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Finding a Solution for the
International Criminal Court –
the Crime of Aggression in
International Law

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Summary

Whether executed as full-scale war or acts short of war, acts of aggression have consistently shaped the history of humankind. Acts of aggression would not occur if it were not for the involvement of individuals. The historical development of aggression in international law has seen a shift from a regime solely focusing on the unlawfulness of the action by States, to include the unlawfulness of the involvement of individuals. The topic of this thesis is this development and the involvement of individuals in such acts, with the possibility of holding them individually criminally responsible for the crime of aggression.

Article 5 of the Rome Statute of the International Criminal Court (Rome Statute) includes the crime of aggression along with the crime of genocide, crimes against humanity and war crimes. Whereas the latter three crimes all have been gifted definitions for the purpose of the Rome Statute, the crime of aggression lacks such a definition. The Rome Statute entered into force on 1 July 2002 and the International Criminal Court (ICC) now practises its de facto jurisdiction over three of the four crimes included in its Statute. However, de facto jurisdiction over the crime of aggression is still lacking. This thesis examines the main difficulties in trying to find a feasible provision on the crime of aggression for inclusion in the Rome Statute. It does so by keeping the 2009 Review Conference in mind.

Two main difficulties are presented; the problems of finding a definition of the crime and setting out the conditions under which the ICC shall exercise jurisdiction over the crime. The work on finding a definition has focused on whether a generic or a specific approach should be applied, the latter containing either an illustrative or an exhaustive list of acts. The trend in the recent debate has been an emerging consensus developing in favour of a generic approach. Overall, the present work on a definition is developing rather encouragingly. As to the conditions for the exercise of jurisdiction, work is progressing in a far less encouraging manner. States appear to have their minds made up about whether a prior determination by another organ, like the Security Council, is necessary for the ICC to be able to exercise jurisdiction over the crime of aggression. At the core of this issue is the relationship between the ICC and the Security Council. It has been argued that the 'primary responsibility for the maintenance of international peace and security' prescribed to the Security Council by the Charter of the United Nations, indicates that it should have a role in the ICC's exercise of jurisdiction over the crime. In addition, concerns about potential infringements on the sovereignty of States have resulted in States appearing reluctant to find a provision.

As a conclusion, it is argued that States need to understand the necessity of political compromise, seeing as a perfect legal interpretation probably does not exist. The Special Working Group on the Crime of Aggression needs to continue the eloquent work being done on a definition in addition to devoting more time to the question of the conditions for the exercise of jurisdiction. Finally, the conclusion is reached that it is rather unlikely that the 2009 Review Conference will be able to adopt a provision on the crime of aggression for inclusion in the Rome Statute.

Preface

During the course of writing this thesis, several persons have been of great inspiration and help in achieving its fulfilment.

First, I would like to thank Mr. Pål Wrangle, Principal Legal Advisor of the Swedish Ministry for Foreign Affairs, Department for International Law, Human Rights and Treaty Law. The materials provided and the interesting discussions exercised on the topic have certainly been of great help.

Furthermore, I reserve an IOU to Anna Beran for being a good friend and for providing valuable support at times when the English language has seemed hard to conquer.

I would also like to express my gratitude to my supervisor, Jur. dr. Olof Beckman, for providing useful insights in our discussions.

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Björn Länsisyrjä,

Lund 30 August 2006

Abbreviations

2002 Discussion Paper	2002 Discussion Paper proposed by the Coordinator of the Preparatory Commission's Working Group on the Crime of Aggression
AD	Annual Digest and Reports of Public International Law Cases (now International Law Reports)
AJIL	American Journal of International Law
CLF	Criminal Law Forum
EJIL	European Journal of International Law
GAOR	Official Records of the General Assembly
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Rep.	Reports of the International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IICLR	Indiana International & Comparative Law Review
ILC	International Law Commission
ILC Ybk.	Yearbook of the International Law Commission
JCSL	Journal of Conflict and Security Law
LNTS	League of Nations Treaty Series
LJIL	Leiden Journal of International Law
NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law
PCIJ	Permanent Court of International Justice
Resolution 3314	UN General Assembly Resolution 3314 (XXIX), 14 December 1974.
Rome Statute	Rome Statute of the International Criminal Court.
UNTS	United Nations Treaty Series

1 Introduction

‘If the names are not correct, language is without an object. When language is without an object, no affair can be effected. When no affair can be effected, rites and music wither. When rites and music wither, punishment and penalties miss their target. When punishments and penalties miss their target, people do not know where they stand.’¹

These words uttered by Confucius some 2500 years ago, claim that things should be called by their proper name and are a suitable point of departure when discussing the crime of aggression and the International Criminal Court (ICC). History is rife with examples of heinous acts of aggression for which individuals in charge have escaped with impunity. As a firm believer in the idea that instigators of war or other acts of aggression should not escape scrutiny, the establishment of the ICC and its potential jurisdiction over the crime of aggression has been followed with close interest. The crime of aggression is included in Article 5 of the Rome Statute but still lacks a definition enabling the ICC to exercise its jurisdiction over the crime. The Review Conference to be held in 2009 will provide the first opportunity for the States Parties to agree on a complete provision and amend the Rome Statute to include it.

The opinion is often voiced that the lack of a complete provision on the crime of aggression is not such a big deal. Central to this perspective is that the ICC still has the possibility to exercise jurisdiction over genocide, crimes against humanity and war crimes. This may be true, seeing as there is a possibility that one or all of these crimes could appear parallel to the crime of aggression. However, they are *not* the same as the crime of aggression and as Confucius claimed, things should be called by their proper name. Just because the ICC could potentially hold someone responsible on account of crimes against humanity does not imply that the crime of aggression has not been committed or should go unpunished. Such a culture of impunity is neither in the best interest of justice nor desirable. Therefore, it is important not to settle for the crimes already defined for the purpose of the Rome Statute, but to examine the possibility of finding a feasible provision on the crime of aggression.

However, the view expressed by Confucius is also applicable to the problems related to finding a provision on the crime of aggression. If things should be called by their proper name, one must also be aware of what the thing consists of. Otherwise, it will be impossible to describe it, and a term such as ‘crime of aggression’ would just be a term devoid of meaning. There were extensive discussions concerning the meaning of the crime of aggression prior to, during and subsequent to the Rome Conference setting up the Rome Statute establishing the ICC. The important and interesting problem of what the crime really consists of will form an integral part of this thesis.

Furthermore, the establishment of the ICC with its potential jurisdiction over the crime of aggression signified the establishment of a new organ in a

¹ Leys, Simon, *The Analects of Confucius*, Chapter 13.3., p. 60.

world governed by the Charter of the United Nations (UN Charter) and its organs. The apparent monopoly of the Security Council on handling cases of aggression appears to be challenged by this new institution. The question of the relationship between the two organs is an interesting albeit contentious issue at the centre of much debate. An examination of the conditions under which the ICC should exercise jurisdiction over the crime of aggression, including whether there needs to be another organ involved, is therefore both interesting and highly relevant.

Finally, as icing on the cake we live in a world based upon the principle of the sovereignty of States. Just as with the Security Council, States may feel that a potential jurisdiction over the crime of aggression could amount to an infringement upon their sovereign rights. Therefore, the multitude of relevant ingredients of the crime of aggression transforms it into a highly intriguing layered 'cake' of international law, ready to be dissected.

1.1 Purpose and Delimitation

The overall purpose of this thesis is to examine the development of the crime of aggression in international law. Even though the main intention is to focus upon recent developments related to the ICC, it is felt that the inclusion of a historical background will allow for a better understanding of this field of international law. It is the aim of this thesis is to contribute to the discussion concerning the possibility of a future provision on the crime of aggression for inclusion in the Rome Statute. It will do so by examining and pinpointing the main problem areas encountered in the work conducted on the issue until present time. The aim is to produce a clear picture of the work conducted within different timeframes, divided into the work conducted prior to, during and subsequent to the Rome Conference, while keeping the 2009 Review Conference in mind. Seeing as a summary including the most recent work appears to be lacking in the present discussions on the issue, this thesis will hopefully fill that gap and work as a useful summary of the action exercised on the crime of aggression until present time. In addition, this study can potentially be seen as a status report, indicating what line of action may be necessary in the future. Therefore, the following questions will form the basis of this thesis:

- Has aggression developed into a crime of international law entailing individual criminal responsibility?
- What are the main difficulties in trying to find a feasible provision on the crime of aggression for inclusion in the Rome Statute of the International Criminal Court, in accordance with Article 5(2)?
- Is it likely, or even desirable, that the 2009 Review Conference will produce a feasible provision on the crime of aggression, i.e. where do we stand today?

Even though this thesis is devoted to the crime of aggression, i.e. the responsibility of individuals, the act of aggression by States, i.e. the responsibility of States, also needs to be considered. However, this will only be done to the extent that it is of interest to the former and will not be

discussed at length. At the centre of attention for this thesis are two main problem areas, a definition of the crime and the conditions for the exercise of jurisdiction over the crime. Other areas such as detailed elements of the crime and its relationship to the other parts of the Rome Statute might be of interest, but will only be discussed to the extent that they are of interest to the main problem areas. Finally, the intention or goal of this thesis is not to produce a draft proposal for a provision, but instead to present a recommendation on what line of work that needs to be followed.

1.2 Method and Terminology

In order to fulfil the aim of amounting to a useful summary, the majority of this thesis consists of descriptive and chronologically ordered sections covering the development on the crime of aggression in international law, including the work that has been carried out in relation to the ICC. However, analytical parts are included throughout to present a more interesting reading of the topic chosen. Even if the work on trying to find a feasible provision on the crime of aggression is largely concerned with examining international law *de lege lata*, the fact that a provision on the crime of aggression is still lacking naturally puts some of the discussion into a *de lege ferenda* perspective.

