifying as aggression, but the list is non-exhaustive and thus other acts not specified may also amount to aggression. [53] The Resolution is in accordance with the UN Charter, granting the Security Council a wide room to manoeuvre when determining if an act of aggression has occurred or not.[54]

Before the Rome Conference, Germany who had support of other States voiced critical arguments against using the emuneration contained in Definition of Aggression for the purpose of defining aggression in a norm and thereby establishing individual criminal responsibility. Germany validly argued that the Definition of Aggression was adopted in a different context and for a different purpose resulting in a political compromise achieved after long and painful debates. Germany questioned whether the possibility was taken in consideration that the emuneration in Article 3 of the Definition of Aggression might later be used as a criminal norm establishing individual criminal responsibility for the crime of aggression. Germany also implied that a norm establishing individual criminal responsibility should fulfil stricter standards of legal precision, clarity and certainty than a political Resolution of the General Assembly.[55]

In the German proposal submitted to the Working Group on Aggression of the Preparatory Commission for the International Criminal Court one can read that during the adoption of the Definition of Aggression there was “significant opposition by States to categorising all the acts of aggression within the meaning of Article 3 of that document as crimes under international law," The proposal continues: "the first sentence of Article 5(2) of the Definition of Aggression deliberately restricts the latter term to the case of a war of aggression.”[56] This view seems to have support and validity from statements done by the ILC. The ILC considers Article 3 of the Definition of

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[51] [Carpenter], 228
[52] [Definition of Aggression], Article 2
[53] [Definition of Aggression], Articles 3-4
[54] [Definition of Aggression], preamble para 2
[UN Charter], Article 39
[55] Compilation of proposals on the crime of Aggression submitted at the Preparatory Committee on the Establishment of an International Criminal Court (1996-1998), the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court, PCNICC/1999/INF/2, 8

Aggression to be an instrument dealing with "aggression by States, not with crimes of individuals, …" The ILC describes it as "…designed as a guide for the Security Council, not as a definition for judicial use" This would imply a narrow concept of the crime of aggression in the context of international criminal law.[57] A similar interpretation would be that a war of aggression results in individual criminal responsibility while the lesser form of aggression only results in State delictual responsibility, creating only the obligation to make reparation.[58] Carpenter comments that "the Security Council is thus not bound to apply the Resolution's definition, rendering the designation of acts of aggression purely a function of procedure and politics, as it had been before."[59]

In the Definition of Aggression "acts of aggression" are described by objective characteristics. The intention as provided in international criminal law (*animus aggressionis* or *mens rea*) behind the aggressive act is not included in the definition. The Resolution is silent on the issue whether *animus aggressionis* is a necessary condition to establish an act of aggression.[60] Article 1 and others fail to elaborate on the issue of threat.[61]

The Security Council has never explicitly relied on the Definition of Aggression in order to determine whether a given situation falls under Article 39 of the UN Charter. It is true that the Security Council, while exercising its competence under chapter VII of the UN Charter, indirectly has relied on the Definition of Aggression, but Cherif M. Bassiouni and Benjamin B. Ferencz consider that "such implicit recognition does not itself contribute to transforming the Resolution into customary international law.[62]

The Chinese government regarded the Definition of Aggression as meaningless when it was adopted. The biggest deficit was that it was limited to armed aggression and did not include economic

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[56] Proposal submitted by Germany *The Crime of aggression: A further informal discussion paper* PCNICC/2000/WGCA/DP.4, 5-6
[57] Report of the International Law Commission 1994, Official Record of the General Assembly, Forty-ninth Session, Supplement No.10 (A/49/10), 72 [Report of the ILC 1994]
[Ferencz, (*Can aggression be deterred by law*?)], 7
[58] [Hogan-Doran & Van Ginkel], 335
[59] [Carpenter], 228
[60] [Hogan-Doran & Van Ginkel], 336
[61] [Bring], 82
[62] [Bassiouni & Ferencz], 334

expansionism and political infiltration.[63] USA does not view the Resolution as a part of international custom; there is no concordant practise, no *opinio juris generalis*.[64]

To conclude, there appears to be weak support from the States that the Definition of Aggression is an authoritative and correct definition of the crime of aggression.

3.5 Nicaragua Case

The Nicaragua Case is one of the few cases where aggression has been tried by a judicial organ. It concerned alleged acts of aggression and intervention against Nicaragua, the perpetrator being USA. The case is divided into two parts, the first concerning jurisdiction and admissibility, the second concerning the merits of the case.

In the Nicaragua Case the International Court of Justice (ICJ) refers to several of the above-mentioned documents in its effort to define aggression, as the use of force in violation of international law was one of the counts of the case.[65] In order to show that the prohibition on the use of force is a customary rule, the ICJ refers to Article 2(4) of the UN Charter and the FRD.[66] The Court views prohibition of use of force as a principle of *jus cogens*.[67] The judgement also makes a reference to Article 3(g)in the Definition of Aggression as customary law.[68] There are differing views among scholars on the value of the judgement. The supporters of the judgement hold that "the Court's prohibition of forceful self-defence against attacks of lesser gravity prevents the discretion of powerful states to exploit their geopolitical strength on the account of international legal rules". Critics of the judgement claim that: "the Court's scale of illegal acts' gravity does not have any backing of states' *opinio juris* and thus is arbitrary".[69] As will be shown later the Nicaragua Case has considerable impact on both the definition of the crime of aggression as well as on the issue of jurisdiction.

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[63] [Bring], 84
[64] NGO Coalition for an International Criminal Court, Protocol from Working Group on Aggression, 6 December 2000
[65] Military and Paramilitary Activities in and against Nicaragua, Nicaragua v. United States of America, Merits, Judgement of 27 June 1986, ICJ Reports 1986, 14, para 15 (1)(c) [Nicaragua Case (1986 Merits)]
[66] [Nicaragua Case (1986 Merits)], para 187-188
[67] [Nicaragua Case (1986 Merits)], para 190
[68] [Nicaragua Case (1986 Merits)], para 195
[69] [Bassiouni & Ferencz], 335-336

3.6 The Rome Statute

Among the four crimes listed in Article 5 of the Rome Statute the crime of aggression was the most contentious. In the Nuremberg judgement "war of aggression" was labelled "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of whole". [70] Benjamin B. Ferencz perceives that “the main reasons given by states objected to including aggression were that it seemed inadequately defined for inclusion in a criminal statute and it was feared that any role for the Security Council might destroy the independence of the Court”.[71]

Herman von Hebel and Darryl Robinsson provide good insights into the negotiations during the Rome Conference. Three basic approaches were used during the preparatory negotiations. The first approach was a general definition of the crime. The second approach contained a general definition, combined with a list of acts that potentially could be considered as acts of aggression, based on General Assembly Definition of Aggression.[72] Under the third approach, no definition was provided; it would be left to the Security Council. Germany tried to balance different interests; to have a definition with broad support, to preserve the independence of the Court, to avoid possible misuse of the crime for political purposes, and to gather support from the five permanent members of the Security Council. Its proposal was the most widely supported before the Rome Conference.[73]

At the Rome Conference, the informal consultations did not bring the delegations to an agreement. Several States from the non-aligned movement advocated that the Security Council should not have any role in relation to the crime of aggression, in addition they also opposed any reference made to the Council throughout the Rome Statute. The permanent members of the Security Council regarded the involvement of the Security Council as a *conditio sine qua non* for the inclusion of the crime in the statute. On the issue of the definition, Herman von Hebel and Darryl Robinson comment that “some States found the German proposal too restrictive, and insisted on a broader definition

[70] [Nuremberg Judgement], 16
[71] [Ferencz (1999)], 6
[72] [Definition of Aggression]
[73] Hebel, Herman von; Robinsson, Darryl, "Crimes within the Jurisdiction of the Court" in *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, 79-126 (editor Roy S. Lee) The Hague: Kluwer Law International, 1999, 81-83 [Hebel & Robinsson]
Both the first and the third options of a definition as presented by the Preparatory Committee were examples of proposals with no definition. Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute for the International Criminal Court*, Part One. A/CONF.183/2/Add.1, 14 April 1998, 14-16

encompassing situations depriving other Peoples of their right to self-determination, freedom and independence and by resorting to armed force to threaten or violate the sovereignty, territorial integrity or political dependence of that State or the inalienable rights of those people".[74] The supporters of the German proposal were concerned that such a broad definition would lead to politicised complaints and they considered this possibility unacceptable. There was little hope that an agreement would be reached due to these incompatible positions. When it became increasingly clear that no compromise could be reached on the definition of the crime or what role of the Security Council should have, some of the Arab and non-aligned States suggested a new approach. They proposed to include the crime, but to leave the elaboration of a definition to future negotiations after the Rome Conference. Until then, there would be an agreement on the definition the Court would not exercise jurisdiction over the crime of aggression. In spite of the objections there was an overwhelming commitment during the Rome Conference to make some kind of reference to the crime of aggression. Thus, Article 5(2) of the Rome Statute was adopted which provides that the Court will not exercise jurisdiction over this crime until "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."

