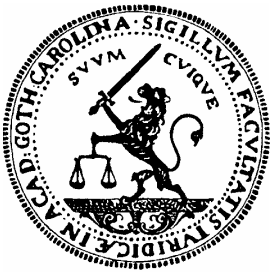

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The Missing Piece Defining the Crime of Aggression

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Contents

Summary

The historical development of responsibility for wars and aggressive acts has seen a shift of focus during the last century. Where the attention was previously focused on the unlawfulness of a State act (the Act of Aggression), the attention is now on the involvement and responsibility of individuals. The topic of this thesis is to follow the development of the possibility to hold those behind State acts of aggression individually responsible for the Crime of Aggression.

The history of aggression goes a long way back and the concept of wrongful wars is possible to trace back to ancient Greek and Roman times. Beginning with the ancient history of aggressive acts and wars, and following the development to contemporary times, this thesis offers a background to understand the concept of the Crime of Aggression in the modern world.

The International Criminal Court was created in 1998. An enormous and time-consuming amount of work had led to a product that was above expectations. Doubts had been expressed about the possibility to reach unification and the results of the negotiations were welcome surprises. However, the International Criminal Court's creation was possible because one of the most controversial issues, the Crime of Aggression, was not fully dealt with.

Article 5 of the Rome Statute includes jurisdiction over the Crime of Aggression as well as over genocide, crimes against humanity and war crimes. The Crime of Aggression has unlike the other crimes, not been linked to a definition. Until a definition exists, there is no possibility for the Court to exercise the jurisdiction that has been vested in it. This thesis assesses and concludes the work conducted in order to find a definition.

The Crime of Aggression presupposes that an Act of Aggression has occurred. By far the most controversial question connected to this issue is the role of the Security Council, which claims a right, based on Article 39 of the UN Charter, to determine if an Act of Aggression has occurred. One must recognize that the Security Council has primary responsibility in this situation. However, this thesis argues that this responsibility is certainly not exclusive and that it does not apply to legal proceedings, the Security Council's responsibility touches upon a different area of competence than the one that is vested in the International Criminal Court. A discussion about the Security Council's role *vis-à-vis* the International Criminal Court's role accordingly occupies a large part of the thesis.

The essay concludes that by far the most important question is to achieve jurisdiction for the International Criminal Court over the Crime of Aggression, and in order to do this concessions will have to be made. The Court is itself a product of negotiations and so will the definition be. Despite the rather firm holdings that are presented in this thesis, the author realizes and argues that politics and law are inseparable. Therefore, what legal experts might find the most appropriate solution might never be possible to achieve.

Preface

Inter arma silent leges[*]

[*] In time of war the law is silent

Abbreviations

AJIL	the American Journal of International Law
ASIL	the American Society of International Law
ASP	Assembly of State Parties to the International Criminal Court
BYIL	British Yearbook of International Law
EJIL	European Journal of International Law
GA	the General Assembly of the United Nations
ICC	the International Criminal Court
ICCPR	the International Covenant of Civil and Political Rights
ICESCR	the International Covenant of Economic, Social and Cultural Rights
ICJ	the International Court of Justice
ICTR	the International Criminal Tribunal for Rwanda
ICTY	the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
ILC	the International Law Commission
ILC Ybk	Yearbook of the International Law Commission
IMT	the International Military Tribunal, Nuremberg
IMTFE	the International Military Tribunal for the Far East, Tokyo
London Agreement	Agreement for the Prosecution of the Major War Criminals of the European Axis
Nuremberg Charter	the Charter of the International Military Tribunal. Also referred to as the IMT Charter
PrepCom	the Preparatory Commission of the International Criminal Court
SC	the Security Council of the United Nations

SWGCA	the Special Working Group of the Crime of Aggression
the Statute	the Rome Statute of the International Criminal Court. Also referred to as the ICC Statute or the Rome Statute
UKMIL	United Kingdom Materials on International Law
UN	the United Nations
UN AGOR	United Nations Official Records of the General Assembly
UNWCC	the United Nations War Crimes Commission

1 Introduction

"The world has paid dearly for the indecision of its political leaders"[1]

True is that the world has paid for the indecisions, but the decisions also. The decisions to start wars, in contradiction with what our laws today stipulate, resulting in endless suffering, and the decisions not to pronounce upon wrongdoings. It is high time to hold those responsible who make the decisions of starting illegitimate wars. Not only is it time for them to accept responsibility for their own actions in the moral sense, just like every human being, but also responsibility in the legal sense. Responsibility, in keeping with the notion of equality between all human beings, which allows no one to be above the law. There can be no justice in war, if there are no responsible men and women.

Why then is it wrong to start a war? In the moral sense the answer is easy; humans are killed, and often in very large numbers. War is pure hell because people are forced to kill other people, populations have to leave their homes, women are raped and mass destruction of land and property are everyday happenings. Even worse, the victims of war are usually innocent civil populations.

In the legal sense war is, at least on paper, illegal. Where aggression occurs there are also aggressors, and in order to deter individuals from committing the Crime of Aggression there needs to be a way to hold the aggressors responsible.

We are sometimes told not to judge our leaders to hard, because after all they are not acting for selfish reasons, but because they believe that they are serving a national interest. That is however a bad argument. Political leaders are humans, just like any other human, with the possibility to take their own decisions. A political or military position is all but risk-free. Instead, they are more morally risky than other positions, in that they take action in the names of other people and because their actions get wide-ranging effects. Their acts do also usually take place in areas with few or shady legal rules. If they act in ways that endanger other people, they can hardly complain when they are held responsible for their acts. The establishment of the International Criminal Court (ICC) in 1998, with jurisdiction to prosecute individuals for among other crimes, the Crime of Aggression, was therefore welcomed by many.

We have insisted on punishing individuals for crimes committed in war times since after the Second World War. How can we have rules punishing crimes committed in connection to war if the war itself is illegal? More bewildering, if wars are fought all the time, and they are, and no one adheres to the prohibition of force, does it then really matter that it is in fact illegal?

[1] Benjamin B. Ferencz in his article *Tribute to Nuremberg Prosecutor Jackson, Jackson's Vision of Peace Through Law*, http://www.benferencz.org/arts/79.html, last accessed 9 June 2007

The answer is quite simple; all rules are sometimes broken by certain individuals. Nevertheless, we have to pronounce upon the wrongdoing.

States are sovereign, and there is no central authority that can exist above them to enforce conformity with certain demands. Therefore, wars can often not be avoided. One has to look to reality and the reality is that wars occur and in war, crimes are committed. Therefore we also have to punish the acts. That is the only way to change the common attitude towards these crimes. The United Nations (UN) did not manage to prevent the war in Iraq. However, the fact is that the condemnation of the war, by the UN, helped to create a public opinion against it.

One of the reasons that the League of Nations failed as an organisation is said to be the obvious failure to stop the Second World War, today with a new organisation, the United Nations, one cannot but wonder, why do we not learn from our mistakes? We live in a world where several ongoing and horrific wars, both international and internal, are taking place and there seems to be little or no way of stopping them by diplomatic or other means. Has the United Nations, just as its predecessor, failed? This essay will not be able to deal with such an enormous question. However, we should remember that just like the failure of the Second World War was followed by the Nuremberg trials, and the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda are products of the failure in connection with the respective wars, so has the ICC partly been established to deal with the failures by the UN to stop war and the crimes that follow.

Therefore, it is enormously alarming that the ICC is not enabled to exercise jurisdiction over all crimes in the catalogue, the Crime of Aggression, is currently not possible to prosecute.

The Crime of Aggression is often described as the “mother crime”. Even though all of the crimes in the Statute obviously can occur even in the absence of an aggressive international war, the other crimes often follow in its footprints. The aggressor in a war or act of aggression is rarely alone in committing war crimes, crimes against humanity and genocide, usually the victim State is responsible of such crimes as well. If wars could be prevented, then it certainly would have a positive effect on the other core crimes included in the ICC’s jurisdiction. The International Military Tribunal used these words in their judgement;

> War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[2]

The Crime of Aggression is already included in Article 5 of the Rome Statute for the International Criminal Court, but the Court cannot exercise

[2] Judgment of the International Military Tribunal for the Trial of German Major War Criminals (hereinafter referred to as the Nuremberg Judgement), reproduced in 41 American Journal of International Law (hereinafter referred to as AJIL) (1947), No. 1, p. 176, p. 186

jurisdiction until an agreement on a definition has been reached. It has been made clear that there is no possibility of prosecuting crimes perpetrated after the Rome Statute entered into force, but before a definition has been found.[3] The question of the definition is of a delicate nature and the work towards reaching a consensus has not been easy. Problems arise since, within a domestic legal system, there are shared norms and values or an idea of natural law, and punishment is justified because the norms have been broken. In the international society, there is no coherent idea of moral norms or natural law. Therefore, the work is more time-consuming and more effort taking. A lot of progress has been achieved and the hope is that a definition will be agreed on in time for the Review Conference in 2009.

1.1 Purpose and Delimitation

The purpose of this thesis is to contribute to the debate by examining, evaluating and giving my own view, an "outsiders" view, on the development of the definition of the Crime of Aggression. To do this I find myself compelled to look at the history behind the crime, the recent as well as in a historical perspective, and the views of States as well as academics. I will examine the state of international law in a broader perspective, meaning that I find an examination of the prohibition of force and possible exceptions necessary. The information found, will be used to try to develop an understanding for the problems of developing legal norms in an international political/legal context, an understanding that I hope to be able to pass on to the reader. To do this three questions are posed and they will form the basis for this thesis:

- What is the Crime of Aggression and what are the difficulties when trying to accomplish a durable definition for the Crime of Aggression and its elements and conditions?
- Can legal experts ever find a solution on a definition?
- What will the political implications of a definition be and will the criminalization of the crime ever be effective?

The focus of this thesis is the definition for the Crime of Aggression and the conditions for the exercise of the jurisdiction. Other areas such as the more detailed elements of the crime as well as the Rome Statute's general parts will for reasons of limited space not be included, unless they are of interest for the main issues.

A thought that will govern me through my work is that violence brings more violence. I have a restrictive view of the use of force. Many States tend to treat the use of force as more or less insignificant. They see "small" and temporary attacks as something they are lawfully entitled to or at least should not be punished in connection to. My view is that the Charter of the UN prohibits any use of force[4], and therefore it should be illegal, regardless

[3] ICC-ASP/3/SWGCA/INF.1, p. 5, paragraph B.II.7

[4] Obviously with the exceptions provided for in the Charter of the UN. More discussion on this subject below.

of how insignificant it is, or the form it takes. Member States to the UN have in this regard given up their sovereignty, now they need to deal with the consequences.

1.2 Method and Terminology

This thesis consists of a large descriptive part. I find it necessary to do so in order to answer the posed questions, and to fulfil my aim of developing a useful summary and background to more recent progress. As thoroughly as possible, this thesis will offer a chronological order of the development of individual responsibility for Acts of Aggression. In order to understand the complexity of the Crime of Aggression it is needed to provide the reader with a firm background. However, the text easily becomes too dense and technical. I have therefore tried to include analytical parts in the consecutive text, both analyses by academics and my own opinions. The reader will consequently not find an isolated chapter of analytical conclusions. The reader should also be aware of the fact that, despite the large descriptive part of the thesis, the Crime of Aggression does largely touch upon areas that do not have simple or correct answers. There is no right or wrong since the definition will create new and untried law. Consequently, this thesis cannot offer any solutions, only proposals.

The terminology that has been used in this thesis might seem difficult to grasp at first hand, different terms seem quite similar, and a clarification is in its place.

When discussing the Crime of Aggression it is important to remember that it is a separate notion, though closely linked to the Act of Aggression, which entails State responsibility. An international crime committed by an individual originates from an action or omission by a State, either because the perpetrator is, an individual performing a duty for the State or acting in his/hers official capacity, or because the crime is the result of a policy or choice indirectly favoured or supported by the State.[5] For example, genocide, Article 6 in the Rome Statute, and crimes against humanity, Article 7, do not need to be directly connected to the conduct of a State. However, when conducting an investigation of either one of those crimes one will find elements of State action. In regard to genocide, there is a reference to “a manifest pattern of similar conduct” and in regard to crimes against humanity, the crime has to be committed as a part of “a widespread and systematic attack”. Both of these phrases indicate a State behaviour or policy, but the perpetrators do not need to be State agents or officials.

State responsibility, put in connection to aggression, represents the use of force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other matter inconsistent with the

[5] This does not mean that the State will be responsible in all cases, the State might not have been able to exercise the right amount of control over the individual. For example, a soldier committing war crimes while in his/hers official capacity as a part of a troop belonging to a State can be individually responsible. The State can also be responsible, if it can be proved that the State exercised the right amount of control over the individual in ordering the acts or omitting to stop them.

UN Charter, which leads to responsibility for the action by the Aggressor State. Responsibility for a State is ideally determined by the ICJ. The Crime of Aggression entails individual criminal responsibility for an individual who can influence the commission of an Act of Aggression against a State, and will in the future ideally be determined by the ICC. Individual criminal responsibility for an act has elements of both domestic law and international public law. For example, domestic law influences the mental criteria, the modalities of perpetration, the process rules and the enforcement system, whereas the actual act is determined in the international law field. Richard L Griffiths puts it well:

> The definition of the Crime of Aggression is the enumeration of the circumstances in which an individual will be held criminally responsible for the commission of an Act of Aggression by a state; the definition of the Act of Aggression is the enumeration of those acts which, when committed by a state, constitute an Act of Aggression in international law.[6]

This approach, the parallel approach, was approved by the PrepCom (the Preparatory Commission for the International Criminal Court, whose purpose was to define the crime of aggression for the Rome Statute) in its ninth session.

The "Act of Aggression" is used in regard to the definition in General Assembly Resolution 3314 (XXIX), the determination by the SC of the occurrence of the act and as to the act that gives rise to the Crime of Aggression in the Rome Statute of the International Criminal Court. The capital letters in the beginning of each word is a conscious choice. It is done in order to separate the notion from the below stated.

The/an "act of aggression", "aggression" and "aggressive act" refers to any aggressive act without a special definition.

The term "Crime of Aggression" refers to the individual act that will be defined in the Rome Statute. The capitalization is yet again a conscious choice.

The concept of aggression does inevitably also touch upon other similar terms, and it is impossible to avoid using them together. "Use of force" as contained in Article 2(4) of the UN Charter, "crimes against peace" and "war of aggression" as contained in the IMT and IMTFE Charters and "armed attack" which is found in Article 51 of the UN Charter are all interrelated and used in this thesis. One should be aware of the close relations of the terms and remember that they all more or less refer to the same action; however, they are connected to different definitions.

1.3 Theory

A large number of materials have been used to complete this thesis. Firstly, primary sources like the UN Charter, the Rome Statute, the IMT Charter

[6] Griffiths R. L., *International Law, the Crime of Aggression and the Ius ad Bellum,* 2 International Criminal Law Review (2002), p. 310

and customary international law. I have also had a lot of help from subsidiary sources for example the Nuremberg judgement, the *Nicaragua* case and a large amount of academic material. Most of the academic material that touches specifically upon the question of the definition of the Crime of Aggression is 2-5 years old, it is mainly from 2002 and earlier. I believe that this has an explanation in the fact that the Preparatory Commission of the International Criminal Court's (PrepCom) Discussion Paper from 2002 has up until February this year been the most recent and up to date material of the progress made in the different working groups. All that could be said had simply been said.

The works and opinions of Ian Brownlie, Benjamin B. Ferencz and Yoram Dinstein are well esteemed and one cannot but agree with most of what they write, simply because they posses great authority and respect in the international public law field. I have found great help in their different publications and I feel that my own opinions correspond closely to many of theirs. Their works have helped me put aggression into a historical perspective as well as been a great help when examining questions such as the prohibition of force and its exceptions.

Finally, the different documents from the working groups have been my most important sources as to the actual definition of the Crime of Aggression. Considerable progress has been made since the 2002 Discussion Paper was drafted and that was realized by the chairman of the Special Working Group for the Crime of Aggression. Consequently, a new Discussion Paper was produced in February 2007.

The PrepCom's Discussion Paper from 2002 is more or less outdated since the new one was produced in 2007. However, I have still chosen to go through it comprehensively, it gives an understanding for the drafting process and it is important for the understanding of the different arguments. It should also be remembered that the drafting process is far from over, and elements that were included in the 2002 Discussion Paper, but excluded in the 2007 Discussion Paper, might turn up again later in the process.

As to the more recent developments, I have not been able to find much academic literature and accordingly the analysis of the 2007 Discussion Paper and the publicized material from the Princeton meetings are mainly my own conclusions, obviously with influence and parallels from earlier work on the points that have not seen much change.

2 The History of the Act of Aggression

Aggression is the name that has been given to the crime of illegal war. The act of aggression has a long history. It is difficult to put a date of birth upon the act of aggression, but it is recent in a historic context. As long as humans have existed, so have wars. However, in ancient times wars were conducted on a "just" war basis. It was felt that war needed to be justified. Illegal use of force as such did not exist. The accused in the Nuremberg trials tried to raise complaints and pointed to the principle of *nullum crimen sine lege*, however they did so in vain. The concept of aggressive acts or war in customary law did occur at the time around the First World War.

2.1 Pre 20th Century and First World War Developments

In ancient cultures, even societies that had reached a high degree of civilization were ready to go to war for reasons that were often very slight. However, Greek literature shows unwillingness to go to war unless it was possible to assign the war a cause. Before war was resorted to, envoys were sent to the country with which the Greek empire had a grievance. Demands, in the name of the Greek government and people, to make amends for the inflicted injuries were made, and if these demands were not met, then a declaration of war was pronounced.[7]

The early Christian Church made it forbidden to enlist until A.D. 170. It was believed that the conversion of the world would forever outlaw war. Therefore, war was seen as a consequence of original sin.[8] The ideas of opposing war lasted for three centuries after Christ.[9] As the Church grew stronger wars became a necessity and rules governing "just war", i.e. wars in accordance with the religion, evolved. Now soldiers were instead expected to shed their blood in the name of God.[10] St. Augustine (A.D. 354-430) introduced and gave authority, in the Christian world, to the concept of "just" war, but in vague terms. The notion of the "just" war was that the war had to be conducted in order to redress a wrong suffered. Consequently, it had to be preceded by an injury. A war conducted in order to achieve personal benefits was nonetheless unjust.[11]

Later on, another important scholar St. Thomas Aquinas (1225-1274), was imbued with the teachings on peace and war by St. Augustine. Von Elbe interprets Vanderpol's translation of Aquinas' Summa Theologica

[7] Phillipson C., *The International Law and Custom of Ancient Greece and Rome*, pp. 179-180

[8] Elbe von J., *The Evolution of the Concept of the Just War in International Law*, 33 AJIL (1939), No. 4, p. 667

[9] Brownlie I., *International Law and the Use of Force by States*, p. 5

[10] Elbe von, *Supra* note 8, p. 667

[11] St. Augustine, *Quaestiones in Heptateuchum*, Cited and translated in Brownlie *Supra* note 9, p. 5

from Latin into French, as meaning that war is permissible in three circumstances; (1) The war was to be conducted by an authoritative leader of a nation, an individual cannot carry out a war. (2) The war must have a just cause. (3) The belligerents must have the right intention, namely, to advance good or avoid evil. For Augustine the injury itself was good enough of a reason to stipulate a cause, Aquinas demands some fault on the part of the wrongdoer.[12]

The concept of "just" war formed also in Islam. Reasons such as self-defence, punishment for apostasy and action against non-Muslims, or even against other Muslims, if it was necessary because the other Muslim State set aside a significant command of the Shari'a law, were causes seen as just. It was also lawful to conduct wars in order to help Muslims in other States, which were governed by non-Muslim governments, so called sympathetic wars. Something like today's humanitarian intervention also existed, namely the right to intervene in order to prevent an evil worse than interfering in other's affairs. The maxim "the lesser of the two evils should be preferred", found in the Koran, was a governing thought[13]

In the 14th and 15th centuries, the power of the Roman Empire was starting to weaken. War was the prerogative of kings, and wars were fought for whatever reason the king, or for that matter, queen, thought appropriate. War was legal when the ruler it so found. If no superior power was to be found there had to be a "just" cause namely a restoration or defence of injured rights.[14] A Roman Emperor could, at the height of the era, instigate "public" wars towards kings of all other entities and countries, but the Pope. War was seen as a means of ensuring the triumph of a religion or truth. In the absence of a common judge, it was a ways of settling disputes. The Pope had always had the prerogative to wage wars against the infidels and so holy wars; such as the Crusades were justified.[15] The end of the Middle Ages came to be the era of the "fathers" of international law. The "fathers" were jurists and scholars, most of them catholic and all of them European. They continued to elaborate on the catholic tradition that only a just war is permissible. Among other things, they found it important to list the causes for the just war. Obviously, these lists were highly subjective and coloured by religion.[16]

Francisci de Victoria[17] (1480-1546), a Dominican friar and a Professor at Salamanca was one of the most influential "fathers" and developed several theories on the "just" war. Among those was the theory that only those who were heads of complete States could make war, no petty rulers. No differences in religion, extension of empire, the personal glory or other advantages of the ruler were seen as just causes; only one cause was

[12] Elbe von, *Supra* note 8, p. 669
[13] Hamidullah M., *Muslim Conduct of State*, pp. 77-78, 153 and 155
[14] Elbe von, *Supra* note 5, pp. 670-672
[15] *Ibid*, pp. 672-674
[16] Dinstein Y., *War, Aggression and Self-Defence*, p. 65
[17] Also known as Franciscus/Francisco de Vittoria/Vitoria/Victoria

just, namely, when a wrong had been committed.[18] Victoria also dealt with his country's war against the Indians in America. He wrote:

> […] the barbarians in question can not be barred from being true owners, alike in public and in private law, by reason of the sin of unbelief or any other mortal sin, nor does such sin entitle Christians to seize their goods and lands […][19]

He concluded that the Spaniards had the right to travel and make trade in the lands as long as they did not harm the natives and the natives did not prevent them.[20] If, and this is how he justified the war against the Indians, the Indians were hostile and did their best to destroy the Spaniards, then the Spanish invaders had the right to defend themselves and had the right to enforce all rights of war against them. Just like any war against Christians, the war had to be just. He asserted that when the Indians hindered the Spaniards from travelling freely, carry on trade and propagate Christianity was the war against the Indians fulfilling the criteria for a just war.[21]

With the emergence of sovereign States in the 16th and 17th centuries, the Pope lost much of his power and new political strategies were developed by scholars like Machiavelli. Other theologian scholars developed new theories that war could be just on both sides, where both rulers thought that their cause was the just one. In the absence of a common judge, it was simply hard to prove who was "right".[22] Hugo Grotius was on of the most influential scholars during this time and he should be given great respect for his work. However, to a large extent he built his theories on what earlier scholars had already written.[23]

The Peace of Westphalia in 1648 ended a long period of violent religious wars, and the influence of the Pope and the Holy Roman Empire on European politics and economics was drastically weakened and became next to nothing in non-catholic States. Dynastic and commercial rivalries now became the most disputed questions. A new order with European public peace and public law came about.[24] European relations were to rest on a "balance of power" between States or groups of States. States were to be seen as equal and sovereign.[25] The public law of Europe actually lasted until 1914 and the balance of power is probably still today the dominant idea within international politics, but in a somewhat different shape.[26]

A regulation of the just war doctrine resulted in the realms of morality and propaganda and governments sought to justify every declaration of war as rightful. Hobbes, Locke, Pufendorf and Spinoza were, among others, important scholars. In the absence of the strong central authority that the

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[18] de Victoria Francisci, *De Indis et de Ivre Belli Relectiones,* Nys E. (ed.) in Classics of International Law, translated by Bate J.P., pp. 165-170
[19] *Ibid,* p. 125
[20] *Ibid,* p. 151
[21] *Ibid,* p. 155-158
[22] Brownlie, *Supra* note 9, p. 11; Dinstein, *Supra* note 16, pp. 66-.67
[23] Elbe von, *Supra* note 8, p. 678
[24] Brownlie, *Supra* note 9, p. 14
[25] *Ibid,* p. 14
[26] Walzer M., *Just and Unjust Wars-A Moral Argument with Historical Illustrations,* p. 76

Catholic Church had made up, there was no one to pronounce upon wrongful wars. The custom of conducting war, as the prerogative of the ruler, continued into the 17th century. It seems incompatible with the "balance of powers" and yet it was a prerequisite for the appearance of a legal order. States needed to challenge each other in order for rules governing their behaviour to develop. In the 18th century, the legal order was constantly disturbed by disputes of commercial and dynastic art, but nevertheless, it stood tall. Emmerich de Vattel was the most influential scholar, even though his ideas followed many others. He concerned himself with the justice of wars that concerned the conscience.[27]

The "age of enlightment" came along with great philosophers and scholars such as Rousseau, Voltaire, Montesquieu, Kant and Bentham. They all concerned themselves with the pacific sentiment. France even included a prohibition of aggression in its constitution.[28] Most positivistic scholars during the 19th and 20th centuries rejected the distinction between just and unjust wars and considered war to be entirely a question within the sovereign State. States however continued to try to use the concept of justice, but the justification did not create legal effects.[29] A State could still break certain rules in international codified law, like the Hague Conventions. Once a war broke out, the State's duties concerning the belligerents and third parties were however the same, irrespective of the fact that the outbreak of the war was a consequence of non-adherence to international law.[30] Kunz means that war was entirely outside the international legal system; it was the means of creating new international law, through the use of force. In the internal sphere, the corresponding idea would be revolution.[31] Von Elbe however notes that States have in all times tried to justify their actions, this depends on the deep need in the human spirit to base political actions on just and equitable grounds.[32]

Today, both the concept of humanitarian intervention and the concept of forcible support to people's right to self-determination are as close to the concept of just wars as one can come. Proponents of these views believe that they are pursuing a higher goal, but there are always room for contradictory subjective opinions and abuse of the law in the name of justice.