It is necessary to clarify some of the language used in this thesis. As a main rule, the term *act of aggression* is used to describe acts by a State that could result in *State responsibility* for the State in question. *The crime of aggression* is used to describe the involvement of individuals in such acts that could result in *individual criminal responsibility* for the individual concerned. Individual criminal responsibility is preferred over the commonly used term of individual accountability as the former is the term used in the Rome Statute. This terminology is used to the extent possible. However, the notion of aggression inescapably interrelates with terms such as *use of force*, as contained in Article 2(4) of the UN Charter, *crimes against peace* and *war of aggression*, used in the Nuremberg Charter and *armed attack*, appearing in Article 51 of the UN Charter. It is difficult to avoid using these terms altogether, and the reader needs to be aware of the similarity of terms existing in this field of international law.

1.3 Material

A great variety of materials has been used to produce this thesis. Primary sources such as international treaties, like the Rome Statute itself, customary international law, with General Assembly Resolutions used as indicators, and general principles of international law have all been a natural part of this thesis. However, the materials most useful to describe the topic chosen and most frequently used have been subsidiary sources. For instance judicial decisions, in particular the Nuremberg Judgment and the Nicaragua Case, and various forms of legal academic works have been central to the completion of this thesis. Concerning the legal academic works, in the form of books as well as articles, not much has been written on the development of the work on the crime of aggression in the last couple of years. A notable

exception and an interesting contribution to the present debate is an article written in 2005 by Mark S. Stein entitled ‘The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council’s Power to Determine Aggression?’.

Generally, the works of Ahmed M. Rifaat and Yoram Dinstein have been useful to put the crime of aggression into a historical context and to describe its necessary nexus with acts of aggression and individual criminal responsibility. Furthermore, Matthias Schuster’s article ‘The Rome Statute of the International Criminal Court and the Crime of Aggression: A Gordian Knot in Search of a Sword’ has been useful to highlight potential problems in trying to find a suitable provision on the crime of aggression. Whether or not one agrees with his drastic conclusion of removing the crime of aggression from the Rome Statute it is still an excellent reading for those interested in potential problems arising out of the conflict with the security mechanisms of the United Nations system.

Finally, documents from different working groups concerned with the crime of aggression and the ICC, such as the Working Group on the crime of aggression within the Preparatory Commission and the Special Working Group on the Crime of Aggression, has been frequently used. Without these sources, it would be impossible to describe how the work on the crime of aggression has progressed in recent years.

1.4 Outline

Following this introductory chapter is chapter two containing a historical background on the crime of aggression. In this chapter, the crime of aggression is put into perspective by giving a chronological summary tracing it is far back as the ideas of Aristotle. Furthermore, the concepts of State responsibility and individual criminal responsibility in relation to aggression are presented. The chapter concludes by explaining the link to the United Nations and its various organs, and by giving a brief view on the possible existence of the crime of aggression as customary international law.

The third chapter is devoted to the crime of aggression and the ICC. As a first part, the work conducted on the crime of aggression prior to the Rome Conference and the adoption of the Rome Statute is presented, including different draft proposals on an international criminal court and the work of the Preparatory Committee. Following this is a part on the work in direct relation to the Rome Conference, explaining the divergent views on whether or not the crime of aggression should be included and how the crime of aggression was finally included but not defined. The third part presents the work conducted subsequent to the Rome Conference and contains the elaborations on the crime of aggression by two different working groups established by the Preparatory Commission and the Assembly of States Parties respectively. Again, the chronological order is followed, thus the latter part of the chapter focuses on where the most recent work is heading.

States reluctant to adopting the Rome Statute, and even more so to finding a provision on the crime of aggression, often voice their concerns on issues of the sovereignty of States. Therefore, the fourth chapter focuses on the possible concerns of infringement upon the sovereignty of States. As a

result, issues such as anticipatory or pre-emptive self-defence and humanitarian intervention are examined along with the example of the United States as a State expressing concern over the sovereignty of States.

Appropriately, conclusions are presented in the fifth and final chapter. This chapter also presents some reflections on the conclusions as well as delivering a set of recommendations for future work on the crime of aggression.

2 Historical Background

When examining aggression as a concept in international law, it is central to understand that the concept is by no means an altogether new one that came into life with the Rome Statute and the establishment of the ICC. As noted by Ian Brownlie, the notion of aggression dates as far back as the early days of Greece.² This chapter aims to introduce the historical background concerning the crime of aggression. Different timeframes will be examined, beginning in the early days of Greece to arrive at a world governed by the UN Charter and the possible existence of aggression as a crime of customary international law entailing individual criminal responsibility. Along the route, the possible international responsibility arising from the occurrence of an act of aggression will be considered both from the perspective of a State and of the involvement of individuals.

2.1 The Doctrine of Aggression

Aggression derives from the occurrence of war, which has shaped the history of the world for centuries. The idea that war was something that could be unjust surfaced early on. It can be traced as far back as Aristotle (384 BC-322 BC) and his ideas of just and unjust wars, to limit the resort to war. St. Augustine (354-430) brought the doctrine of just war to the forefront of the Christian world. He proposed that war should only be allowed for punishing wrong and to restore peace. Therefore, aggression was unjust and violence had to be controlled. In addition, a war that God himself ordained was always just.³ One of the scholastics, St. Thomas Aquinas (1225-1274), developed the doctrine of just war further. In his opinion, war was justified if waged by the sovereign authority, it had just cause, i.e. punishing wrongdoers, and the belligerents had the right intentions, i.e. advancement of good, or the avoidance of evil. Similar ideas also surfaced among Muslim scholars regarding permissible and impermissible resort to war.⁴ Other efforts made at this time to limit the waging of war included non-aggression pacts and other collective security arrangements between States.⁵

After a period where European States had been plagued by the violence of religious wars came the treaties establishing the Peace of Westphalia in 1648. The system set up through the treaties meant that States from now on were to be seen as sovereign and equal, excluding the possibility of one State judging on the just cause of another State. According to Malcolm N. Shaw, this resulted in that 'the concept of the just war disappeared from international law as such'.⁶ In fact, up until and during the beginning of the

² Brownlie, Ian, *International Law and the Use of Force by States*, pp. 3-4.

³ Ibid, p.5; Bassiouni M. Cherif and Ferencz Benjamin B, 'The Crime Against Peace' in Bassiouni, M. Cherif (ed.), *International Criminal Law 1. Crimes*, p. 313.

⁴ Brownlie, Ian, *International Law and the Use of Force by States*, p. 6.

⁵ Ntanda Nsereko Daniel D., 'Aggression under the Rome Statute of the International Criminal Court', 71 NJIL (2002) pp. 497-498.

⁶ Shaw, Malcolm N., *International Law*, pp. 1014-1015.

twentieth century, there was a practise of war being pursued as ‘the continuation of diplomacy by other means’.⁷

World War I and its atrocious effects marked a significant change. During the Peace Conference in Versailles, the sovereign right of States to wage war was questioned. A central part of the final peace treaty was the creation of the League of Nations. The 1919 Covenant of the League of Nations was based on a collective security system for the maintenance of peace. Article 10 states that the members of the League are to respect and preserve the territorial and political integrity of all members from external aggression. However, the Covenant was mainly concerned with banning war while leaving the importance of aggression not entirely clear.⁸ In the opinion of Ahmed M. Rifaat, the Covenant made the notion of aggression equal to that of aggressive war, casting aside that the notion of ‘aggression’ in reality is wider than that of ‘war’. Thus, Article 10 can hardly be interpreted as a legal prohibition of the concept of aggression, since other provisions in the Covenant allow recourse to war under certain circumstances.⁹

The discussion concerning war and aggression continued throughout the period between the two World Wars. In 1928, the General Treaty for the Renunciation of War as an Instrument of National Policy was signed, better known as the *Kellogg-Briand Pact*.¹⁰ It condemned recourse to war and renounced it as a legitimate instrument of national policy. No definition of aggression was included in the pact nor did it contain any sanctions in case of a breach.¹¹ Yet, it would come to play a significant role during the Nuremberg trials.¹² At a disarmament conference in 1933, the Soviet Union produced a proposal aimed at defining aggression by enumerating certain acts amounting to aggression.¹³ The proposal sparked interest in the League of Nations and its Committee on Security Questions presented a similar draft. However, definitional problems were encountered and with the outbreak of World War II and the events leading up to it, further elaborations were put on hold until the end of the war.¹⁴

⁷ von Clausewitz, cited in Bassiouni, M. Cherif, ‘Historical developments of Prosecuting Crimes Against Peace’ in Bassiouni, M. Cherif (ed.), *International Criminal Law 3. Enforcement*, p. 25.

⁸ Bassiouni M. Cherif and Ferencz Benjamin B., ‘The Crime Against Peace’ in Bassiouni, M. Cherif (ed.) *International Criminal Law 1. Crimes*, p. 316; 1919 Covenant of the League of Nations *reprinted in* Ferencz, Benjamin B., *Defining International Aggression, The Search for World Peace vol. 1*, pp. 61-69.

⁹ Rifaat, Ahmed M., *International Aggression: A Study of the Legal Concept – Its Development and Definition in International Law*, pp. 46-49.

¹⁰ 1928 General Treaty for the Renunciation of War as an Instrument of National Policy, 94 LNTS 57, *reprinted in* Ferencz, Benjamin B., *Defining International Aggression, The Search for World Peace vol. 1*, pp. 190-193.

¹¹ Bassiouni M. Cherif and Ferencz Benjamin B., ‘The Crime Against Peace’ in Bassiouni, M. Cherif (ed.) *International Criminal Law 1. Crimes*, p. 317.

¹² *See infra* chapter 2.2.2.

¹³ *Reprinted in* Ferencz, Benjamin B., *Defining International Aggression, The Search for World Peace vol. 1*, pp. 199-204.