The current Article 5(2) is largely based on the proposal of the non-aligned movement. The Preparatory Commission for the ICC established at the Rome Conference was assigned to prepare proposals for a provision on aggression.[75] Due to the fact that a compromise was needed which would be accepted by a majority of states as well as the powerful five permanent members one important sentence was added in the end of the Article providing that the definition "shall be consistent with the relevant provisions of the Charter of the United Nations". Without a compromise and an acceptance by a majority of States and the five permanent members the Rome Statute and its provisions on the crime of aggression would lose the necessary legitimacy. According to Herman von Hebel and Darryl Robinson this phrase was understood as a reference to the role that the Security Council potentially will have in relation to the crime. "The result of this compromise is that the

[74] [Hebel & Robinsson], 84 Proposal submitted by Algeria, Bahrain, Iran, Iraq, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen.
[75] Resolution F, Para 7 of the Final Act of the Conference, A/CONF.183/10 (17 July 1998)

Court's jurisdiction over the crime is recognized, at least theoretically, but that jurisdiction cannot be exercised until the definition and appropriate preconditions are developed and agreed upon."[76]

There were three factors that produced this result. First the question if the crime should be included in the statute. The delegates wanted to avoid a retrogressive step compared to Nuremberg and Tokyo tribunals that had held persons individually criminally responsible for this crime more than 50 years ago. Second, States had different views on the role of the Security Council in its relation to the application of the crime by the ICC. The ILC draft Statute provided a precondition that before the ICC exercise jurisdiction the crime of aggression, the Security Council must have determined "that a State has committed the act of aggression which is the subject of the complaint". [77] With this solution Herman von Hebel and Darryl Robinson states that "the role of the ICC would then consist of determining the legal question of whether an individual person from the State in question has committed the crime of aggression." The solution had support by the five permanent members. Several other States feared that this provision might be a threat to the independence of the ICC and would not guarantee a fair trial for the person accused of the crime. Lastly there were diverging views on the definition of the crime.[78]

Carpenter argues that "given the present absence of a clear articulation and agreement on the acts constituting aggression, the Court would likely rely on events at Nürnberg and Tokyo following World War II. In addition the Court might utilise General Assembly Definition of Aggression."[79] This would probably continue through a generic definition in the Rome Statute.

Ferencz illustrates the tension in this context between larger, more powerful nations and smaller nations. The powerful United States often calls for military interventions that it perceives to be justifiable on humanitarian grounds but has shown little enthusiasm for including the crime of aggression within the jurisdiction of the Court. Smaller nations resent the privileged veto power reserved to the five permanent members of the Security Council and they oppose any dependence of

[76] [Hebel & Robinsson], 84-85
[Rome Statute], 5(2)
[77] [Report of the ILC 1994], Article 23(2)
[78] [Hebel & Robinsson], 81-82
[79] [Carpenter], 236

the ICC on the Security Council that many regard as politicised and self-serving.[80] For the permanent members of the Security Council a reference to the Security Council is an absolute condition for the inclusion of the crime.

The crime was included in the Rome Statute but the problems related to it were not resolved. It was recognised as an international crime but the second step allowing the Court to act could only be taken after certain conditions were met. There must be a near-consensus agreement on a definition of aggression and the relationship between the ICC and the Security Council has to be clarified, in consistency with the UN charter. As a third and final, step the proposed new definition and clarification will only be considered for adoption at an amendment conference that will not take place until more than seven years have elapsed after the Rome Statute comes into effect following ratification by at least sixty nations. The reason for the limit of seven years before amendments are possible, is presumably to test how reliably the ICC functions. The new provisions require a two-thirds majority and acceptance by seven-eighths of the Parties. In order for the amendment to be binding upon a State party, the State in question has to accept the amendment. A dissenting Party could also immediately withdraw from the Rome Statute.[81]

3.7 Custom

As shown above, the prohibition of the use of force has support in various legal sources. The question is what status does the prohibition of the use of force and the crime of aggression have as customary rules? The Nuremberg judgement did not make the necessary connection between the crime against peace to the Covenant of the League of Nations or the Kellogg Briand Pact.[82] One could claim that the concept of aggression is not linked to the UN Charter, but has an independent status under international customary law, as was determined by the ICJ in the Nicaragua Case. In addition to case law, scholars appears to agree that the prohibition of the use of force has the character of *jus cogens*.[83]

[80] [Ferencz (*Can aggression be deterred by law*?)], 4-5
[81] [Rome Statute], Articles 5, 121, 123
[Ferencz (1999)], 7
[82] [Nuremberg Judgement], 46-51
[83] [Malanczuk], 311

The wider notion of "crimes against peace" appears to have been replaced by the narrower notion of "crimes of aggression". In the FRD and in the Definition of Aggression the latter notion is used. In the various sources there are two basic approaches and a third approach, a combination of the previous two. Either the definition is generic or the acts amounting to aggression are listed. In the Definition of Aggression, where the mixed approached is used there is difference between Article 5(2) between "act of aggression" and "war of aggression", where only the latter implies State responsibility.[84] As "crime against the peace" is not used it is reasonably to assume that "war of aggression" corresponds to "crime of aggression". Thus one can conclude that there is a prohibition on the use of force. The existence of a crime of aggression seem to have support in custom, but the definition of the crime remains open.

[84] [Definition of Aggression]

4. Scope of State Responsibility and Individual Criminal Responsibility

4.1 The Difference Between State and Individual Responsibility

It is a central principle of international law that every international wrongful act by a State such as the illegal use of force entails State responsibility. As the crime of aggression is preconditioned and dependant by the occurrence of a State act of aggression one could argue that state responsibility is an essential part of the criminal act (*actus reus*).[85] It is important to stress that the definition in customary law of individual criminal responsibility is not identical to the definition in customary law of State responsibility and the use of force.

International customary law differentiates between acts of aggression and crime of aggression. The first are committed by States. The latter by individuals who have stricter procedural safeguards according to international criminal law. This does not imply that the two definitions are isolated islands that are not related to each other. On the contrary, the general customary development of the notion of aggression also has bearing on the definition of aggression in international criminal law.

The Treaty of Versailles provided that the German emperor Wilhelm should be held responsible. The attempt to impose individual liability on emperor Wilhelm was not successful; Ove Bring argues that it was more a *de lege ferenda* argument at the time. As the Netherlands granted the emperor asylum; the Dutch government did not perceive that there was an international obligation to extradite him. In the Dutch communication it was made clear that the state responsibility that could be attributed to Germany could not be transferred onto the Netherlands, a State that was not even a party to the Treaty of Versailles.[86]

The IMT regarded individual responsibility as *lege lata* by the end of the Second World War, 1945. Ove Bring does not adhere to this as he claims that it was not the common view. Rather, he regards it as an innovation at that time. Bring considers the issue even more interesting today because

[85] [Hogan-Doran & Van Ginkel], 324
[86] [Bring], 88

it is not only an academic question. Today war of aggression is classified as a crime against peace.[87] Regardless on what view is correct the London Charter paved the way for the principles of individual criminal responsibility.

The ILC confirmed 1950 the Nuremberg principles establishing that any person who commits an act constituting a crime under international law is responsible and therefore liable to punishment.[88] The ILC interprets the IMT judgement defining State aggression, "a violation of the law by a State is a *sine qua non* condition for the possible attribution to an individual of responsibility for a crime of aggression."[89] The principle of individual responsibility has later been affirmed by the Rome Statute in Article 25.

4.2 Addressee of the Crime

The crime of aggression is considered to be a "leadership crime".[90] As all the State comments on this issue argue that it is a leadership crime, one could claim there is common consensus. In the Preparatory Committee some States made it clear that "a provision on aggression aims exclusively and directly at those responsible for the war as such."[91] This is consistent with the Nuremberg Trials holding that the crime against peace was directed towards the responsible for the war in Europe. This distinguishing feature of the crime of aggression has some repercussions. If the crime was attributable only to leaders, to a small group, a positive determination of a State act of aggression would presuppose the guilt of the State leaders. Thus the issue of the addressee of the crime is connected to the principle of a fair trial.

If the Security Council has already established that there has been an act of aggression, and it is possible to determine who among the leadership took the decision to commit the act, would it then be possible to exculpate the person in the ICC? If the answer is no, there would be no need for a trial in the ICC, it would only be a formality. If a determination of the Security Council that an act of

[87] [Bring], 88-89
[88] Yearbook of the International Law Commission Vol II, 1950, 375f
[89] Yearbook of the International Law Commission Vol II Part Two, 1996, 15-56, Draft Code of Crimes against Peace and Security of Mankind, Article 16, Commentary para 4
[90] Proposal submitted by Germany *The Crime of aggression: A further informal discussion paper* PCNICC/2000/WGCA/DP.4, 13 November 2000, 7
[91] Compilation of proposals on the crime of Aggression submitted at the Preparatory Committee on the Establishment of an International Criminal Court (1996-1998), the United Nations Diplomatic Conference of

aggression has occurred is binding there is no need to have court proceedings in the ICC. One could then argue that even if the Security Council determined that there was an act of aggression, the ICC would still be able to acquit the accused individual. The ICC could chose to ignore the Security Council and only base the judgement on the merits presented before the Court. An important question in this context is whether this would prohibit the prosecutor of referring to the Security Council at all? It is easy to understand the complications if the Security Council is involved. The argument that the ICC can make an independent assessment of the merits in conflict with the view of the Security Council is not a valid defence for the involvement of the Security Council. Even if the ICC has the option to acquit in such situation it could still be influenced by the decision of the Security Council and the criminal proceeding would not fulfil the requirements of a fair and politically independent trial.