[27] Brownlie, *Supra* note 9, p. 17
[28] Brownlie, *Supra* note 9, p. 18
[29] Elbe von, *Supra* note 8, p. 684; Dinstein, *Supra* note 16, p. 67
[30] Elbe von, *Supra* note 8, p. 684
[31] Kunz, *The Problem of Revision in International Law ("Peaceful Change")*, 33 AJIL (1939), No.1, p. 33
[32] Elbe von, *Supra* note 8, p. 685. *See* for a further examination of many different situations von Elbe, p. 686

2.2 Developments After the First World War

The first time in history that recourse to war was prohibited was after the horrors of the First World War. Both the Covenant of the League of Nations[33] and the Kellogg-Briand Pact[34] made it more or less illegal.

2.2.1 The Treaty of Versailles

The Commission on the Responsibility of the Authors of War and on Enforcement of Penalties created pursuant to a decision by the Preliminary Peace Conference on 25 January 1919 presented its report to the Peace Conference on 29 March 1919. In the conclusions it was stated that

> It is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.[35]

The recommendations by the Commission were not adopted by the Paris Peace Conference, but a specific provision was included in the Treaty of Versailles.

The Treaty of Versailles was probably the first time that aggression, as a crime entailing individual responsibility, was recognized in international relations, although in a somewhat different form. It contained provisions in connection to the trial of Kaiser William II of Hohenzollern. The unspecified acts he was said to have committed constituted "a supreme offence against international morality and the sanctity of treaties".[36] The provision did not establish obligations and rights for States. It is purely declaratory and does not have juridical character. The trial however never came about, since the Kaiser fled to the Netherlands, which was not a party to the Treaty of Versailles and refused to extradite him.[37] That was probably for the better. The crime was, unlike war crimes and crimes against humanity, which were underpinned by ordinary crimes in national legislation, unprecedented. Such a loose description of the crime would have resulted in an enormous amount of work and it would have been hard to prove what constituted "international morality", not to mention that it would certainly not have stood up to the principle of legality. However, this

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[33] The Covenant of the League of Nations, League of Nations-Official Journal, pp. 3-11, printed in Ferencz B.B., *Defining International Aggression- the Search for World Peace, a Documentary History and Analysis*, Vol. 1, 1975, Oceana Publications, Inc., Dobbs Ferry, New York, pp. 61-69 (this publication by Ferencz will hereinafter be referred to as Ferencz B.B. 1, Volume 2 from the same author will hereinafter be referred to as Ferencz B. B. 2)

[34] General Treaty for the Renunciation of War as an Instrument of National Policy August 27 1928, Art. I, League of Nations Treaty Series 1929, pp. 59-64, printed in Ferencz B.B. 1, pp. 190-193 (The treaty will hereinafter be referred to as the Kellogg-Briand Pact); Also printed in 22 AJIL, (1928), No.4, Suppl., pp.171-176

[35] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 14 AJIL (1920), No.1, p. 250

[36] Treaty of Peace with Germany (hereinafter referred to as the Treaty of Versailles), 1919, Art. 227 printed in 13 AJIL (1919), No. 3, Suppl., p. 151

[37] Brownlie, *Supra* note 9, pp. 53-54

was the first time that it was recognized that war could be a criminal offence as well as morally wrong and from now on, it was a question that not only pacifists and idealists concerned themselves with, also ministries and public officials recognized the importance.

2.2.2 The League of Nations

The League of Nations was founded after the Paris Peace Conference in 1919 and annexed to the Treaty of Versailles. Articles 10, 11, 12 and 15 paragraph 7 in the Covenant of the League of Nations made the recourse to war subordinated to the peaceful settlement of disputes. The Covenant contained several gaps and the relation between Article 10 on the one hand and Articles 11 to 15 on the other was not clear. All articles that prohibited war were made subject to the overriding Article 15 paragraph 7 and could easily be ignored. Therefore, it did little to advance the restrictions on forceful actions.

The effectiveness of the League depended highly on the will by the powerful members of the Council to assume the responsibilities of imposing sanctions. Article 16 stipulated the application of sanctions, but it only had effect in regard to smaller States, which preferred to end conflicts instead of suffering the effects of economic sanctions. In many situations, the Council members showed unwillingness to impose sanctions, which could affect their own economy. The essence of the Covenant was the obligation to use peaceful means in order to solve controversies. Resort to war was only allowed if the procedure of peaceful settlement failed. Therefore, one can speak of legal and illegal wars, the legal ones being those where a State had made itself subject to the settlement procedure but it had failed.[38]

The right to go to war was, according to Brownlie, assumed to still exist, since the League was a creature of its time and the custom to go war if peaceful settlements failed, occurred in international customary law during the 19th century and early 20th century.[39] The Covenant therefore only *restricted* the resort to war but did not prohibit it. In general, the Covenant created a presumption against the legality of war as a means of self-help. The Kellogg-Briand Pact, described below, therefore complemented the Covenant well. Article 11 of the Covenant of the League of Nations provided that, any war or threat of war was a matter of concern for the whole League of Nations. Wars were therefore no longer of private concern between two States; it was of an international interest, which affected the whole world community.

Despite several successes, the Leagues ultimate failure was the outbreak of World War II. The US never became a member of the League and that was certainly one reason to its failure. The US had a policy of non-interference in other States affairs and they expected other States not to interfere in theirs. There was a wish not to be forced to cooperate in matters, in which the US did not want to work together. They also opposed the idea

[38] Brownlie, *Supra* note 9, p. 57
[39] *Ibid*, p. 56; *See* Cassese, *International Law*, p. 36

of achieving peace through threats and they were afraid of having to use force in cases when they themselves could not fully decide.[40]

The League lacked an armed force of its own and so depended on the Great Powers to enforce its resolutions. The lack of enforcement measures in general was definitely part of the failure. States did not feel that the League was to any use, many never signed and some left the League or were expelled.[41]

2.2.3 The Kellogg-Briand Pact

The General Treaty for the Renunciation of War as an Instrument of National Policy was signed Aug. 27, 1928. It condemned "recourse to war for the solution of international controversies."[42] The Pact, also known as the Pact of Paris or the Kellogg-Briand Pact, came about in June 1927 when Aristide Briand, foreign minister of France, proposed a treaty to the US government, which was supposed to outlaw war between the two countries. Frank B. Kellogg, the US Secretary of State, returned a proposal for a general pact against war. After prolonged negotiations the Kellogg-Briand Pact was signed by 15 nations-Australia, Belgium, Canada, Czechoslovakia, France, Germany, Great Britain, India, the Irish Free State, Italy, Japan, New Zealand, Poland, South Africa, and the United States.

The contracting States agreed that disputes should be settled only by pacific means and that war was to be renounced as an instrument of national policy.[43] Even though war was prohibited, it remained lawful in the case of self-defence. The Pact only consisted of three articles and the exception of self-defence was therefore communicated to all principal members before the pact was signed, and identical notes were sent to the parties that later adhered to it. There was never any doubt that self-defence was an exception to the renunciation of war.[44] The Preamble to the Pact also made it clear that any party “which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty”.[45]

Consequently, any Party, which went to war against another Party, would lose its protection by the Pact, and the victim of the attack, as well as other parties to the Pact, could take recourse to self-defence. Self-defence was, as mentioned, not set out expressly in the Pact, limitations were simply left unset. There was also no competent body to decide whether a State, which used force, was acting in self-defence or in breach of the Pact.

Wars were prohibited as a national policy, and consequently it was legal to conduct war as an instrument of an international policy. According to one interpretation, war could also be legal if it had other goals than

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[40] Hudson M.O., *America’s Rôle in the League of Nations,* 23 American Political Science Review (1929), No. 1, p. 20; Wharton Pepper G., *America and the League of Nations,* 3 Journal of Comparative Legislation and International Law (1921), No. 1, pp. 25, 28-29

[41] Brownlie, *Supra* note 9, pp. 55-56, *see* also note 4 on pages 55-56

[42] The Kellogg-Briand Pact, Art. I

[43] *Ibid*, Art. I and II

[44] The notes are reproduced in 22 AJIL (1928), No. 3, Suppl., pp. 109-115 and replies are printed in 23 AJIL (1929), No. 1, Suppl., pp. 1-13

[45] Kellogg-Briand Pact, pp. 59-61

national ones, say religious, ideological or similar. However, regardless of whether this interpretation is true or not, this analysis cannot be harmonized with Article 2 of the Pact, which stipulates that all disputes shall be subject to peaceful settlement. A State that did not settle its disputes peacefully would therefore be in breach of the Pact. It should also be mentioned that the Pact only outlawed war between members of the Pact. Disputes between a non-contracting party and a contracting party were therefore not affected by the prohibition of war. Obviously, the same applied between two non-contracting parties. The effect of this was however not of any significance since almost all States were parties.[46]

Sixty-three nations ultimately ratified the Pact,[47] and this meant that it was of almost universal obligation since only four countries, as the world looked before the Second World War, stood outside of it.[48] The Kellogg-Briand Pacts effectiveness was, just as the League of Nations, affected negatively by the failure to provide measures of enforcement. It did nevertheless probably prevent wars in a couple of situations (hostilities between China and the USSR in 1929 and between Japan and China in 1931).[49]

Some[50] have asserted that the Pact in fact did not have the legal character that has been prescribed to it. They find that the language of the Pact is general, vague and refers rather to a moral principle. The lack of sanctions has also led some writers to arrive to the above conclusion. However, many treaties and sources of law are without sanctions, that does not make them less valid in the legal sense.

States also expressed reservations to the Pact. According to Brownlie these reservations find their likes in other reservations made in the international legal context, such as the right to self-defence in the UN Charter. Reservations in fact make a treaty or statute more clear, and it is common that States want the treaties they sign to be accurate and descriptive. The most important factor, which disproves the assumption that the Pact only has a moral significance, is, according to Brownlie, that the negotiators and signatories in fact intended and desired the Pact to have the result of outlawing war. No State did in fact challenge the legal significance and that supports that view. Subsequent practice and treaties did also reaffirm the principle of prohibition of war.[51]

Another question of controversy has been whether the Kellogg-Briand Pact outlawed the use of force not amounting to war from the scope of application. War is the word used in the Pact, but State practice has the possibility of changing the scope of application. Neither the literature nor the *travaux préparatoires* offer any guidance. In the above-mentioned

[46] Dinstein, *Supra* note 16, pp. 84-85
[47] Complete list of States that ratified or adhered to it by December 1938 can be found in 33 AJIL (1939), Suppl., p. 865
[48] Bolivia, El Salvador, Uruguay and Argentina plus the entities of San Marino, Yemen and Nepal; Brownlie, *Supra* note 9, p. 75
[49] For more situations *see* Brownlie, *supra* note 9, pp. 75-80
[50] Bilfinger cited by Cohn E.J. in: 19 Modern Law Review (1956), No. 2, p. 232
[51] Brownlie, *Supra* note 9, pp. 83-84

conflicts, it was never asserted by any of the parties that the conflicts did not amount to war and that the Pact therefore should not be applicable.[52]

Treaties concluded after the Kellogg-Briand Pact referred to aggression, invasion and the use of force.[53] These factors seem to suggest that the Kellogg-Briand Pact did in fact prohibit all forms of use of force not just the force that amounted to a war. It is a difficult question and many different views can be found. The Pact is probably[54] still in force, but has no significant legal meaning and the above discussion is therefore mainly of academic interest. The Kellogg-Briand Pact was despite the good intentions not enough to stop the Second World War.

2.3 Developments During the Second World War and in its Aftermath

The Second World War brought about turbulence and suffering, hardly seen before in the world, but also a will to prevent the same thing from happening again. This era was therefore full of developments, and it constitutes the beginning of the road towards the ICC.

2.3.1 The United Nations War Crimes Commission

The Allied Powers, apart from the USSR, established the United Nations War Crimes Commission in October 1943 at a Diplomatic Conference in London. The Commission was supposed to undertake preparatory investigative work for future prosecutions in the international field. The Commission actually drafted a statute for a future international criminal court. However, the question that the Commission deemed "[b]y far the most important" was "whether aggressive war amounted to a criminal act".[55]

Despite the good outlook, certain States decided not to vote for the inclusion of aggression in the concept of war crimes.[56] Therefore, they did not resolve the question and it did not come back on the agenda until the London Conference of the four Powers-the USA, the UK, France and the Soviet Union-when it was decided to include crimes against peace in the IMT Charter. The Commission sought to make representation to the San Francisco Conference, during which the UN was established, in order to try to recommend a norm stipulating individual responsibility for violations of international law and prohibiting the threat or use of force. It was met with general agreement, but the Commission was split on whether to give the

[52] Griffiths, *Supra* note 6, p. 306; Brownlie, *Supra* note 9, pp. 87-88
[53] Brownlie *Supra* note 9, p. 76 note 1
[54] Discussions on whether the absence of references to the Pact might mean that it is not in force have taken place is interesting, but outside the scope of this essay.
[55] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, His Majesty's Stationery Office, 1948, p. 180
[56] *Ibid*, pp. 184-185

norm retroactive effect, in order for it to apply to the Nazi war criminals as well as future perpetrators. Ultimately, the UN Charter did not include any provision invoking individual responsibility on the issue.[57]

2.3.2 The Nuremberg and Tokyo Trials

After Germany had been defeated, the British, led by Churchill, wanted to punish those responsible for the war. It was stated that it would be enough to arrest and hang those who were primarily responsible, the major Nazi war criminals, without wasting time on legal proceedings. Minor criminals were suggested to be tried in specially created tribunals. Neither Roosevelt nor Stalin agreed, they were in favour of trying all of the criminals, and in the end, their line prevailed.[58]

Anything but that solution would have been out of line with the basic principle of "innocent until proven guilty in a court of law". It was important that the Allies proved that they were different then the Nazi's, who conducted arbitrary mock trials, if even any. It was also essential to make the crimes of the Nazi's known to the world, in order to create a strong opinion against racism and totalitarianism. The Allies also felt that it was of considerable significance to set a visible record for coming generations, so that the crimes would never be forgotten. A trial would assemble enormous amounts of material, which could otherwise disappear.[59]

The Agreement for the Prosecution of the Major War Criminals of the European Axis (hereinafter referred to as the London Agreement)[60] on 8 August 1945 made aggression a criminal offence, entailing individual responsibility. A proposal by the US to include aggression within the jurisdiction of the Tribunal had been formally presented to the London Conference on 26 June 1945, the same day that the San Francisco Conference outlawed the use of force in the Charter of the UN. France resisted including aggression, referring to the principle of legality, and the USSR was concerned that their attacks on Finland and annexation of parts of Eastern Europe would fall under the crime. The American view however prevailed. [61] The Charter of the International Military Tribunal (hereinafter referred to as the Nuremberg Charter or the IMT Charter) was annexed to the London Agreement.[62] The Nuremberg Tribunal was given jurisdiction to

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[57] Schabas W. A., 'Origins of the Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime"', in Politi M., Nesi G. (eds.*), The International Criminal Court and the Crime of Aggression*, p. 27 (hereinafter Referred to as Politi and Nesi)

[58] Cassese A., *International Criminal Law*, p. 330

[59] *Ibid*, p. 330; Wright Q., *The Law of the Nuremberg Trial*, 41 AJIL (1947), No. 1, p. 42

[60] The Agreement for the Prosecution of the Major War Criminals of the European Axis, August 8, 1945, pp. 420-421, printed in Ferencz B.B.1, pp. 406-407

[61] Ferencz B.B., *Defining Aggression: Where it Stands and Where it's Going*, 66 AJIL (1972), No. 3, p. 492; Abrams J.S., Ratner S.R., *Accountability for Human Rights Atrocities in International Law*, p. 125

[62] Charter of the International Military Tribunal, pp. 422-428, printed in Ferencz B.B.1, pp. 408-414

prosecute among others; Crimes against Peace[63], including planning, preparing, initiating or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participating in a common plan or conspiracy to accomplish any of the above.[64] The IMT Charter therefore incorporates two notions, direct planning and waging of an aggressive war as well as the conspiracy to do so. In the Nuremberg indictment they became two different counts. Count one being the conspiracy and count two, the planning and so on, the direct action

"Planning" consists of "the formulation of a design or scheme for a specific war of aggression" whereas "preparation" means the instigation of the "the various steps taken to implement the plan" before the actual outbreak of the hostilities.[65] "Initiation" is linked to the commencement of the war, while waging continues until the war has ended.[66] The terms can also be described as the "planning" and "preparation" referring to activities intended to contribute to the "initiation" of an aggressive war, which the accused knows is aggressive and "waging" referring to activities taken in order to win the war.[67] As to the conspiracy, the Nuremberg Tribunal pronounced that:

> […] the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action[68]

From this follows that the individual must have participated in a concrete common plan, not just an unclear political programme, and the plan must have had the purpose of starting a war of aggression. The Crime of Aggression mainly consists of the same elements as the Crimes against Peace, although differences, as will be shown, exist. For the first time in history, it stood clear that the crime of aggression is not just morally indefensible, but also legally wrong.

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[63] William Schabas in his article 'Origins of the Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime"' presumes that it was named so for the sake of parallelism with crimes against humanity, in Politi and Nesi, p. 28

[64] Art. 6 of the Nuremberg Charter reads as follows:

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

> (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

[65] Greenspan M., *The Modern Law of Land Warfare*, p. 455

[66] Dinstein, *Supra* note 16, p. 132

[67] Wright, *Supra* note 59 , p. 67

[68] Nuremberg Judgement, p. 225

The fact that individuals had not been prosecuted for Crimes against Peace before was submitted as being contradictory to the principle of *nullum crimen sine lege.*[69] The judges however did not find it to be a legitimate ground to exclude individual responsibility. The Court observed that the defendants must, by virtue of their positions, have known that the invasions were in breach of treaties outlawing the recourse to war. In the judgement, the Court affirmed that Article 6 (a) was declaratory of International Law as it stood in 1939. The Court also reaffirmed that Articles 227 and 228 of the Treaty of Versailles illustrated and enforced this view. The Court also concluded that the principle that sometimes protects the representatives of a State from responsibility could not be used in a situation where the acts were condemned as criminal by international law. It is simply not possible to shelter oneself behind an official position and in that way escape responsibility. Chief Justice Stone gave a list of cases that had been tried by the Courts, where individuals were charged with offences against the laws of nations and in particular the laws of war.[70] The Court went on to make the now classic proclamation that:

> [c]rimes 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.[71]

Whether the above conclusion was actually true was actively debated during the following years.[72] It is clear that even if the IMT Charter might not have been truly declaratory at the time, as of today it is most certainly international customary law. Schabas, being quite critical of the Nuremberg Judgement, means that the description of crimes against peace by the IMT as being the "supreme international crime" was a consequence of prosecutorial strategy, sanctioned by the US, and politics in general. Schabas goes on to conclude that the judges did not invent the focus on aggressive war but that especially Chief Justice Prosecutor Jackson pointed them in that direction. He also means that it is evident that the judges at Nuremberg and Tokyo were hesitant when they convicted the accused for crimes against peace. He gives the example that none of the accused that were found guilty of crimes against peace and not the other two categories of crimes, crimes against humanity and war crimes, were sentenced to death.

For example, Rudolph Hess was convicted for crimes against peace but not for war crimes or crimes against humanity, he was sentenced to life imprisonment. Julius Streicher was convicted of crimes against humanity and acquitted of crimes against peace, he was sentenced to death. Schabas puts it like this, "when the judges came to impose the 'supreme penalty', aggressive war no longer figured as the 'supreme crime'".[73] He believes that

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[69] Brownlie, *Supra* note 9, pp. 169-170
[70] The Nuremberg Judgement, pp. 220-221
[71] The Nuremberg Judgement, pp. 220-221
[72] See for example Finch G.A., *The Nuremberg Trial and International Law*, 41 AJIL (1947), No. 1, pp. 33-34 and Cassese, *Supra* note 58, pp. 143 and 147-8
[73] Schabas, *Supra* note 57, p. 30

the major powers were afraid that the Nazi leaders would go unpunished, since they thought it could be difficult to attach responsibility for war crimes and crimes against humanity to the leaders. It was simply easier to use aggressive war as a way to ensure certain convictions of the Nazi criminals.[74]

Whether lifetime imprisonment in isolation is less severe than the death penalty can definitely be discussed, but Schabas does have a point. There are constant discussions and attempts to abolish the death penalty in the States of the world that still impose it, but there is no ongoing equivalent discussion concerning life imprisonment. Another explanation is offered by Quincy Wright who concludes that aggressive war might have been seen as not always resulting in large loss of life and also that it is seen as being "further away" from the outcome. He also argues that an aggressor might be a gentleman or a brute, and only he who was guilty of other crimes, which added brutality, could be sentenced to death.[75]

To me it seems clear that individual criminal responsibility did not exist at the time of the Nuremberg proceedings. Aggressive war seems to most certainly have been illegal, due to the historic background, the Kellogg-Briand Pact and the unwillingness to conduct war without a "valid" reason. Whether criminal responsibility existed is however a completely different issue. It seems that the judges at Nuremberg and Tokyo were a bit too eager to punish the war criminals to remember the principle of *nullum crimen sine lege.* It feels quite certain to say that the Nuremberg Trials in regard to Crimes against Peace did violate the principle of legality.

Basing criminal law on customary law is not tolerable if it has retroactive effect. The ICC Statute is in fact partly based on customary law, but at the Princeton 2004 meeting it was made clear that the effect does not apply in retrospective.[76] Anyone who in the future will find themselves before the Court will in fact know that his/hers actions were illegal. That was not the case in the trials following the Second World War. The inclusion of Crimes against Peace was in fact a compromise. The American delegation found that conducting aggressive war was illegal whereas the French delegation found it not to be a crime. If a reference to a violation of treaties and assurances was included would, according to the French delegation, the objection of retroactivity be met. It was also alleged that such a reference would avoid the problem of not including a definition of aggression.[77] The Nuremberg Tribunal did also avoid defining aggression, but it still found defendants guilty of twelve cases of aggression. The judges could, or would, not define it, but somehow they still found themselves able to decide that Germany had committed aggressive acts.