¹⁴ Bassiouni M. Cherif and Ferencz Benjamin B., ‘The Crime Against Peace’ in Bassiouni, M. Cherif (ed.) *International Criminal Law 1. Crimes*, p. 318.

The end of World War II propelled the adoption of the Charter of the United Nations and with it, the relevance of the Kellogg-Briand Pact of 1928 diminished.¹⁵ Article 2(4) of the UN Charter stipulates:

‘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 matter inconsistent with the Purposes of the United Nations.’¹⁶

The Charter differs from the Kellogg-Briand Pact and earlier discussions in that it prohibits the ‘threat or use of force’, unlike ‘aggression’ or ‘war’ which had previously been the main focal points. Despite this change in terminology the acts thought of were basically the same, namely to prohibit the essence of war. However, the change was produced to avoid technical discussions in a specific situation of whether or not a State was at war.¹⁷ The term ‘aggression’ appears in Article 39 of the UN Charter, which leaves it to the Security Council to ‘determine the existence of any threat to the peace, or act of aggression’ and to take appropriate actions.¹⁸ However, there is no definition concerning precisely what is included in the term ‘act of aggression’. This was done consciously because of a fear that a definition would be unable to cover every possible case of aggression, keeping in mind the development of modern warfare at the time. In any case, the drafters felt it was best to leave the responsibility to the Security Council to decide what had happened in a particular case and to decide what actions to take.¹⁹

Besides action authorised by the Security Council, the only exception to the prohibition on the use of force in Article 2(4) is the right States have to self-defence. Article 51 of the UN Charter allows for ‘individual or collective self-defense if an armed attack occurs..., until the Security Council has taken measures to maintain international peace and security’.²⁰

Clearly, the Security Council has been vested with the responsibility to maintain international peace and security in the world order governed by the UN Charter. This amounts to a shift from a system focused on the sovereignty of States and their right to wage war to a system where collective security is at the forefront. The role of aggression within the UN-system and its relationship to the ICC will be discussed at length in this thesis, but first we will look into the notion of aggression in terms of the international responsibility of both States and individuals.

¹⁵ For a contrary opinion see Brownlie, Ian, *International Law and the Use of Force by States*, pp. 75, 91-92, 113-116, who advocates the Pact as a ‘parallel and complement of the Charter’ in limiting resort to force by States.

¹⁶ Charter of the United Nations, 26 June 1945, UNTS XVI, Article 2(4).

¹⁷ Bassiouni M. Cherif and Ferencz Benjamin B, ‘The Crime Against Peace’ in Bassiouni, M. Cherif (ed.) *International Criminal Law I. Crimes*, pp. 320-322.

¹⁸ Charter of the United Nations, 26 June 1945, UNTS XVI, Article 39.

¹⁹ Bassiouni M. Cherif and Ferencz Benjamin B, ‘The Crime Against Peace’ in Bassiouni, M. Cherif (ed.) *International Criminal Law I. Crimes*, p. 322; Kittichaisaree, Kriangsak, *International Criminal Law*, p. 211.

²⁰ Charter of the United Nations, 26 June 1945, UNTS XVI, Article 51.

2.2 International Responsibility

Following World War II, the Allied forces commenced trials in Nuremberg and Tokyo to try war criminals. Among the crimes defendants had to face was aggression, as a part of 'crimes against peace'. A precedent for individual criminal responsibility for the crime of aggression was thereby established. However, aggression undeniably originates from acts of State in that it is perpetrated by and in the name of a State against another State. Therefore, when discussing aggression as a crime in international law it is necessary to examine both the responsibility of States as well as that of individuals.

2.2.1 State Responsibility

That every internationally wrongful act of a State is followed by State responsibility for that State is a widely accepted principle of international law.²¹ Such an act can be aggression violating the prohibition on the use of force as set out in Article 2(4) of the UN Charter. The content of the international responsibility of a State for violating international obligations involves cessation, non-repetition and reparation of the wrongs committed.²²

In conjunction with this delictual responsibility of States, the idea of attributing international criminal responsibility to States has surfaced. Considerable work and discussion in this area has taken place within the International Law Commission (ILC) and it seems appropriate that their work is the main source for this discussion. While working on the Draft Articles on State Responsibility, the ILC decided to make a distinction between 'international crimes' and 'international delicts'. Robert Ago, Special Rapporteur, has explained the distinction as one between 'two completely different regimes' of State responsibility. The former would apply to the case where a State breaches an obligation of fundamental value to the international community as a whole, such as acts of aggression, constituting an international crime. The latter would apply to less serious breaches of obligations not of a fundamental value, branded 'simple breaches'.²³

The ILC followed this line of thought in its 1996 Draft Articles on State Responsibility. Article 19(2) defines an international crime of a State as 'An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized by that

²¹ *Chorzów Factory Case (Indemnity)*, Merits PCIJ Series A, No. 17 p. 29; *Corfu Channel Case*, Merits ICJ Rep. (1949) pp. 12-23; see also Article 1 of the ILC Draft Articles on Responsibility of States for internationally wrongful acts adopted by the ILC at its fifty-third session (2001).

²² Articles 30-31 of the 2001 ILC Draft; see also for cessation: *Rainbow Warrior Case* 82 ILR, p. 573; non-repetition: *LaGrand Case*, ICJ Rep. (2001), pp. 508-514; reparation: *Chorzów Factory Case (Indemnity)*, Merits PCIJ Series A, No. 17, pp. 47-48 and *Gabčíkovo-Nagymaros Project Case*, ICJ Rep. (1997), pp. 80-81.

²³ Ago, Robert, 'Fifth Report on State Responsibility', 1976 ILC Ybk. Vol. II Part 1, p. 26, para. 80.

community as a whole'.²⁴ To avoid confusion on terminology, the ILC commented on the expression 'international crime' as used in Article 19 in relation to similar expressions found in other international instruments such as 'crime under international law' and 'crimes against peace'. The latter expressions could be found in instruments requiring States to punish certain heinous individual crimes and might occur in conjunction with the international crime of a State. However, the attribution of an international crime to a State was explained to differ from the incrimination of individuals for connected actions. The ILC held that not only was the obligation to punish certain individual actions different from international responsibility applicable to a State for international crimes, but also that it was not the sole form of responsibility.²⁵ Ian Brownlie has noted a number of penal sanctions that have been suggested for inclusion in the concept of the criminal responsibility of States, such as indemnities, military occupation, demilitarization, pacific blockade and exclusion from the international society of States.²⁶

Although the 1996 ILC Draft on State Responsibility does not allow for use of force or military occupation against a State committing an international crime, it contains far-reaching Articles on duties of reparation and satisfaction.²⁷ A fair conclusion to draw from the work and discussion within the ILC up until and including the 1996 Draft is that the crimes of States and the connected criminal responsibility of States was seen as a different thing in international law from the criminal responsibility of individuals. This holds true for both the subject matter and the nature of that responsibility.²⁸ Nonetheless, the inclusion of international crimes and the criminal responsibility of States turned out to be highly controversial and criticised.²⁹ The international crimes of States were therefore excluded, when the ILC made the final adjustments of the Draft Articles in the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts.³⁰ Instead, the spotlight was turned to the consequences resulting from breaches of obligations *erga omnes* and of peremptory norms, i.e. *jus cogens* norms.³¹

Today, the discussion of whether States can entail criminal responsibility seems to have shifted from being a discussion within the ILC into more of an academic debate. This debate, interesting as it may be, is not

²⁴ 1996 ILC Draft Articles on State Responsibility, 1996 ILC Ybk. Vol. II Part 2, pp. 58-65, Draft Article 19 was adopted by the ILC in 1976, 1976 ILC Ybk. Vol. I, p. 253.

²⁵ 1976 ILC Ybk. Vol. II Part 2, p. 119.

²⁶ Brownlie, Ian, *International Law and the Use of Force by States*, pp. 150-151.

²⁷ 1996 ILC Draft Articles on State Responsibility, 1996 ILC Ybk. Vol. II Part 2, pp. 58-73, Articles 41-53.

²⁸ Hogan-Doran, Justin and van Ginkel, Bibi T., 'Aggression as a Crime under International Law and the Prosecution of Individuals by the Proposed International Criminal Court', 43 *NILR* (1996), p. 324.

²⁹ Shaw, Malcolm N., *International Law*, pp. 720-721; Dinstein, Yoram, *War, Aggression and Self-defence*, pp. 110-111.

³⁰ 2001 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its fifty-third session (2001), text including commentaries appears in UN GAOR 56th Sess. Supp. No. 10 (A/56/10), pp. 43-365.

³¹ See *ibid*, p. 283, where the ILC mentions that the prohibition of aggression should be regarded as a peremptory norm.

of great relevance to this thesis as here the main focus is on the question of individual criminal responsibility for the crime of aggression within the auspices of the ICC. To sum it up, it is difficult to see how any criminal responsibility of States can exist, since international crimes were excluded from the 2001 ILC Draft and clearly, there is no *opino juris* in international law claiming that it exists. Finally, that leaves us to draw the conclusion that an act of aggression can entail State responsibility in the delictual sense but not in the criminal sense. Let the focus now be turned to the criminal responsibility of individuals.

2.2.2 Individual Criminal Responsibility

Prior to the end of World War II, the question of holding individuals responsible for crimes of war or aggression did not receive much attention as the focus was mainly on the action and possible responsibility of States. In 1919, with World War I just ended came the Treaty of Versailles, and it can be seen as the first international instrument indicating the principle of individual criminal responsibility for the crime of aggression. Article 227 stipulated that Kaiser Wilhelm II, the former German emperor, awaited prosecution for the ‘supreme offense against international morality and the sanctity of treaties’, related to German invasion of Belgium and ‘little Luxembourg’.³² Aggression had never before been declared an international crime, and it was not in conformity with the spirit of the time, where war as an instrument of national policy enjoyed permission.³³

Besides the fact that jurisdiction was based on dubious principles such as ‘international morality’, questions were raised concerning the principle of *nulla poene, nullum crimen sine lege*. As individuals had never previously been held criminally responsible for war or acts of aggression, the prosecution of the Kaiser was seen as the imposition of *ex post facto* law and therefore impermissible. In any event, as the Kaiser received asylum in the Netherlands, refusing to extradite him, no tribunal was held and the Kaiser did not have to face charges.³⁴ To clarify things it might be appropriate to mention that the principle of individual criminal responsibility for acts resembling aggression had occurred before³⁵, but the Treaty of Versailles was the first time that an international instrument set forth the principle.