4.3 Threat to Use Force

In international law a difference is made between the use of force and the threat of use of force. The prohibition on the use of force is clear. The issue of threat of use of force needs to be addressed in two regards; first, how is the issue dealt with in international instruments, is there a clear prohibition for the States to threat to use force? Second, what kind of State acts would amount to the threat of use of force? What implications does it have for the individual criminal responsibility?

The instruments in international law provide different answers on the issue whether the threat of use of force is prohibited. Article 2(4) of the UN Charter prohibits the threat of force as well the use of force.[92] In the Definition of Aggression acts of aggression are described with objective criterias and there is no reference to threat.[93] The FRD has explicitly expressed the duty of "every State has the duty to refrain from the threat of use of force…".[94] As the Definition of Aggression is silent on the issue and its binding force is disputable, one could argue that the prohibition on the threat of use force has support in customary law.

Plenipotentiaries on the Establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court, PCNICC/1999/INF/2, 6

[92] [Bassiouni & Ferencz], 321

[93] [Bring], 82

[94] [FRD]

The threat of force is not the same as the threat of aggression, because the use of force is not the same as an act of aggression. Aggression is some kind of armed attack. Is it then possible by analogy to extend the prohibition of the threat of force to a prohibition on the threat of aggression? In the absence of any cases and conclusions in doctrine on this topic, it appears to be weak support for this view.

On the issue on what kind of State acts that would amount to the threat of use of force one could consider the case of the Egypt blockade of the Gulf of Aqaba in 1967. Israel that was the target of the blockade attacked Egypt, Syria and Jordan, an act which Malanczuk considers a legitimate response. One could interpret the Egyptian blockade as a prohibited act, a threat of use of force. Israel's response would then be legitimate expression of the right to self-defence. This would have the result that an act which *prima facie* amounts to aggression, in this case Israel's attack on its neighbours, would be legitimate use of the right to self-defence in response to a threat of force. Thus the issue of the threat of use of force has significant effect on the issue of when force is lawful or not. This interpretation of the events from 1967 appears to be legally controversial, Ahmed M. Rifaat does not mention the threat of use of force, he only comments on "the Israeli attack against Egypt, Syria and Jordan".[95] Hence, with some support one could argue that a blockade or movements of troops could amount to the threat of use of force.

As discussed above in relation the Nuremberg Judgement the IMT "was able to pierce the veil of the sovereign to hold individuals accountable."[96] Thus, if a State has violated international law by the threat of use of force, the individual leaders could be held responsible. It is more disputable if all threats of aggression would imply responsibility. One could also question whether propaganda in national media, alone could imply individual criminal responsibility.

4.4 Thresholds on Purpose and Consequences

In international criminal law all crimes are divided into two elements, the criminal act (actus reus) and a criminal consciousness (mens rea).[97] One could also describe *mens rea* as "guilty knowledge".[98] This has been reflected in the Rome Statute by requiring both a material and mental element as a

[95] [Rifaat], 212
[96] [Carpenter], 225
[97] [Hogan-Doran & Van Ginkel], 333

prerequisite for holding a person criminally responsible.[99] Thus there is a requirement on intention, *mens rea*.

There is no provision in the UN Charter requiring the Security Council to consider *mens rea*. In the Definition of Aggression acts of aggression are described with objective criterias; there is no need to show subjective intent.[100] It appears that there is no need in public international law to prove intention in order to entail State responsibility.

According to Carpenter, in context of the Nuremberg trials, "it is generally believed that the defendants' guilt was based on their pursuance of an 'expansionist policy through deliberate criminal acts'. From this, the notions of intention and purpose can be inferred as elements of the crime."[101] It is also argued that "a threat or use of force employed consistently with" the purposes of the UN Charter, "and not directed against 'territorial integrity or political independence' "[102], is lawful. This could be used as a defence of the lawfulness of humanitarian interventions.

State responsibility according to public international law and individual criminal responsibility differs. Thus, it appears that in order to claim individual criminal responsibility for the crime of aggression the prosecutor needs to show both that a the criminal act has occurred and the existence of a criminal consciousness. The prosecutor also has to show which individuals, who among the leaders that is responsible.

The criminal act could either be a threat of use of force or the use of force. In the context of the crime of aggression, examples of *mens rea* could involve an intention to violate the sovereignty, seize, occupy territory or in any other way infringe on the territorial integrity of an other State.

4.5 Grounds for Excluding Criminal Responsibility

At the heart of the problems of defining the crime of aggression and establishing rules on jurisdiction along with deciding on the role of the Security Council is the fact that, in international law under

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[98] [Ferencz (*Can aggression be deterred by law*?)], 7
[99] [Rome Statute], Article 30
[100] [Bring], 82
[101] [Carpenter], 223
[Nuremberg Judgement], 54-56
[102] Stone, Julius, *Aggression and World Order*, London: Stevens & Sons, 1958, 43 [Stone]

certain conditions, the use of force is lawful. One could easily imagine a situation where the opposing parties to a conflict are each in good faith and both sides claim that the other side is the aggressor. One example is the Nicaragua Case where the US pleaded collective self-defence and defended its use of force because of a foreign intervention in El Salvador. The US attributed the activities against El Salvador to Nicaragua as an armed attack. The ICJ rejected this argument.[103] Although some might argue that it was a clear-cut case, one could easily find several other conflicts, even more complicated, where there are different views on who is the true aggressor.

4.5.1 Self-defence

With an extensive interpretation of the prohibition on the use of force formulated in Article 2(4) of the UN Charter only two grounds from exception of the use of force are perceived. The first the right of States to self-defence and the second, use of force authorised by the Security Council under Chapter VII. As commented by Ian Brownlie and later by Ove Bring, an extensive interpretation on the prohibition of the use of force in Article 2(4) of the UN Charter has found support in the *travaux préparatoires*.[104]

Article 51 of the UN Charter restricts permissible individual or collective self-defence to those cases where an armed attack has occurred (i e if an other State has committed an act of aggression). In the Definition of Aggression the notion of self-defence has been omitted but it could be included under Article 6 which refers to the inviolability of the UN Charter. In the Nicaragua Case the ICJ stated that the prohibition on acts of aggression in the UN Charter and in modern custom is the same. The ICJ applied an extensive interpretation of the prohibition on the use of force which it based on wording of Article 2(4) of the UN Charter, but also on the *opinio juris* as it has been expressed in UN and in particular in the FRD. The only legitimate exceptions that the ICJ discussed was individual and collective self-defence.[105]

In the Nicaragua Case, the ICJ regards the gravity of a foreign State involvement as a decisive factor when determining if self-defence is legitimate. The support provided by Nicaragua to insurgents in El

[103] [Nicaragua Case (1986 Merits)], para 35; 193-195; 199; 211; 229; 233; 236-238
[104] [Bring], 72-73
Brownlie, Ian, *International Law and the Use of Force by States*, Oxford: Oxford University Press, 1963, 266-268
[105] [Bring], 74-75
[Nicaragua Case (1986 Merits)], para 193

Salvador only amounted to foreign intervention and it was not serious enough to constitute an armed attack. Thus, the US claim that it had legitimate grounds to claim self-defence was not accepted. [106]

The issue of self-defence as a ground for excluding criminal responsibility was discussed during the Rome Conference, but was in the end not accepted. Articles 31(3) and 21 in the Rome Statute read together, could be interpreted as making self-defence a legitimate ground for using force by referring to other treaties and general principles of law.[107] Per Saland claims that this interpretation is wrong. The original idea had been to deal with military necessity and reprisals and perhaps also with self-defence under Article 51 of the UN Charter. A solution which had self-defence as a legitimate ground for excluding criminal responsibility was not chosen in the Rome Statute. According to Saland "the United States, in particular, insisted on keeping the placeholder until other issues became clearer". This would also explain why the adopted version of Article 21(1)(b) contains the more restrictive wording "the established principles of international law of armed conflict". [108] In light of the context of the negotiations it appears that Saland's interpretation is correct. Thus, self-defence is not a ground for excluding criminal responsibility with the current wording of the Rome Statute.

4.5.2 Humanitarian Intervention

With a *bona fide* interpretation of the custom and purpose of the UN Charter one could argue that armed attacks with humanitarian and democratic aims are lawful.[109] The prohibition of the of force in Article 2(4) of the UN Charter could be avoided by claiming that the political independence is not violated by a humanitarian intervention, if there is a limited timescale of the intervention, and no borders are changed. With the same reasoning the provisions in the Definition of Aggression could be interpreted. Article 2(7) of the UN Charter which prohibits a UN intervention uses the notion "matters which are essentially the domestic jurisdiction of any state". According to the FRD and customary law, the principle of non-intervention in matters within the domestic jurisdiction also applies to states.[110] One could claim that human rights are more than a domestic issue and thus violations could be matters beyond exclusive domestic jurisdiction.

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[106] [Nicaragua Case (1986 Merits)], para 230-238
[107] [Rome Statute], Article 31(3) on Grounds for excluding criminal responsibility and Article 21 on applicable law.
[108] Saland, Per, "International Criminal Law Principles" in *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, 189-216 (editor Roy S. Lee) The Hague: Kluwer Law International, 1999, 209
[109] [Bring], 72
[110] [FRD]

Lastly, one could claim by the wording of Article 24 of the UN Charter that the Security Council is acting on behalf of States. Hence the true carriers of powers are States, if the Council is unable to act against violations of human rights, the States are obliged to act.
Hence, the supporters of the concept of humanitarian intervention could argue that the delegated power to the Security Council to authorise force is not absolute, monopolised and may be by-passed by the States in cases of gross violations of human rights.