The International Military Tribunal for the Far East, also called the Tokyo Tribunal was established by a Special Proclamation of the Supreme

[74] Schabas, *Supra* note 57, p. 31; Matthias Schuster follows the same line of argument in *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword*, 14 Criminal Law Forum (2003), p. 12
[75] Wright, *Supra* note 59, pp. 43-44
[76] *Supra* note 3
[77] Brownlie, *Supra* note 9, pp. 164-165

Commander for the Allied Powers, General Douglas MacArthur.[78] In the Protocol of the Proceedings of the Berlin Conference (better known as the Potsdam Declaration) the Allied Powers at war with Japan declared that bringing the major war criminals to justice would be one of the conditions of surrender[79] and in the Instrument of Surrender Japan also accepted these terms.[80]

Just like the IMT Charter, the Charter of the IMTFE included Crimes against Peace. The difference was that the definition in the IMTFE Charter referred to "*a declared or undeclared* war of aggression"[81] The United Nations War Crimes Commission concluded that the formulation was:

> "purely verbal and that they did not affect the substance of the law governing the jurisdiction of the Far Eastern Tribunal over crimes against peace on comparison with the Nuremberg Charter"[82]

They went on to say that,

> In this connection it is convenient to point out that it is precisely in the *irrelevance* of a declaration of war that lies the main feature of the development of international law as formulated in the two Charters and as established by the Judgment of the Nuremberg Tribunal[83]

The Court stated in its judgement that the Nuremberg Charter was decisive and binding on the Tribunal, but that the Allies had no right to enact laws in conflict with principles of international law. Also in the IMTFE did the defendants try to challenge the Courts jurisdiction on the grounds of *ex post facto* legislation. The Court dismissed those challenges with reference to the Nuremberg Judgement.[84]

The Control Council of Germany adopted Law No. 10[85] as a legal basis to prosecute other war criminals, than the major criminals who were prosecuted in the Nuremberg IMT trials. Law No. 10 was also annexed to the Moscow Declaration of 1943, which stated that those responsible for crimes committed by Nazi Germany could be held personally responsible

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[78] Special Proclamation: Establishment of an International Military Tribunal for the Far East, annexed to the Judgement of the International Military Tribunal for the Far East, Annex No. A-4, Art. 1, *Infra* note 84

[79] The Protocol of the Proceedings of the Berlin Conference (Potsdam Declaration), annexed to the Judgement of the International Military Tribunal for the Far East, Annex No. A-1, para. 10, *Infra* note 84

[80] Instrument of Surrender of Japan of 2 September 1945, annexed to the Judgement of the International Military Tribunal for the Far East, Annex No. A-2 and reprinted in 39 AJIL (1945), No. 4, Suppl., p. 264

[81] Charter of the International Military Tribunal for the Far East, Section II, Art. 5. Printed in Ferencz B.B.1, p. 522. Italicized by the present author

[82] United Nations War Crimes Commission, *Supra* note 55, p. 259

[83] *Ibid*, p. 258

[84] Brownlie, *Supra* note 9, p. 172

[85] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity (hereinafter referred to as Law No. 10), printed in Ferencz B.B.1, p. 491

and sent to the countries where the crimes had been committed and where they could be tried.[86]

Following Control Council Law No.10 both France and the United States established military tribunals. The US Tribunals conducted several trials, which were concerned with Crimes against Peace, among them the *I.G. Farben* case (US vs. Krauch), the *Krupp* case, the *High Command* case (US vs. von Leeb) and the *Ministries* case (US vs. von Weizsaecker). The French Tribunal conducted the *Roechling* case. The Nuremberg Charter was a fundamental part of Control Council Law No.10 as it was to be applied to the trials in the Tribunals, and the Tribunals found themselves to be bound by the judgements of IMT.[87]

Two main differences between the definition of Crimes against Peace contained in the Nuremberg Charter and the one in Law No.10 could be found. Law No.10 included invasion as well as a war and the list of acts that constituted the crime was non-exhaustive. The jurisdiction reached a bit further as it was possible to prosecute high-level political staff, but also, financial, military and economic leaders. However, the tribunals in *Krupp, Krauch* and *von Leeb* emphasized the importance of the accused individual being in a position to actually influence or determine the policy or plan. It was not enough only to have knowledge about the plan.[88] Mere knowledge would result in an unreasonable situation where it would be difficult to draw a line between the innocent and the guilty among the German population.[89]

The fact is that even though the citizen of a State cannot be held individually responsible, they are still collectively punished once the war is over. That punishment is less obvious, but ever so present, military occupation, political reconstruction and reparative payments to the victim State are effects of an aggressive war, which is lost. This affects the society as a whole, not just the ones that were active supporters of the aggressive war. While citizens cannot be held responsible merely for voting, supporting or not opposing a war, they can still be blameworthy, though not guilty of conducting aggressive war. On the other hand, it should be remembered that most of today's States are large and difficult to overview. Little is known about a certain official's programme, at the time of election, to the citizen who votes. However, when an official is re-elected or an aggressive programme is well known, blame can definitely be attributed to the elector. The Dutch Jewish girl Anne Frank, who had to hide from the Nazi's and

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[86] Great Britain-Soviet Union-United States Tripartite Conference in Moscow (hereinafter referred to as the Moscow Declaration), printed in 38 AJIL (1944), No. 1, Suppl., p. 5, Several countries, including, but not limited to, Norway, Denmark, Poland, the Netherlands and China, also made use of this possibility. Some also convicted individuals for Crimes against Peace or crimes that resembled it, *See* Brownlie *Supra* note 9, pp. 175-182 for more information.

[87] Historical review of developments relating to aggression, prepared by the Secretariat, PCNICC/2002/WGCA/L.1, New York 8-19 April 2002, pp.44-45, para.121

[88] Brownlie, *Supra* note 9, p. 204; *See also* the *US* vs. *von Leeb*, Law Reports of the Trials of War Criminals selected and prepared by the UNWCC, Vol. XXI, pp. 68-69; *US* vs. *Krupp*, Law Reports of the Trials of War Criminals selected and prepared by the UNWCC, Vol. X, pp. 127-128

[89] *US* vs. *Krauch*, Law Reports of the Trials of War Criminals selected and prepared by the UNWCC, Vol. X, pp. 38-39

ultimately died in the Concentration camp of Bergen-Belsen, wrote in her diary;

> I do not believe that it is the leading men, the government and the capitalists that are to blame for the war. No, the little man is surely also guilty. Otherwise, people would have made resistance a long time ago! A need to exterminate, to kill, to murder and to tear down is ever present with humans. Wars will exist until humankind has gone through a total transformation.[90]

Whatever we believe of Anne's somewhat drastic and pessimistic conclusion of humankind, she does have a point. Most of the time citizens do have a choice, and there always comes a time when we realize and cannot hide under false perception. Unless we then oppose war and the leaders that conduct it, no international court will ever deter individuals from conducting aggressive acts. However, we can never call the little men war criminals or hold them individually responsible.

As will be shown later, the definition in question for the ICC will probably not be so far reaching as to include financial, military or economic leaders, but will only include those in a position to effectively exercise control over the military or political action of a State, i.e. high-level political and military staff.

The first General Assembly of the UN did unanimously affirm the principles of International Law in the Charter and Judgement of the IMT.[91] On 21 November 1947, the GA also established the International Law Commission[92] and on the same day, another Resolution[93] was adopted in which the ILC was directed to formulate the principles recognized in the Nuremberg Charter and its judgment, and to prepare a draft code of offences against the peace and security of mankind.

Debates on the effect of Resolution 95 (I) and 177 (II) have been considerable. The question is whether the Nuremberg Charter and the interpretation of the Charter in the judgement is now to be considered customary international law, or whether the Principles only express moral support for the outcomes of the IMT Charter. There have been assertions that the resolutions diminish the importance of the Nuremberg Charter. Implications have also been made that, since it is *lex specialis*, it can only be accepted as a general part of international law when there has been careful study, approval and general acceptance. Some support has been given to this last interpretation, due to a statement by the Secretary General, which states that it is important to affirm principles so that they can be made a permanent part of international law.[94]

The GA had not given any clear indications as to the legal significance of such procedures. Despite the difficulties and ambiguities, it seems that

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[90] Frank A., *Anne Franks Dagbok*, translated to Swedish by Ella Wilcke and to English by the present author, the originals Dutch title *Het Achterhuis*, Lars Hökerbergs Bokförlag 1953, AB Fälths Tryckeri, 1977, Värnamo, Sweden, p. 219

[91] GA Resolution 95 (I) 1946

[92] GA Resolution 174 (II) 1947

[93] GA Resolution 177 (II) 1947

[94] Brownlie, *Supra* note 9, p. 189

the GA resolutions have reinforced the position of the Nuremberg Charter as a part of international law. According to Brownlie, the wording in the resolutions, though being clumsy, does approve the Nuremberg Charter as international law.[95] It should also be remembered that though GA resolutions do not create a legal obligation for the members, they do show a strong evidence of the general opinion among States. The effect of Resolutions 95 (I) and 177 (II) today is probably not of as big significance since the definition of the crime of aggression will be substantially different. It most certainly builds on customary law and other principles, but will mainly create new law.

[95] *Ibid*, p. 190

3 The United Nations and the Act of Aggression

The era after the Second World War meant a lot to the development of the act of aggression. Both customary law and written text saw achievements as to the definition of aggression. In the end of the war, the super powers addressed the issue of ensuring peace once again. The result was two-fold, on the one hand the United Nations, with a mandate to foster friendly relations and try to resolve conflicts by pacific means. On the other hand, the International Military Tribunal in Nuremberg, established in order to punish those the major war criminals responsible for the war, but also in order to deter others, by showing that individuals could, and would, be held responsible for their actions.

3.1 The Prohibition of the Use of Force

The time between the world wars and the above-mentioned treaties bore witness of a general trend by States to accept the principle of non-use of force in international relations. The creation of the UN on 24 October 1945 however meant that the recourse to armed force became explicitly prohibited.[96] Article 2(4) in the UN Charter reads;

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

It is clear that the Charter of the UN aims at prohibiting all forms of force, not just the force amounting to war. The wording was a deliberate choice. The intent was that there should be no confusion as to whether violence amounted to war. The prohibition does however not cover all use of force, such as economic and or political coercion. Whilst the Charter itself does allow for such an interpretation, the wider context and the intention behind it does not. It only covers armed or military force.[97] Additionally, article 2(4) goes beyond the actual recourse to war and also prohibits the threat to use force. Nevertheless, for the threat to use force to be unlawful must the force itself be illegal.[98] In the words of the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* case:

[96] Charter of the United Nations, Art. 2(4)
[97] Brownlie, *Supra* note 9, p. 362 , Dinstein, *Supra* note 16, pp. 85-86
[98] Dinstein, *Ibid*, p. 86

> The notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal-for whatever reason-the threat to use such force will likewise be illegal.[99]

Consequently, if a State declares that it will use economic sanctions against another member State that is not an illegal threat, imposing economic sanctions does not constitute an illegal use of force, since it is not armed.

The ICJ has also confirmed that Article 2(4) is customary law. In doing so they stressed that the prohibition to use force was *opinio juris* among States, what they however not did was investigate the actual behaviour of States.[100] The use of force among States is in fact enormously widespread and that has led authors to the conclusion that Article 2(4) does not have any significance anymore.[101] That is a somewhat drastic conclusion; the truth is that certain States do not adhere to the rules of the prohibition of use of force in international relations. It is nonetheless a small minority of States, powerful but few and most States strongly dislike the conduct, and are probably eager to make that known, though not in public. The controversy about actually using force is known even to the States conducting it, reasons in order to try to justify the force are usually provided, though not accepted by the majority of States. The NATO countries justified the bombing of Kosovo by referring to humanitarian intervention. The US invasion of Afghanistan was said to be self-defence and the invasion by the US in Iraq was blamed on Iraq's unwillingness to comply with the UN International Atomic Energy Agency inspector's investigation of Iraq's nuclear programs. A reference to the US National Security Strategy,[102] which speaks of a right to pre-emptive self-defence, was also submitted, and it was alleged that SC Resolution 1511 adopted in 2003 did allow for a multinational force in Iraq, and that the resolution was still active. No State has ever tried to proclaim that Article 2(4) is dead and does not apply in international relations. That should be enough proof.[103]

As pointed out by Dinstein, an assault on this key provision in international law hardly diminishes its scope of action and importance.[104] In the introduction, I mentioned that all rules are sometimes broken by certain individuals, but that we still have to pronounce upon the wrongdoing. In national law systems is murder a crime, however, it still occurs. That does not mean that it should be legal to kill other human beings. What it means is

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[99] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226, p. 246, para. 47

[100] Kirgis F.L. Jr., *Custom on a Sliding Scale*, 81 AJIL (1987), No. 1, pp. 146-147

[101] Military and Paramilitary Activities in and against Nicaragua, *Nicaragua* v. *United States of America*, Merits, Judgment, 27 June 1986, ICJ Reports 1986 p. 14, p. 99, para. 188 (hereinafter referred to as *Nicaragua* case); Franck T.M., *Who Killed Article 2 (4)? or: Changing Norms Governing the Use of Force by States*, 64 AJIL (1970), No. 4, pp. 809, 835; Arend A.C., *International Law and the Preemptive Use of Military Force*, 26 The Washington Quarterly (2003), No.2, pp. 100-101

[102] The National Security Strategy of the United States of America, Chapter V, *Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction*, http://www.whitehouse.gov/nsc/nss.html, last accessed 6 June 2007; Dinstein, *Supra* note 16, p. 299; *See* Chapter 3.2.2

[103] Dinstein, *Supra* note, p. 94

[104] *Ibid*

that certain criminals will not obey the rules that the majority of the population have set up. The legal validity of the prohibition to kill will nevertheless remain. Criminology sets up a thesis that a rule will sustain its legal validity until a majority is in breach of the rule and finds the rule to be redundant. Most States do not find the prohibition to use force redundant. To my knowledge, there have at least not been any assertions to that end. Therefore, it cannot be said to have lost its legal significance. Criminality occurs in all groups of society, leaders of States are humans, and some of them do lack the moral standards that we hoped they would possess.

In the *Nicaragua* case, the Court went on to say that it is not expected that the practice of States is perfect for a customary rule to exist. No rigorous conformity could be expected. What should be considered was if the States general behaviour was consistent with the rule. It was also noted that when a State acted inconsistently with a rule, that behaviour was not to be treated as a new rule having developed, but as a breach of the rule. The Court also stated that when States act in breach of a rule and they try to give justifications or invoke exceptions to the rule, then that confirms the rule rather than weakens it.[105] It is most certainly so that the prohibition to use force is as of today a *jus cogens* rule. The ILC asserted that it was in its commentary on the draft of the Vienna Convention on the Law of Treaties.[106] In the *Nicaragua* case, the Court concluded that the prohibition to use force was a customary international law rule as well as *opinio juris* among States. Several judges affirmed that the principle was peremptory. Scholars also seem to believe that this is the case.[107]

It should be noted that the use of force is only prohibited in international relations. Use of force within a State is still fully legal, but very rarely morally defensible.

The Charter does not specify the notion of aggression; it has been left legally undefined as a threat to the peace or a breach of the peace, and within the SC's discretion to decide. Politically it is however well defined and done through voting in the SC. It has been a concern of States that the SC has too much power concerning this question and that the wide discretionary power can turn into a monopoly on when to intervene in conflicts or not. Nevertheless, long and unfruitful debates between the two wars did not lead to a definition on aggression and it was considered more imperative to leave it out, in order to be able to unify on a Charter for the UN. The consequence was that the question came to lie within the competence of the SC.

From a strict reading of the UN Charter and related important documents is acceptable use of force, as of today, probably limited to three situations;

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[105] *Nicaragua* case, p. 98, para. 186

[106] Paragraph 1 of the Commentary of the Commission to Article 50 of its draft Articles on the Law of Treaties, ILC Ybk, 1966, Vol. II, pp. 247-258

[107] *Nicaragua* case , paras., 181, 189, *See* separate opinion of Judge Sette-Camara, p. 199 and Separate Opinion of President Nagendra Singh, p. 153; Cassese in; *Terrorism is also disrupting some crucial legal categories of international law*, EJIL online forum, October 2001, http://www.ejil.org/forum_WTC/ny-cassese.html, last accessed 4 June 2007

1. Authorisation by the SC
2. Invitation by the State in question
3. Self-defence

The *travaux préparatoires*[108] as well as legal experts support the view that these are the only situations when use of force is permissible.[109]
The legal basis for the use of force in these situations can be found in (1) Article 39 and 42 of the UN Charter, (2) in Article 3(e) of the Definition of Aggression as annexed to Resolution 3314 (XXIX) of the General Assembly, Article 20 of the Draft Articles of State Responsibility and (3) Article 51 of the UN Charter, and certainly in customary law. As of invitation, it is also embedded in the right to sovereignty; a government may invite another State into its territory as it wishes. The ICJ did also confirm that right in the *Nicaragua* case.[110]

Article 39 of the UN Charter decides that the SC shall determine "the existence of any threat to the peace, breach of the peace or act of aggression". The effect of this is that an essentially political body, whose members are very likely to be governed by political policies instead of legal criteria, decides in essentially legal questions.[111]

It is evidently and obviously so that a permanent member who has committed, or is about to commit, an act of aggression can use its right to veto and therefore block a decision that an act of aggression is occurring, or that action needs to be taken. This is one of the fundamental weaknesses of the Charter of the UN, and yet, without the right to the veto the existence of the United Nations would be unlikely. This situation does indeed affect the International Criminal Court in its decisions regarding the Crime of Aggression. The question is discussed in detail below.

3.2 Exceptions to the Prohibition of the Use of Force

In order to properly define the Crime of Aggression it is needed to consider the law relating to the use of force. There is also a need to establish what we mean by "aggression", and once that has been done, which actions that do not constitute the Crime of Aggression. The in Chapter 3.1 mentioned examples are quite likely the only situations where States are allowed to use force in or against another State. However, customary law might contain exceptions, situations and other interpretations. Occasionally issues contradicting the prohibition of the use of force occur. In these situations States find that exceptions to the prohibition of the use of force can be useful and they assert that there are certain situations where use of force can be lawful. Examples are the right to humanitarian intervention, the forceful

[108] Brownlie, *Supra* note 9, pp. 265-267
[109] Wright Q, *The Outlawry of War and the Law of War*, 47 AJIL (1953), No. 3, p. 370, Randelzhofer A. (contributor), in Simma B. (ed.), *The Charter of the United Nations, a Commentary*, pp. 117-120; Griffiths, *Supra* note 6, article in general
[110] *Nicaragua* case, p. 108, para. 205
[111] For a discussion on the possible inseparability of law and politics see the conclusion.

support of self-determination and the protection of nationals abroad, but these situations exist in a grey zone and are a matter of controversial discussion among most States.[112] Below these will be examined more thoroughly.

3.2.1 Forceful Support of Self-determination

The right to self-determination is possibly more controversial than humanitarian intervention, since it more than the latter affects the borders and territory of the State. It is often mentioned in international texts, for example, Article 1(2) in the UN Charter, Article 1 in both the ICCPR and ICESCR, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereinafter the Friendly Relations Declaration), Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples as well as a number of UN declarations and resolutions, not to mention State practice. However, in the case where this right can only be reached by the use of force, the issue is far more complicated.

The Friendly Relations Declaration notes that a people "in their actions against, and resistance to, such forcible action" can receive support in accordance with the purposes and principles of the UN Charter. A phrasing somewhat like that can also be found in Resolution 1514 paragraph 4. Resolution 1514 is only applicable in cases that refer to colonial issues, whereas the Friendly Relations Declaration seems to be universal and applicable to all peoples. Resolution 1514 indicates that a territorial criterion shall be used to decide what "peoples" are.[113]

The 1514 Resolution also seems to suggest a right for a group of people to secede if the State fails to comply with the requirement to act in compliance with the principle of equal rights and self-determination of peoples without distinction as to race, creed or colour. The group cannot be synonymous with the whole population of the State and the right seems to be possible to exercise only by one group of the population of the State. Subsequent practice has nonetheless not supported the application concerning a right to secede for identifiable groups in already independent States; therefore, a right to use self-defence to achieve the inherent right to self-determination is probably not possible in the case of already independent States.[114] The UN Charter is neutral, it neither confirms nor denies a right to forcible support of self-determination. International law does not forbid rebellion, but it does also not confirm a right for any group of peoples to secede. International law leaves the question to be dealt with in the domestic law system. The principle of sovereignty simply seems to be the governing rule.

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[112] Richard L. Griffiths makes a convincing analysis of several interesting situations where force is said to be rightful in his article *International Law, the Crime of Aggression and the Ius Ad Bellum, Supra* note 6

[113] GA Resolution 1514 (XV) 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples , para. 6

[114] Shaw M., *International Law*, pp. 443-444

When Resolution 3314 (XXIX) on the Definition of Aggression was adopted in 1974, the question was dealt with in a rather ambiguous wording. Most third world States held on to the view that if there was a people entitled to self-determination, force should be legitimate as self-defence against the very existence of colonialism. Most Western States took the view that the use of force by a people should be the response to force already used to suppress the right to self-determination for that group of people. In the end this quite cumbersome phrasing was adopted;

> Nothing in this definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right […] nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter […] and in conformity with the Friendly Relations Declaration.

The provision raises several questions, the wording "forcibly deprived" brings the problem whether it refers to future or contemporary acts, or if it embraces all acts that might have occurred within a State. Most of today's States have been established following the use of force, therefore it seems difficult to draw such a conclusion. The result is that the conflicts as to the interpretation are preserved even after the "consensus" definition had been reached. It is still open to interpret the phrasing as meaning that use of force is legitimate in order to break free from the parent State. The inclusion of the wording "territorial integrity" in paragraph 6 in the preamble made it even more difficult to interpret, since these words usually refer to sovereign States rather than peoples struggling for self-determination, who usually do not have a defined territorial base.

A struggle furthermore needs to be in accordance with the rules of the Charter of the UN. The use of force in accordance with the Charter is only allowed if it is authorized by the SC or used as self-defence. Self-defence can hardly come into question for most of today's cases of self-determination. If Article 7 in Resolution 3314 is to be understood as permitting the use of force for matters of self-determination, when self-defence or collective security is not at hand, then the effect would be that it is in breach of the Charter.[115]

The adoption of the 1977 Additional Protocols I and II to the Geneva Conventions of 1949 once again raised the issue. The question of whether self-determination wars could be regarded as international conflicts ultimately led to the adoption of Article 1(4) of Protocol I. It provides that international armed conflict situations "include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination" as enshrined in the UN Charter and the Friendly Relations Declaration. The effect of this is (within the clear self-determination context as defined in the Charter of the UN and the Friendly Relations Declaration) that valid self-determination conflicts are now to be accepted as within the international

[115] Dinstein, *Supra* note 16, pp. 130-131

sphere of activities of States. It does however not confirm a legal right. The very objective with the internationalisation of these conflicts was nevertheless only to maximize the function of protection that the humanitarian law possesses.

It is likely that the very principle of self-determination means that if forcible action has been taken to suppress the right, or in cases of decolonisation or illegal occupation, force may be resorted to in order to resist this and achieve self-determination. Whether Articles 2(4) and 51 in the UN Charter apply to self-determination conflicts so that peoples may use force in order to reach self-determination, is controversial and difficult to maintain. Armed help by third countries, both to countries suppressing the right to self-determination and to peoples trying to achieve it, is most likely unlawful.[116]

Judge Schwebel, in his dissenting opinion in the *Nicaragua* case uses the following words;

> […] it is lawful for a foreign State […] to give to a people struggling for self-determination moral, political and humanitarian assistance; but it is not lawful for a foreign State […] to intervene in that struggle with force[.][117]

The conclusion must be that the issue, whether the right exists or not, varies between cases, but in general there is no legal right.

3.2.2 Humanitarian Intervention

As to the right to humanitarian intervention, it is nowhere to be found in codified international public law. It merely exists as a moral norm and it is sometimes used as a justification by a State to enter another State. Humanitarian intervention involves military action on behalf of oppressed people, and it requires that the intervening State concerns itself, to some degree, with the want and wishes of the oppressed people. A State cannot intervene on the behalf of a people but against their ends and way of achievement.[118] More specifically, it claims a right for a State to intervene in another State to avert a humanitarian catastrophe in the case where the territorial government concerned is unwilling or unable to protect its citizens. The intervention must be as close to a non-intervention as possible.

Respected international jurists have supported both sides, and three schools of thought can be discerned. There are the ones that believe that Humanitarian intervention exists[119], the ones that do not[120], and the ones that believe that while the concept was not recognized at the time of the NATO bombings it has since then developed, following the recognition of the actions that the world community gave the NATO.

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[116] Shaw, *Supra* note 114, p. 1038
[117] *Nicaragua* case, Dissenting Opinion of Judge Schwebel, p. 351, para. 180
[118] Walzer, *Supra* note 26, p. 104; *Nicaragua* case, p. 108, para. 205
[119] *See* the opinions of Greenwood and Reisman in the Fourth Report of the UK Foreign Affairs Select Committee, http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaff/28/2813.htm, last accessed on 3 June 2007
[120] *Ibid*, Brownlie, Chinkin, Littman and Vaughan-Lowe

There are those that assert that humanitarian intervention is consistent with the purposes of the UN Charter[121] and that it therefore would be allowed, such an *e contrario* interpretation can however not be done, use of force must always be authorized by the SC. However, in the *Nicaragua* case the ICJ held that

> […] the Court observes that the United Nations Charter, the convention to which most of the United States arguments is directed, by no means covers the whole area of the regulation of the use of force in international relations.[122]

This shows that there can definitely be room for other exceptions, although unclear, to the prohibition of the use of force, than those in the Charter. Nevertheless, they must stand firm in the customary law. Professor Greenwood put it like this in the Fourth Report of the UK Foreign Affairs Select Committee,

> […] an interpretation of international law which would forbid intervention to prevent something as terrible as the Holocaust, unless a permanent member could be persuaded to lift its veto, would be contrary to the principles on which modern international law is based as well as flying in the face of the developments of the last fifty years.

Professor Reisman continued:

> […] when human rights enforcement by military means is required, it should, indeed be the responsibility of the Security Council acting under the Charter. But when the Council cannot act, the legal requirement continues to be to save lives.[123]

Surely, these opinions are, at a first glance, what most people would agree with and find morally sound. The question is therefore extremely difficult, leaving a population to die because of legal rules is certainly difficult to justify (if even possible) and not acceptable for most human beings. It does in fact go against all sense and sensibility.