³² Ferencz, Benjamin B., ‘The Crime of Aggression’ in Kirk McDonald, Gabrielle and Swaak-Goldman, Olivia (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Vol. 1: Commentary*, pp. 38-39.

³³ Rifaat, Ahmed M., *International Aggression: A Study of the Legal Concept – Its Development and Definition in International Law*, p. 35.

³⁴ Ibid; Ferencz, Benjamin B., ‘The Crime of Aggression’ in Kirk McDonald, Gabrielle and Swaak-Goldman, Olivia (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Vol. 1: Commentary*, p 39.

³⁵ *History of the United Nations War Crimes Commission, and the Development of the Law of War*, p. 242 n. 1, citing the examples of Conrad V, found guilty of initiation of an unjust war and executed in Naples 1268, and on an international scale, a war crimes trial conducted by the Holy Roman Empire in 1474 in which Peter von Hagenbach faced charges for violations of the laws of God and humanity.

The atrocities of World War II signalled the next step in establishing individual criminal responsibility for the crime of aggression. The idea of holding individual authors responsible for their involvement in World War II originates from the Moscow Declaration of 1943. In it, the Allies declared their will to try all German war criminals for their part in the atrocities.³⁶ Once again, questions were raised concerning the principle of *nulla poene, nullum crimen sine lege*. The illegality of acts amounting to aggression had been established by previous international instruments such as the Kellogg-Briand Pact of 1928, and was not the primary subject of the dispute. Rather, the discussion focused on whether such acts were considered a crime in existing international law prior to the outbreak of World War II, and whether individuals could be held criminally responsible for their involvement.³⁷ The Kellogg-Briand Pact confirmed aggression as illegal acts of a State, but failed to mention anything on individual criminal responsibility. The Allied nations expressed differing views concerning whether international law allowed them to try individuals for the crime of aggression. Robert H. Jackson, an associate justice of the U.S. Supreme Court who would later be chief prosecutor at Nuremberg, argued that common sense of justice must prevail over sterile legalism.³⁸ Others expressed the view that condemnation in peace-treaties were the appropriate way, and that it was better to develop penal sanctions for the future. Concerned with if German actions could be described as crimes under international law, British representatives went so far as to suggest that 'execution without trial is the preferable course'.³⁹ The Soviet Union insisted on an ad hoc tribunal limited to the European Axis leaders, rather than a universal declaration for future application.⁴⁰ It seems fair to believe that Soviet leaders suggested this out of concern for their own impunity.

Work on a suitable way of trying German war criminals continued as representatives of the Allies in 1945 held an International Conference on Military Trials in London. The problem of *ex post facto law* continued to be a significant influence during discussions and one of the major issues dealt with was trying to find a definition for the crime of aggression within the broader concept of crimes against peace. The question of whether individuals could be held criminally responsible for the crime was a logical part of the discussions. An American initiative to include a definition of aggression in the Charter of the Tribunal met with disapproval from the Soviet and French representatives.⁴¹ Finally, on 8 August 1945, the Allies, Great Britain, France, the Soviet Union and the United States, reached a

³⁶ Rifaat, Ahmed M., *International Aggression: A Study of the Legal Concept – Its Development and Definition in International Law*, pp. 138-139.

³⁷ *Ibid*, p. 139.

³⁸ Bassiouni M. Cherif and Ferencz Benjamin B., 'The Crime Against Peace' in Bassiouni, M. Cherif (ed.), *International Criminal Law 1. Crimes*, p. 319.

³⁹ *Ibid*; Ferencz, Benjamin B., 'The Crime of Aggression' in Kirk McDonald, Gabrielle and Swaak-Goldman, Olivia (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Vol. 1: Commentary*, p 42.

⁴⁰ Rifaat, Ahmed M., *International Aggression: A Study of the Legal Concept – Its Development and Definition in International Law*, p. 143.

⁴¹ *Ibid*, pp. 143-149.

unified agreement on the establishment of an ‘International Military Tribunal’ (Nuremberg Tribunal) for the trial of the German Major War Criminals.⁴²

The Charter of the Nuremberg Tribunal, commonly referred to as the Nuremberg Charter, was annexed to the London agreement, setting out the constitution, jurisdiction and functioning of the Tribunal.⁴³ Article 6 gave the Tribunal jurisdiction over crimes against peace, war crimes and crimes against humanity. Paragraph (a) of the Article defines crimes against peace as:

‘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.’⁴⁴

The final paragraph clarifies the targeted group of individuals:

‘Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan.’⁴⁵

The final wording of Article 6 was a compromise between the different views expressed at the London Conference. ‘War of aggression’ was given the status of a separate crime alongside of ‘war in violation of treaties and agreements’. With the inclusion of the latter, it was considered enough to avoid the problematical inclusion of a distinct definition of aggression.⁴⁶

The confusing formulation of Article 6 clearly leaves much to be desired. It seems as if too much leeway was given to the Tribunal in determining what types of acts of aggression to include within the formulation and what individuals to punish. It would have been to the benefit of the legality of the Nuremberg Charter if a more distinct definition of aggression at the time had been included. However, it must be kept in mind that the Nuremberg Charter was the product of a compromise between the Allies and their separate agendas and opinions concerning international law. This, of course, helps us understand why Article 6 was drafted as it was, but it does not remove the need for predictable penal provisions.

The Tribunal indicted and tried 24 major Nazi war criminals and delivered its ‘Nuremberg Judgment’ on 30 September-1 October 1946.⁴⁷ As this thesis is limited to the crime of aggression, so will the examination of the Nuremberg Judgment be limited to the parts dealing with crimes against peace, as this includes the crime of aggression. Consequently, crimes

⁴² ‘Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis’, 8 August 1945, *reprinted in* 39 *AJIL* (1945), pp. 257-258.

⁴³ ‘Charter of the International Military Tribunal’, *ibid.*, pp. 258-264 ().

⁴⁴ *Ibid.*, p. 260.

⁴⁵ *Ibid.*

⁴⁶ Rifaat, Ahmed M., *International Aggression: A Study of the Legal Concept – Its Development and Definition in International Law*, p. 149; Brownlie, Ian, *International Law and the Use of Force by States*, pp. 163-164.

⁴⁷ ‘Trial of the Major War Criminals, Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences’, *reprinted in* 41 *AJIL* (1947), pp. 172-332.

against humanity and war crimes will be left aside. In addition, it is beyond the scope of this thesis to examine objections of Nuremberg dispensing ‘victor’s justice’, i.e. that heinous acts of the Allies were never tried. Instead, let us turn our attention to the principle of legality and the Tribunals’ discussion on whether individual criminal responsibility for crimes against peace, including the crime of aggression, was accepted in international law at the time.

Not surprisingly, the Tribunal had to face arguments from the defendants that Article 6(a) amounted to *ex post facto* criminalisation, contrary to the principle of *nullum crimen, nulla poene sine lege*. The Tribunal explained that the Nuremberg Charter, in their view, reflected existing international law at the time and that it in itself contributed to the development of international law.⁴⁸ The fact that it explicitly held a ‘war of aggression’ or a ‘war in violation of international treaties’ to be illegal was in reality sufficient for the Tribunal to try such acts. However, due to the important aspects of international law involved, they decided to validate it by expressing their view on the matter. First, the Tribunal concluded that ‘the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice.’⁴⁹ The defendants, occupying high positions in the German government, must have known that their acts of invasion and aggression were contrary to international law and treaties. In that case, it would be unjust not to punish them and therefore it appeared to the Tribunal as if the maxim had no application concerning the acts.⁵⁰

The Tribunal went on validating their view by explaining the state of affairs in this area of international law in 1939. At the outbreak of the war in 1939, Germany was party to the Kellogg-Briand Pact of 1928 condemning recourse to war and renouncing it as an instrument of national policy. In the eyes of the Tribunal, this established the illegality of wars as an instrument of national policy and ‘that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing’.⁵¹

Acts amounting to a war of aggression were deemed to be included and therefore outlawed by the Kellogg-Briand Pact. Arguments were raised that the Kellogg-Briand Pact did not expressly make such wars crimes, nor did it set up courts to try those accused of such acts. In an attempt to confront these arguments, the Tribunal made an analogy with the Hague Convention of 1907, prohibiting resort to certain methods of warfare. The acts banned by the Hague Convention had been looked upon as war crimes for a long time, or at least since 1907. Yet, the Hague Convention nowhere designated certain acts as criminal, nor did it contain any provision setting up a tribunal to try offenders. That had not stopped military tribunals from trying and punishing individuals for violations of the rules of warfare contained in the Convention. The Tribunal considered the criminality of acts amounting to a war of aggression to be analogous and even more convincing.⁵²

⁴⁸ Ibid, p. 216.

⁴⁹ Ibid. p. 217.

⁵⁰ Ibid.

⁵¹ Ibid, p. 218.

⁵² Ibid, pp. 218-219.