4.6 Manifest Contravention

Several of the issues related to the incorporation of the crime of aggression in the Rome Statute relate to controversial areas in international law, such as the legitimate use of force. It is clear that States' views differ as to in what situations force can be used , which makes it more difficult to incorporate the crime of aggression in the Rome Statute. In order to find a solution one could advocate that the ICC should only investigate clear cases.

Several western States argue that the Court should not investigate controversial issues. [111] One example could be the Nato intervention in Kosovo in 1999. Is use of force legitimate, in order to suppress serious violations of human rights, even if one can not claim self-defence and the Security Council is blocked? According to current international law the answer must be no, but there are valid opposing arguments as presented in the previous section.

In order to avoid the discussion on humanitarian intervention in the ICC an Article on the crime of aggression could demand that an act of aggression must be in *manifest contravention* of international law; a recent example would be the Iraqi invasion of Kuwait in 1990. There has to be a clear criminal consciousness in order to make an individual responsible for the crime of aggression. This would introduce a threshold on what acts that could amount to crime of aggression and imply individual criminal responsibility.

[Malanczuk], 32
[111] Proposal submitted by Germany *The Crime of aggression: A further informal discussion paper* PCNICC/2000/WGCA/DP.4, 13 November 2000, 2 para 6; 3 para 11, 13 and 14

4.7 Conclusions on State and Individual Responsibility

To conclude, there is a difference between state and individual responsibility in the context of the crime of aggression. The two concepts are interlinked, individual criminal responsibility is dependant on a state act. The crime of aggression is clearly a leadership crime. As discussed above, it is questionable whether the threat of aggression by analogy to threat of force is prohibited. The element of intention, *mens rea* could be one element in the definition of the crime of aggression. As grounds for excluding criminal responsibility one could mention self-defence. It is more questionable if an act which *prima facie* is an act of aggression could be legitimate, by the argument that it is to be considered as a humanitarian intervention. In order to avoid controversial legal disputes on what acts are prohibited, a threshold could be introduced, the act must be in *manifest contravention* of the UN Charter.

5. Conditions for Jurisdiction

One of the foundations in the UN system is the role of the Security Council to deter the use of force. The permanent members of the Security Council would like to have a monopoly power to determine whether there is a threat to peace, breech of peace or if an act amounts to aggression. Therefore the permanent members and States in general have different perspective and interests on the issue of incorporating the crime of aggression in the Rome Statute. The States which has voiced this scepticism the most has been the five permanent members. Several commentators and politicians in the US do not want any court, except for American courts, to have jurisdiction over US militaries and State leaders.[112] The permanent members also have a strong interest to keep the veto power, in order to block any attempts aimed against themselves or one of their allies, to establish that an act of aggression has occurred.

The Security Council has been hesitant to use the notion "act of aggression". During the cold war the Security Council only referred to acts of aggression in the cases of Israel and South Africa, and "threat to international peace and security" only at seven occasions.[113] In the case of South Africa the Security Council acted under Chapter VII of the UN Charter, drawing implicitly on the Definition of Aggression, and condemned the "persistent acts of aggression".[114] If a positive decision by the Security Council that an act of aggression has occurred is necessary in order to establish the jurisdiction of the ICC, such a hesitant practise would weaken the possibility of the ICC to act.

5.1 Monopoly for the Security Council

The Security Council has according to Chapter VII of the UN Charter, been granted the competence to determine which acts fall under Article 39, including the "act of aggression"; a determination which is a *sine qua non* condition for the enforcement measures in Articles 41 and 42. The Charter provides that the Security Council has the "primary responsibility for the maintenance of international peace and security".[115]

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[112] Scheffer, David J., "A Negotiator's Perspective on the International Criminal Court" in *Military Law Review*, Volume 167 March 2001, 1-19, 5, 13

[113] [Malanczuk] 391

[114] Security Council Resolution 1977, 418, United Nations Security Council Official Records, Thirty-second Session, 2046th Meeting, S/RES/418 (1977)

As described above historically, the Security Council has, with rare exceptions, chosen not to charge States with aggression, it has instead utilised its Chapter VII power without specifying the exact charge against the State in question.[116] This creates an obvious problem if the ICC is dependent on prior determination of the Security Council that an act of aggression has occurred. Would the Security Council have to formally declare that it was exercising its Chapter VII authority and subsequently found "aggression" to have been committed by a State? A requirement that the Security Council should determine an act of aggression by the State, on whose behalf an individual is accused, would place a judicial question under the supervision of a political body.[117]

A straightforward argument for involving the Security Council is that the issue of aggression is political and can not be transformed into a legal question.[118] The involvement of the Security Council is a reflection of political reality and the problems that exist are described as practical and not principal. One could view the authority of the Security Council functioning "in a judicial or quasi-judicial manner". Carpenter describes this as a problem because the prime *desideratum* of the Security Council "is neither justice nor legality, but mutual interest through collective action aimed at achieving effective pacification, efforts to bring aggressors to justice will be compromised whenever they conflict with the Security Council's efforts to achieve peace." With some pessimism Carpenter states that "until consensus is reached among Nations on the elements compromising aggression, the role of the Security Council will remain unavoidable, and the possibility that justice will be sacrificed for peace remains viable." [119]

One could argue that there are positive aspects of granting the Security Council a role in the determination if an act of aggression has occurred. It can be used as a bargaining chip both against aggressors in order to prevent further use of force and in peace negotiations. Justin Hogan-Doran and Bibi T. van Ginkel argue that impunity for the crime of aggression as a bargaining chip is neither an adequate perspective nor a desirable outcome. Liability for war crimes is not something that should be traded off against a strategic advantage.[120]

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[115] [UN Charter], Article 24(1)
[116] [Carpenter], 233
[117] [Hogan-Doran & Van Ginkel], 322-323
[118] [Hogan-Doran & Van Ginkel], 346
[119] [Carpenter], 235ff
[120] [Hogan-Doran & Van Ginkel], 341-343

The Security Council relation to the crime of aggression remains to be solved and there is an express requirement that the provision adopted on the crime of aggression must be "consistent with the relevant provisions of the Charter of the United Nations".[121] This formulation refers, it is understood by some, to Article 39 of the UN Charter pursuant to which the "Security Council shall determine the existence of any…act of aggression…". Lionel Yee comments that “the mandatory language of Article 39 of the Charter seems to indicate that a primary role must be given to the Council to determine the existence of aggression on the part of a State as a pre-condition to the institution of criminal proceedings against individuals by the Court”.[122] A partially opposite view is that any decision on the fact of aggression by the Security Council is only a precondition for the exercise of jurisdiction, and is not prejudicial. The defendant could for example claim self-defence before the ICC. A totally different view would interpret Article 39 in such a manner that it is restricted enforcement measures under Chapter VII, a case concerning the crime of aggression could thus bypass the Security Council. As the ICC will consider individual criminal responsibility and not enforcement measures, the ICC could exercise its jurisdiction without any involvement of the Security Council.

5.2 The Challenges to the Exclusive Competence of the Security Council

The responsibility of the Security Council to determine an act of aggression is not exclusive, as other UN organs have been granted or assumed by themselves competence. This view was also advocated by some States during the Rome Conference, for example Portugal and Greece.[123]

5.2.1 International Court of Justice

From the case law of the International Court of Justice one could argue that the competence of the Security Council to determine if an act of aggression has occurred is not exclusive, with exception for the purposes of Chapter VII. On the merits in the Nicaragua Case the Court established that there was a breach of the "obligation under customary law not to use force against another State".[124] Concerning jurisdiction and admissibility ICJ argues in the Nicaragua Case that even if Article 24 of

[121] [Rome Statute], 5(2)
[122] Yee, Lionel, "The International Criminal Law Court and the Security Council" in *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, 143-152 (editor Roy S. Lee) The Hague: Kluwer Law International, 1999, 145
[123] Proposal submitted by Greece and Portugal, 28 November 2000 PCNICC/2000/WGCA/DP.5, 3
[124] [Nicaragua Case (1986 Merits)], para 292, count 4

the UN Charter allocates the "primary responsibility for the maintenance of international peace and security" on the Security Council this is not the same as exclusive competence. In the lack of any regulation granting the Security Council priority over the ICJ in the UN Charter, ICJ found that "both organs can therefore perform their separate but complementary functions with respect to the same events." and that "the Charter accordingly does not confer exclusively responsibility upon the Security Council for the purpose.[125] The most relevant provisions are found in Article 92 of the UN Charter which states that "the International Court of Justice shall be the principal judicial organ of the United Nations", but it does not give any definitive guidance.