> Suppose […] that a great power decided that the only way it could continue to control a satellite State was to wipe out the satellite's entire population and recolonise the area with "reliable" people. Suppose the satellite government agreed to this measure and established the necessary mass extermination apparatus […] Would the rest of the members of the United Nations be compelled to stand by and watch this operation merely because [the] requisite decision of United Nations organs was blocked, and the operation did not involve an "armed attack" on any [member state]… ?[124]

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[121] As enshrined in Chapter I Article I of the UN Charter; *See below,* Greenwood
[122] *Nicaragua* case, p. 94, para. 176
[123] *Supra* note 119, Fourth Report of the UK Foreign Affairs Select Committee
[124] Stone J., *Aggression and World Order-A Critique of United Nations Theories of Aggression,*, p. 99

There is no moral reason that justifies passively standing by, although, as unreasonable as it might seem, that is what international law demands from us. What nonetheless always has to be remembered is that stronger States, wanting to gain from an intervention in a weaker State, can misuse humanitarian intervention, humanitarian reasons are simply easy to fabricate. It is also difficult to stop violations, maybe especially with the use of armed force. The concept therefore creates several moral dilemmas. Following the law, the legalist paradigm, rules out the right to humanitarian intervention, because it requires a crossing of an international border, without having the consent of the society of nations.[125] The law shall be followed; we have rules governing our international behaviour because they are needed. This seems persuasive while looking at it from afar, but a close up would probably change the most headstrong opposition. The moral absolutist agrees that in order to avoid the sliding scale (which is best described as *the more justice the more right* i.e. the more just the cause is, the more rules can be violated for the sake of the cause, though some rules are always inviolable.)[126], one must hold on to the rules of non-intervention in humanitarian catastrophes. The rules of non-intervention are categorical and unqualified prohibitions, but they cannot be rightly violated not even in order to stop massive human rights violations.[127] This is a hard position to take and most people would not agree.

We have a choice to make between two (equally?) bad situations. (1) Infringing upon the principle of sovereignty and risking that the intervening State has other motives with the intervention than those of simply helping a suffering population, or (2) leaving the same people to die. From a utilitarian view, it first seems right to chose intervention, since that would probably benefit the most people, however we do not know what the future effects will be for the State and its population. Given the uncertainty of international and national politics, there is probably no answer, the utilitarian does not base his or hers moral assumptions on religious values, but on a belief that what benefits the most people is the right thing to do. We have to realize that there might not be a completely right way to go.

The idealist probably finds that a non-intervention is morally unsound; he or she believes that we have to hope that the intervening State only has one goal, to help the population of the territorial State.

The realist identifies the situation and finds that a forceful intervention will cause suffering just as well as a non-intervention will, there might not be a justification for either option, because that is what war does to people. The realist imposes no moral requirements. There are simply no answers, but that little voice inside us, which tells us when something is utterly wrong.

It is easier to find codified examples supporting no right to humanitarian intervention than it is finding one that does. The Friendly Relations Declaration undoubtedly stated the duty not to intervene, for any reason whatsoever, in matters referring to political, economic and cultural elements clearly within the domestic jurisdiction of any State. Armed

[125] Walzer, *Supra* note 26, p. 106
[126] *Ibid*, p. 229
[127] *Ibid*, This discussion is an analogy from Walzer's discussion on aggressive acts, p. 230

intervention and all other forms of interference or threats against the sovereignty of the State were explicitly prohibited.[128]

Also GA Resolution 3314 (XXIX) on the Definition of Aggression stated that no consideration of whatever nature could serve as a justification for aggression. In this case, aggression meant the use of armed force by one State against the territorial integrity or political independence of another State. The most authoritative source[129] in international law that supports the view that there is no armed intervention in order to protect the nationals of the territorial State from human rights violations is the *Nicaragua* case in which the ICJ found that;

> […] while the USA might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the *contras*.[130]

It seems quite clear that humanitarian intervention at least did not exist in international law before 1990 when the Liberia crisis occurred.

The intervention by the ECOWAS[131] in Liberia raised the question, had the concept humanitarian intervention evolved? The ECOWAS intervened in Liberia in the summer of 1990 after a complicated civil war had broken out. Neither the UN nor the OAS acted and in the absence of a UN authorisation, the ECOWAS decided to act anyways. The protocol establishing the ECOWAS does however not mention the possibility of peacekeeping operations, neither does it allow intervention in a member State by the other members.[132]

UN involvement did not occur until January 1991 when the President of the SC commended the ECOWAS for the efforts.[133] The UN later imposed an arms embargo and took part in the peace negotiations. It is clear that the UN ultimately supported the ECOWAS, but it is questionable whether that was in line with Chapter VII of the UN Charter. Some[134] have called the case in Liberia the first humanitarian intervention and pointed at the SC's recognition of the work as a sign that the notion of humanitarian intervention exists. However, the intervention was first and foremost a

[128] GA Resolution 2625 (XXV) 1970
[129] In saying that the ICJ is the legal source with the most authority, I refer to the fact that the UN Charter is the superior legal source in international law. This assertion can be inferred from Article 121, which states that any legal document, which contravenes the Charter, will be invalid. The ICJ is the primary judicial organ of the UN and therefore the Court's interpretation of international law should prevail. With that not said that the judgements cannot be questioned, the ICJ is not always right, but until proven wrong or until customary law changes a certain issue, the Court's view is the authority.
[130] *Nicaragua* case, p. 134, para. 268
[131] Economic Community of West African States
[132] Shaw, *Supra* note 114, p.1157
[133] S/22110/Add.3, 1 February 1991
[134] Greenwood *Supra* note 119

peacekeeping mission.[135] It was also an intervention, which was supported by the official government of Liberia.[136] None of the parties even sought to justify it as a humanitarian intervention and that might just be the most compelling evidence that it did in fact not occur.

The next case where voices have been raised that humanitarian intervention exists was when so called no-fly zones where imposed in Northern Iraq in 1991 and Southern Iraq 1992. Again, there was no action taken by the SC. A Resolution by the SC, however, condemned the widespread repression of the Kurds and Shia populations. Citing this, the UK, the US and France imposed no-fly zones in Northern and Southern Iraq. The UK also argued that it was "justified under international law in respect to a situation of overwhelming humanitarian necessity."[137] The discussions were ambiguous, and statements showed clearly that there was no consensus on the question, even in the governments that conducted the operation.[138]

The NATO forces sought to justify the action taken in 1999, towards the Serbian forces in Kosovo, as humanitarian intervention. It is generally accepted that a humanitarian catastrophe was occurring in Kosovo, due to action taken by Serbian government agents.[139] The Federal Republic of Yugoslavia (hereinafter FRY) argued that there was no such right and that the NATO actions therefore amounted to an Act of Aggression entailing State Responsibility. They therefore brought the case to the ICJ.

While the situation in Kosovo most certainly was a threat to peace and security[140] it did not in any way entitle to the right to self-defence by any other states than the victim state, unless the victim state so asked. In this case it was more difficult than so because even if Kosovo would have asked for help, at this time it was not a State, but still an integral part of the FRY.

Professor Brownlie provided the Committee in the Fourth Report of the UK Foreign Affairs Select Committee with an exhaustive review of the authorities, including jurists of twelve nationalities, three of whom had been President of the ICJ. He concluded that "there is very little evidence to support assertions that a new principle of customary law legitimating humanitarian intervention has crystallised". He gives examples of how different UK government officials during speeches do not seem to have clear opinion as to if there is a legal right to humanitarian intervention, or only a moral right. There is certainly no consensus or *opinio juris* even within the UK government. The overall conclusion drawn in the report is that

> […] at the very least, the doctrine of humanitarian intervention has a tenuous basis in current international customary law, and that this renders NATO action legally questionable.

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[135] *For example* SC Resolution 866 refers to it as "a peacekeeping mission already set up by another organisation, in this case ECOWAS", S/RES/866 (1993)
[136] Griffiths, *Supra* note 6, p. 343
[137] UKMIL, 63 BYIL (1992), p. 824-828
[138] UKMIL, 57 BYIL (1986), p. 619; UKMIL, 70 BYIL (1999), p. 590
[139] *See for example* S/RES/1199 (1998)
[140] *Ibid* ; S/RES/1203 (1998)

In the *Legality of the Use of Force* case brought before the ICJ by the FRY against the NATO members that contributed in the bombings, only Belgium managed to provide a legal defence. All other respondent States relied purely on moral grounds. Belgium's defence was four-fold and relied on the following grounds;[141]

1. The actions were authorised by the SC Resolutions 1160 of 1998, 1199 of 1998 and 1203 of 1998.
2. The actions were not targeted against the "territorial or political independence" of the FRY and was therefore not contrary to Article 2(4) of the UN Charter;

> NATO has never questioned the political independence and the territorial integrity of the Federal Republic of Yugoslavia - the Security Council's resolutions, the NATO decisions, and the press releases have, moreover, consistently stressed this. Thus this is not an intervention against the territorial integrity or independence of the former Republic of Yugoslavia. The purpose of NATO's intervention is to rescue a people in peril, in deep distress. For this reason the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State.[142]

3. Historical precedents such as the intervention of India in East Pakistan, the intervention of Tanzania in Uganda, and the intervention of West African States in Liberia and Sierra Leone supported the right to humanitarian intervention
4. A state of necessity was present.

> A state of necessity is the cause which justifies the violation of a binding rule in order to safeguard, in face of grave and imminent peril, values which are higher than those protected by the rule which has been breached.[143]

Unfortunately, the ICJ never illuminated and examined the controversial question as it found that it lacked jurisdiction since the FRY, at the date of the application, was not a party to the Court. However, it is safe to draw the conclusion that States have difficulties providing legal basis for humanitarian intervention, and that there is actually no *opinio juris* on what it constitutes and in what situations it can actually be invoked.

The SC rejected a resolution condemning the action taken by the NATO States, by twelve votes to three.[144] The adoption of SC Resolution 1244 (1999) which authorized the use of force after the action by the NATO members had already been taken, can also be interpreted so that most members of the SC at this time realized that the use of force had improved

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[141] Legality of Use Of Force (*Serbia and Montenegro* vs. *Belgium,*) Oral Proceedings, CR 99/15 in English translation to be found at; http://www.icj-cij.org/docket/files/105/4515.pdf, last accessed on 4 June 2007
[142] *Ibid*
[143] *Ibid*
[144] Security Council meeting 3989, 26 March 1999, UN Doc. S/PV.3989

the situation for the population of Kosovo. There was no formal endorsement but also no condemnation. However, one can be certain that informal criticism was harsh. It was just not made public.

Ultimately, the SC is the organ that has the mandate to take a decision on when to intervene. When the SC cannot manage to unify on the issue whether to use force or not, the UN and the world community do not have to stand helpless outside of an ongoing humanitarian catastrophe. The GA can rely on both practice and resolutions in order to initiate peacekeeping operations. In many cases, peacekeeping operations are actually the better method to use in order to protect populations, since they demand a valid consent from the government in question and therefore, more or less, ensure co-operation by the government. There are few cases in which force has been used, that have resulted in fast and painless solutions.[145]

The above, on page 37, quoted statement from the *Nicaragua* case stated that the use of force could not be the appropriate method to monitor or ensure respect for human rights in Nicaragua. I do agree that the notion of human rights hardly matches with the use of force, but what is important to realize is that it also does not match to ignore widespread violations because of a policy, or even prohibition in international law, not to use force. I think that it is definitely safe to say that the concept has started to evolve, and I do actually hope it will. I say so because I find it unlikely that the state of the world will change so much so that the permanent members of the SC will always agree on when to resort to force. Attempts to try to formalize the concept of humanitarian intervention have been met with resistance by developing countries who are worried of disguised imperialism.[146] The principle of sovereignty is strong wherever one looks in the world. The problem of whether a State finds it "interesting" to intervene will unfortunately remain.

Law and morals are definitely not the same thing, but they can also never be completely separated. Most people would probably agree with the statement that humanitarian intervention should exist as a concept in international law, at least if they did not know more about it. To me it seems as if public support and knowledge for and about humanitarian intervention has grown more solid in the western world's consciousness, at least since the genocide in Rwanda, as well as through the current situation in Darfur. However, interventions such as the one in Kosovo do definitely not create support for the use of force in humanitarian catastrophes. We have to ask ourselves if a certain moral viewpoint is compatible with law, and if it is not, if we should follow it? One makes it easy for oneself if one only looks

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[145] *See* for example the situation between Iraq and Kuwait, the UN intervention in the late 80s and early 90s did in fact result in the withdrawal of the Iraqi forces from Kuwait, but the losses and suffering was maybe not worth it, since the root of the problem was not dealt with. The situation in Iraq today and the use of force there has only resulted in more suffering and less understanding between the populations. Somalia has witnessed the same problem.

[146] Smith T.W., *Moral Hazard and Humanitarian Law: The International Criminal Court and the Limits of Legalism*, 39 International Politics (2002), June, p. 184; Group of 77 Declaration of the South Summit and Havana Program of Action, Havana, Cuba, 10-14 April 2000, Art. 54, UN Doc. A/55/74, http://www.g77.org/doc/docs/summitfinaldocs_english.pdf, last accessed on 4 June 2007

to the legal facts. Walzer argues that humanitarian intervention is justified when it is a response to acts that "shock the moral conscience of mankind". He means that it is not the moral conscience of the leaders that matter in this case but the convictions of humankind. Given that one can make a persuasive argument of these convictions, he finds that there is no reason whatsoever to wait for a decision, which might never come, by the UN.[147] It seems clear that humanitarian intervention does not exist in legal documents. That it does as a moral concept in our consciences is a very different question.

3.2.3 Self-defence

The right to self-defence is most definitely recognised in international law. Article 51 of the UN Charter mentions the inherent right to individual or collective self-defence and makes it clear that nothing can impair this right. However clear the right might seem, there are plenty of interpretations. Some say it is to be read in conjunction with Article 2(4) of the UN Charter, which now sets the scope and limitations of the principle, and that this leads to self-defence only being legal when an armed attack has occurred. Others find that the wording "nothing shall impair" mean that the right to self-defence exists in customary law and beyond and above the specific provisions of Article 51. The ICJ has clearly established the right is inherent under customary law as well as under the UN Charter and that customary law exists alongside treaty law.[148]

Dinstein means that though most States today find the principle of self-defence to lie within the principle of sovereignty, there is nothing that says that it will in the future as well. The use of force used to be connected to sovereignty. Therefore, it was legal. There is quite a large possibility that in the future there will be a prohibition to use self-defence. Consequently, he argues that there is nothing that hinders a treaty from derogating from the right to self-defence. He finds it to be by no means clear that the right to self-defence is *jus cogens,* and thus prohibiting States from contracting out the right.[149] It is probably certain to say that this is a somewhat controversial statement and that most States would not agree with Dinstein. However, every time has its own peremptory norms, which changes with time, and for the time being it seems sure that self-defence is such a norm.

The widely accepted statement made by Secretary of State Webster after the *Caroline* incident is still today the base for self-defence. In the statement, Secretary Webster concludes that a test has to be made for self-defence to occur, that includes the existence of "necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[150]

After the attacks on September 11, the questions regarding the issue have become many and difficult to deal with. Issues regarding the right to

[147] Walzer, *Supra* note 6, p. 107
[148] *Nicaragua* case, pp. 93-104
[149] Dinstein, *Supra* note 16, pp. 180-181
[150] Jennings R.Y., *The Caroline and McLeod Cases,* 32 AJIL (1938), No. 1 p. 89

strike back at a State harbouring terrorists and the possibility of whether a right to pre-emptive or anticipatory self-defence exists are difficult to answer and many different voices and ideas have been raised. States generally seem not to recognise the claim for anticipatory self-defence[151] and a strict Article 51 interpretation does not support it, since no armed attack has yet occurred. Therefore, it might be difficult to find support for it in customary law.

Before the UN era, the situation might have been different. Arend means that it was generally accepted that pre-emptive force was permissible in self-defence, and he refers to the *Caroline* case in order to support that.[152] If a State could demonstrate necessity i.e. that another State was about to use force against the State and the State could show that there was proportionality in the use of force to avert the attack, then pre-emptive self-defence could be permissible. One should remember that when the UN Charter was drafted there was no one that could anticipate the threats, which weapons of mass destruction (chemical, biological and nuclear) and terrorism pose. Chemical weapons had been used in the First World War, but they had not proven very useful and there was no significant use of them in the Second World War. The idea of nuclear weapons was still a secret, and it did not become known until August 1945. It was therefore probably a non-issue when the negotiations of the Charter took place in the spring of 1945. Terrorism was not an unknown concept, but certainly not as well known and common as it is today. All prior important international documents like the League of Nations Covenant and the Kellogg-Briand Pact has only dealt with State actors and so did the Charter of the UN. Today both of these issues are very present, a revision of the Charter should therefore, in my view, be considered.

Article 51 in the UN Charter mentions that nothing shall impair the inherent right to self-defence, that indicates that the drafters of the Charter did not intend to limit the broad pre-UN concept of self-defence. Regardless of that possible intention it is, as mentioned, quite a controversial question and it is all but clear that the right exists in customary law. Personally, I believe that pre-emptive self-defence should be allowed, but it is extremely important that there is certainty about the imminence of the attack and that the principles of necessity and proportionality are met. I do not see the point in waiting until an attack has already occurred; such an approach will only cause double the suffering. Nevertheless, as of today, I cannot see that there is an agreement as to the existence of the right, the rules governing the use of pre-emptive are all but clear, it can therefore not be allowed. Self-defence is an evolving principle and it is difficult to draw conclusions. Brownlie observes:

> […] it is conceivable that a co-ordinated and general campaign by powerful bands of irregulars, with obvious or easily proven complicity of the government of a state

[151] *See* Cassese *Supra* note 39, p. 362 where he states that anticipatory self-defence is probably legally prohibited but it might be justified on moral and political grounds.
[152] Arend, *Supra* note 101, pp. 91-92

> from which they operate, would constitute an "armed attack", more especially if the object were forcible settlement of a dispute or the acquisition of a territory.[153]

The self-defence situation that arose after the Al-Qaeda attacks on the US in 2002 poses several problems, which connect to the development of the concept of self-defence. Firstly, the network spreads over so many States; of which most of the countries at least have official negative positions, but maybe not enough resources to efficiently deal with the problem. Secondly, there is the timeframe in which the self-defence has to be conducted, the *Caroline* case points to an instant reaction, which leaves no choice of means and no time to deliberate. Thirdly, there is the issue of whether the Taliban regime had enough control over the conduct so that the actions could be contributed to them. Finally, there is the problem that the US has so far not left Afghanistan, despite the Taliban regime having been defeated. When do the foreign forces have to leave a country? Once the responsible government has been removed from the power, or can the use of force be continued until the responsible persons have been found and brought to justice? The concept of self-defence is certainly not clear and a modernization of the concept is necessary, however it has to be well based in customary law and achieve recognition among States. Such a process will take its time. It seems like a case-by-case, evaluation will have to be done when and if a State asserts self-defence as a ground for excluding responsibility in connection with the use of force. Cassese writes:

> A sober consideration of the general legal principles governing the international community should lead us to a clear conclusion: it would only be for the Security Council to decide whether, and on what conditions, to authorize the use of force against specific states, on the basis of compelling evidence showing that those states, instead of stopping the action of terrorist organizations and detaining its members, harbour, protect, tolerate or promote such organizations[.][154]

It is not difficult to agree with this, there is always a danger in deciding something in the heat of the moment and therefore is seems sensible to leave it to the SC for discussion. As critical as one can be of the SC's lack of action in armed conflicts and humanitarian catastrophes, it is also important to remember that force should always be avoided and the structure of the SC might lead to less use of force and a time to cool off before a decision is taken. There is a point in having members that have completely different views on certain issues, it does in fact hinder powerful States from always pushing their opinion through. Self-defence is an evolving concept and until it can be agreed on, it might be the best bet to hold on to the old and well-accepted concept.

[153] Brownlie, *Supra* note 9, p. 278
[154] Cassese, *Supra* note 107

3.2.4 Other Situations

The **protection of nationals and property abroad** is sometimes used as an excuse to use force. Many situations have occurred where this said right has been resorted to. The concept has since the adoption of the UN Charter however become quite a controversial issue, since the "territorial integrity and political independence" in Article 2(4) then would be infringed. It is not commonly accepted that attacks on individuals or property abroad would constitute such an attack as to invoke the right to self-defence, since self-defence can only occur when the State's territory itself has been attacked.

Invitation is as mentioned lawful. However, there is a need to act cautiously in cases where there is an ongoing civil war or where one is expected to break out. The UK has contended that assistance to a government short of war is permissible, whereas the same action in an ongoing civil war probably is not, unless the rebel forces have already achieved help from another State actor.[155] Dinstein seems to find that assistance to the central legitimate government always is permissible for as long as the rebel forces have not gained recognition of belligerency (i.e. when outside States need to remain neutral in an internal armed conflict), if the government so asks. The ICJ pronounced in the *Nicaragua* case that forcible intervention from the outside "in support of an opposition within another State" constitutes a breach of Article 2(4) and the prohibition to use force.[156] The area is as mentioned quite unsure and caution should be used.

Article 20 of the Draft articles on State Responsibility states that where there is consent by a State to the commission of an act by another State this precludes wrongfulness. Therefore, if two States conclude a treaty in which the territorial State invites the other State to use force against non-state actors in the territorial State this is legal. Nevertheless, it can never, regardless of an agreement between two States, be legal to solve a dispute by means of war.[157] This comes from the fact that the prohibition of the use of force is a peremptory norm, a *jus cogens* rule, and those rules can never be derogated from. Even if the two States think that the use of force would only affect themselves, it does not. An armed conflict will mean enormous suffering for the peoples of the countries, and as members of the world community, the two disputing States have an obligation *erga omnes* to avoid the use of force since it might spill over on other States in forms of, for, example refugees. The other States do, because of the obligation *erga omnes*, also have an interest in protecting the people of the warring States.

The African countries have a tendency to conduct treaties in which they allow forcible intervention in the affairs of the member States, without *ad hoc* consent by the State concerned. If a central government is still in place it can always withdraw the States consent, but if the condition of the conflict has led to that there is no central authority, then there will naturally not exist any competence to withdraw the consent. Any attempt by another country to intervene despite a wish by a central government or an intervention with the

[155] The UK put forward this view in a Foreign Policy Document and it is generally accepted by States, UKMIL, 57 BYIL (1986), p. 614
[156] *Nicaragua* case, p. 109, para. 209
[157] Dinstein, *Supra* note 16, pp. 112-114

goal to impose a different legal regime, would be a breach of Article 2(4) in the UN Charter. A treaty can never contract out the general prohibition to use force.[158] It shall also be noted that according to 53(1) of the UN Charter can the use of force by a regional arrangement only be pursued under the authority of the SC. The SC will despite a treaty always have the final call when use of force is undertaken.

Authorisation by the SC does not have to be discussed in detail. It is clear that if a threat to peace, breach of the peace or act of aggression has occurred, and all other measures not involving force have been employed without giving effect to the SC decisions, then the SC can authorise the use of force. The SC can obviously act *ultra vires*, but it is presumed that they do not. When an authorisation to use force has been approved, it is therefore open for States to use the force they find needed, without having to determine if it is righteous. If it should later be determined that the SC had acted outside of its capacity or taken a wrongful decision, then the State or individual concerned would be excluded from criminal responsibility or State responsibility based on a mistake of fact.[159]

3.3 The General Assembly

No individual has been convicted of Crimes against Peace or an Act of Aggression since the trials following the Second World War. The ICJ has however passed judgement concerning state responsibility in connection with an Act of Aggression or through aggressive behaviour, which infringed on the principle of sovereignty.[160]

In accordance with the relevant provisions in the UN Charter (Articles 11, 12 and 14) may the GA discuss and make recommendations in case of any threat to the peace and security. However, it may not do so while the SC is exercising the functions assigned to it by the UN Charter. Any question regarding action, meaning enforcement or coercive action[161], has to be referred to the SC.

GA Resolution 377 (V) also called "Uniting for Peace" was adopted on 3 November 1950. The Uniting for Peace Resolution indicated that in case of lack of unanimity of the permanent members of the SC and following that, a failure to exercise its functions, could the GA make recommendations to Member States for collective measures. However, the recommendation refers more to collective self-defence than collective security. The difference is that the recourse to collective security is decided by a central organ of the international community i.e. the SC, whereas collective self-defence is accorded to every single State. In case of an actual breach of the peace or act of aggression (not a threat), does the GA have the possibility to

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[158] *Ibid*, p. 116

[159] *See* Article 32 in the Rome Statute

[160] See for example the *Nicaragua* case, generally, and the *Corfu Channel* case, Merits, Judgment of April 9th 1949: ICJ Reports 1949, p. 4, pp. 35-36 (hereinafter referred to as the *Corfu Channel* case)

[161] *See the Certain Expenses of the United* Nations case (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, ICJ Reports 1962, p. 151, pp. 163-165 hereinafter referred to as the *Certain Expenses* case)

make recommendations including the use of armed force when necessary to maintain or restore international peace and security. However, in the *Certain Expenses* case did the ICJ pronounce upon this and said, as indicated above, that this only applies to situations in which no enforcement or coercive action is taken. The GA could for example recommend peacekeeping missions (as it did in the *Certain Expenses* case), nonetheless, a military force conducting a peacekeeping mission does never have a mandate to use force unless they have to act in self-defence. The ICJ concluded that the responsibility conferred upon the SC was primary but not exclusive.[162]

D. Stephen Mathias, Assistant Legal Advisor for UN Affairs at the US Department of State, admits that according to the UN Charter does the SC not have exclusive power to determine that an Act of Aggression has occurred. However, he finds that the *travaux préparatoires,* the practice of the UN organs and the structure of the UN system supports the belief that only the SC can make such a determination, he then forgets the *Certain Expenses* case, which most definitely contains practice and confirms that the structure allows for secondary responsibility.[163]

The GA can however not make a recommendation that contradicts a SC Resolution. The Uniting for Peace Resolution has been almost unanimously accepted by States and the ICJ and has therefore power *de jure*. What the effect of the Resolution is today is more difficult to evaluate. The Cold War is over and the Resolution has not been used in many years, it might be that it has lost its significance, at least for the moment.