Express mention was made of the Treaty of Versailles that allowed the Allies to try the Kaiser after World War I. However, arguments continued to be raised that international law was concerned solely with sovereign States and provided no punishment for individuals. Included in this was that where a certain act is an act of State, individuals cannot be held responsible due to the doctrine of the sovereignty of the State. The Tribunal refuted these arguments and claimed that it was duly recognised that international law imposed duties and liabilities upon individuals as well as States. In the eyes of the Tribunal ‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’.⁵³ In addition, the principle of international law allowing for protection of representatives of a State was not applicable to acts deemed criminal by international law.⁵⁴

When applying the possible individual criminal responsibility to action taken by Germany, the Tribunal made a distinction between ‘acts of aggression’ and ‘wars of aggression’. The seizure of Austria and Czechoslovakia were considered the first acts of aggression and the war against Poland in September 1939 was the first occurrence of a war of aggression.⁵⁵ Wars of aggression followed against Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, the Soviet Union and the United States.⁵⁶ The German occupation of Austria and Czechoslovakia was not seen as wars of aggression as such. As a result, the Tribunal tried the defendants for their involvement in these acts as planning to wage a war of aggression against other countries.⁵⁷ In all the other mentioned cases of German aggression, the Tribunal concluded that they amounted to wars of aggression, even though shifting in terminology.⁵⁸

It would appear as if the vagueness of Article 6(a) could have caused the Tribunal a great deal of difficulty in determining whether a case of aggression had occurred. With the practical lack of a definition of aggression, instead leaving it in the hands of the Tribunal to decide, this could have been rather problematic. However, when reading the Judgment, a striking observation is how little difficulty the Tribunal actually felt it faced. It is fair to believe that this can probably be attributed to the fact that the acts of Nazi Germany would, in the eyes of the Tribunal, amount to aggression no matter what an actual definition would look like. As a result, the brutality of the offences made it possible for the Tribunal to elude the issue of an actual definition. The Judgment revealed the Tribunal’s state of

⁵³ Ibid, pp. 220-221.

⁵⁴ Ibid, p. 221.

⁵⁵ Ibid, p. 186.

⁵⁶ Ibid, pp. 203-214.

⁵⁷ Ibid, pp. 192-197, *see also* p. 301 where the Tribunal stated that the occupation of Austria and the Sudetenland did not amount to wars of aggression.

⁵⁸ *History of the United Nations War Crimes Commission, and the Development of the Law of War*, pp. 254-255, pointing out that the Tribunal varied in terminology to describe German action. ‘Invasion’ was used with regard to Austria; Denmark, Norway, Belgium, the Netherlands and Luxembourg; ‘seizure’ with regard to Czechoslovakia; ‘aggression’ in terms of Poland, Yugoslavia and Greece; ‘aggressive war’ regarding the Soviet Union and ‘war’ with reference to the United States. The difference is said to derive from technical and legal aspects and especially the amount of armed resistance encountered and whether the States technically were at war or not.

mind, as pointed out by Yoram Dinstein when discussing the criticism that the illegality of war inevitably leads to criminality⁵⁹:

‘War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but effect 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.’⁶⁰

With the far-reaching Article 6 of the Nuremberg Charter, it would probably have been possible to hold ordinary combatants and maybe even citizens responsible for the crimes committed. However, the judges of the Tribunal apparently found that the circle of responsible persons had to be restricted to those at a policy-making level. It was concluded that ‘Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and business men’.⁶¹ Subsequently, the circle of persons tried at Nuremberg was drawn rather loosely from around the head of State. Of the 24 defendants charged at Nuremberg, one committed suicide and one was declared unfit to stand trial. Of the 22 that were tried, 19 were convicted (12 guilty of the crime of aggression), 12 were sentenced to death (7 guilty of the crime of aggression) and three defendants were acquitted.⁶² As Benjamin B. Ferencz has pointed out, all of the defendants that received death sentences on counts of the crime of aggression were closely linked to Hitler as either confidants or sitting on high military or diplomatic posts and were all well aware of the aggressive intentions of the head of State.⁶³

Following the Nuremberg Tribunal, an International Military Tribunal for the Far East was created for the trial and punishment of the Japanese Major War Criminals. Its Charter, approved on 19 January 1946, was very similar to the Nuremberg Charter.⁶⁴ Article 5(a) included a similar provision on individual criminal responsibility for crimes against peace. To avoid arguments of whether Japan had technically been at war, the words ‘declared or undeclared’ were incorporated before ‘war of aggression’. During trials at Tokyo, the principle of *nullum crimen, nulla poene sine lege* was again brought to the front. The majority upheld the individual criminal responsibility for the involvement in acts related to a war of aggression, but the question produced dissenting opinions from two judges.⁶⁵

⁵⁹ Dinstein, Yoram, *War, Aggression and Self-defence*, p. 120.

⁶⁰ ‘Trial of the Major War Criminals, Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences’, *reprinted in* 41 *AJIL* (1947) p. 186.

⁶¹ *Ibid*, p. 223.

⁶² *Ibid*, pp. 272-333.

⁶³ Ferencz, Benjamin B., ‘The Crime of Aggression’ in Kirk McDonald, Gabrielle and Swaak-Goldman, Olivia (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Vol. 1: Commentary*, p 45.

⁶⁴ ‘Charter for the International Military Tribunal for the Far East’, *reprinted in* Ferencz, Benjamin B., *Defining International Aggression, The Search for World Peace vol. 1*, pp. 522-527.

⁶⁵ *In re Hirota and Others* (International Military Tribunal for the Far East), 15 AD (1948), pp. 356-376, Justice Röling of the Netherlands denied that war of aggression existed as a crime under international law, pp. 374-375; Justice Pal of India also rejected the idea of the criminality of a war of aggression. He argued that individuals acting as agents of State incur

In connection with the Nuremberg Tribunal, the Allies also decided to enact Control Council Law No. 10.⁶⁶ It enabled each occupying authority in Germany to prosecute individuals within their zone of occupation for the same crimes that were tried by the Nuremberg Tribunal. Regarding crimes against peace, Article 2(a) added ‘initiation of invasions’ and pointed out that the list was not exhaustive. The trials of *I.G. Farben*⁶⁷, *High Command*⁶⁸, and *Ministries*⁶⁹ reiterated the idea that only individuals at the policy-making level with a real influence over national policy could be held responsible for crimes against peace, including the crime of aggression. In the *Ministries* trial, it was also explained that German conduct towards Austria and Czechoslovakia were to be seen as ‘initiation of invasions’ according to Control Council Law No. 10 and therefore punishable as crimes against peace *per se*⁷⁰.

In conclusion, the case law following from some of the heinous acts committed during World War II set a precedent of allowing for individual criminal responsibility in connection to acts or wars of aggression. At that time in history, such crimes were called crimes against peace; today, the crime of aggression has replaced the former notion.

2.3 Aggression and the United Nations

As noted previously, the establishment of the United Nations with the adoption of the UN Charter resulted in the prohibition of the use of force, and a world where the Security Council was given an important role in dealing with acts of aggression. In addition to examining the role of the Security Council, this chapter will also present the relationship other UN-organs, such as the General Assembly, the ICJ and the ILC, have to aggression.

2.3.1 The Security Council

Before examining how the Security Council has dealt with situations of aggression it is necessary to describe its role and functions within the UN-system. Article 24(1) of the UN Charter provides that the Security Council ‘has the primary responsibility for the maintenance of international peace and security’. It has been argued that the role of the Security Council in determining acts of aggression is just that, a *primary* one, and not an *exclusive* one. This idea has characterised parts of the work on the crime of aggression ever since the establishment of the UN Charter, and continues to do so. This will be discussed further throughout this thesis.

no criminal responsibility in international law for such acts, p. 375-376; *see also* Rifaat, Ahmed M., *International Aggression: A Study of the Legal Concept – Its Development and Definition in International Law*, pp. 160-164.

⁶⁶ ‘Allied Control Council Law No. 10’, 20 December 1945, reprinted in Ferencz, Benjamin B., *Defining International Aggression, The Search for World Peace vol. 1*, pp. 491-496.

⁶⁷ *In re Krauch and Others* (I.G. Farben Trial), 15 AD (1948), pp. 669-671.

⁶⁸ *In re von Leeb and Others* (High Command Trial), 15 AD (1948), pp. 379-383.

⁶⁹ *In re von Weizsaecker and Others* (Ministries Trial), 16 AD (1949), pp. 348-349.

⁷⁰ *Ibid*, pp. 347-348.

Article 39 stipulates that the Council ‘shall determine the existence of any threat to the peace, breach of the peace, or act of aggression’. It is further authorised to make recommendations or decide what measures should be taken to maintain or restore international peace and security in accordance with Articles 41 and 42. The measures taken may or may not include the use of force. As previously noted, the only exception to the prohibition on the use of force in Article 2(4), besides action authorised by the Security Council, is a States right to use individual or collective self-defence in accordance with Article 51.

Yoram Dinstein has explained that the scope of discretion given to the Security Council, in discharging its duties, is considerable. Unlike in the case of a State claiming to practise their right to self-defence, there is no need for an ‘armed attack’ to occur. A determination of a threat to the peace, a breach of the peace or an act of aggression is sufficient to take action. In the Dinstein’s view, the authority given to the Council can be seen as a ‘*carte blanche*’ in determining whether and how to use force, as well as when and against whom. As an example, the Council has the power to instigate a preventive war to deter an anticipated future breach of the peace.⁷¹ In addition, it can be hard to separate between the categories of a breach of the peace and an act of aggression. Neither the UN Charter nor the practice of the Council gives any clear guidance on how to do this. However, what category the Council produces for acting in a particular situation is not of great relevance to it as it has the right to act as long as one of the categories in Article 39 is at hand.⁷²

It must also be kept in mind that the Security Council is a political and not a judicial organ. Its member States make politically motivated decisions that might not always correspond with legal considerations. Being a non-judicial body, the Council is not required to clarify the reasons for its decisions. Nevertheless, when it decides that one of the categories of Article 39 is at hand, the decision is conclusive and binding for all States Parties to the UN Charter in accordance with Article 25.