A related issue that was contemplated in the Nicaragua Case was whether the case should be rejected because if the Court admitted the case it would be an appeal of the Security Council decision on the issue. The US claimed that if the matter, which had been rejected already by the Security Council, was brought to a court such as the ICJ it would be an appeal from an adverse ruling. The US claimed that due to the fact that because of lack of support in the UN Charter, ICJ could "not properly exercise subject-matter jurisdiction" and thus had no competence to try the merits of the case.[126]

The ICJ rejected the claim of the US and pronounced that: "The Court is not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which members of the Council employed their right to vote." The ICJ had been asked to comment "on certain legal issues of a situation" and that they were the "principal judicial organ of the United Nations".[127] hence they could try the case by its merits.[128]

One could argue that ICJ's verdict in the case would have been an appeal on a decision that had not been taken. An acceptance of the US view on the matter would have the consequence that a Security Council veto, without any formal legal ground, would extend from the political to the judicial arena. J.G. Merrills claims that: “if the Court had accepted that claims relating to the use of force are outside its competence, it would have disqualified itself from dealing with a wide range of important

[125] Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgement of 26 November, ICJ Reports 1984, 392; 434 para 95 [Nicaragua Case (1984 Admissibility and Jurisdiction)]
[126] [Nicaragua Case (1984 Admissibility and Jurisdiction)]: 432 para 91
[127] [UN Charter], Article 92

international disputes and relegated the rules of international law which govern these matters to a second class status." [129]

In the Nicaragua Case, the ICJ also referred to its own case law citing the Diplomatic Hostages in Tehran Case.[130] The Court pronounced: "…Whereas Article 12 of the Charter expressly forbids the General Assembly to make any recommendation with regard to a dispute or situation while the Security Council is exercising its functions in respect of that dispute or situation, no such restriction is placed on the functioning of the Court by any provision of either the Charter or the Statute of the Court. The reasons are clear. It is for the Court, the principal judicial organ of the United Nations, to resolve any legal questions that may be in issue between the parties to a dispute; and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the peaceful settlement of the dispute."[131]

Thus, the case law of the International Court of Justice seem to support the view that the competence of the Security Council to determine if an act of aggression has occurred is not exclusive, with exception for the purposes of Chapter VII.

5.2.2 General Assembly

The UN Security Council was during the Cold War paralysed by the veto powers of the five permanent members. There was a fear that the new organisation would be as unable to act as its predecessor, the League of Nations. There has been a successful attempt to circumvent the Security Council. [132] On 3 November 1950 the General Assembly adopted the Uniting for Peace Resolution in order to use its secondary or residual responsibility.[133] The Resolution was supported by western States allied to the US, which at the time held a majority in the General Assembly. The Soviet and its allies were a minority.

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[128] [Nicaragua Case (1984 Admissibility and Jurisdiction)]: 436 para 98
[129] Merrills, J.G., *International Dispute Settlement,* Cambridge: Grotius, 1991, 192-193
[130] [Merills], 193
[131] United States Diplomatic and Consular Staff in Tehran, Judgement, Judgement of 24 May 1980, ICJ Reports 1980, 3, 22 para 40
[Nicaragua Case (1984 Admissibility and Jurisdiction)], 433 para 93
[132] [Bassiouni & Ferencz], 323
[133] UN General Assembly Resolution 1950, 377 *Uniting for Peace Resolution*

The arguments used in the Uniting for Peace Resolution have later been approved by the ICJ in its advisory opinion of the Certain Expenses of the United Nations, where the ICJ expressed the view that the responsibility of the Security Council for "the maintenance of international peace and security"[134] does not preclude the General Assembly from using its implied powers, exercising a secondary or residual responsibility.[135]

In subsequent decades, the socialist countries together with the decolonized countries from the third world, reached majority in the General Assembly. Due to this there has been increased reluctance from the western States to support a doctrine allowing new Uniting for Peace Resolutions. This could be one explanation why the Nato alliance did not use the General Assembly when the Security Council was blocked on the issue of use of force against the Federal Republic of Yugoslavia (FRY), 1999.

If the General Assembly could be used as an alternative to the Security Council to determine whether "an act of aggression" has occurred in the context of the crime of aggression, this would not change the problems of having a political body involved in the decision or merit the requirements of a fair trial.

5.2.3 The ICC and the Ad Hoc Tribunals

The advocates for the position that the Security Council should have a significant role in the process of attributing individual criminal responsibility for the crime of aggression could point out that the ad hoc Tribunals ICTY and ICTR are bodies created by an to some respect controlled by the Security Council. Thus, they could argue that the ICC jurisdiction concerning the crime of aggression should be dependant on the Security Council.

It is true that the ad hoc Tribunals were created under UN charter VII as enforcement measures to deal with specific situations after crimes had been committed in those territories.[136] Thus there is tight relation between the ad hoc Tribunals and the Security Council. The subject-matter that are under the jurisdiction of the ad hoc Tribunals is chosen by the Security Council. One could argue that the

[134] [UN Charter], Article 24(1)
[135] Certain Expenses of the United Nations, Advisory Opinion of 20 July, ICJ Reports 1962, 151, 162-163
[136] [Lee], 4; 6

same relationship should exist between the ICC and the Security Council as between the Security Council and the ad hoc Tribunals. The Security Council would select what matters and situations to be dealt before the ICC.

This view cannot be upheld. First the ad hoc tribunals are created through Security Council Resolutions; the ICC is created through a multilateral treaty.[137] Second, the fact that the Security Council has the primary responsibility for the maintenance of international peace and security does not mean that it has exclusive jurisdiction to establish when an act of aggression has occurred.[138] This has been illustrated above by the practice of the UN General Assembly and the case-law of the ICJ.

The advocates for a monopoly role for the Security Council would argue that the ICJ only refers to a dual competence "for the maintenance international peace and security" as in Article 24 of the UN Charter and not to the determination of "the existence of … act of aggression" as in Article 39 of the UN Charter. This is a valid argument if one makes a literal interpretation of Article 39 in the UN Charter and disregards the context, object and purpose of the Charter. One has to remember that Article 39 must be read together with the enforcement measures granted in and the purpose of chapter VII in the UN Charter. The purpose of chapter VII is to authorise enforcement measures such as economic interventions or the use of armed force. It is neither evident nor necessary to interpret that chapter VII encompasses a monopoly power for the Security Council to determine if an act of aggression has occurred.

[137] [Hogan-Doran & Van Ginkel], 344
[138] [Nicaragua Case (1984 Admissibility and Jurisdiction)], 434 para 95

6. Fair Trial and Human Rights

In the preparations before the Rome Conference one important conclusion was reached; the Rome Statute would adhere to the highest standards of justice and due process, and this should be embodied in the statute and not to be left for future judges.[139]

In the context of the ICC two interests have to be measured and balanced against each other: the interests of peace and justice. The Security Council is not a court, but still, if the determination of the Council as to whether an act of aggression has occurred or not is a precondition for the jurisdiction of the ICC, it may have consequences in the question of the individual liability and for every person's right to a fair trial. Allegra Carroll Carpenter's view is that "the Security Council is concerned with actions of States, not individuals. It is a political body, it is comprised of members each having independent and common interests such as surviving the nuclear age and making domestic achievements both economically and socially." [140]

Let us assume that the Security Council has established that there has been an act of aggression, and it is possible to determine who among the leadership took the decision to commit the act, would it then be possible to exculpate the person in the ICC? If the answer is no, there would be no need for a trial in the ICC as regards the act as such, it would only be a formality. The supporters of a solution in which the Security Council has a role in the determination could then argue that even if the Security Council determined that there was an act of aggression, the ICC would still be able to acquit the accused individual. One could still argue that, even if the ICC has the option to acquit in such situation it would be influenced by the decision of the Security Council and the criminal proceeding would not fulfil the requirements of a fair and politically independent trial.

The concept of fair trial can be related to several Articles of the Rome Statute. Before the Rome Conference there was an aim that the highest international standards for protection of persons suspected or accused of a crime, being central to the concept of justice and fair trial, should apply. The minimum level of protection for the accused would be the rights as they appear in different

[139] [Lee], 7
[140] [Carpenter], 233

international instruments, in particular the International Covenant on Civil and Political Rights (ICCPR).[141] The ICCPR and other human rights instruments only bind those States that have ratified the treaties. However, some of the human rights provisions are also a part of customary international law created to deal with violations of States. The question is whether customary rules also apply to international organisations such as the ICC and the UN Security Council. Kenneth S. Gallant claims that "nothing in contemporary practice prohibits customary international law concerning human rights from applying to international organisations as well as to states. … In any event, some of the protections against unfair criminal prosecutions contained in the ICCPR may not yet have passed into customary law, or it may be quite difficult to determine the extent of the customary right." Thus, the safeguards for a fair trial need to be written in to the Rome Statute. [142] In Article 21(3) of the Rome Statute there is a general commitment that the "application and interpretation of law … must be consistent with internationally recognized human rights,...".

In addition to a general provision there are specific provisions on the rights of the defendants before the ICC. Håkan Friman divides the rights of the person suspected or accused of a crime under three headings; (1) general procedural rights, (2) specific procedural rights, and (3) trial in absentia.[143]

6.1 General Procedural Rights

6.1.1 A Public Hearing

The accused has the right to a public and fair hearing.[144] This is important for the accused or the general public, in the form of States or individuals, to react if the procedure is unjust. There is an exception, to protect the "personal interests of the victims", limitations on public trials and knowledge of identity of victims and witnesses "shall not be prejudicial to or inconsistent with the rights of the accused". [145] This is similar to the provisions of ICTY and ICTR.[146] There are no provisions that the negotiations or the deliberations in the Security Council should be public.