The ILC, established as a subsidiary body to the GA, did in 1954 submit the Draft Code of Offences against the Peace and Security of Mankind to the GA. The 1954 Draft Code did in part embody the principles found in the Nuremberg Charter and the judgement in regard to crimes against peace. The GA found that a serious examination of the 1945 Draft Code had to be suspended until a definition of aggression could be agreed upon.

The adoption of Resolution 3314 on the Definition of Aggression meant that the work by the ILC was resumed in 1981. The Draft Code of Crimes against Peace and Security of Mankind was adopted in 1996, with the term “offences” having been replaced by “crimes”. Nonetheless, it is also a disappointment as it does not define the crime. The Commission found that it was not necessary to propose an exact definition but that it was better to leave that to practice. Article 16 in Draft Code of 1996 mentions that:

> “An individual, who, as a leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State, shall be responsible for a crime of aggression”.[164]

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[162] *Ibid*

[163] Mathias D.S., in Dascalopoulou-Livada P., Mathias D.S., Paust J.J. and Reisman W.M., *The Definition of Aggression and the ICC,* ASIL, Proceedings of the Annual Meeting, 2002, ABI/INFORM Global, p. 182

[164] The Draft Code of Crime against Peace and Security of Mankind, A/51/332

Article 16 equally deals with acts of aggression in general, and not only wars of aggression. Article 16 also refers to the crime as a leadership crime. The Commentary however mentions that "leader" or "organizer" is to be interpreted in the broad sense, covering not only members of the government but also high-level military staff, members of the diplomatic corps, political parties and industry. The Commentary refers to the Nuremberg Charter, but in fact, the reference should probably be made to the judgements by the different Tribunals established under Control Council Law No. 10. It is interesting that the Code includes such leaders and organizers, as the development and situation today is strictly limited to invoking responsibility for crimes committed by high-level government- and military staff. The 1996 Draft Code would therefore in that matter not have any effect.

Fact is that the Draft Code does have very little legal significance. The development since the work started has evolved beyond the principles and judgement in Nuremberg, not only as to the Crimes against Peace/Crime of Aggression, the other crimes in the Draft Code have found their place in different instruments such as the ICTY, ICTR and ICC Statutes and many others. Practice has changed and evolved due to the judgements of the ICTY and the ICTR and the effect is, in my opinion, that the Draft Code has become redundant and out of date.

3.4 1974 General Assembly Resolution 3314 (XXIX) on the Definition of Aggression

On 14 December 1974, the GA adopted Resolution 3314 on the Definition of Aggression by consensus. It was the product of 24 years of hard work and compromises. The road to the Definition started in November 1950 when the GA in resolution 378 (V) B gave the ILC the mandate of examining the problem of finding a definition for aggression. The ILC did, after many lengthy discussions conclude that it would never be possible to come up with an exhaustive definition, since the concept of aggression is a constantly developing notion. It would simply be too artificial and not reflect reality. Instead, they decided to include the crime of aggression in the above-mentioned draft code of crimes against peace and security of mankind, that was then in the process, without defining it.[165]

A Committee was appointed by the GA in 1952, its task was to try to develop a definition of aggression.[166] The Committee unanimously decided not to submit the draft proposals to voting, but to communicate the proposals to the UN member States. A new try to agree on a definition was done in December 1954 when the GA once again set up a committee with the mandate to find a definition.[167] Also, this time around did the committee in the end conclude that their opinions were so different that it was not

[165] Leanza U., 'The Historical Background', in Politi and Nesi, pp. 5-6
[166] GA Resolution 688 (VII) 1952
[167] GA Resolution 895 (IX) 1954

possible to unify in the question, and they referred the question back to the GA.

The GA adopted Resolution 1181 (XII) during its autumn 1957 session. It stated the GA's will to overcome old controversies and find a solution for the question. Member States were asked to submit their opinions to a new committee, which was to examine the view of the States. The committee could, due to reluctance by western States, not finish its work and was suspended. The question bounced back and forth between different committees for ten years, until the GA, on the USSR's initiative, once again set up a committee.[168] This time it consisted of 35 members, chosen based on geographical equality. Three different draft proposals by three groups of States were finally merged into what is today the 1974 Definition of Aggression.

The definition consists of ten articles, which do not affect Article 39 of the UN Charter. The definition was meant to be used as guidance for the SC in its work to decide if aggression had occurred. The SC was however not obliged to follow the definition in its work it was seen merely as guidance and was to be used at the SC's discretion. In that lays the very problem and disappointment with the definition, it is incomplete. The reality is that the Definition of Aggression has had no real effect on the work conducted by the SC.[169]

The Definition of the Act of Aggression is wholly contained in Article 1, the remaining articles are examples of the definition. Article 1 repeats the core of the wording in Article 2(4) of the UN Charter, though some variations occur. Examples of the variations are among others that the mere threat to use force does not constitute an act of aggression, the actual use of force is paramount in order to determine if aggression has occurred. Another variation is that the word "armed" has been inserted before "force" and the use of force is forbidden whenever it is inconsistent with the UN Charter as a whole, and not only when it is incoherent with the Purposes of the UN. This last variation might imply that even technical provisions of the Charter have to be observed, for example, that a breach of a procedure may turn the use of armed force into an unlawful aggression, say for example the rules concerning reporting to the SC when a State is using its right to self-defence.

Article 2 sets forth that "[t]he first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression". However, the SC may determine otherwise "in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity".[170] These other circumstances have a broad margin of interpretation, the SC can decide that anything can constitute relevant circumstances, including the object and purpose of the acting State.[171] How this corresponds with Article 5(1), which states that "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression"

[168] GA Resolution 2330 (XXII) 1967
[169] Dinstein, *Supra* note 16, p. 129
[170] GA Resolution 3314 (XXIX) 1974, Article 2
[171] Ferencz B.B.2, p. 31

is difficult to see. The motive is according to Article 5(1) not supposed to count as a justification, but States still invoke it as a ground for justification and the SC is free to deem it a relevant circumstance for not determining that aggression has occurred. This is a typical example of the kind of contradictions that the Definition of Aggression contains.

Article 3 in the definition is of particular interest. It distinguishes a list of particular acts, which might constitute the Act of Aggression entailing State responsibility. The acts are either conducted on a direct or indirect basis. Article 3(g) constitutes indirect aggression and identifies two examples.

The first example consists of acts such as sending armed bands, groups, irregular troops or mercenaries to another State. In this case, the acts of these persons are attributable to the sending State once it has been ascertained that the group has been sent by that State. This is the case even if their uniforms should not be the sending State's or if they are not under the direction or control of the regular staff of the sending State.

The other situation is more difficult to identify. Article 3(g) refers to substantial involvement of the State. The seriousness of the acts are the same in both of the situations, but in the second case, the difference is the substantial involvement in the acts. The State might not have sent the group or troops but can instead train the groups, supply them with weapons or give financial aid to one of the parties in the conflict, in order to influence the outcome of the conflict. Indirect aggression was what the ICJ considered in the *Nicaragua* case in 1986.

The other paragraphs in Article 3 constitute direct aggression, such as attacks or blocking of ports.

The definition is considered customary law. The fact is that the ICJ in the *Nicaragua* case stated that the Definition of Aggression reflected customary law. The court held, in regard to Article 3(g) in the Definition of Aggression, that:

> This description […] may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces[172]

The pronouncement by the ICJ indicates that the other paragraphs in Article 3 may be equally considered as customary law. Whatever the legal implications are, Article 3 is not exhaustive. It should also be remembered that the GA resolutions, at most times, mirror customary law, since they are adopted by representatives of the member States, which in their turn amount to most of the States of the world as it looks today.

Resolution 3314 is the most recent and widely accepted definition of aggression[173] and the definition has been helpful. It does most definitely

[172] *Nicaragua* case, p. 103, para. 195
[173] Dinstein, *Supra* note 16, p. 126

offer guidance in the work towards a definition for the Rome Statute, but it is important to remember that it is a political document not a legal one. On the other hand, some[174] contend that law and politics can never be separated and that international law in fact is a by-product of politics. I am inclined to agree. International law is mainly created by politicians, maybe with legal schooling, but with politics as their foremost concern.

Furthermore, the definition did not specify clearly if aggression could entail both state responsibility and individual criminal responsibility. Article 5(2) of the definition differentiates between aggression which "gives rise to international responsibility" and a war of aggression, which is a "crime against international peace". This could be a signal from the drafters saying that not every act of aggression constitutes a crime against peace entailing individual criminal responsibility, but that only a war of aggression does. An act of aggression short of war would still entail State responsibility. On the other hand, Resolution 3314 is not concerned with criminal responsibility. Its purpose is to be used as guidance in the SC's work on determining acts of aggression. It is difficult to see how the Definition could have implications for international criminal law, especially since many of the acts then would be measures short of war and therefore not international crimes.

Aziz Shukri makes the statement that the Definition of Aggression's reference to international responsibility refers to both State responsibility and individual responsibility, anything else is playing with words. He bases this on the fact that aggression as a crime cannot be committed by anyone but a natural person, even when such a person is exercising his/hers official capacities. Dinstein means that Article 5(2) differentiates between aggression, which gives rise to State responsibility and a war of aggression, which entails individual responsibility.[175]

I do agree with both authors to a certain extent. It is true that a lot of playing with words does take place in the international field and the overall leading concern should be as true as possible to a literal interpretation. It must nevertheless be remembered that customary law and treaty law is a reflection of what most States consider themselves bound to follow by ways of common use, interpretation and conduct codes. The result is that if most States consider that the Definition of Aggression does not speak of individual responsibility then it most certainly does not.

The underlying considerations and the *travaux préparatoires* should also be considered, and they do not support such a wide interpretation. The reason for the definition was in fact to provide a guide for the SC in their determinations under Article 39, not to set the record straight about individual criminal responsibility. It is one thing to wish and want a certain question to be covered, it is another to realize the reality.

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[174] *See for example* Muhammad Aziz Shukri, 'Will Aggressors Ever be Tried Before the ICC?', in Politi and Nesi, p. 35

[175] Dinstein, *Supra* note 16, p. 125

Certain States and authors[176] seem to think that because Resolution 3314, the Nuremberg Charter, Control Council Law No. 10 and other documents refer only to State responsibility in connection with acts of aggression and not to individual criminal responsibility, there should only be individual responsibility for wars of aggression and not for acts. However, even an act can have horrendous effects and thus in accordance with Article 5 of the Rome Statute constitute one of the "most serious crimes of concern to the international community as a whole." Furthermore, Article 5(2) of the ICC Charter calls for consistency with the UN Charter, this does not only refer to the SC's role but to the UN Charter as a whole. Accordingly, since the UN Charter prohibits all use of armed force it should be a non-issue whether the Crime of Aggression entails responsibility for acts or not. Even the tiniest spark might start-off wars and small disturbances or conflicts between States rock the relations. If peace and security is to be maintained, we cannot tolerate small-scale use of force.

The Resolution has been criticized for merely codifying the conflicts it was supposed to resolve. States ambitions to narrow down certain loopholes were followed by inclusions of other provisions demanded by other States, which usually led to new ambiguous situations.[177] It is difficult to evaluate the effects of Resolution 3314 and, as mentioned, it has had no real effect on the SC's work. However, such statements are difficult to examine and it is possible that its role as a guideline has had results, which are unknown. What is certain, despite the ambiguities, is that it embodies acts that many States consider Acts of Aggression.

[176] Müller-Schieke I.K., *Defining the Crime of Aggression Under the Statute of the International Criminal Court,* 14 Leiden Journal of International Law (2001) p. 418; Proposal by Germany PCNICC/2000/WGCA/DP.4, para. 5

[177] Stone J., *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AJIL (1977), No 2, p. 224-5

4 The Development of the Crime of Aggression in the International Criminal Court

The crime of aggression is a relatively old concept in International Law. In order to encourage and ensure compliance with a definition it has to be reached by consensus and correspond to established customary law. It shall not and cannot be a product of difficult negotiations with many concessions by some States and none by others, at least not in regard to the substantive law issues.

It is interesting to note that the USA, which has supported and played a central role through the history of international criminal justice, from the Nuremberg and Tokyo trials to the ICTY, ICTR and Sierra Leone Tribunal, and in the beginning also the ICC, is the biggest critic and opponent against the inclusion of the Crime of Aggression in the ICC's jurisdiction.[178]

Whereas, no exhaustive definition on aggression exists or can be agreed on, nothing obstructs individual perpetrators from being prosecuted and punished. Most certainly, some traditional forms of armed aggression are prohibited by customary law. These forms of aggression contain the core of the crime as envisaged in the Definition of Aggression and at least in part confirmed by the ICJ in the *Nicaragua* case.[179]

International practice, especially the resolutions by the SC, which speak of "acts of aggression", as well as this holding by the ICJ, seems to point to the effect that, even before there is a definition of the Crime of Aggression, there are certain clear cases of Acts of Aggression. In the discussions on the definition of the Act of Aggression for the Crime of Aggression, there is firm support for including Resolution 3314 or parts of it in the definition (*See below 4.3.1*), that definitely supports that view. Therefore, in such cases individual criminal responsibility could exist if there was a court, which could exercise jurisdiction. If universal jurisdiction for the Crime of Aggression existed, one could also imagine that a State, which had criminalized the crime, could prosecute an individual. Whether the Crime of Aggression is such an international universal crime, is however unsure. A quite recent example is the invasion by Iraq in Kuwait; few would deny that it was a violation of Article 2(4) in the UN Charter and an Act of Aggression.

The US set forth a completely different view to the Preparatory Commission for the Establishment of an International Criminal Court. It was reported in AJIL that the US representative of the US State noted that "the Resolution [of Aggression] did not… restate already existing customary international law" nor did it generate such law, due to lack of subsequent practice and *opinio juris*, the representative continued "Obviously, there has been no concordant practice based on the [Definition

[178] Schabas W., *United Nations Hostility to the International Criminal Court: It's All About the Security Council*, 15 EJIL (2004), No. 4, p. 702
[179] *Supra* note 172

of Aggression]. Just look at the records of the Security Council. And if anybody still had any doubts, the controversy about Resolution 3314 in our own discussions, has clearly demonstrated the absence of *opinio juris generalis"*.[180] However, this is an isolated statement by a country, which has a tendency to conduct interventions in other countries for various, but mainly, not legal reasons. US Senator Helms made his view clear in a hearing on the creation of the ICC: "I think I can anticipate what will constitute a crime of 'aggression' in the eyes of this Court: it will be a crime when the United States of America takes any military action to defend its national interests, unless the U.S. first seeks and receives the permission of the United Nations."[181] This view that there is no existence of acts of aggression in customary international law is not supported by most other States.[182]

4.1 The Road to the Rome Statute

The UN started the work towards a mechanism for international justice in the late 1940s. The Genocide Convention of 1948 even mentioned an "international penal tribunal" in Article VI. The work took, as mentioned, two different roads, one led to the codification of international crimes, the other to the establishment of a draft statute for an international court.

The ILC worked towards a formulation of the principles recognised in the Nuremberg Charter in order to prepare a draft code of international crimes against the peace and security of mankind. Parallel to that was the ongoing work of elaborating a statute for an international criminal court pursued by a special committee. However, the GA found that the number of States that collaborated and gave comments and suggestions was too small.[183] A second draft was produced in 1954, but shelved because a definition of aggression was being elaborated in another body.[184] A draft code was adopted in 1954 at the ILC's sixth session. However, the GA postponed it in its Resolution 897 (IX) of 4 December 1954 since it collided with problems closely related to the definition of aggression and the elaboration of the draft statute for an international criminal court. Without a definition for aggression, the code was incomplete and without the code there was no need for a court. It was decided that a definition for aggression needed to be elaborated before further action could be taken.

Poorly co-ordinated work did in the end not result in any real conclusive work. The lack of synchronised work has also been blamed on different political wills[185], it was however not entirely accidental. There was a will to delay the establishment of an international court, since the world

[180] *US View of the Crime of Aggression*, 95 AJIL (2001), No. 2, p. 400-401
[181] Hearing on the Creation of an International Criminal Court Before the Subcommittee on International Operations of the Committee on Foreign Relations, 105th Cong.60 (1998) quoted in Schabas, *Supra* note 178, p. 717
[182] Cassese, *Supra* note 58, p. 113
[183] GA Resolution 687 (VII) 1952
[184] GA Resolution 898 (IX) 1954
[185] Ferencz B.B., *The Draft Code of Offences against the Peace and Security of Mankind*, 75 AJIL (1981), No. 3, p. 675

then was divided into different political blocks with a frequent risk of war. Lack of political co-operation because of the Cold War was certainly the overriding explanation.[186]

The end of the Cold War brought about several important and welcomed effects. Increased agreement on international questions meant more comprehension between the SC members and therefore a much more effective SC. However, much like in old times when an emperor fell, there was a lot of confusion, newly independent countries wanted to break free from old constellations. Fundamentalism, nationalism and struggles for power lead to, mainly, internal armed conflicts. Gross violations of humanitarian law, as well as increased conscience of the large-scale human rights violations conducted against the populations in many of the old communist States, contributed to increased overall awareness of human rights.

The atrocities during the 1990s in Yugoslavia and Rwanda and the successes of the ICTY and the ICTR made the international community realize the need for an international court, with jurisdiction to prosecute individuals for crimes in an international context. The ICTY and the ICTR were established pursuant to SC Resolutions[187], the SC feared that a treaty establishing the Courts would not be signed by the parties to the conflicts. Establishment in the form of a SC Resolution ensured that States would accept the Courts; since members to the UN are obliged to follow a decision by the SC. It was nevertheless found that establishing *ad hoc* Tribunals took a lot of efforts and resources and the SC became less willing to set up new similar ones for other conflicts. Special Tribunals have since then, nevertheless been established in Sierra Leone, Cambodia and East Timor. However, the need for an international criminal court became apparent.

Trinidad and Tobago brought the question back into focus when they in 1989, after the Cold War had ended, suggested that a criminal court be established in order to prosecute crimes relating to drug trafficking. The GA requested the ILC to readdress the issue of an international criminal tribunal.[188] A Draft Statute was adopted by the ILC in 1994.[189] The final product was not limited to drug trafficking, but it was however well received by the GA, which also decided to recommend a conference of plenipotentiaries to discuss and evaluate the draft and the possibility to establish an international criminal court[190] The Draft took to a large extent account of the major powers. In 1996 did the GA establish a Preparatory Committee on the Establishment of an International Criminal Court with the object to prepare the question further.

A Draft Statute and a Draft Final Act were eventually submitted to the Diplomatic Conference of the Plenipotentiaries on the Establishment of an International Criminal Court held in Rome on the 15-17 June 1998. Representatives from more than 160 States as well as a range of

[186] Cassese, *Supra* note 58, p. 334; Ferencz B.B., *Ibid*
[187] SC/RES/827 (1993), SC/RES/955 (1994)
[188] GA Resolution 44/39 (1989); GA Resolution 49/53 (1995)
[189] Report on the ILC on the Work of its 46th Session, 2 May-22 July 1994, UN GAOR, 49th Session, Supp. No. 10, A/49/10, pp.16 ff
[190] GA Resolution 49/51 (1995)

international institutions and representatives from non-governmental-organisations attended the Conference. It was possible to distinguish between three different groups of States during the Conference in Rome. The Like-Minded-Group consisted of States spread over all different regions, but was to a large extent led by Canada and Australia. The Permanent Members of the Security Council made out one group, but the UK and France joined the Like-Minded-Group during the negotiations. The third group was the Non-Aligned-Movement compromised by Barbados, Jamaica, Trinidad and Tobago, Dominica, India, Sri Lanka, Algeria and Turkey.

The Like-Minded-Group opted for a strong court with a broad jurisdiction and a wide definition of war crimes. They also pushed for the Crime of Aggression to be included in the Rome Statute. The Permanent Members were opposed to a broad jurisdiction and a prosecutor with powers to initiate proceedings. They were nevertheless eager to let the SC decide in certain questions. For example, they preferred the SC to be able to prevent cases from being heard by the court. In addition, they were strongly opposed to including the Crime of Aggression. The Non-Aligned-Movement insisted on including the Crime of Aggression and some of them wanted drug trafficking to be included, whereas others supported including terrorism in the crime catalogue.

The so-called "Final Package"[191] was presented to the delegates in the early hours of the last Conference day. It was up to the delegates to reject it or adopt it. In the end, the Statute was adopted by 120 votes to seven, with the Crime of Aggression included, but without definition and possibility to exercise jurisdiction. The period to establish the definition is set to seven years after the entry into force by the Statute. A Review Conference will then take place. The Rome Statute came into force in 2002 and accordingly the Review Conference will take place in 2009. Recently there has been talk about the Conference being delayed until 2010.

4.2 The Preparatory Commission for the International Criminal Court

A Preparatory Commission was established in 1998 following Resolution F of the Rome Conference, its task was to define aggression.

> 1. There is hereby established the Preparatory Commission for the International Criminal Court. The Secretary-General of the United Nations shall convene the Commission as early as possible at a date to be decided by the General Assembly of the United Nations.[192]
>
> [...]

[191] *Infra* note 192

[192] Resolution F- Resolution on the Establishment of the Preparatory Committee for the International Criminal Court, at 1 and 7 annexed to the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, A/CONF.183/10, July 17 1998

> 7. The Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. [193]

The task of the PrepCom was evidently three-fold: (1) to define the crime of aggression, both the individual conduct (the Crime of Aggression), and the collective conduct i.e. State conduct (the Act of Aggression), (2) to define the elements of the crime and (3) to set out the conditions for the exercise of jurisdiction i.e. namely to decide if another organ then the Court should decide when aggression has occurred. The questions are all interrelated but my focus is on the definition of the Crime of Aggression and the conditions.

In order to achieve a greater understanding for the below discussion a few views and principles should be clarified. The actual definition of the Crime of Aggression can be separated into three elements: the leadership clause, the conduct and the State Act of Aggression. Both the definition of the individual conduct and the collective conduct can be defined in several different ways, however they will be either generic or enumerative, or a combination of both. For example, the definition of the Act of Aggression can be made up by a generic paragraph, like Article 1 in Resolution 3314, connected to an enumerative list of acts, like the one in Article 3 in Resolution 3314.

The enumerative list can be exhaustive or non-exhaustive. An example of a combination of a generic and enumerative definition can be found in Article 7 in the ICC Statute concerning Crimes against Humanity, which combines a generic article with a non-exhaustive list of acts constituting the crime. It is also possible to use a generic definition or an enumerative list separately. An advantage of a generic definition, both in regard to the definition of the Act of Aggression and the Crime of Aggression, is that it is impossible to include all possible situations of State and individual conduct that can result in a Crime of Aggression in an enumerative definition. The generic definition would therefore leave it at the Courts discretion to decide what it feels falls within the generic definition. On the other hand, the disadvantage of this is that the principle of legality might become an obstacle, it is important that the individual can foresee that a certain act is illegal.

One problem with an enumerative list, in regard to the definition of the Act of Aggression, is that it cannot include all possible situations. There is a constant development and it would be wish worthy that once a definition has been found it will be accurate and up to date, therefore it can be argued that the Court should have a wide discretion. Some proponents of the enumerative list has alleged that certain acts such as the "blockade of ports or coasts of a State" in Article 3 (c) of Resolution 3314 would not be captured in a generic definition.[194] A non-exhaustive list however carries with it the same problem as the generic definition, there might be an infringement on the principle of legality.

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[193] *Ibid*

[194] ICC-ASP/5/SWGCA/INF.1, paragraph II.A.9

The argument that certain State acts might fall outside of the scope of a generic definition definitely holds some truth, if the generic definition includes a requirement for a certain object or result. In regard to the definition of the Act of Aggression, it would be difficult to support an enumerative exhaustive list if the SC was to determine the occurrence of the act since the SC has full discretion in such questions. Another problem with an exhaustive list would be the extremely difficult drafting process, which consequently would follow. States would be severely tempted to include new cases or excluding existing ones. The drafting process would simply be too difficult. Accordingly, both the option of an enumerative exhaustive list and the option of an enumerative non-exhaustive list have flaws. The best might still be to draft the definition of the Act of Aggression as a generic one.

It has been alleged that the PrepCom went through three phases. The first one was characterized by the PrepCom struggling with other issues, which was also within its mandate to deal with, such as the Rules of Procedure and Evidence and the Elements of the Crimes. The second phase focused on rationalizing the debate and putting together options and proposals and during this phase, there was also established a working group on aggression. The third phase was mainly concerned with discussing the merit on certain proposals.[195] A lack of interest from certain States affected the success of its work and in fact, the only substantial effect of its work was a Discussion Paper on Aggression,[196] produced by the Coordinator of the PrepCom's Working Group on Aggression.[197]

4.2.1 The 2002 Discussion Paper

The 2002 Discussion Paper (reproduced in Supplement A) was a text containing the preliminary proposals on what had and had not been agreed upon. It also included the Elements of the Crime[198] but a footnote explained that the Elements were drawn from a proposal by Samoa and they had not been thoroughly discussed.