Finally, Article 27(3) declares that a decision of the Security Council requires the affirmative vote of at least nine of its fifteen members. Moreover, for a decision to pass it needs the concurring votes of the five permanent members of the Council, China, France, Russia⁷³, the United Kingdom and the United States. This procedure is what is usually referred to as the ‘veto power’ of the permanent members. This means that a negative vote by a permanent member will block a decision, even if fourteen of the fifteen members are supportive. If a permanent member is involved, directly or indirectly, in a situation on which the Council is to make a decision under Chapter VII, they are not abstained from voting. Consequently, the Council’s action in a situation involving one of the permanent members is practically beyond the reach of the collective security system established by the UN Charter.

⁷¹ Dinstein, Yoram, *War, Aggression and Self-defence*, p. 283.

⁷² *Ibid*, p. 288.

⁷³ The five Permanent Members are listed in Article 23(1) of the UN Charter, which refers to the Union of Soviet Socialist Republics. This place has been taken over by the Russian Federation, *see* Dinstein, Yoram, *War, Aggression and Self-defence*, p. 291 n. 79.

The establishment of the UN-system of collective security has unfortunately not signalled the end of unilateral resort to force or existence of wars. During the last 60 years, numerous, seemingly clear, cases of acts of aggression have occurred around the Globe. However, the Security Council has been hesitant to brand specific situations as acts of aggression in accordance with Article 39 of the UN Charter.⁷⁴ On a few occasions, the Security Council has characterised acts by Israel⁷⁵, South Africa⁷⁶ and Southern Rhodesia⁷⁷, today known as Zimbabwe, as acts of aggression. Nevertheless, the mere characterisation is not the same as a formal determination under Article 39 to that effect. While Matthias Schuster claims that such a formal determination has never been made⁷⁸, Giorgio Gaja points to Security Council Resolution 387, covering South African aggression against Angola, as the sole case.⁷⁹ In any case, the Security Council is evidently reluctant to make formal determinations that a situation amounts to an act of aggression.

The reluctance to determine situations as acts of aggression can be described by looking at cases where the notion was not used. In 1990, Iraq invaded and attempted to annex Kuwait. Mark S. Stein describes this event as ‘surely the most flagrant act of aggression in the post-World War II era’.⁸⁰ Yet Iraqi action was not branded as an act of aggression. In Security Council Resolution 660, ‘a breach of international peace and security’ was opted for.⁸¹ Only when Iraq decided to close foreign embassies in Kuwait did the Council pass a Resolution condemning ‘aggressive acts...against the diplomatic premises and personnel’.⁸² Other examples of incidents not amounting to acts of aggression according to the Council include the Korean War, the Falkland War and the Iran-Iraq War; all branded a breach of peace.⁸³ Adding to this, the veto of the permanent members means that no case involving one of them has been labelled as acts of aggression.

In the cases of the conflicts in the former Yugoslavia and Rwanda, the Security Council as an alternative opted for the establishment of ad hoc

⁷⁴ See for a detailed summary of Security Council, General Assembly and ICJ practice with respect to aggression, *Historical Review of Developments Relating to Aggression, Prepared by the Secretariat*, UN Doc. PCNICC/2002/WGCA/L.1, 24 January 2002, pp. 115-135.

⁷⁵ The Security Council has condemned Israeli attacks on Tunisia on two separate occasions, see Resolutions 573, UN Doc. S/RES/573, 4 October 1985, and 611, UN Doc. S/RES/611, 25 April 1988.

⁷⁶ See for instance Resolutions 387, UN Doc. S/RES/387, 31 March 1976, and 577, UN Doc. S/RES/577, 6 December 1985.

⁷⁷ See for instance Resolutions 411, UN Doc. S/RES/411, 30 June 1977, and 445, UN Doc. S/RES/445, 8 March 1979.

⁷⁸ Schuster, Matthias *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword*, 14 *CLF* (2003), p. 41.

⁷⁹ Gaja, Giorgio, ‘The Long Journey towards Repressing Aggression’ in Cassese, Antonio et al (eds.) *The Rome Statute of the International Criminal Court: A Commentary, Vol. 1*, p. 434.

⁸⁰ Stein, Mark S., ‘The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council’s Power to Determine Aggression?’, 16 *IICLR* (2005), p. 8.

⁸¹ UN Doc. S/RES/660, 2 August 1990.

⁸² UN Doc. S/RES/667, 16 September 1990.

⁸³ Antonopoulos, Constantine, ‘Whatever Happened to Crimes Against Peace’, 6 *JCSL* (2001), p. 46.

Tribunals to try individuals for their involvement in the heinous acts occurring in the respective conflicts. Acting under chapter VII of the UN Charter the Tribunals were set up pursuant to the Council's power to decide measures necessary to maintain or restore international peace and security. In 1993 the International Criminal Tribunal for the former Yugoslavia (ICTY), and in 1994 the International Criminal Tribunal for Rwanda (ICTR) were established.⁸⁴ The ICTY was empowered to exercise jurisdiction over grave breaches of the Geneva Conventions of 1949, violations of laws and customs of war, genocide and crimes against humanity allegedly perpetrated in the former Yugoslavia since 1 January 1991.⁸⁵ For the ICTR subject-matter jurisdiction was given for genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of the Second Additional Protocol, allegedly perpetrated in Rwanda between 1 January and 31 December 1994.⁸⁶ Since the crime of aggression was left outside the scope of the ad hoc Tribunals, interest in them is limited to individual criminal responsibility in general and the fact that the formation of an ad hoc Tribunal is an additional alternative for the Security Council when taking action.

In conclusion, it appears as if the Security Council has an established practice of not branding clear-cut cases of aggression as such. This can partly be described by the organisation of the Council as established by the UN Charter. The veto power enables the permanent members to avoid being labelled as aggressors. Additionally, other States may from time to time surely benefit from a friendly veto in their favour by one of their 'friends' amongst the permanent members. It is not necessary for the Council to decide that an act of aggression has occurred for it to embark on enforcement measures. According to Article 39 of the UN Charter, a particular situation can just as easily be called a breach of or a threat to the peace for it to have all the enforcement measures of Chapter VII available. Therefore, the Security Council may prefer, for political or other reasons, to use a more imprecise term as breach of the peace. The fact that the Council is a political and not a judicial body obviously comes into play. This issue will be revisited when discussing the relationship between the Council and the ICC. Finally, it should be observed that with the establishment of the ad hoc Tribunals the Council, if nothing else, indicates that it understands the importance of international criminal responsibility as a useful tool for the maintenance of international peace and security.

However, the Security Council is not the only UN-organ to have dealt with cases of aggression. As will be shown, both the General Assembly and the International Court of Justice have considered acts of aggression contrary to Article 2(4) of the UN Charter.

⁸⁴ ICTR was established by Security Council Resolution 827, UN Doc. S/RES/827, 25 May 1993, ICTR was established by Security Council Resolution 955, UN Doc. S/RES/955, 8 November 1994.

⁸⁵ ICTY Statute, Articles 2-5.

⁸⁶ ICTR Statute, Articles 2-4.

2.3.2 The General Assembly

The powers of the General Assembly are contained in Articles 10 to 14 of the UN Charter. In short, the Assembly may discuss any question within the scope of the UN Charter and may consider the general principles of co-operation in the maintenance of international peace and security. The Assembly may also make recommendations to member States or the Security Council or both, on the condition that the Council is not dealing with the matter in question. Additionally, matters concerning international peace and security requiring action must be referred to the Council. Despite the vaguely outlined powers prescribed to it, the General Assembly has considered questions involving aggression.

When North Korean forces invaded South Korean territory without warning in 1950, the Security Council was able to pass Resolutions condemning the action and calling for the assistance of member States.⁸⁷ These Resolutions were adopted while the Soviet Union was boycotting the Council due to a disagreement on who should occupy the 'Chinese' seat at the Council.⁸⁸ Shortly thereafter, the Soviet Union returned and made use of its veto right, blocking the Council's work. The General Assembly acted swiftly and adopted the 'Uniting for Peace Resolution' on 3 November 1950.⁸⁹ It maintained that the Council had the primary responsibility for the maintenance of international peace and security, but in case of paralysis in the Council, the factual competence to make recommendations was transferred to the Assembly. On 1 February 1951, a Resolution was passed concluding that the People's Republic of China had engaged in aggression in Korea 'by giving direct aid and assistance to those who were already committing aggression in Korea and by engaging in hostilities against United Nations forces there'.⁹⁰ The ICJ later approved the secondary responsibility of the General Assembly, elaborated in the Uniting for Peace Resolution, in an advisory opinion.⁹¹

During this period of time, more than one UN-organ was dealing with conduct of States that could potentially amount to acts of aggression. Yet, a generally acceptable definition of which acts actually amounted to aggression was lacking. As a result, work by the ILC on a Draft Code of Offences against the Peace and Security of Mankind had stalled and it was apparent that a Resolution clarifying the concept was desirable.⁹² A Special Committee was created to commence work on finding a definition, but work progressed slowly. Finally, consensus was reached and on 14 December 1974, the General Assembly adopted Resolution 3314 on a definition of aggression.⁹³ The Resolution had as its main purpose to formulate guidelines for the Security Council to follow when determining whether an

⁸⁷ See for instance Resolutions 82, UN Doc. S/1501, 25 June 1950, and 83, UN Doc. S/1511, 27 June 1950.

⁸⁸ Kittichaisaree, Kriangsak, *International Criminal Law*, p. 211.

⁸⁹ General Assembly Resolution 377 (V), 3 November 1950.

⁹⁰ General Assembly Resolution 498 (V), 1 February 1951.

⁹¹ *Certain Expenses case*, see *infra* chapter 2.3.3.

⁹² See *infra* chapter 2.3.4, for the work of the ILC.