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[141] International Covenant on Civil and Political Rights, New York 16 December 1966, 999 UNTS 171
[142] [Gallant], 695-696
[143] Friman, Håkan, "Rights of Persons Suspected or Accused of a Crime" in *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, 247-262 (editor Roy S. Lee) The Hague: Kluwer Law International, 1999, 248 [Friman]
[144] [Rome Statute], Articles 67
[145] [Rome Statute], Articles 68
[146] [ICTY Statute], Article 22
[ICTR Statute], Article 21

6.1.2 Presumption of Innocence

One of the cornerstones in criminal law is the presumption of innocence. The burden of proof should be on the prosecutor; he or she must convince the Court that the accused is guilty. This is also manifest in the Rome Statute.[147]

A related issue is the necessary standard of proof required for the establishment of guilt in a criminal proceeding and the expression "to prove guilt beyond reasonable doubt". Maybe to the surprise of some, this is not explicitly spelled out in the principal international human rights instruments.[148] Instead these instruments contain general references, such as being proven quilty "in accordance with law", "in a fair trial" or similar expressions. However, the requirement to "prove guilt beyond reasonable doubt" and the principle that the burden of proof should be on the prosecutor, may be found in related legal sources to the conventions as well as in case law. In its general comment to article 14 of the ICCPR the Human Rights Committee made the following remarks about the presumption of innocence: "the burden of proof of the charge is on the prosecution… No quilt can be presumed until the charge has been proved beyond reasonable doubt."[149] In the case law of the European Court of Human Rights the presumption of innocence is a procedural guarantee and the burden of proof is on the prosecution. The presumption of innocence is considered to be a universally recognized rule of natural justice.[150] Thus, in an international criminal court, the issue concerning the burden of proof is essential.

Although the ICTY and ICTR Statutes[151] use the expression "until proved guilty according to the provisions of the present Statute", both of the tribunals have Rules of Procedure and Evidence, containing a provision that a conviction requiring that “guilt has been proved beyond reasonable

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[147] [Rome Statute], Articles 66, 67 (g); (i)
[148] [Friman], 250
Universal Declaration on Human Rights (1948); UN General Assembly Resolution, 217A (III), Article 10
International Covenant on Civil and Political Rights, New York 16 December 1966, 999 UNTS 171, Article 14(2)
European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November, 1950, UNTS 213 1955 2889 p 221, Article 6(2)
African Charter on Human and Peoples Rights, 27 June Nairobi 1981, UNTS 26363, Article 7(1)(b)
American Convention on Human Rights, San José 22 November 1969, Article 8(2)
[149] Yearbook of the Human Rights Committee Vol II, 1983-1984, 622 (CCPR/4/Add.1), para 7
[150] Lahti, Raimo, "Article 11" in *The Universal Declaration of Human Rights*, 239-249 (editors Gudmundur Alfredsson and Asbjorn Eide), The Hague: Kluwer Law International, 1999, 244-245
[151] [ICTY Statute] Article 21(3), [ICTR Statute Article] 20(3)

doubt".[152] In contrast to the previous human rights instruments and the statutes for the ad hoc tribunals there is an explicit demand in the Rome Statute that "the Court must be convinced of the guilt of the accused beyond reasonable doubt".[153]

If it is necessary for the jurisdiction of the ICC is dependant on the Security Council, it is highly questionable whether that presumption of innocence is respected and that the burden of proof is on the prosecutor and not on the accused. One could imagine a solution with an even higher degree of involvement by the Security Council. If a decision by the Security Council is binding for the Court and the defendant can not vindicate herself, or claim mitigating factors such as self-defence, it would be in violation of the Rome Statute and several HR instruments. The crime is attributable only to leaders, which is a small group. A positive determination of an act of aggression would presuppose their guilt, and would violate the principle of a fair trial. It would also not be in consistency with the provisions in the UN Charter; the purpose "to maintain international peace and security, … in conformity with the principles of justice and international law" and the obligation to respect human rights.[154]

6.1.3 Equality of Arms

One important element in the concept of a fair trial is the requirement that the prosecutor and the defendant should have similar strength in the trial, access to the same documents and witnesses. A trial where these requirements are meet one could speak about an equality of arms.

One of the seven Nuremberg principles as formulated by the ILC is that "any person charged with a crime under international law has the right to a fair trial on the facts and law."[155] Also the London Charter recognized the right to a fair trial and the following procedure was provided:[156]

> "(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents with the Indictment,

[152] ICTY Rules of Procedure and Evidence as amended 1 and 13 December 2000, rule 87 available at <http://www.un.org/icty/basic/rpe/IT32_rev19.htm#Rule 87> 2001-05-14
ICTR Rules of Procedure and Evidence as amended 3 November 2000, rule 87 available at <http://www.ictr.org/> 2001-05-14
[153] [Rome Statute], Article 66(3)
[154] [UN Charter] Articles 1 and 55
[155] Yearbook of the International Law Commission Vol II, 1950, 375-376
[156] [London Charter], Article 16

translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him."

(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands."

(d) A Defendant shall have the right to conduct his own defence before the Tribunal or to have assistance of Councel.

(e) A Defendant shall have the right through himself or through his Councel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution."

These provisions and principles demand that in order for a trial to be fair, an equality of arms, there should be a contradictory procedure where the prosecutor and the accused individual are on similar standings. A similar provision can be found in the Rome Statute.[157] The contrast to a contradictory process is an inquisitory procedure where the judge is also acting as the prosecutor. In most legal systems the contradictory procedure has been chosen as it has been seen as best fulfilling the requirement of a fair trial.

Is the involvement by the Security Council in this context, in violation of human rights standards? When the Security Council is deliberating whether an act of aggression has occurred it is rather more inquisitory than contradictory. Thus, the concept of fair trial may be at risk. If one regards fair trial as an essential human right, the principle of "equality of arms" must be respected.

6.1.4 Legality

One of the major controversies during and in the aftermath of the Nuremberg trials was whether the crime that was attributed to the accused was a part of international law before the alleged acts were perpetrated. In the prosecutions at Nuremberg, the most difficult count to define was "crimes against peace" due to the lack of legal specificity with respect to prohibition against initiating and resorting to

[157] [Rome Statute], Article 67

war.[158] In the Rome Statute the principles of *nullum crimen sine lege* and *nulla poene sine lege* are clearly stated.[159] These principles of legality, meaning that the crime description must exist before the act has been committed, also provides that provisions involving criminal responsibility can not be vague. Article 22 paragraph 2 states that "the definition of a crime shall be strictly construed and shall not be extended by analogy. …" In order to adhere to these principles the crime of aggression should be very clearly defined and ad hoc determinations by the Security Council whether an act of aggression has occurred does not fit in well.

In this context several commentators have raised the issue of needing a clear definition of the crime of aggression, particularly whether the crime should consist of a *mens rea* element.[160]

M. Cherif Bassiouni and Benjamin B. Ferencz attache great importance to the issue of legality concerning the role of the Security Council: "The definition of aggression as an international crime differs greatly from the definition of aggression for the purposes of political determination by the Security Council, if for no other reason than that the principles of legality in international criminal law (like those in the most legal systems) require that crimes be specifically defined and their elements clearly stated."[161]

To conclude, the principle of legality would benefit if the crime of aggression was clearly defined, for example in the form of list clearly specifying which acts are prohibited.

6.2 Specific Procedural Rights

Only limited specific procedural provisions are included in the Rome Statute itself.[162] The relevant example in the context of the crime of aggression is the principle of *ne bis in idem* in Article 20 (also refereed to as double jeopardy).[163] According to this provision "no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been

[158] Bassiouni, M Cherif, "The Sources and Content of International Criminal Law: A Theoretical Framework" in *International Criminal Law Vol. I Crimes*, 3-125 (editor M Cherif Bassiouni) New York: Transnational Publishers, 1999, 63
[159] [Rome Statute], Article 22
[160] [Hogan-Doran & Van Ginkel], 322; see also section "4.4 Thresholds on Purpose and Consequences"
[161] [Bassiouni & Ferencz], 334
[162] [Friman], 253
[163] [Gallant], 714

convicted or acquitted by the Court." This is an important issue because there is a general interest that a defendant should be able to know when the accusations against him or her are resolved. If a matter can be tried several times, until a quilty verdict is passed, a defendant who is not yet found quilty will not be able to perform his or her daily work and enjoy his or her right to a normal life.

In the UN Charter there is limitation on the number of times a matter can be brought before the Security Council. This could be acceptable when considering accusations against a state, but when an individual is the defendant some safeguards should exist.
In some circumstances it can be legitimate for the ICC to circumvent the prohibition on double jeopardy when the prior judgement had the purpose of shielding the accused from the jurisdiction of the ICC or if the prior judgement was not independent and impartial. This is a highly relevant issue when considering the existing role of the Security Council of determining the existence of "an act of aggression".[164] One could imagine a case where a international institution such as the Security Council finds that no act of aggression has occurred, such a judgement would rather be based on state interests than on law. The provision on the possibility for the Court to circumvent the prohibition on double jeopardy only refers to Articles 6, 7 and 8, and evidently not to the crime of aggression in Article 5.[165] This may risk the respect for the impartiality and legitimacy of the ICC.