Paragraph 1 of the Discussion Paper contains the core conduct of the crime and it is generic. It distinguishes between an "act of aggression" and the "crime of aggression" using the words "For the purpose of the present Statute". These words are taken from the other articles in the Statute that define the other crimes within the Courts jurisdiction.

The Discussion Paper follows the arguments in literature and debates as well as in customary law and emphasizes that the crime is a leadership crime. The wording "effectively" points to the problem of "puppets", the

[195] Politi M., 'The Debate within the Preparatory Commission for International Criminal Court', in Politi and Nesi, pp. 44-45

[196] PCNICC/2002/WGCA/RT.1/Rev.2 (hereinafter the 2002 Discussion Paper)

[197] The PrepCom functioned through a set of Working Groups, each chaired by a Coordinator

[198] Roger S. Clark argues in his article *Rethinking Aggression as a Crime*, 15 Leiden Journal of International Law, 2002, Kluwer Law International, p. 865-867 that most of the delegates at the Rome Conference probably did not know what this actually meant since it then was a new concept in international law

perpetrator needs to have actual influence on the events and cannot be a mere figurehead with no power.

Next, the Co-ordinator introduces the condition that the perpetrator needs to commit the following acts with intent and knowledge. Article 30 in the Statute stipulates intent and knowledge for all the material elements "unless otherwise provided". In this case, another construction is provided in the very article. The placement of the wording after the first element could perhaps be enough to prove that it is not needed to have any kind of mental requirement for the first element.

On one hand, it is difficult to be in a position to effectively exercise control unless one is aware of it and planning to use it. Whatever the case is, "intentionally and knowingly" seems to apply to all other material elements that come after it. On the other hand, the below mentioned Elements of the Crime provide that the perpetrator knowingly was in a position to exercise control. In this question there is no right or wrong, it will be up to the Assembly of States to finally decide what they find the most appropriate.

The next element is a conduct element. The perpetrator orders or participates "actively in the planning, preparation, or execution of an act of aggression". "Participated actively" refers to a nexus between the perpetrator's conduct and the Act of Aggression. The perpetrator must have contributed to the Act of Aggression, but he or she does not have to be the sole mastermind, or the initiator. The action must be taken intentionally and knowingly.[199] Ordering or participating exhaustively defines the conduct. Participating works as a "catch all clause" for the differentiated list of forms of participation in the crime as contained in Article 25, paragraph 3(a) to (d). Because "participated" covers all differentiated forms of conduct, there is no need for the list of different conduct forms contained in Article 25, paragraph 3 and it is excluded from the applicability concerning the Crime of Aggression. This is referred to as monistic approach i.e. there is no enumerative list of forms of conduct, the crime can only be committed through ordering or participating.[200]

It might have been enough to stop just there, but instead another threshold was introduced. The Act of Aggression needs to be one "which by its character and scale constitutes a flagrant violation of the Charter of the United Nations." This seems redundant, any Act of Aggression should entail criminal responsibility and there is no need to categorize the acts into grave or less grave. As have already been pointed out, the UN Charter aims at prohibiting all kinds of violence. However, Robert S. Clark points to something important, it can be used as a safeguard for the accused should the SC be the organ to decide if an action is an Act of Aggression.[201] It would then be up to the ICC to decide if the act in fact was a flagrant violation and in that way the Court could get a little bit more influence.

Nevertheless, it has to be thoroughly discussed whether such a formulation would be in breach with the principle of legality, in fact it might be too vague. The Samoan proposal introduced the requirement of knowledge of the flagrant violation, and that might be fair to the defence.

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[199] *Ibid*, p. 875
[200] ICC-ASP/4/32, Annex II.B, p. 376, para. A.I.1
[201] Clark *Supra* note 198, p. 876

On the other hand, once one conducts an illegal action knowingly, one takes a risk of the action turning out to be criminal.

Three options for acts that constitute aggression follow, none of which is enumerative. The first one is non-exhaustive and starts with the words "such as" then goes on and mentions two situations "a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof" which can constitute the Crime of Aggression. The other option is exhaustive and makes the two above situations in the definition exclusive. In order for the crime to exist, the above-mentioned elements must be fulfilled and the action must fit into one of the two categories. The last option is neither of the above and the definition would stop after the mention of the flagrant violation of the UN Charter.

Both of the two first options would modify the definition in Resolution 3314 and narrow its scope. It is difficult to see how all of the actions specified in Article 3 in Resolution 3314 would fit into either of these two options. Option 1 does open up for other acts, since it is non-exhaustive, but the acts must have the object or result mentioned above. The wording "war of aggression" goes all the way back to the Nuremberg and Tokyo trials, however, it was never defined in the IMT Statute or in the judgement.

It is also not defined in Resolution 3314, and there is no indication as to whether it means something more than the acts listed in resolution 3314, therefore it seems a bit out of place. However, governments might find it favourable since it quite possibly would mean that only large-scale use of force would be included.

Paragraph 2 in the Discussion Paper deals with the definition of the Act of Aggression. It consists of two parts; firstly, a reference to Resolution 3314 as a basis for the analysis of if an Act of Aggression has occurred. This means that the entire Resolution 3314 is included. Secondly, a requirement that an Act of Aggression must have been determined by a certain body, this requirement is discussed under a separate chapter below. Turning to the first point, the reference to Resolution 3314 has the effect that, in the Discussion Paper, the definition for the Act of Aggression is a combination of a generic and specific definition. Article 1 in Resolution 3314 stands for the generic part, whereas Article 3 answers for the specific enumerative component.

Resolution 3314 stipulates in Article 2 that the first use of armed force in contradiction to the UN Charter shall constitute proof for a breach of the prohibition of force. The SC may however decide that in the light of other circumstances, such as lack of sufficient gravity, does the act not amount to an Act of Aggression. A possible circumstance seems to be the right to self-defence, but other situations could also be invoked as justification, for example humanitarian intervention authorized by the SC or unilaterally taken, or the protection of nationals abroad. These situations would necessarily not be approved of, but there is always a possibility. The SC seems to have such possibility, in general or in specific cases. What has to be justified is the use of force and if that can be done, then aggression has not occurred. It is simply up to the SC to determine, without restrictions as to the grounds.

Article 4 in Resolution 3314 makes it even more complicated, for it states that the acts enumerated in Article 3 are not exhaustive. The SC is free to determine that other acts constitute the Act of Aggression. Article 6 in Resolution 3314 says that nothing in the Definition is to be construed as enlarging or diminishing the scope of the Charter, applying this could be a problem, depending on how it is interpreted.

The Discussion Paper also brings up the question on different articles that should be excluded in connection with the Crime of Aggression, for example the ones that deal with responsibility of commanders and other superiors, it seems redundant to include such provisions since the Crime of Aggression is a leadership crime. As important as it is, for reasons of limited space and since it is outside of the scope of this essay, the purpose of it is to deal with the definition and not with general principles of international criminal law, it can only be dealt with briefly.

The real problem was however not the definition but under what conditions was the ICC going to exercise its jurisdiction, in other words, how much influence was the SC to have on the ICC and the decision on what constitutes aggression? The Samoan proposal pointed out specifically that before one could turn to the elements the preconditions had to be fulfilled. The preconditions being those pointed out in Article 12 in the Statute, but also that an appropriate organ had made a determination that an act of aggression actually had occurred.[202] They also mentioned that in connection with this last precondition the rights of the accused had to be considered. This is a thorny question and one of the most important considerations that have to be well thought out.

Elements of Crimes regarding articles 6, 7 and 8 were adopted on 9 September 2002. According to the Elements, focus should be on the *conduct* (An act or omission), the *circumstances* and the *consequence* (the result of the act or the omission) associated with the crime.[203] The Elements are so to say the different parts that constitute the crime.

The Samoan elements focus on a determination on what constitutes aggression before any further action can be taken. A decision on that might be not only a precondition, but also a circumstance.

To judge by the discussions it is quite possible that the appropriate organ to determine if an Act of Aggression has occurred could be the SC.[204] The SC might base such a determination loosely on Resolution 3314. However, the SC will not in clear text say that a decision was taken in accordance with Resolution 3314 and it has no obligation to do so.[205] Therefore, Element number 5 seems a bit out of place, if it is also a pre-requisite that the decision has been taken by the SC. Also, paragraph 7 in the proposed elements seems inapt, on the same grounds that have been articulated above.

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[202] Discussed in Part I of the document

[203] Elements of Crimes, p. 5, para. 7. Clark argues, and rightly, I think, that not all crimes consist of the three. For example, using prohibited weapons might actually result in no one getting hurt, and therefore there is no consequence, Clark, *Supra* note 198, p. 867

[204] Other solutions have been proposed, for example that the GA or the ICJ decides on the issue in case the SC fails to make a determination., Art 5 in the 2002 Discussion Paper

[205] General Assembly Resolution 3314 (XXIX), para. 4 and Art. 4 in the annexed Definition of Aggression

All of the elements will have to be proven to be consistent with the Statute and the ICC will deal with that in its coming trials. However, elements of the Crime of Aggression can obviously not be adopted until an agreement on the definition of the Crime of Aggression can be reached. The PrepCom was resolved after the production of the Discussion Paper.

4.3 The Special Working Group on the Crime of Aggression

At its first Session in September 2002 the Assembly of State Parties (ASP) established a Special Working Group on the Crime of Aggression (SWGCA), Chaired by Ambassador Christian Wenaweser of Lichtenstein, to continue the work on elaborating a definition on the Crime of Aggression and its Elements. The SWGCA is open to all States, members or non-members to the Rome Statute, on an equal basis, and is to meet during the ASP's Sessions or whenever the ASP finds it appropriate.

The SWGCA's efforts and course of work has consisted of meetings during the second, third, fourth, fifth and resumed fifth Session of the ASP as well as three informal inter-sessional meetings. The inter-sessional meetings took place at Princeton in June 2004, 2005 and 2006 respectively. During the fourth ASP meeting, it was decided that between 2006 and 2008 should the SWGCA be allocated at least ten days of meetings during the regular ASP sessions and during inter-sessional meetings. At the fifth ASP meeting, the Chairman also reiterated that the SWGCA needs to conclude its work at least 12 months before the Review Conference in 2009. Therefore, the work needs to be complete in 2008. The view was expressed that the Review Conference might be held in 2010.[206] Support was expressed for the existing timetable, but if it cannot be held, the SWGCA will probably continue its work beyond 2008.[207]

4.3.1 The 2007 Discussion Paper

The Co-ordinator's 2002 Discussion Paper has, up until now, served as the basis of the negotiations. Since 2005, three Discussion Papers by three Sub-Co-ordinators have further structured the work (ICC-ASP/4/32, Annex II. B, C, D). The first of the three papers is on different modes of participation, the second on the conditions for the exercise of jurisdiction and the third on the definition of the Act of Aggression. These three papers will not be investigated in chapters or paragraphs of their own but interwoven in the text concerning the 2007 Discussion Paper (as will the official documents from the inter-sessional meetings and ordinary ASP meetings). They form the background and consist of the thoughts that have formed the new Discussion Paper and I find it more relevant to refer to them in that context.

At the fifth ASP session in November last year several delegations made it clear that they thought that it was time to update the 2002

[206] ICC-ASP/5/SWGCA/1, para. 4
[207] *Ibid*, para. 12

Discussion Paper.[208] Accordingly, in January 2007, the Chairman of the SWGCA proposed a Discussion Paper (2007 Discussion Paper)[209] in order to help the participants of the fifth resumed Session of the Assembly of States (The 2007 Discussion Paper is reproduced in Supplement B). The new Paper is more streamlined than the earlier edition, yet consists of several different variants and options in square brackets and footnotes. The focus for the SWGCA is to find a definition for the Crime of Aggression, to elaborate a definition for the Act of Aggression and to set out the conditions for the exercise of jurisdiction for the Court. The question on the elements has taken a step back and the same elements as in the 2002 Discussion Paper are introduced, paragraph 7 in the Explanatory note explains that they are elaborated by Samoa and that they have not been discussed at the Princeton meetings. Therefore, they are outdated and do not reflect the changes in part I of the Paper.

Two variants of the *definition of the Crime of Aggression* are introduced, both within a generic definition, the first one (a) encompasses the so-called differentiated approach where several different options for conducting the crime are mentioned, variant (b) the monistic approach covers two different ways of conducting the crime, by ordering or participating. The differentiated approach applies to Article 25 paragraph 3 in the Rome Statute, with the exception of 3(f) (attempt). The monistic approach excludes Article 25 paragraph 3 in its entirety, since "orders or participates" already covers all of the commission forms listed in that article.

The differentiated approach was introduced during the 2005 Princeton inter-sessional. The crime will, under this approach, be treated in the same way as all the other crimes in the Statute. The definition of the Crime of Aggression will be focused on the individual perpetrators conduct. Other forms of participation will be addressed in Article 25 paragraph 3.

During the 2007 New York meeting it was also noted that the language used in the beginning of the definition of the Crime of Aggression should follow the definition of the other crimes in the Statute. Notice was drawn to the Princeton 2005 report and the proposed rewording contained therein. The definition would according to that proposal read:

> For the purpose of this Statute, 'crime of aggression' means engaging a State, when being in a position effectively to exercise control over or to direct the political or military action of that State, in […collective/State act].[210]

The proposal revealed a broad preference for the new alternative; others found that they needed more time to reflect on the changes. The proposal reflects the differentiated approach and Article 25 paragraph 3 would apply.[211]

Article 25 paragraph 3(f) in the Rome Statute asserts that attempt to commit a crime induces individual responsibility. However, it is most likely

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[208] *Ibid*, para. 10
[209] ICC-ASP/5/SWGCA/2
[210] ICC-ASP/4/SWGCA/INF.1, Annex I, proposal B
[211] ICC-ASP/5/35, Annex II, p. 10, paras. 10-11

that this will not apply to the Crime of Aggression. That position does not go well with Article 25 paragraph 3(b) to (d) since all of the modes of participation therein refer to the "attempted commission". Paragraph (a) to (d) would therefore be left without reference. This is mainly a formal point, which does not matter in practice, but it should be noted. A potential inclusion of attempt would extend the scope of individual criminal responsibility to cases where the collective act has been completed but not the individual.

During the Princeton 2006 meeting, it was noted that if attempt would be included there would be a need to draft a specific article for that since the Crime of Aggression as such presupposes a completed State act.[212] The question of whether individual responsibility can extend to situations where the collective act has not fully materialized is extremely sensitive. An example of when an individual's act has not been completed could be when a high-ranking politician or military leader has been a part of preparatory meetings and planning. Nonetheless, the individual is prevented from actually influencing the decision to conduct the Act of Aggression/use of force/armed attack or prevented to give an important order in the course of commencing the execution of the act.

Whether drafters of Article 25 paragraph 3(f) intended to include the attempted collective act in the application of the article is a relevant and important question. Because of these uncertainties, there is definitely doubt as to whether judges would apply the article on attempted collective acts, if it was not excluded from the applicability. It should also be noted that Resolution 3314 uses the wording the "first use of armed force" and this confirms the view that attempt cannot occur. Further it was mentioned that the phrasing "planning, preparation, initiation and execution" in the 2002 Discussion Paper did refer to the individuals conduct and it should not be confused with the State act. Some wanted to exclude the phrase because it could cause confusion. Others found that it should be excluded because it could blur the distinction between the principal and other perpetrators, since these words define the forms of participation found in Article 25 paragraph 3. Some found that it reflected the typical features of aggression as a leadership crime and it is still included in the 2007 Discussion Paper.[213]

Since the Crime of Aggression is a leadership crime, there is a need to exclude participants who are not able to influence the policy or carry out the crime, such as soldiers, and a provision stating this would, in case of a prevalence of the differentiated approach, be included in the definition. The solution favoured at the inter-sessional meeting was to transpose the "leadership qualifier" into Article 25. It would state, "In respect of the crime of aggression, only persons being in a position effectively to exercise control over or to direct the military action of a State shall be criminally responsible and liable for punishment."[214] At the New York 2007 it was once again alleged that if the differentiated approach was chosen there would be a need to add a subparagraph to Article 25 paragraph 3, which should clarify that the different forms of participation in Article 25

[212] ICC-ASP/5/SWGCA/INF.1, p. 9, para. 40
[213] *Ibid*, p. 9, para. 45 and p. 16, para. 92
[214] ICC-ASP/4/32, Annex II.B, Discussion Paper 1, para A.I.2, p. 377

paragraph 3 only applied to those persons who were in a position to exercise effective control. Interestingly enough, it was also discussed, during informal consultations, that the leadership clause should capture persons outside of the military and political circle, if they could influence the policymaking or actions of the State. I find it difficult to include such a sphere, trying to sort out who could influence the actions of a State is hard enough when the accused individual has an official title, which indicates responsibility. However, it seems not to have been discussed further.[215]

The differentiated approach has been favoured since the Princeton meeting in 2005, but what the final result will be is yet to be seen. Most participants favoured the differentiated approach at the meeting in New York, since it would be consistent with the other crimes in the Statute. Many participants however made it clear that even though they did prefer one of the two options they were very flexible on the issue.[216]

The monistic approach has the advantage of being quite simple, "participates" covers most forms of conduct. The main critique of the monistic approach is that it might exclude the group of perpetrators that cannot be said to have participated in the collective act, but should, as well as could, still be held responsible, by referring to one of the categories in Article 25 paragraph 3 (a) to (d). A solution in order to include this group needs to be found. Another argument against the monistic approach is that the ICC Statute was drafted with general principles of international criminal law in part three of the Statute. For systematic concerns, it would be good if the entire part three was to be applied to all of the core crimes equally.[217] On the other hand, the Crime of Aggression has a special character and it stands out from the other core crimes, therefore an exclusion of Article 25 paragraph 3(a) to (d) need not be too difficult to justify.

One quite interesting feature is also introduced, instead of the words "act of aggression" is "armed attack" or alternatively "use of force" meant to be used to define the collective conduct. If either of those phrasings would be used, then the entire question of the definition of the "act of aggression" in paragraph 2 would be redundant and therefore deleted, according to the proponents of this formulation. The 2007 Discussion Paper does not mention if there would be a need for a definition for either of those two phrasings.

During the New York 2007 meeting, it was made clear that there was a preference for the term "act of aggression". It was recalled that it was used in Article 39 of the UN Charter and defined in Resolution 3314. The use of that term was also necessary in order to link this part of the draft to the reference of Resolution 3314 in part 2, defining the Act of Aggression, which occurrence is the pre-requisite to the Crime of Aggression. Those who favoured "armed attack" held that the wording reflected the idea that only the gravest violations of the UN Charter would be covered by the Crime of Aggression and that part to of the draft then could be deleted.[218]

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[215] ICC-ASP/5/35, Annex II, p. 10, para. 13, p. 10, para. 9

[216] Explanatory notes ICC-ASP/5/SWGCA/2, para 5 and ICC-ASP/5/35, Annex II, p. 10, para. 9

[217] ICC-ASP/4/32, Annex II. B, Discussion Paper 1, para A.IV, p. 381-382

[218] ICC-ASP/5/35, Annex II, pp.10-11, paras. 14-15

During the Princeton inter-sessional meeting in 2006 it was noted that the terms above refer to the quality of the attack whereas the "qualifier", described below, refers to the intensity of the attack. It was also noted that the wording "act of aggression" refers to the "use of armed force" as described in Resolution 3314 Article 1. It was alleged that any departure from Resolution 3314 should be made with caution.[219]

Those who favoured "armed attack" instead of "act of aggression" alleged that the latter could be too broad to serve as a basis for defining the Crime of Aggression in accordance with international customary law. It was noted that the practical implication for using any of the (at this stage) three terms was limited, since they all were present and used in Resolution 3314. The difference in wording and meaning would only become material if the definition of the Act of Aggression was to become generic. An exclusion of the pre-condition that the SC determines the act to be an Act of Aggression would most likely not be an effect. The SC still has the primary responsibility for questions relating to peace and security.[220] It is difficult to see why the proponents of the SC as the organ determining the occurrence of an Act of Aggression would agree with another term, which would inhibit the SC's power as to the determining of aggression.

Further, during the Princeton 2004 meeting it was found that the mental elements "intentionally and knowingly" contained in the 2002 Discussion Paper could be removed.[221] Accordingly, they were deleted from the 2007 Discussion Paper's variant (a) and (b). In regard to mental elements one is now to rely on Article 30 in the Rome Statute, which provides for the same mental elements. Article 30 states a requirement for the mental elements to be applied to all the material elements. The discussion concerning this in the chapter dealing with the 2002 Discussion Paper, as to the non-application of mental elements to the first material element of being in a position to effectively exercise control, is therefore not relevant anymore. Article 30 applies to all material elements and therefore, also, to the effective control requirement.

The SWGCA has also evaluated other general principles. The applicability of Article 33 (superior orders) was excluded in the 2002 Discussion Paper, that has been changed and according to the 2007 Discussion Paper, it is to be applied to the Crime of Aggression. Article 28 (the responsibility of superior and commanders) is however still not applicable.

The so-called qualifier, "flagrant", concerning the violation of the UN Charter has been substituted with "manifest" in the 2007 Discussion Paper. It was found to be a better word and was therefore introduced. I have already made my mind clear on the issue. I think it is not only redundant with a qualifier but also not in line with the UN Charters purpose and meaning. At the Princeton 2006 and New York 2007 meetings participants in favour of an exclusion of the qualifier asserted that the ICC Statute was already limited to dealing with the "most serious of crimes of international concern", and that it therefore would be up to the Court to decide what it so

[219] ICC-ASP/5/SWGCA/INF.1, p. 6, paras. 14-17
[220] *Ibid*, p. 6, paras. 14-17
[221] ICC-ASP/3/SWGCA/INF.1, p. 12, para. 6

found. The argument mentioned above, that a qualifier could be a safeguard for the accused, can obviously be made here as well.[222]

The pre-dominant view at the Princeton 2006 meeting was that "war of aggression" was too restrictive. However, it was agreed to keep that question on the agenda for further discussion. I believe that the majority of States will not agree upon such a definition. It would simply exclude too many of the Crimes of Aggression that are committed, not to mention that the Rome Statute itself refers to "aggression" and not just a "war of aggression".[223] The 2007 New York meeting once again dealt with the question without coming to any conclusions. Participants found that the wording was too closely related Nuremberg and the modalities of warfare that was the question there. It was also noted that the non-exhaustive list in the second bracket variant (b) of the 2007 Discussion Paper was difficult to reconcile with the principle of legality, and that if therefore should be deleted. No further action was however taken.[224]

The relevance of the object or result of an Act of Aggression was found not to be of particular interest among most States. It was alleged that the object of the act would extend into the *ius in bello*, whereas the Crime of Aggression belongs to the sphere of *ius ad bellum* and an exhaustive enumeration of all possible objects would not be possible. It was also asserted that the SC, when making a determination as to the Act of Aggression would not make reference to the object or result.[225] Military occupation and annexation are but two situations, which today are not among the most common reasons for acts of aggression.

The question of the *definition of the Act of Aggression* is obviously one of great importance as well as one of controversy. There have been numerous discussions of whether it should be enumerative or generic (or both), based on Resolution 3314 or drafted anew. Since Princeton 2006 three options have been discussed (1) a generic reference to Resolution 3314 as a whole, (2) a reference to specific parts of Resolution 3314 specifically Articles 1, 3 and 4 and (3) a reproduction of parts of the text of Resolution 3314 incorporated into the ICC Statute.[226]

A general reference, option (1), to Resolution 3314 was favoured by most States since there would be no need to deal with the time-consuming discussion concerning what articles that should be selected. That option was also found to preserve the integrity of Resolution 3314 and respect the interconnected nature of the articles in the Resolution. It was observed that an inclusion of Resolution 3314 would not be inconsistent with the other crimes in the ICC Statute, since it would not refer to the individual conduct of the perpetrator i.e. the Crime of Aggression but to the Act of Aggression, the collective act, and thus be a circumstance element.[227]

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[222] ICC-ASP/5/SWGCA/INF.1, p. 6, paras. 18-20; ICC-ASP/5/35, Annex II, p. 11, paras. 16-17
[223] *Ibid*, p. 7, paras. 21-24
[224] ICC-ASP/5/35, Annex II.p. 11, para. 18
[225] ICC-ASP/5/SWGCA/INF.1, p. 7, paras. 25-30
[226] ICC-ASP/5/SWGCA/INF.1, p. 8, para. 32
[227] *Ibid*, p. 8, paras. 32-35

It was suggested that if a generic reference to Resolution 3314 was to be included in the definition of the Crime of Aggression there was a need to clarify that the reference was to Resolution 3314 as a whole and not just to Article 3, in which the specific acts are elaborated.[228]

States have held that for the definition to be in line with the principle of legality it must be independent from a post-crime determination, such as a pre-trial but post-crime determination by the SC. The definition must be clear in all its elements, including the element of the States Act of Aggression, before the crime is committed. The accused must know what the Crime of Aggression is, and what actions that might constitute the crime. It was alleged that an inclusion of Article 4 in Resolution 3314 might not measure up to that specificity and that it therefore could be better to combine Article 1 with Article 3 in Resolution 3314.[229]

The article concerning this in the 2007 Discussion Paper remained relatively unchanged. There was a reference to the Resolution as a whole and in square brackets a reference to specifically Articles 1 and 3, but not to 4. Apparently, a decision had been made to exclude the open-ended Article 4 from the application in case that the specific reference would be the prevailing option.[230]

In this context, it can also be mentioned that the SWGCA has pointed to the due process rules. The SWGCA stressed how important it is that any determination as to the Act of Aggression outside of the Court is not binding on the Court on substance. The Court must be able to examine the element of the State act under the definition and the threshold of the Statute, and the burden of the proof cannot be shifted from the prosecution to the accused.[231]

The SWGCA has dealt with several other questions that are not mirrored in the 2007 Discussion Paper. During the 2004 Princeton inter-sessional meeting the question on how the Crime of Aggression was to be fitted into the Rome Statute was a matter of discussion. There was a strong preference for an integration of the definition and the conditions of exercise of jurisdiction in the Statute. It was agreed that only necessary minor adjustments should be done and that once a definition was found Article 5(2) would be deleted.[232]

There was no agreement as to whether a State could "opt out" the Courts jurisdiction over the Crime of Aggression. That will depend on whether the new provision will be adopted in accordance with Article 121(4) or (5).[233] The Princeton 2005 inter-sessional meeting kept discussing the issue. Three approaches were possible to distinguish.