⁹³ General Assembly Resolution 3314 (XXIX), 14 December 1974, UN GAOR. 29th Sess., Supp. No. 31, pp. 142-144.

act of aggression had occurred according to Article 39 of the UN Charter. The aim of a more concise definition was to simplify this determination and deter potential aggressors. Eight substantive Articles were included and in the Preamble the role of the Security Council was recalled, and it was observed that ‘aggression is the most serious and dangerous form of the illegal use of force’.⁹⁴

The achievements of Resolution 3314 and its definition of aggression have produced different views in the literature. While some give their approval⁹⁵, others seem rather critical of it.⁹⁶ More than twenty years of discussion with States giving their distinct views on aggression preceded the final product that was Resolution 3314. It has been pointed out that in order to achieve a consensus in adopting the Resolution, several confusing phrases made it into the final product.⁹⁷ A brief look into its substantive Articles will be presented, seeing as the discussion surrounding Resolution 3314 and its possible ambiguities may be of interest for the concept of aggression as a crime entailing individual criminal responsibility.

When trying to produce a definition of aggression there are generally three schools of thought: a generic, a specific and a mixed approach. The generic approach broadly defines the offence leaving a great deal of space of interpretation of what acts to include. The specific approach contains an exhaustive list of acts amounting to aggression. A mixed approach seeks to combine ‘the best of both worlds’ by combining a generic definition with an illustrative list of acts to help understand the general clause.⁹⁸ Resolution 3314 appears to use a form of mixed approach by combining a generic definition in Article 1 with a list of acts in Article 3. Article 1 states that ‘Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State’.⁹⁹ The added list of acts in Article 3 includes invasion, attack, bombardment, blockade and sending of armed bands or mercenaries to attack another State. Seeing as Article 4 explained that the Security Council could determine that other acts amounted to aggression, the list in Article 3 was not intended to be exhaustive.

Furthermore, Article 5(2) stipulating that ‘A war of aggression is a crime against international peace. Aggression gives rise to international responsibility’ has received much attention.¹⁰⁰ The drafters seem to have differentiated between a ‘war of aggression’, which is a crime against international peace, and ‘aggression’ which gives rise to international responsibility. However, the definition does not give any hints on where the separation line between the two notions lies, or what should happen in case

⁹⁴ Ibid, Preamble, paras. 2 and 5.

⁹⁵ See for instance Rifaat, Ahmed M., *International Aggression: A Study of the Legal Concept – Its Development and Definition in International Law*, pp. 279-280.

⁹⁶ See for instance: Stone, Julius. ‘Hopes and Loopholes in the 1974 Definition of Aggression’, 71 *AJIL* (1977), pp. 243-246.

⁹⁷ Ibid.

⁹⁸ Bassiouni M. Cherif and Ferencz Benjamin B, ‘The Crime Against Peace’ in Bassiouni, M. Cherif (ed.) *International Criminal Law 1. Crimes*, p. 326.

⁹⁹ General Assembly Resolution 3314 (XXIX), 14 December 1974, UN GAOR 29th Sess., Supp. No. 31, Article 1.

¹⁰⁰ Ibid, Article 5(2).

of a breach of either of them.¹⁰¹ In addition, the definition is silent on whether it is a State or an individual who commits the 'crime' and whether 'international responsibility' relates to a State or an individual. It has been suggested that the definition generally aimed at defining the crime of aggression and the following individual criminal responsibility.¹⁰² Another view is presented by Yoram Dinstein, interpreting Resolution 3314 to be understood to only include acts amounting to a war of aggression in connection with individual criminal responsibility, and that acts 'short of war' would fall outside of that regime.¹⁰³

Nevertheless, the applicability of Resolution 3314 to individuals remains unclear. As the purpose of the definition was to function as a guideline for the Security Council, its significance to individual criminal responsibility for the crime of aggression can be questioned. A consideration of aggression by the Security Council for political purposes might not look the same as one by a judicial organ for individual criminal responsibility.¹⁰⁴ It has also been observed that the definition lacks a mental, subjective, element, leaving the question of whether it meant to establish individual criminal responsibility even more dubious.¹⁰⁵

Despite the criticism voiced for its vagueness, Resolution 3314 might still prove to have been a useful contribution to the development of international law. As it was at the time, the development of the crime of aggression, individual criminal responsibility and a permanent international criminal court had been put to a halt before a definition of aggression could be reached. Without a compromise that resulted in the inclusion of a couple of vague Articles, a consensus definition would probably never have been reached. With the adoption of Resolution 3314, work on these intriguing and important areas of international law could yet again progress. Since the definition of aggression took the form of a UN General Assembly Resolution, it did not have legally binding force as such. Its legal input must therefore instead be sought in the role it played for the work mentioned and its possible influence on customary international law.

In conclusion, it is fair to state that the General Assembly has been involved with different aspects of aggression. In fact, in addition to the Korea crisis previously mentioned, the General Assembly has adopted Resolutions concerning acts of aggression in situations involving Namibia, South Africa, the Middle East and Bosnia Herzegovina. In some of the cases, the General Assembly declared that State conduct amounted to an act of aggression as spelt out in Resolution 3314.¹⁰⁶

¹⁰¹ Kittichaisaree, Kriangsak, *International Criminal Law*, p. 214.

¹⁰² Ferencz, Benjamin B., 'Can Aggression be Deterred by Law?', at <<http://www.derechos.org/nizkor/doc/articulos/ferencz1.html>>, last visited 2006-08-30, after n. 25.

¹⁰³ Dinstein, Yoram, *War, Aggression and Self-defence*, p. 125.

¹⁰⁴ Ibid, p. 126.

¹⁰⁵ Hogan-Doran, Justin and van Ginkel, Bibi T., 'Aggression as a crime under international law and the prosecution of individuals by the proposed international criminal court', 43 *NILR* (1996), p. 335.

¹⁰⁶ See *Historical Review of Developments Relating to Aggression, Prepared by the Secretariat*, UN Doc. PCNICC/2002/WGCA/L.1, 24 January 2002, pp. 121-128.

2.3.3 The International Court of Justice

According to Article 92 of the UN Charter, the ICJ is the principal judicial organ of the United Nations. It may give advisory opinions upon requests from the General Assembly, the Security Council or other UN-organs and specialized agencies authorised to do so concerning legal questions pursuant to Article 96 of the UN Charter. In addition, legal disputes between States can also fall within the realm of the Court if a case is referred to it in accordance with Article 36 of the Statute of the Court.¹⁰⁷

The case law of the ICJ reveals that it has considered issues relating to aggression in several cases. In its advisory opinion in the *Certain Expenses* case, the ICJ considered the respective functions of the General Assembly and the Security Council under the UN Charter with respect to the maintenance of international peace and security. It held that the role prescribed to the Council under Article 24 was 'primary, not exclusive'.¹⁰⁸ The Court further explained that only when the Council is taking action in accordance with Chapter VII of the UN Charter do they have an exclusive right, and only in those cases must the Assembly refer the question to the Council.¹⁰⁹

In its 1986 judgment in the *Nicaragua* case, the ICJ considered alleged support by the United States to the *contras* and established a breach of the 'obligation under customary international law not to use force against another State'.¹¹⁰ The obligation under customary international law not to use force was described to encompass practically the same as the prohibition on the use of force in Article 2(4) of the UN Charter.¹¹¹ The ICJ also examined if United States action could be justified under the right to self-defence, and therefore if Nicaragua had engaged in an 'armed attack' as stated in Article 51 of the UN Charter or the corresponding customary international law rule. General Assembly Resolution 3314 was used as a tool to determine what acts amounted to an armed attack, and it was held that its description in Article 3(g) of the sending by a State of armed bands to carry out acts of armed force in another State reflected customary international law.¹¹² According to Mark S. Stein, the ICJ did not determine that the United States had committed an act of aggression. As a distinction was made with armed attack and aggression on one side and the use of force on the latter, the ICJ simply attributed the latter to the United States.¹¹³

During the jurisdiction and admissibility-phase, the United States had raised arguments questioning the competence of the ICJ to examine a situation that was being dealt with by the Security Council. The ICJ recognised the primary responsibility of the Council in accordance with

¹⁰⁷ Statute of the International Court of Justice, Article 36.

¹⁰⁸ *Certain Expenses of the United Nations*, Advisory Opinion of 20 July, ICJ Rep. 1962, p.163.

¹⁰⁹ *Ibid*, pp. 164-165.

¹¹⁰ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), Judgment of 27 June 1986, ICJ. Rep. 1986, para. 292(4).

¹¹¹ *Ibid*, paras. 187-190.

¹¹² *Ibid*, para. 195.

¹¹³ Stein, Mark S., 'The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?', 16 *IJCLR* (2005), pp. 19-21.

Article 24 of the UN Charter, but with reference to its own case law in the *Hostages* case stated that it was not one of exclusivity. Unlike the relationship between the Council and the General Assembly, there existed no clear demarcation between the Council and the ICJ. In describing the different functions of the organs, the ICJ stated that ‘The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events’.¹¹⁴ Furthermore, it was clarified that proceedings in the ICJ was not objectionable as being in effect an appeal of a Security Council decision. As the principal judicial organ of the United Nations, the ICJ could pass judgment on certain legal aspects of a situation which had also been considered by the Council.¹¹⁵

The practice of the ICJ, as well as the General Assembly, reveals that the Security Council is not the only UN-organ to have dealt with acts of aggression. The role of the Council as the sole actor in determining if an act of aggression has occurred is seemingly questioned by the practice of the ICJ and the Assembly. The case law of the ICJ shows that there is a possibility for a judicial organ to try to solve legal questions in a case involving acts of aggression. The role that the Security Council plays in the same case is one where the functions performed are of a political nature. The potential exclusivity of the Council to determine if an act of aggression has occurred is apparently limited to measures taken in accordance with chapter VII of the UN Charter. Even though the ICJ is concerned with States or UN-organs and not individuals, its position as judicial organ in relation to the Security Council is still very interesting to note. Consequently, the possibility of a court to work alongside the Council, to exercise purely judicial functions in cases of acts of aggression should be kept in mind. In fact, the role that a court plays in trying to solve a situation of acts of aggression can be instrumental to try to find a peaceful settlement.