6.3 Trial in Absentia

A controversial legal issue during the negotiation process of the Rome Statute was the issue of trials in absence of the accused (trials *in absentia*). In the different domestic legal systems different views exist, thus it has not been possible in international law to provide a definite answer to the question of whether trials in absentia should be allowed. According to Håkan Friman “everyone subscribed to the principle” during the Rome Conference “that in general the accused should be present during the trial”. A significant amount of time and effort was spent discussing whether any exception to this general rule should be provided for in statute.[166]

[164] [UN Charter], Article 39
[165] [Rome Statute], Article 20(3)
[166] [Friman], 255

Trials *in absentia* were permitted at Nuremberg.[167] During the Rome Conference, no compromise was found resulting in the provision that the accused must be present.[168] In the pre-trial proceedings the hearing for confirmation of charges can proceed even in absence of the accused.[169] In this respect, procedural safeguards are also protected by the UN Charter. A country facing the accusation of aggression "shall be invited to participate, without vote" as it is a "party to a dispute under consideration by the Security Council".[170]

One could argue that this right to participate before the Security Council belongs to the prosecuted state and not to the individual defendant. As the individual defendant in the context of the crime of aggression probably is one of state leaders, it is reasonable to assume that the prosecuted state will protect the interests of its state leaders through its UN ambassador. However, one could also imagine situations where the change of power would put the defendant in opposition with the subsequent leadership of their country, for example Milosevic. This is an exception, and it is probably that the subsequent leadership will put the former state leader before a trial where procedural safeguards are respected. One could question if a former state leader would be tried in a national court for the crime of aggression, which appears to be a quite hypothetical situation. The case could still be brought to the Security Council, the individual defendant would then have no channels to forward his or her view, and the problem with *trials in absentia* would reappear.

[167] [Friman], 256
[London Charter], Article 12
[168] [Rome Statute], Article 63
[Friman], 261
[169] [Friman], 262
[170] [UN Charter], Articles 32

7. The Interaction between the Scope of Crimes and the Conditions for Jurisdiction

There are three problem or interest areas which are interrelated; First the type and scope of the crimes to be covered by the statute, second the jurisdiction of the Court and the role of the Security Council, and third the related question of the right to a fair trial and protection of human rights. One could claim that finding a balance between these three areas is a "mission impossible".

The first problem area concerns the definition: should it cover a wide the potential of acts or a more limited number? Should the acts be listed or should the statute only have a generic definition? Should the ICC be able to act *ex officio* or is a prior determination by the UN Security Council or any other organ necessary? The third area is related to the role of the Security Council. Can a political determination adhere to the requirement of fair trial and respect of human rights? In order to structure the discussion, the table below illustrates the interrelationship. The dimension on the horizontal axis relates to the issue of defining the crime. The dimension on the vertical axis relates to the role of the Security Council.

Table I

Involvement of the Security Council	**Definition: Generic**	**Definition: List of crimes**
Yes	**1. Wide political discretion**	**2. Limited political discretion**
No	**3. Wide judicial discretion**	**4. Limited judicial discretion**

Table I
The interrelationship between the choice of definition and the involvement of the Security Council

The issue of fair trial is not used as a third dimension in the table, rather it is used in the next chapter as a yardstick to measure to what extent the different combinations fulfil an ideal of fair trial and respect for human rights. A fourth dimension could be expressed showing a low or a high threshold for the level of violence. As the dimensions of conflict have a high degree of complexity even more dimensions could be added. Table I with two dimensions represents a gross, but still useful simplification.

8. The Normative Perspective

8.1 Fair Trial and Human Rights

The four fields described in the previous chapter can be judged by setting them against the yardstick of fair trial and human rights in six different aspects; i) a public hearing, ii) presumption of innocence, iii) equality of arms, iv) legality, v) *ne bis in idem*, vi) and trial *in absentia*.

In the first field, the Security Council is involved and the definition is generic meeting only one goal: the right of the state representatives may be present. The other five standards are at risk.

The second field where the Security Council is involved and the punishable acts are listed also fulfils the standard of the right of the accused to be present and to some extent the principle of legality.

The third field represents low or no involvement of the Security Council and a generic definition of the crime. It fulfils the standards of a public hearing; the presumption of innocence, equality of arms, *ne bis in idem*, and the right of the defendant to be present. The only standard not fulfilled is the principle of legality. This problem can be addressed and compensated to some degree by case law of the Court.

The fourth field fulfils all the standards concerning the requirement of a fair trial and respect of human rights. The Security Council is not involved and the acts that could amount to the crime of aggression are listed.

The four different fields represent different solutions for incorporating the crime of aggression in the Rome Statute. Even if one seems to adhere more to the requirement of a fair trial and respect for human rights it does not mean that this solution is coherent with other areas in international law and it could also be in conflict with what is acceptable for States. In their actions and positions, States are often more politically than legally motivated.

8.2 Coherence

The solution chosen for incorporating the crime of aggression in the Rome Statute should fit in the surrounding system of international law, it should be coherent. Aleksander Peczenik defines the level of coherence in a legal system by three criterias; (1) consistency (2) the different parts are supportive of each other, and (3) the legal system should have a connection to reality.[171] It should avoid being utopic. All of the three requirements must be meet in order for the system to be coherent, a legal system which provides for a supranational state with police powers over all States could have a high degree of internal consistency but would have a very weak connection with the reality as the world order is organised today.

In order to make the legal system consistent, the incorporation of the crime of aggression in the Rome Statute must be in line with treaties, international custom, general principles of law, UN General Assembly Resolution, judicial decisions and legal doctrine.[172] As these different sources do not give a clear answer and the Rome Statute will have an effect on the legal system concerning aggression, the objective when incorporating the crime of aggression in the Rome Statute should be to enhance clarity and remove previous inconstancies. The issue of consistency is important because the ICC, with no independent enforcement powers is dependent upon the good will of nations to see that Court decisions are accepted. The Rome Statute can not deviate significantly from the international norms already established.[173]

The definition on the crime of aggression given by international criminal law must support the principles in public international law, and *vice versa*. The definitions can not be totally different. There has to be some kind of connection, either that they are identical or that the definition established under international criminal law is more restricted but still inside the scope of the definition under public international law.

With the objective of finding a connection between the statute and reality one could try to find principles that are accepted by a vast majority of States. As the acts and will of the States are the basis of the international legal order, a solution chosen which is accepted by nearly all states will have

[171] [Peczenik (Juridikens teori och metod)], 86-91
[172] [ICJ], Article 38

a closer connection to reality. One example that would promote this objective would be to state that there are only two grounds for avoiding responsibility for use of force, self-defence and acts of force authorised by the Security Council under Chapter VII of the UN Charter. Over time one could include a third ground, humanitarian intervention. The disagreement on whether this ground exists, would render it premature as an exculpating ground at the present time.

8.3 Opinion of the States

Will the definition be politicised to serve the purposes of the major powers or juridicized to serve the purposes of an international criminal court? The issue of how to define the crime appears to be a more legal issue, while the question of the jurisdiction and the role of the security council is still open for political deliberations as there is no institution set up.

How is it possible with different interpretations and why do States have different opinions? Antonio Cassese explains this reasoning that "in the international community there are no judges to 'declare the law' with binding effect on all subjects." The link between the prohibition on acts of aggression and vital State interests has led to the situation that many States, both great and middle-sized have seen advantages with a law left in a condition of inexactitude and uncertainty. A system of auto-interpretation has been developed.[174] This tendency of arbitrariness can only be broken by either an explicit or implicit agreement between all the UN members, especially the great military powers, an agreement whereby an interpretation of the prohibition on acts of aggression is based in accordance with the UN Charter and the intentions in San Francisco.[175]

In the international system different groups can be identified by their view of the Security Council and its role in international law and politics. In table II there is an attempt to place some of the groups.

Table II

[173] [Ferencz (*Can aggression be deterred by law*?)], 8
[174] Cassese, Antonio, *Violence and Law in the Modern Age*, Cambridge: Polity Press, 1988, 39-40
[175] [Bring], 99

		Definition	
		Generic	**List of crimes**
Involvement of the Security Council	**Yes**	**1. Wide political discretion** The five permanent members	**2. Limited political discretion**
	No	**3. Wide judicial discretion** Several Western States, some States from the NAM and other States	**4. Limited judicial discretion** Some States from NAM

Table II
The interrelationship between the choice of definition and the involvement of the Security Council – the positions of different groups of States

The five permanent members want to keep their unique position in world order, which would result in a solution where the crime of aggression is judged by political rather than legal grounds. Several western and other States want to diminish the role of the Security Council and create a more interdependent system where a trial over the crime of aggression would be more legal and impartial. The Non-Aligned Movement (NAM) agrees that the Security Council should have a low or no role at all, but does not have a uniform view on how to define the crime.

What are the prospects that a common position can be reached? With some optimism one could only hope that the five permanent members will accept the arguments that trials in ICC should be impartial. The issue of how to define the crime may appear to be a difficult obstacle, but still more easy to overcome compared to the question of jurisdiction.

9. Conclusions or a Draft Proposal

To conclude the thesis, a constructive attempt to formulate a definition of the crime of aggression and conditions for the exercise of jurisdiction is offered in the form of a draft Article on the Crime of Aggression.

In this effort three different interests will be considered; first, that the requirements of fair trial is fulfilled and human rights are respected, second, that the solution will be coherent with international law, and third, that the proposal is acceptable to a vast group of States, it should not be utopic.