The first one opted for the applicability of Article 121(4) and pointed to the importance of maintaining a unified legal regime for all crimes in the Statute. According to this approach, when seven eighths of the parties to the Statute had ratified or accepted the amendment it would be binding on all parties, including future parties. It was argued that the Crime of Aggression

[228] *Ibid*, p. 8, paras. 33-34
[229] *Ibid*, p. 8, para. 35
[230] *Ibid*, p. 8 paras. 32-35
[231] *Ibid*, p. 13, para. 71
[232] ICC-ASP/3/SWGCA/INF.1, p. 7, paras. 10-19
[233] *Ibid*, p. 7, para. 18

was already included in the jurisdiction of the Court and States that had chosen to become parties to the Statute were bound. It was also argued that the Crime of Aggression should not be treated differently than the other crimes in the Statute and that State parties had in fact chosen to include the crime, the intention was for all State parties to be bound by it. It was also alleged that the Statute should not be a an "à la carte" menu, with the possibility to pick and chose what seemed attractive or not.[234]

The second approach alleged that Article 121(5) was applicable and that a State would have to "opt in" the provision defining the Crime of Aggression before recognising the Courts jurisdiction. The reason for the applicability of paragraph (5) is that it expressly refers to Article 5 in the Statute and therefore it has to be applicable. On the other hand, it was alleged that the incorporation of the Crime of Aggression would probably not be accommodated in Article 5 but in Article 8 *bis*[235], and that the procedure envisaged in paragraph 5 was not applicable to the Crime of Aggression, but was rather to be applied to the possible inclusion of other new crimes. The Crime of Aggression is already clearly within the jurisdiction of the Court according to Article 5 paragraph 1.

The third approach alleged that the Article 5 paragraph 2 only required the adoption of a definition and not an amendment. According to this view, an adoption by the ASP would be sufficient for the entry into force of the definition, and Article 121(3) would therefore be applicable. It was asserted that the discussion should focus of the definition and conditions for the exercise of jurisdiction and that if these two questions were solved the answer on whether to use paragraph 5 or 4 would be become self-evident.[236]

The SWGCA has drawn attention to the issue of the complementarity of the Court. The question was posed that if a State itself chooses to deal with the crime, would there then be a need for a determination of the Act of Aggression by the SC. Points were raised both in favour of a determination by the SC when a crime was dealt with in the domestic criminal system and against it. It was noted that only a few States have legislation criminalizing aggression in national law.[237]

With regard to the SC's role, it was asked whether it was possible for a State to deal with the question when the SC was seized upon the matter. Some delegates found that if a prior determination by the SC was needed for the jurisdiction of the ICC, there would not be such a need for the application of national legislation. Others had the opposite view and thought that national legislation should be in line with international law. Since there was, and is, no conclusive decision on the conditions issue, it was agreed that this was a matter that would have to be dealt with once a definition has been adopted.[238]

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[234] ICC-ASP/4/SWGCA/INF. 1, p. 5, paras. 8-9
[235] See the heading of the 2007 Discussion Paper, ICC-ASP/5/SWGCA/2
[236] ICC-ASP/4/SWGCA/INF.1, pp. 5-7, paras. 15-17
[237] For example German criminal law criminalizes a war of aggression, *See* Section 80 of the German Criminal Code
[238] ICC-ASP/3/SWGCA/INF.1, pp. 7-8, paras. 26-27

A further inter-sessional meeting is scheduled to be held in June 2007 at Princeton University.[239]

In conclusion as to the PrepCom's and SWGCA's work, it should be noted that in comparison to the previous 60 years or so of efforts to define aggression, there has been considerable success in the conducted work, and it is steadily moving forward.

[239] ICC-ASP/5/SWGCA/1, para. 13

5 The Security Council and the International Criminal Court

One of the biggest problems in finding a definition for the Crime of Aggression is the conditions of the exercise of jurisdiction over the crime. The inclusion of the "unfortunate", but quite probably deliberate, phrasing in Art 5 paragraph 2 in the Statute has created quite some controversy.

> The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall *be consistent with the relevant provisions of the Charter of the United Nations.*[240]

This might lead one, and has led many of the delegates in the Assembly of States, to the conclusion that a pre-requisite for the Court to even consider the crime would be that the Security Council deems it an Act of Aggression, in accordance with Article 39 in the Charter of the United Nations, or the UN Charter in general. Competing competencies between the ICC and the SC is therefore on the agenda. The fact is, that if the result would be that the SC decides whether aggression has occurred or not, we would not need a definition on the Act of Aggression, namely the collective act, since the occurrence of aggression is within the SC's discretion to determine.

The 2002 Discussion Paper[241] by the Co-ordinator for the PrepCom sets up several different possible options for this issue. The proposals are in short; (1) where the SC makes no determination within six months the Court may proceed with the case. (2) the Court shall ascertain whether there is a determination by the SC, if no such determination has been made the Court shall give the SC an opportunity to do so. If the SC fails to act then that is the end of the matter. (3) the Court may request the GA to make a recommendation and when no such recommendation exists the Court may proceed with the case. (4) the Court may ask the GA or the SC-on a vote of any nine members, meaning it is a procedural question-to seek an advisory opinion from the ICJ on the legal question of whether or not an Act of Aggression has occurred, if the ICJ it so finds then the Court may proceed. (5) the last option is a referral of the question to the ICJ, which determines if an Act of Aggression has occurred. If the ICJ answers in the affirmative then the Court is also free to deal with the case of a Crime of Aggression.[242]

As to the conditions of the exercise of jurisdiction in the 2007 Discussion Paper, it has also been streamlined, but is essentially the same as in the 2002 Discussion Paper. Some changes have however been done. The possibility for the Court to request the GA or the SC to seek an advisory opinion from the ICJ, concerning if an Act of Aggression has occurred, has been removed. Delegates at the Princeton 2006 meeting found that it would

[240] Emphasis added by the author.
[241] PNNICC/2002/WGCA/RT.1/Rev.2
[242] For changes in the 2007 Discussion Paper see Chapter 4.3.1

be to "clumsy" and that it would create a double workload. It was also seen as alarming that the ICJ might apply different standards of proof.[243]

The delegates participating at the meeting were also opposed to the wording "acting on the vote of any nine members" contained in Article 5 option 4 variant (b) in the 2002 Discussion Paper. This was considered to amount to interference in the SC's competence and therefore contrary to the UN Charter, which stipulates that the SC itself decides what a procedural matter is and what is not. It was also pointed out that at such a late time in the process there would already have existed plenty of opportunities for the SC to decide on the question, accordingly, there was no point for the SC to ask for a second opinion. Asking the ICJ would probably be time-consuming and therefore this option was not found to be interesting either.[244]

In the end, all options but Option 4 were kept in the 2007 Discussion Paper, but with slight exchanges of words. Especially Option 3 under paragraph 5 is interesting, instead of using the word "shall", in the first sentence, concerning the possibility to ask the GA for a determination on the Act of Aggression, the word "may" is introduced. Whether this means that it is optional for the Court to ask for such a determination or not, is not clarified. Such an interpretation could nonetheless be possible considering the last sentence in the paragraph, "In the absence of such a determination, the Court may proceed with the case [.]". That indicates that the possibility is optional. In addition, Option 2 and 4 have also had the word "shall" exchanged for "may". In these cases there is no question as to a difference of the meaning.

During the Princeton 2006 meeting, which led to the 2007 Discussion Paper, it was suggested that Article 13 and 16 in the Rome Statute would be enough to preserve the SC's role as to peace and security. Article 13 deals with the exercise of jurisdiction and who can refer a case to the ICC. Article 16 states a right for the SC to defer an investigation or prosecution by ways of adopting a resolution.[245]

One quite interesting idea that was brought up during the Princeton 2006 meeting was to introduce different solutions for each of the scenarios for jurisdiction set out in Article 13 of the ICC Statute. In the case of referral to the ICC based on Article 13(a) (State referral) it might not be as delicate of a situation and therefore the exclusion of a prior determination might be accepted. The same would be the case with paragraph (b) in which the SC refers a situation, if the SC refers a situation there is most probably no controversy as to the determination of an Act of Aggression. The last option is where the prosecutor him/herself refers the question to the Court and this could be the situation where a pre-determination by the SC could come into question. Nevertheless, this idea has not come into reality and it is not included as an option in the 2007 Discussion Paper.[246]

Furthermore, the 2002 Discussion Papers option 3, which corresponds to option 4 in the 2007 Discussion Paper, has been slightly changed. The

[243] ICC-ASP/5/SWGCA/INF.1, p. 11, para. 60
[244] *Ibid*, p. 11, paras. 78-80
[245] *Ibid*, p. 10 para. 53
[246] *Ibid*, p. 12, paras. 61-2

word “recommendation” has been exchanged to “determination”. It was not seen as meaningful to ask the GA for a recommendation and then proceed with the case in the absence of such a recommendation. The word “determination” therefore indicates that unless there is determination that an Act of Aggression has occurred, the Court cannot proceed.[247]

The 2007 meeting in New York brought few changes on this issue. The most interesting idea regarded paragraph 4 of the 2007 Discussion Paper. The proposal suggested that the SC need not make a determination on the Act of Aggression. Instead it would be enough if the SC gave a “green light” for the ICC to proceed with the case. It was emphasized that the proposal was relevant in connection with paragraph 5 of the 2007 Discussion Paper. The proposal was welcomed by some delegations, whereas others preferred the original draft in the 2007 Discussion Paper. It was noted that the different options needed further discussion. It was also noted that the SC might refer a case to the Court without determining the occurrence of a State act, and that there then was no need for the SC to determine the occurrence, but that it could be up to the ICC.[248]

The SC’s possibility to stop the ICC from bringing up a case in accordance with Article 16 is slightly limited. The SC must pass a decision pursuant to Chapter VII of the UN Charter i.e. they must determine the existence of a “threat to the peace” a “breach of the peace” or an “act of aggression”. It is likely that given the political power structure of the SC will there, in controversial cases, be at least one permanent member that does not want to stop the ICC from exercising its jurisdiction and that would be enough. However, voting against powerful States might threaten the sensitive balance in the SC. SC Resolution 1422 of 2002 is a recent example. The resolution states that:

> […] if a case arises involving current of former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, [the International Criminal Court] shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise […][249]

The US threatened to veto all future peacekeeping operations unless the SC passed the resolution. It was renewed again in 2003.[250] This shows how difficult and fragile all work and relations that take place in and on the international arena are.

This division of competencies cannot be found anywhere else in international law.[251] The only comparison that can be found would be the example of the Tribunals established pursuant to Control Council Law No. 10, which were bound by the decisions taken by the IMT in regard to the fact that “invasions, aggressive acts, aggressive wars, atrocities or inhumane

[247] *Ibid*, p. 14, para. 75; ICC-ASP/5/SWGCA/2
[248] ICC-ASP/5/35, Annex II, pp. 12-14, paras. 23-34
[249] SC/RES/1422 (2002)
[250] SC/RES/1487 (2003)
[251] The Secretariats Historical Review, *Supra* note 87, p. 45

act were planned or occurred." Such determinations could not be questioned; it was only up to the Tribunals to decide whether the mental elements and the participation in the acts were present. The difference from the issue we are facing today is that we now are looking at a non-judicial body taking decisions with legal effects.

It raises several problems; a political body taking legal decisions is not in line with numerous due process rules. The approach is completely out of line with among other rules and principles, the impartiality of the court, public trials, the judgement being based on clear legal provisions and the prosecution having to prove every element of the offence beyond reasonable doubt, including that an Act of Aggression has been committed by a State.

The right to a fair and public hearing by a competent, independent and impartial tribunal, as established in ICCPR Art 14.1 and corresponding provisions in other human rights instruments,[252] would be seriously impaired. The meetings of the SC are not public and the members of the SC are surely not impartial or independent, and in some cases not competent in the same way as a specialized judge. To me it seems bizarre even to suggest that a decision on individual criminal responsibility for such a serious crime indirectly would be taken by a political organ. The ICC could, in my view, hardly exercise the mandate given to it. Any perpetrator could and would (rightly) always declare the trial and judgement by the ICC invalid and in breach of human rights, unless the ICC had the opportunity to investigate the decision again.

During the Princeton 2005 meeting, there was agreement that a prior determination by another body does not relieve the Court from its responsibility to examine the situation, which it lays as a ground for its judgement. This is definitely important to clarify.[253] However, the biggest problem is that the SC mostly is not able to unify in a decision that an Act of Aggression has occurred. It is more likely that they will not take a decision as to the question. It would be a problem if the SC and the ICC in such a case came to different conclusions or if one organ could not decide. The effect is difficult to evaluate. On the other hand, the two different conclusions would be based on different considerations and criteria.

In this case, it is also important to remember that one has to separate the rights of the accused from the determination of the jurisdiction. While it was seen as important to safeguard the rights of the accused, the due process rights should not be confused with the determination of aggression. It is important to keep apart the notion of State responsibility, which is dependent on the determination of aggression, and the individual responsibility.[254]

The SC does most certainly not exercise its functions exclusively, only primarily. This is no news and it has been affirmed by the ICJ in the *Certain Expenses* case. The ICJ made it abundantly clear, as mentioned above, that,

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[252] *See for example* ICCPR Article 14, Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, (ETS No. 5) Article 6 and Universal Declaration of Human Rights, 1948, Articles 10 and 11 all are re-produced in *Human Rights in International Law-Collected Texts*, Council of Europe Publishing

[253] ICC-ASP/4/SWGCA/INF.1, p. 13, paras. 64-69

[254] *Ibid*, p. 12, paras. 60-62

there was nothing under Article 24 of the UN Charter that gave the SC exclusive responsibility. In fact, it was found that the GA is and should be concerned with international peace and security. The GA has several times dealt with questions regarding the safeguarding of peace and security. It did adopt both Resolution 3314 and the Uniting for Peace Resolution without any protests. The SWGCA did itself confirm the SC's primary, but not exclusive, responsibility during the Princeton inter-sessional meetings in 2005 and 2006 as well as in New York in 2007.[255]

As above-mentioned, the ICC is partly a product of the failures of the SC to act in situations where aggression actually has occurred. There is no point of creating yet another one. If the SC should be the body determining if an Act of Aggression has occurred, without any influence by the ICC, ICC's jurisdiction would in regard to the Crime of Aggression be completely ineffective, inappropriate and even redundant. I suspect that also the jurisdiction concerning the other crimes in the Rome Statute would be affected negatively. I believe that the Courts reputation would be weakened by doubt of its competence and impartiality. It is also unlikely that States would be prepared to subject themselves[256] to the jurisdiction of the Court in regard to the Crime of Aggression if the SC would be deciding on the question, especially since it concerns individual criminal responsibility.

The fact that the definition has to be in line with the UN Charter does not mean that it also has to be in line with the decisions that the SC takes, i.e. the decisions that are based on Article 39. Article 39 deals only with the response, in terms of sanctions, force and so forth, of the international community in case of a situation of aggression. It does not deal with the aftermath of a conflict. That is the task of the Court. This should be more than clear since the SC itself initiated the ICTY and the ICTR to deal with legal responses for international crimes.

This was also the view of several delegates at the Princeton 2006 meeting. It was also asserted that a pre-determination for the Crime of Aggression was not consistent with the other crimes in the ICC Statute, which do not require such a determination.[257] The fact that the two bodies might label a situation differently should not stop either of them from performing their assignments, especially since they look at the situations from different views, one from the political and one from the legal.

Already today, do the ICJ and the SC act side by side, both of them taking decisions on the Act of Aggression. The ICJ decides freely on what constitutes an Act of Aggression (nonetheless, the ICJ does not have territorial jurisdiction or an autonomous prosecutor. It might therefore be easier to accept its free decision making power.), and has done that in the *Nicaragua* case. I find it hard to believe that it would not do the same again

[255] ICC-ASP/5/SWGCA/INF.1, p. 10, para. 55; ICC-ASP/4/SWGCA/INF.1, p. 13, para. 69; ICC-ASP/5/35, Annex II, p. 14, para. 37

[256] Different ways to include the Crime of Aggression has been discussed. Article 123(3) and 121 establishes the procedure to be followed. Amendments to articles in the Statute require at least a two-thirds majority of the State parties to be adopted. Only States that have ratified the amendment will be bound by it. It then seems likely that certain States, who are members of the ICC, but not one of the SC permanent members, would not ratify the amendment.

[257] ICC-ASP/5/SWGCA/INF.1, p. 10, paras. 55-56

if the situation arose. There is no institutional hierarchy between the SC and the ICJ, as the two bodies serve distinct functions.

The Appeals Chamber of the ICTY in the *Tadic* case examined its own jurisdiction i.e. the legality of the SC resolutions that laid the base for its own establishment. It found that it has "jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council."[258] It should be possible also for the ICC to examine whether the SC, in determining if an Act of Aggression has occurred, has acted *ultra vires* or not.[259]

I realize that State responsibility is less of a thorny question, since in the case of State responsibility, it is actually not an individual who is sentenced. The lack of enforcement mechanisms make it easier for States to accept the judgement on State responsibility, simply because there is nothing, other than the shame factor, that can actually make them comply with it.

The ILC in its draft statute for the ICC included in its Article 23 paragraph 2 that no complaint related to an Act of Aggression could be brought before the Court:

> "unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint."[260]

The Commentary adopted by the Commission on this point stated,

> [a]ny criminal responsibility of an individual for an act or crime of aggression necessarily presupposes that a State had been held to have committed aggression, and such a finding would before the Security Council acting in accordance with Chapter VII of the Charter to make.[261]

What is important to remember in connection with this is that the delegates of the Rome Conference[262] were in fact not impressed enough, or united enough, to adopt the view of the ILC. The permanent members of the Security Council supported the ILC Draft, but on this question, they had to give in. However, it is still an issue in the SWGCA, which shows the magnitude and importance that States consider this to be.

Looking back at the history of the UN, the Korean War[263], the first Iraq war[264] and the intervention by the NATO in Bosnia Herzegovina[265] the situation in the Democratic Republic of the Congo[266] and Afghanistan[267] are

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[258] *Prosecutor* v. *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, paras. 20-22
[259] Dascalapoulou-Livada, *Supra* note 163, p. 189
[260] Report on the ILC on the Work of its 46th Session, 2 May-22 July 1994, UN GAOR, 49th Session, Supp. No. 10, UN Doc. A/49/10, p. 43
[261] *Ibid*, p. 44
[262] It should be remembered that it is in fact the views of governments that form the international law and the *opinio juris*
[263] SC/RES/83 (1950)
[264] SC/RES/678 (1990)
[265] SC/RES/787 (1992); (SC/RES/816 (1993); SC/RES/836 (1993)
[266] SC/RES/1484 (2003)

a few of the situations where the SC managed to actually agree that aggression had occurred and that it was necessary to act under Chapter VII i.e. to authorize use of force. Not even at these occasions did they use the phrase "act of aggression" but other wordings such as "breach of international peace and security". The SC has also found aggression to have occurred in several other cases and then used the wording "act of aggression", however, at these times no use of force by other member states was authorized.[268]

To label another State as an "aggressor" means an intentional condemnation of its behaviour internationally. It is not difficult to understand that such action might undermine or contradict the SC's role of offering its good offices in times of conflict. It also creates conflicts between the State that is labelled as an "aggressor" and the States that vote in favour of the condemnation. Such a conflict can most certainly backlash in another situation. It is therefore easy to understand the reluctance by States to create those conflicts and sometimes it is possible to defend their unwillingness. As difficult as it might be, one has to understand this; it is all about giving and taking. Because of this situation, it is even more important that the SC is not involved in the decision making as to Acts of Aggression's occurrence. An impartial and independent court is the only option in this question. A criminal court must be completely independent of strategic interests of its signatory States.

One problem, already mentioned above, and I am not the only one to be worried about this,[269] is that a permanent member of the SC who has committed or is about to commit an Act of Aggression can in fact shelter its leaders from individual criminal responsibility. It can use its veto and so stop the SC from determining that aggression has occurred. The fact that the very reason for inclusion of Crimes against Peace in the IMT Charter was to hinder the individuals who instigated war from escaping responsibility seems to have been forgotten.

That certain countries have chosen not to ratify the Statute is alarming but not wrongful, each country has that right vested in their right to sovereignty. What is upsetting though is that members of the governments in some countries might actually be precluded from the Courts jurisdiction. France and Great Britain[270] are not the only ones, but also other countries that have powerful friends among the SC's permanent members.

The argument that the SC might have excellent reasons, associated with the maintenance of peace and security, not to make a determination on an Act of Aggression is most probably right but not convincing. Surely, it might be better to solve an aggressive act through means of mediation, but in order to reach conformity in behaviour certain individuals cannot be excluded from responsibility. A judicial body must most definitely be the

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[267] SC/RES/1386 (2001)

[268] SC/RES/411 (1977) (South Rhodesia), SC/RES/387 (1976) (South Africa), SC/RES/573 (1985), (Tunisia), SC/RES/405 (1977) (Benin)

[269] Griffiths, *Supra* note 6, p. 309; Schuster, *Supra* note 74, pp. 40-41

[270] France and Great Britain are the only countries that are permanent members of the SC as well as parties to the Rome Statute, *See* http://www.icc-cpi.int/statesparties.html, for States that have ratified the Rome Statute, last accessed on 9 June 2007

decision maker when acquitting a perpetrator. If the ICC finds that a perpetrator has not committed a crime it has to be based on well defined and established grounds, for example that the State act is trivial. If certain individuals were to be released from responsibility by the SC, because an act is not found to be an Act of Aggression then that would be highly arbitrary and cause disbelief among other State leaders who have faced or will face charges.

Another alarming question is the practice of compelling other countries to sign immunity agreements with the effect that Article 12.2(a) does not apply. These actions are presently conducted by the USA, who originally were signatories to the Statute, but later on chose to draw back the signature. Conducting the agreements, while being a signatory, put them in breach of Article 18 in the Vienna Convention on the Law of Treaties.

Furthermore, a decision by the SC can never be more than a political act, an obligation *erga omnes* to be followed by the member States.[271] It is therefore difficult to see how it could have any legal implications outside of the UN Charter. It also seems unreasonable that members of the SC who have not ratified the Statute (among them three out of the five permanent members of the SC; the USA, China and Russia) would have any influence on the work of the Court.

It might be possible that the SC's recognition of an Act of Aggression for purposes of ICC jurisdiction could rest on a majority decision i.e. a procedural vote instead of being equated with a "decision" of the SC about the need for sanctions or use of force under Articles 41-42 of the UN Charter. The choice to "recognize" the Act of Aggression would not inhibit the SC from making a decision about sanctions under Articles 39 and 41-42. However, the SC decides itself what it considers a procedural matter and it does so through a concurring vote of nine SC members including the permanent five.

It is unfortunately quite likely that the SC cannot decide to determine that an Act of Aggression has occurred or avoids the wording "act of aggression" and instead uses "breach of the peace". If the sole basis for the ICC's jurisdiction lays with the SC there is most certainly a risk that the SC will dominate the Court. In such cases the prosecutor must have a possibility to start investigating the situation on his or hers own initiative. As mentioned the SC's competence is primary not exclusive. This is not a wanted outcome, but it is better than refusing all interference by the SC and maybe causing the delay of the definition of aggression with another 50 years. Such a solution would still infer the ICC with jurisdiction. Because of the veto, there would be controversial cases when the different "blocks" of permanent members cannot agree and in that case, the decision would go to the Court. Most of the time there would probably not be a problem as to the determination, since the council members often cannot agree.

There is according to me only one possible solution in order to preserve at least some of the ICC's independence. That is full power for the ICC to determine the existence of an Act of aggression when the SC cannot agree or do not take a decision. Full power for the ICC to investigate the SC's

[271] Charter of the United Nations, Chapter V Art. 25

decisions on aggression, is also necessary in order to preserve of the rights of the accused. Any other outcome would according to me only leave one choice, to leave the Crime of Aggression outside of the ICC's jurisdiction.