In order to adhere to the requirements of fair trial and ensure human rights are respected, one could argue for a lesser involvement by the Security Council and a definition listing the acts of aggression. However, the actors in favour of involving the Security Council could argue that no at judicial procedure without the Security Council would not be coherent with international law. They will claim that the UN Charter and the Rome Statute themselves proscribe some involvement by the Security Council. On the role of the Security Council the States have different interests and views. There are also divergent views on what specific acts would amount to aggression. It has been made clear that the States themselves do not regard the Definition of Aggression, which is combination of a generic definition and a list, as a preferable solution, authoritative, and correct interpretation. Therefore a compromise is needed balancing different interests against each other.

The solution chosen is one with some reduced involvement by the Security Council. In order to compensate for the interests of the five permanent members some thresholds are introduced. If the Security Council is going to have a limited role, controversial State acts such as the intervention in Kosovo must neither be legitimised nor explicitly prohibited by the Rome Statute. The question of whether humanitarian interventions are lawful or not should remain outside the scope of the ICC. If the question in the future is resolved by other legal institutions such as in the ICJ or the UN Charter itself, the ICC would be able to take the issue of humanitarian intervention into consideration.

9.1 Definition of the Crime of Aggression

In this draft Article, a generic definition of the crime of aggression is chosen. In addition to the fact that this solution is supported by most states Julius Stone has formulated some valid points about the

problem with a mixed definition: Stone argues, "If the abstract definition in the general clause could be self-applying, the list of acts or situations would be unnecessary; and is it not, in any case, really a part of the definition. Its inclusion manifests 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."[176] A generic definition would address the potential inconsistency that Julius Stone points out.

The draft Article on the definition of the crime of aggression is divided into two elements, the criminal act *actus reus* and a criminal consciousness *mens rea*. The criminal act is described in the first part of the definition:

> "For the purposes of the present Statute, the crime of aggression means the use of armed force, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action of a State…"

The criminal consciousness follows in the second part:

> "… against the territorial integrity or political independence of a another State, …"

The notion territorial integrity and political independence is also used in Article 2(4) of the UN Charter. One could propose that the notion "sovereignty" instead. The choice not to use the "sovereignty" is deliberate due to the fact the definition of this notion is very controversial in itself. It appears to be more easy to reach a consensus or broad majority on how to define "territorial integrity or political independence". Aggression against the "territorial integrity" of an other State would include use of to use armed force with the intent to occupy land or settle a border dispute. Aggression against the "political independence" would include use of force with the intent to replace a State leader of an other State.

It would be a challenge for the Court to establish intent in the context of the crime of aggression. One method would for the Court to study how the aggressor in public and in its internal deliberations legitimised the use of armed force. One could argue that already at this stage humanitarian interventions such as the actions against the FRY would fall out of the definition. The US and its allies could argue that the use of armed force neither was directed against the territorial integrity nor the political independence. The use of armed force were not connected to any public or concealed intention to occupy land, to change state borders or to change the leadership of FRY, the purpose

[176] [Stone], 80

was to secure human rights in Kosovo. Some of the critics of the humanitarian intervention could argue that there is concealed agenda with the objective of dismantling the FRY into smaller States. They would argue that in the internal deliberations of the aggressors there was and still is a plan to split FRY into smaller parts and control, by the use of armed force or the threat thereof, the line-up and political disposition of the leadership in the FRY. It will be an issue for the Court to decide whether a criminal consciousness can be found.

In the third and last part of the definition a threshold is introduced in order to avoid controversial acts come before the Court, such as a humanitarian intervention:

> " …in manifest contravention of the Charter of the United Nations."

In the absence of measures to exclude humanitarian interventions from the definition in the Rome Statute, key Western States will not support any incorporation of the crime of aggression.

The last part also encompasses the right self-defence, as this is a central part of the UN Charter.[177] Legitimate self-defence should be defined in case law as in the Nicaragua Case.

9.2 Jurisdiction

In the draft Article on jurisdiction, the Security Council will have a limited role in the process:

> "1. When a complaint related to the crime of aggression has been lodged, the Court shall first seek to discover whether a determination has been made by the Security Council with regard to the alleged aggression by the State concerned and, if not, it will request, subject to the provisions of the Statute, the Security Council to proceed to such a determination."

As there is a potential risk that the Security Council will not take a positive decision even if it is justified, the ICC should be able to proceed. The Security Council will still have the possibility to temporarily block the ICC, but this requires a uniform view by the five permanent members, i e they all have to either actively or passively support the attempt to block. None of them should veto the deferral of the investigation or prosecution.[178] This is the most controversial proposal of the draft Articles.

[177] [UN Charter], Article 51
[178] [Rome Statute], Article 16

"2. If the Security Council does not make such a positive determination or does not make use of article 16 of the Statute within 12 months of the request, the Court shall proceed with the case in question."

In order to handle the counter arguments against granting the ICC a wide discretion to proceed one should consider two issues. First the definition contains two thresholds, criminal consciousness and it has to be in manifest contravention of the UN Charter. Second a positive determination by the ICC on the issue of whether an act aggression has occurred will have significantly different objectives and implications than a positive determination by the Security Council on the same issue. The powers vested to the Security Council under Chapter VII are not to attribute individual responsibility for the crime of aggression but to authorise the use of force against a State. This power will still be under the monopoly of the Security Council. If the ICC takes positive decisions on the individual responsibility for the crime of aggression in total conflict with the view of the Security Council, and a significant number of States, the Court's judgements will simply not be accepted, as having any legal value or practical implications. The ICC would lose its legitimacy.

Closely related to the independence of the ICC are the requirements for a fair trial and respect for human rights. The third paragraph of the Draft Article on Jurisdiction forces the ICC to make a material examination an alleged crime of aggression after a positive determination by the Security Council.

"3. If the Security Council has made a positive decision under paragraph 1 above, the Court will proceed and make a determination of the responsibility for the crime of aggression. …"

Together with the fourth and last paragraph there are explicit provisions that even if the ICC is forced to go into the merits it should make an independent judgement of all the prerequisites given by the definition of the crime.

"…The prior decision by the Security Council shall not be interpreted as in any way affecting the independence of the Court in the exercise of its jurisdiction with regard to the crime of aggression.

4. The Court will act independently of the positive determination by the Security Council to determine the existence of the use of armed force, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action

of a State and if the act of using armed force was against the sovereignty of a another State, in manifest contravention of the Charter of the United Nations."

As a consequence other provisions in the Rome Statute must be changed as well with regard to two areas; first to circumvent efforts to shield the defendant, and second self-defence should be an explicit, legitimate ground to use force.

First, in some circumstances it may be legitimate for the ICC to circumvent the prohibition on double jeopardy, when the prior judgement had the purpose of shielding the accused from the jurisdiction of the ICC or if the prior judgement was not independent and impartial. This is a highly relevant issue when considering the already existing role of the Security Council of determining the existence of "an act of aggression".[179] The provision on the possibility for the Court to circumvent the prohibition on double jeopardy only refers to Articles 6, 7 and 8, evidently not to the crime of aggression in Article 5.[180] This may risk the respect for, impartiality and legitimacy of the Rome Statute and should be changed during a review conference.

Second, there are some provisions: Articles 31(3) and 21 that read together could be interpreted as making self-defence a legitimate ground for using force, by referring to other treaties and general principles of law.[181] The current wording of Article 21(1)(b) excludes this in the case of crime of aggression by referring to "the established principles of international law of armed conflict".[182] This qualification needs to be deleted.

There are several different positions where a balance between the different interests may be struck, above is only one proposal. There is a possibility that not all States can unite on one solution during the review conference on the issue. Would this block an agreement? The new provisions do require a solution close to a common consensus. Two-thirds majority followed by acceptance of seven-eighths of the Parties. Of course there is an interest to gain acceptance from as many States as possible, but a State is not automatically bound by an amendment, the State in question has to ratify

[179] [UN Charter], Article 39
[180] [Rome Statute], Article 20(3)
[181] [Rome Statute], Article 31(3) on Grounds for excluding criminal responsibility and Article 21 on applicable law.
[182] [Saland], 209

the amendment. A dissenting Party could also immediately withdraw from the Rome Statute with the stigma attached to such an action.[183] States have a choice: to support a legal deterrence on force or remain satisfied with the current system.

[183] [Rome Statute], Articles 5, 121, 123
[Ferencz (1999)], 7

Annex: Draft Articles on the Crime of Aggression

Definition of the Crime of Aggression

For the purposes of the present Statute, the crime of aggression means the use of armed force, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action of a State against the territorial integrity or political independence of a another State, in manifest contravention of the UN Charter.

Conditions for the Exercise of Jurisdiction

1. When a complaint related to the crime of aggression has been lodged, the Court shall first seek to discover whether a determination has been made by the Security Council with regard to the alleged aggression by the State concerned and, if not, it will request, subject to the provisions of the Statute, the Security Council to proceed to such a determination.
2. If the Security Council does not make such a positive determination or does not make use of Article 16 of the Statute within 12 months of the request, the Court shall proceed with the case in question.
3. If the Security Council has made a positive decision under paragraph 1 above, the Court will proceed and make a determination of the responsibility for the crime of aggression. The prior decision by the Security Council shall not be interpreted as in any way affecting the independence of the Court in the exercise of its jurisdiction with regard to the crime of aggression.
4. The Court will act independently of the positive determination by the Security Council to determine the existence of the use of armed force, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action of a State and if the act of using armed force was against the sovereignty of a another State, in manifest contravention of the Charter of the United Nations.

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