6 Conclusions on the Development of the Crime of Aggression

Two main objections have been brought forward against the existence of the Crime of Aggression. First, assertions have been made that there is no Crime of Aggression in customary international law. The second objection claims that there is no need for the Crime of Aggression, an offender of the Crime of Aggression will quite probably also be guilty of the other three core crimes in the ICC. The criticism as to the first point is redundant, it is well established that individuals can be individually responsible for aggression. Already in the Nuremberg judgements was that made clear, and the concept has ever since been known to international law, however no court with authority to prosecute has existed before the creation of the ICC. The fact that those proceedings were criticized for breaching the principle of legality has nothing to do with the evolution since, and fact is that the trial happened and therefore created new customary law. Most important, it does not matter if the Crime of Aggression exists in customary law or not. Many legal rules have been created without a firm basis in custom. Custom is no pre-requisite for a legal rule to develop in codifications. What can be difficult is defining the rule, and that has shown to be a problem. Nonetheless, aggressive acts are regarded as well known in international customary law and yet the definition was difficult to reach. Such are drafting processes in controversial questions.

There is however one big difference between the Nuremberg proceedings and the discussions concerning the crime of aggression and its definition. In 1944-45 there was certainty about who should be punished, but there was uncertainty about whether or not it would be consistent with the principle of *nullum crimen sine lege*. Today there are no concerns as to the latter; the principle of legality is firmly established in the Rome Statute, but more about who potentially could be held responsible for the Crime of Aggression.

As to the second assumption, one must agree that we shall call things by their correct name. In murder cases there are often elements of physical assault, however no one asserts that murder should be prosecuted within the frames of assault. While it is true that the other core crimes often take place in the course of an act or war of aggression, genocide and the crime of aggression have nothing in common. Criminalization of the Crime of Aggression also establishes the principle of prohibition of the use of force, the value of that cannot be disregarded.

It is probably clear by now in which way the definition of the Crime of Aggression will most likely be constructed. The definition will include a provision that stipulates the basic elements that constitute the Crime of Aggression. It will stipulate the mental elements such as intent and knowledge as well as the material elements made up of conduct, circumstances and consequence. It will then be connected to the action by a

State, demanding that the actions taken by the individual are conducted in the course of an Act of Aggression. Therefore two definitions must be included, a definition of the Crime of Aggression and some sort of a reference to a definition of an Act of Aggression. This is the way that both the Co-ordinator's 2002 Discussion Paper and the 2007 Discussion Paper by the Chairman of the Working Group were constructed.

In this chapter, the question on the conditions will not be further elaborated and all personal standpoints will be based on the assumption that the ICC has full power to decide what constitutes an Act of Aggression. I find that anything but a general non-exhaustive definition of the Act of Aggression would be redundant if the SC determined on the question and therefore several points in the following discussion would not be of any interest. The SC itself decides what it considers being the Act of Aggression and it would not be obliged to follow a definition of the actual Act of Aggression elaborated by another organ.

I favour a generic *definition for the Crime of Aggression*. However, I find the question on the differentiated or the monistic approach more difficult to answer. The monistic approach does have two positive aspects. Firstly, it would facilitate consensus on the actual acts because there would only be two ways of conducting the crime by "ordering or participating". Secondly, the reference in Article 25 paragraph 3 to attempted acts would not be left without reference, because all of paragraph 3 would be excluded from the applicability. These two reasons do not seem convincing enough. The differentiated approach in fact offers a more difficult drafting process because there has to be consensus on the terms that should identify the conduct of the crime. From there on the reference to Article 25 and the different participation forms would however be a better choice because, as has been alleged, there are forms of participation that the monistic term "participating" cannot cover.

The other crimes in the Statute are made up of a generic definition combined with an enumerative differentiated approach. In order to ensure conformity it would therefore probably be better to take the same approach concerning the Crime of Aggression. It is however so, that the Crime of Aggression is different since the actual crime has been preceded by a State act. The definition for the crime itself will not enumerate the different course of actions that constitute the crime. That will instead be done in the definition for the Act of Aggression. The definition for the crime will list the different conduct forms, either through the differentiated approach or through the monistic approach.

When discussing the Crime of Aggression and the definition of the actual crime there is one element that everybody seems to agree on, the Crime of Aggression is a leadership crime. It can only be conducted by individuals in a position of high military or political leadership who has a possibility to influence the organization and planning of the attack constituting aggression. The crime can only be perpetrated by those who have a decision-making power within a State. This view is supported by all States and has a firm base in customary law as well as the precedent IMT and IMTFE judgements, even though there were such discussions at the New York 2007 meeting. The leadership requirement is quite possibly a

circumstance element, but could maybe be one of conduct as one makes a choice to be in a leading position.

Criticism[272] as to the limited group of perpetrators is valid, but including non-state actors is definitely beyond the scope of developments in international law. Today there are multiple threats as to the peace and security by non-state entities. In order to achieve the deterrent effect that is hoped to be a product one should include such actors as well. I believe that the reluctance to do so lies in the principle that only those who can affect the come into being of international law can be bound by it. However, the other core crimes can be perpetrated by individuals without connection to the State. The current position is therefore out of line. It is definitely surprising that States did not want to include that group of perpetrators, since it would not have affected State leaders. One reason could be that attacks such as those on September 11 were hard to imagine in 1998.

Returning to the question indicated above. What actions should constitute the Crime of Aggression? Several different proposals have been made throughout the years. One refers to customary law and the prohibition of the planning, preparation, initiation or waging of a war of aggression as provided for in the Nuremberg Charter (Proposed and supported by the UK and Russia[273]). A second option is a general definition, based on the use of armed forced against the sovereignty, territorial integrity or political independence of a State in violation of the UN Charter (Proposed and supported by Denmark, Greece, Finland, Cameroon, Portugal and Colombia[274]). A third proposal aims at a general definition and an inclusion of the non-exhaustive list of acts found in Resolution 3314 (Proposed by Egypt, Italy and a group of Arab countries[275]). A fourth proposal was made by Germany, it aimed at linking the commission of a crime of aggression to the circumstance that the armed attack by a State had the object of military occupation or annexation of the territory of another State. This proposal however only covered the most obvious cases of aggression, and the fact is that many attacks today have other objectives.[276] At the moment, all of these proposals have been more or less merged into one. The 2002 Discussion Paper contained an option, which limited the scope of application. The option held that the only acts that were illegal were those that either amounted to a war of aggression or had a certain object or result. That option is still in the definition, but those two situations are not exhaustive.

For reasons already indicated, I believe that it is of outmost importance that the definition of the crime is free from "qualifiers" like the terms "flagrant" or "manifest" as well as limitations of a certain object or result of the act. Fortunately, it seems that at least the latter of these concerns are shared with the majority of the negotiators in the SWGCA.[277]

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[272] Schuster, *Supra* note 74, p. 23

[273] PCNICC/1999/DP.12

[274] PCNICC/1999/DP.13 and the same proposal with an explanatory note by Greece in: PCNICC/2000/WGCA/D.P.5

[275] Proposal by Egypt and Italy in: A/AC.249/1997/WG1/DP.6, and proposal by a group of Arab States in: A/CONF.183/C.1/L.56

[276] Dascalopoulou-Livada, *Supra* note 163, p. 186

[277] Kindly refer to Chapter 4.3.1 for a more extensive discussion

As to the *definition for the Act of Aggression*, I prefer the option of referring to Resolution 3314 as a whole or referring or reproducing the text of Articles 1, 3 and 4. The fact that an enumerative non-exhaustive list (crimes against humanity) already exists in the ICC Statute has not met objections in regard to the principle of legality. States might simply be more reluctant to use non-exhaustive lists when it is realized that the Crime of Aggression will affect the high leaders of the States to a larger extent than the other crimes in the Rome Statute do. I find that it should stand clear to anyone engaging in the use of force that there are only three situations in which use of force is allowed. All other situations are, as has been mentioned above, to controversial to exist as *opinio juris* in international law. As important as it is to have clearly defined provisions in international criminal law, this is clear; all use of force, except as provided for in the UN Charter or when an invitation by the territorial State exists, is prohibited

Opinions have been raised that an enumerative exhaustive list would facilitate consensus on the definition[278], since States would feel that they then had greater influence on the Courts future judgements. On the other hand, as mentioned, it would probably also be a more difficult process leading up to the consensus. Several concerns towards using Resolution 3314 for the definition of the Act of Aggression have also been made, by those who allege that it was once adopted in regard to State responsibility.[279] The current Working Group has also supported this view.[280]

I am not quite sure that I see the problem, Resolution 3314 would not, in any way, be used to define the Crime of Aggression, but only the Act of Aggression. Regardless of if it is decided that Resolution 3314 should be used as a whole or in parts, there is a need for conformity between the Act of Aggression that can entail State responsibility in the ICJ and the Act of Aggression that can lead to an individual being prosecuted for the Crime of Aggression in the ICC.

Resolution 3314 is probably, at least in part, customary law. However, the list is not and can never be exhaustive and contain all acts that constitute aggression in customary law, it is therefore important not to limit it. Resolution 3314 was after all elaborated during the Cold War, the drafting process was, as has been mentioned, difficult and full of concessions, and many situations were left out. It does contain divergent political positions, conflicting concerns and "an agreement on phrases with no agreement as to their meaning."[281]

As the development looks, according to the 2007 Discussion Paper, there will be a generic definition coupled with either an exhaustive or a non-exhaustive list of acts, given that either the whole definition including the open-ended Article 4 will be included or just Article 1 and 3. I believe that the principle of legality will not be infringed if the list should be non-

[278] PCNICC/2000/WGCA/DP.2, para. 1
[279] Mathias, *Supra* note 163, p. 183; Müller-Schieke, *Supra* note 176, pp. 415-416
[280] Press Conference by Chairman of Working Group on Crime of Aggression on 31 January 2007, http://www.un.org/News/briefings/ docs/2007/070131_ Wenaweser.doc.htm, last accessed on 9 June 2007
[281] Stone, *Supra* note 177, p. 243, italicised in original

exhaustive. Courts in domestic criminal systems have always had the possibility to determine more specifically, which the acts are that can constitute a certain crime. I am inclined to believe that the sudden interest in the specificity of the crime has its roots in a will by States to influence and impair the Courts freedom of action.

The generally accepted view is that the prohibition of the use of force against the "territorial integrity" and "political independence" of a State in the UN Charter covers any possible kind of trans-border use of armed force, or any use of force interfering with the territorial or political independence of a State (most wars today are not conducted in the way that there is an actual crossing of borders by the attacking State), and there is no point in restricting the scope of the prohibition of the use of force.[282]

Whether the use of force affects the "territorial integrity" or "political independence" is in reality not a matter of importance since the phrase "or in any manner inconsistent with the Purposes of the United Nations" is a sort of catch-all-clause. The most important Purpose of the UN is found in Article 1(1) of the Charter, it reads;

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression and other breaches of the peace.

Accordingly, any use of force that jeopardizes peace is prohibited, and that is almost all use of armed force. There is therefore no restriction as to the prohibition of the use of force. Read in conjunction with Article 2(3), which is inseparable with 2(4), will the above conclusion, if not found persuasive on its own, be even more convincing.

For example, inclusion of bombardment by the armed forces of a State against the territory of another State in the definition of the Crime of Aggression has been a matter of controversy in the negotiations. A generic and enumerative exhaustive or non-exhaustive definition, as the one most likely to come into being, will include that act in the definition of the Crime of Aggression. Should there however be a change and option 2 of the 2002 Discussion Paper comes into question again, then those acts would not be criminal since they might not have the result or object of establishing a military occupation or an annexation of the State, or parts of it. It seems as if most States prefer not to include the purpose or object in the definition, and that is certainly well.[283] Anything else would be highly unfortunate, not to say incompatible with the intent behind the creation of the ICC. What is considered an Act of Aggression should also be a Crime of Aggression if the mental (intentionally and knowingly) and material (for example: in a position to effectively exercise control) elements are fulfilled and no grounds for exclusion of responsibility can be found.

It might seem irrational, since most States have signed the UN Charter and therefore have to abide by Article 2(4), but States are terrified of admitting that they are never allowed to use armed force. Certain acts are seen as being so insignificant that they cannot possibly constitute an Act of

[282] Brownlie, *Supra* note 9, p. 267
[283] ICC-ASP/5/SWGCA/INF.1, p. 7, paras. A 25-27

Aggression. This is in some cases true. I believe that in order not to cause unrealistic situations, is a reference to an act *de minimis* needed, there are certainly cases where mistakes are made and States can solve a controversy without legal proceedings. Nevertheless, the UN Charter prohibits all use of armed force and there is little point in trying to withhold the prohibition and defining a breach of it as a crime, unless all cases of armed use of force also are also criminal. A determination of what constitutes an Act of Aggression will always take account of all issues and circumstances surrounding the use of force. An act that is seen as trivial, will regardless of which organ that determines the occurrence of the act, certainly not be prosecuted as a Crime of Aggression in the ICC. Criminalizing only a war of aggression is however not in line with the developments. The ICJ pronounced upon the question in the *Corfu Channel* case and rejected the UK's argument that the unauthorized mine-sweeping in Albania's territorial waters did not threaten the territorial integrity or political independence of Albania because it was (a) undertaken for the purpose of securing possession of evidence that the UK wanted to submit to the Court and (b) the action was of short duration. The Court said:

> The Court cannot accept such a line of defence. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organisation, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States.[284]

[284] *Corfu Channel* case, p. 35

7 Discussion

The first question that I posed in the introduction has been thoroughly dissected in the previous three chapters, and it is difficult to summarize the findings concerning that question in just a few lines. I believe that the best solution would be to draft the definition for the Crime of Aggression in a general way and quite possibly in connection to a differentiated approach. The differentiated approach offers a more challenging drafting process than the monistic approach; on the other hand, it is probably the least controversial question that States need to agree on. The differentiated approach offers a more detailed list of forms of participation, so that the possibility of accused person to pass through the net is smaller. I am opposed to so-called qualifiers like the wordings “flagrant” and ”manifest”. I also find the term “war of aggression” too restrictive and I believe that the object or result of an Act of Aggression is completely redundant. I am glad to find that this view is shared by most States.

As to the definition of the Act of Aggression, I do not find any reasons convincing enough not to use Resolution 3314 in its entirety, or at least in parts. In connection to that assertion it should be mentioned how important it is to keep an open-ended approach to the enumerative list in resolution 3314. It is imperative that the ICC (or for that sake the SC) is not limited when deciding what constitutes an Act of Aggression. Assertions that a non-exhaustive list would infringe on the principle of specificity of the crime cannot be accepted. As has been mentioned, open-ended lists are not uncommon in domestic criminal law, and such a list already occurs in the Rome Statute itself.

In relation to the role of the SC in the ICC, I have made my mind clear that I believe it to be against human rights as well as other well-established principles of international law if the SC would be the body to determine the existence of an Act of Aggression. Unfortunately, I also believe it difficult not to take account of the SC. The permanent members are simply to powerful. If their will is not taken notice of, I believe that they will take “revenge” in other ways. The question is, if smaller States will dare to stand up to the super powers. If the SC will be the determining body, it is important that the veto does not block the ICC. If the SC cannot determine that an Act of Aggression has occurred, be it a result of veto powers or a simple refuse to deal with the issue, the ICC must have full possibility to decide on the question itself. A failure by the SC should not and cannot limit the Court’s possibility of action. When the SC manages to determine the occurrence of an Act of Aggression, it is nevertheless also important that the ICC’s possibility to examine that conclusion is not impaired. Should the situation be that the ICC does not have such power, it can only be concluded that an exclusion of the Crime of Aggression from the ICC’s jurisdiction is the only possibility. The inclusion of the crime cannot be at the cost of the individual’s human rights as to due process.

The Rome Conference tried to ignore politics by allowing Phillipe Kirsch, Chair of the Committee as a Whole and former Chair of the Like-Minded-Group, to handle all controversial issues personally and then in the

last hour present the proposals to the Conference. The US strongly opposed Kirsch's solutions and forced the proposal to a vote. It had been hoped that the proposals would be adopted by consensus, but politics made that impossible. Instead, a vote was necessary. We know that this vote allowed for the adoption of the Rome Statute, but we also know that it was not the end. The result of the ignorance might be that the procedures around the Court do not allow for politics and that it therefore is weakened, because all States do not favour or feel content about certain decisions.

On the other hand, the Statute was drafted to attract the maximum number of States, as well as the powerful States. The most controversial questions were left out.[285] I would say that the Statute is just on the border between being too rigorous for States to accept and having too many shortcomings for international law specialists to respect. In reality it is difficult to point to any international document, which has not been criticized on several points.

Evidently, in international law, law and politics cannot be separated. There is no common moral code among different States and therefore politics are inevitably needed. It is also only through political procedure that differences can be negotiated, the ICC is itself a proof of that. The different States managed to settle themselves into three groups and they merged their ideas into three different schools of thought. Through bargaining and compromises one solution, the ICC and its Statute emerged. It is therefore dangerous to treat all the rules that were the product of the negotiations in Rome as universal moral standards. They were all but that, but at least they were agreed on, and from now on, they govern State leaders in their international relations

The work and efforts that in the end led to the Rome Statute were all but easy. Every new treaty, convention and agreement that has seen daylight in the international law field has done so because of countless hours of work and compromises. Legal rules cannot be forced through by international lawyers; if they were, they would not get any effectiveness. States need to feel that they are part of the procedure in order to recognize rules that they are bound by in their international relations.

It is extremely difficult to predict the outcome of an adoption of a definition for the Crime of Aggression. As mentioned, I am afraid that too much influence by the SC might make the ICC toothless, without due attention to due process. On the other hand, if legal experts push through rules without recognition among States, then the ICC will most definitely not be effective, because States will look upon it as unrighteous and illegitimate.

Therefore, in reality all strictly legal views on the definition of the Crime of Aggression that are being expressed above by the present author, and others, are of little or no significance. They can certainly influence State negotiators but in the end, politics will be the only way to reach a definition. As much as we would want the situation to be different, law and politics cannot be separated. It may be that they would not exist without each other. All developments in this field have taken long time and difficult

[285] Smith, *Supra* note 143, p. 182

negotiations. Consensus or near consensus will be the only possible solution. It is likely that such a consensus agreement would be much like Resolution 3314, in which differences were merely codified. At least this time there is a court that can try to clarify discrepancies and uncertainties.

It is a changing world that we are living in, and we have scarcely criminalized actions by State leaders before new questions come into being. Will the jurisdiction by the ICC ever be able to reach non-state actors such as Osama Bin-Laden and his likes? Is a true hearted humanitarian intervention really morally defensible to prosecute? International law is a constantly evolving concept, which will probably never be finalized.

Supplement A

United Nations PCNICC/2002/WGCA/RT.1/Rev.2

Preparatory Commission for the International Criminal Court

11 July 2002
Original: English

Working Group on the Crime of Aggression
New York, 1-12 July 2002

Discussion paper proposed by the Coordinator

I. Definition of the crime of aggression and conditions for the exercise of jurisdiction

1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.
Option 1: Add "such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof".
Option 2: Add "and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof".
Option 3: Neither of the above.

2. For the purpose of paragraph 1, "act of aggression" means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, which is determined to have been committed by the State concerned,
Option 1: Add "in accordance with paragraphs 4 and 5".
Option 2: Add "subject to a prior determination by the Security Council of the United Nations".

3. The provisions of articles 25, paragraph 3, 28 and 33 of the Statute do not apply to the crime of aggression.

4. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court so that the Security Council may take action, as appropriate:
Option 1: under Article 39 of the Charter of the United Nations.
Option 2: in accordance with the relevant provisions of the Charter of the United Nations.

5. Where the Security Council does not make a determination as to the existence

of an act of aggression by a State:
Variant (a) or invoke article 16 of the Statute within six months from the date of notification.

Variant (b) [Remove variant a.]

Option 1: the Court may proceed with the case.
Option 2: the Court shall dismiss the case.
Option 3: the Court shall, with due regard to the provisions of Articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make a recommendation within [12] months. In the absence of such a recommendation, the Court may proceed with the case.
Option 4: the Court may request
Variant (a) the General Assembly
Variant (b) the Security Council, acting on the vote of any nine members,
to seek an advisory opinion from the International Court of Justice, in accordance with Article 96 of the Charter and Article 65 of the Statute of the International Court, on the legal question of whether or not an act of aggression has been committed by the State concerned. The Court may proceed with the case if the International Court of Justice gives an advisory opinion that an act of aggression has been committed by the State concerned.
Option 5: the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.

II. Elements of the crime of aggression (as defined in the Rome Statute of the International Criminal Court)*

Precondition
In addition to the general preconditions contained in article 12 of the present Statute, it is a precondition that an appropriate organ[1] has determined the existence of the act of aggression required by element 5 of the following Elements.
* The elements in part II are drawn from a proposal by Samoa and were not thoroughly discussed.
[1] See options 1 and 2 of paragraph 2 of part I. The right of the accused should be considered in connection with this precondition.

Elements

1: The perpetrator was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression as defined in element 5 of these Elements.

2: The perpetrator was knowingly in that position.

3: The perpetrator ordered or participated actively in the planning, preparation or execution of the act of aggression.

4: The perpetrator committed element 3 with intent and knowledge.

5: An “act of aggression”, that is to say, an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, was committed by a State.

6: The perpetrator knew that the actions of the State amounted to an act of aggression.

7: The act of aggression, by its character, gravity and scale, constituted a flagrant violation of the Charter of the United Nations,

Option 1: Add “such as a war of aggression or an aggression which had the object or result of establishing a military occupation of, or annexing the territory of another State or part thereof”.
Option 2: Add “and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof”.
Option 3: Neither of the above.
8: The perpetrator had intent and knowledge with respect to element 7.

Note:
Elements 2, 4, 6 and 8 are included out of an abundance of caution. The “default rule” of article 30 of the Statute would supply them if nothing were said. The dogmatic requirement of some legal systems that there be both intent and knowledge is not meaningful in other systems. The drafting reflects these, perhaps insoluble, tensions.

Supplement B

The Explanatory note and the Elements (because they have not been changed since the 2002 Discussion Paper) have been left out of this reproduction.

International Criminal Court ICC-ASP/5/SWGCA/2

Assembly of States Parties

Distr.: General
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Original: English

Resumed fifth session

New York
29 January – 1 February 2007

Discussion paper proposed by the Chairman

Annex

Discussion paper on the crime of aggression proposed by the Chairman

I. Definition of the crime of aggression and conditions for the exercise of jurisdiction

Insert new article 8 bis (entitled "Crime of Aggression") into the Rome Statute: 1

Variant (a):2
1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person (leads) (directs) (organizes and/or directs) (engages in) the planning, preparation, initiation or execution of an act of aggression/armed attack

Variant (b):
1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person orders or participates actively in the planning, preparation, initiation or execution of an act of aggression/armed attack. *3*

continue under both variants:
[which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations] [such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof].

2. For the purpose of paragraph 1, "act of aggression" means an act referred to in [articles 1 and 3 of] United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.

under variant (a) above:
3. The provisions of articles 25, paragraph 3 (f), and [28] of the Statute do not apply to the crime of aggression.

under variant (b) above:
3. The provisions of articles 25, paragraph 3, and [28] of the Statute do not apply to the crime of aggression. *4*

4. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court. *5*

5. Where the Security Council does not make such a determination within [six] months after the date of notification,
Option 1: the Court may proceed with the case.
Option 2: the Court may not proceed with the case.
Option 3: the Court may, with due regard to the provisions of articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make such a determination within [12] months. In the absence of such a determination, the Court may proceed with the case.
Option 4: the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.

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1 The question as to whether the amendments are adopted under article 121, paragraph 4 or 5, requires further discussion.

2 Variant (a) reflects the "differentiated" approach, under which article 25, paragraph 3, *does* apply to the crime of aggression, with the exception of subparagraph (f). Further options for the wording of this paragraph under the differentiated approach are contained in the report of the 2006 Princeton meeting (see ICC-ASP/5/32, annex II, appendix I). Variant (b) represents the "monistic" approach, under which article 25, paragraph 3, in its entirety *does not* apply to the crime of aggression.

3 The proponents of the language "armed attack" (or alternatively "use of force") for paragraph 1 advocate, along with this formulation, also the deletion of paragraph 2 as a whole.

4 Under variant (a), which foresees that article 25, paragraph 3, *does* apply with the exception of subparagraph (f) ("attempt"), a new subparagraph could be added to article 25 which re-confirms that the forms of participation described in article 25, paragraph 3, subparagraphs (a) to (d), apply only to persons who are in a position effectively to exercise control over or to direct the political or military action of a State. It is widely agreed that article 28 is not applicable by virtue both of the essence and the nature of the crime. However, there is not yet any agreement whether or not non-applicability needs to be specified.

5 It has been suggested that paragraphs 4 and 5 should be redrafted in order to differentiate between the trigger mechanisms reflected in article 13.

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Special Working Group on the Crime of Aggression

ICC-ASP/3/SWGCA/INF.1
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ICC-ASP/4/32, Annex II.B
ICC-ASP/5/SWGCA/INF.1
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