2.3.4 The International Law Commission

In 1947, the General Assembly established the ILC by Resolution 174(II).¹¹⁶ At the same session, the ILC was given the task of formulating the principles of international law recognised by the Nuremberg Charter and Judgment and to prepare a Draft Code of Offences against the Peace and Security of Mankind.¹¹⁷ The ILC produced a formulation of the principles in 1950, principle VI(a) reciting the definition of crimes against peace from the Nuremberg Charter.¹¹⁸ Work on a Draft Code of Offences continued within the ILC, and the first phase of this work was completed with a 1954

¹¹⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Jurisdiction and Admissibility), Judgment of 26 November, ICJ Rep. 1984, pp. 432-435, paras. 91-95; see also *Case Concerning United States Diplomatic and Consular Staff in Tehran* (Hostages case), Judgment of 24 May 1980, ICJ Rep. 1980, para. 40.

¹¹⁵ *Ibid.*, p. 436, para. 98.

¹¹⁶ General Assembly Resolution 174 (II), 21 November 1947.

¹¹⁷ General Assembly Resolution 177 (II), 21 November 1947.

¹¹⁸ 1950 ILC Ybk. Vol. II, pp. 374-378.

Draft.¹¹⁹ Article 1 followed in the footsteps of Nuremberg by prescribing individual criminal responsibility and Article 2 contained a list of acts deemed ‘offences against the peace and security of mankind’.¹²⁰ Of the thirteen main offences included, the first nine, directly or indirectly, were concerned with aggression.¹²¹ In its commentary to the Article, the ILC explained that no attempt was made to enumerate such acts exhaustively and that aggression could arise out of other acts referred to in other paragraphs of the Article.¹²²

In comparison to the Nuremberg Charter, the 1954 Draft used another way of regulating the crime of aggression. The Nuremberg Charter applied a short rather generic approach, with much to the discretion of the judges to decide on acts to be included, limited to a ‘war of aggression’. Instead, the 1954 Draft utilised a comprehensive list of acts constituting aggression and still left the door open to the possibility of other acts amounting to aggression. In addition followed in the line of the UN Charter by using the terms of ‘aggression’ and ‘use of force’ to describe the offences. The 1954 Draft even went as far as to include threats of aggression and indirect aggression such as participation in civil strife, backing of terrorism and breach of disarmament treaties. In general, the 1954 Draft was an ambitious effort, but it failed to meet the approval of the UN member States. The lack of a generally accepted definition of aggression in international law at that time resulted in that a final decision on the 1954 Draft was not possible.¹²³ Standing at the outset of a Cold War, political reality at that time were to block the 1954 Draft for two decades and leave it dormant.

With the adoption of General Assembly Resolution 3314, a definition of aggression was in place, and the Assembly invited the ILC to resume its work on a Draft Code in 1981.¹²⁴ The ILC decided to focus on individual criminal responsibility for the crimes to be included, leaving aside the question of the possible criminal responsibility of States to a later stage.¹²⁵

In 1991, the ILC adopted its Draft Code of Crimes against the Peace and Security of Mankind.¹²⁶ Article 3 established the individual criminal responsibility by stating that ‘An individual who commits a crime against the peace and security of mankind is responsible thereof and is liable to punishment’.¹²⁷ Article 5 was included to clarify that the individual criminal responsibility was something distinct and without prejudice to potential State responsibility for the same acts. Even though an individual acting as an ‘agent of the State’ could commit the acts included, it did not mean that

¹¹⁹ Draft Code of Offences against the Peace and Security of Mankind, 1954 ILC Ybk. Vol. II, pp. 149-152.

¹²⁰ Ibid, p. 151-152.

¹²¹ Rifaat, Ahmed M., *International Aggression: A Study of the Legal Concept – Its Development and Definition in International Law*, p. 188.

¹²² 1951 ILC Ybk. Vol II, p. 135.

¹²³ Rifaat, Ahmed M., *International Aggression: A Study of the Legal Concept – Its Development and Definition in International Law*, p. 191.

¹²⁴ General Assembly Resolution 36/106, UN Doc. A/RES/36/106, 10 December 1981.

¹²⁵ 1984 ILC Ybk. Vol. II Part 2, p. 11 para. 32.

¹²⁶ 1991 ILC Ybk. Vol. II Part 2, pp. 94-97, the term ‘Offences’ contained in the 1954 Draft was replaced by that of ‘Crimes’ in the 1991 Draft.

¹²⁷ Ibid, p. 94.

the 1991 Draft sought to apply international criminal responsibility to States. The ILC only pointed out that the same act could encompass both individual criminal responsibility and State responsibility.¹²⁸ A definition of aggression was included in Article 15, establishing individual criminal responsibility for the crime of aggression. Resembling Resolution 3314, the 1991 Draft, used a general clause combined with an illustrative list of acts, almost literally the same as the one used in the former. Since the 1991 Draft was concerned with individuals, unlike Resolution 3314, it added a paragraph clarifying that potential perpetrators of the crime were to be sought at the policy-making level.¹²⁹ Following its previous 1954 Draft, the ILC decided to include threats of aggression in Article 16 and several forms of indirect aggression, under the heading of ‘intervention’, in Article 17.

The 1991 Draft was transmitted to governments around the world for comments and observations.¹³⁰ Five years later, after assessing the opinions presented by some governments, the ILC adopted its 1996 Draft Code of Crimes against the Peace and Security of Mankind.¹³¹ Like the 1991 Draft, the 1996 Draft made it clear in Article 2 that it dealt with individual criminal responsibility and in Article 4 that it did not prejudice the question of State responsibility. However, a different approach was used in defining the crime of aggression in Article 16:

‘An individual who, as 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.’¹³²

The ILC explained that the Article was drawn from the Nuremberg Charter and that ‘leader or organizer’ referred to the same individuals at the highest policy-making level as the Nuremberg Tribunal had discussed. The ILC further explained that the violation of international law rules governing the use of force by a State was a *sine qua non*-condition for the possibility of the crime of aggression to arise. In fact, they noted that a sufficiently serious violation of the prohibition contained in Article 2(4) of the UN Charter was required.¹³³

The 1996 Draft and its approach to the crime of aggression appears to have been influenced by the views expressed on its 1991 Draft. Despite the overall resemblance between the two, there is a striking difference in regards to the definition of aggression. The trend in the years before with the 1954 Draft, Resolution 3314 and the 1991 Draft had leaned towards some form of mixed approach where a generic definition was combined with list of acts. The 1996 Draft stepped away from this and included a generic rather vague approach, with more resemblance to the definition in the Nuremberg Charter. On discussing the fact that some of the crimes that were included in the 1991 Draft were excluded in the 1996 Draft, the ILC concluded that it was necessary for reaching consensus and obtaining the support of

¹²⁸ Ibid, p. 98-100.

¹²⁹ Ibid, p. 95, Article 15(1).

¹³⁰ 1991 ILC Ybk. Vol. II Part 2, p. 94 para. 174.

¹³¹ 1996 ILC Ybk. Vol. II Part 2, pp. 17-56.

¹³² Ibid, p. 42-43, Article 16.

¹³³ Ibid, p. 43.

governments.¹³⁴ Presumably, the same holds true for the change in the approach to the crime of aggression. It might well be that some governments felt the need to change a long explanatory definition into a short vague one. At least, one can assume that it is likely that States acted this way under the belief that it would suit their interest. While it is not certain that a short generic approach could not include more or less the same acts as one combined with a list of acts, it leaves more room for interpretation. States might have been of the belief that this would suit them when exercising their sovereign rights, claiming that certain acts cannot be interpreted to be included in the crime of aggression.

2.4 Customary International Law

Before turning our attention to the ICC, a brief note on the status of aggression in customary international law will be given. First, one should note that the work conducted on the crime of aggression in relation to the ICC probably influences the opinion on the status of customary international law on the issue. However, this chapter will briefly examine the status of the crime of aggression in customary international law outside the scope of that work, and is a complement to the latter.

As shown by the discussion above, the idea that acts of aggression and the intrinsically linked crime of aggression is prohibited finds support in the development of international law and its various legal sources. Rightfully, concerns were raised when the Nuremberg Tribunal pronounced that the Nuremberg Charter, in their view, reflected existing international law at the time and that it in itself contributed to the development of international law.¹³⁵ Doubts as to whether the crime of aggression was recognised in international law at the time seem legitimate and necessary. As Yoram Dinstein simply puts it, the provision in the Nuremberg Charter relating to the crime of aggression ‘was not really declaratory of pre-existing customary international law’.¹³⁶ However, these doubts certainly must have vanished during the last 50 years. For today there seems to be a general opinion that aggression has the status of an international crime.¹³⁷ Irina Kaye Müller-Schieke explains that the Nuremberg Tribunal either enforced existing customary international law or embodied the first act in establishing a new custom. She continues by recalling the opening speech by Mr Justice Jackson, the American Chief Prosecutor, in which he stated ‘every custom has its origin in some single act and every agreement has to be initiated by the action of some State’.¹³⁸ It seems as if the latter of the alternatives presented by Müller-Schieke is the most feasible one, as it has to be highly

¹³⁴ Ibid, p. 16-17.

¹³⁵ See *supra* chapter 2.2.1.

¹³⁶ Dinstein, Yoram, *War, Aggression and Self-defence*, p. 120.

¹³⁷ See for instance *ibid*, pp. 120-121, 124-125, Müller-Schieke, Irina Kaye, ‘Defining the Crime of Aggression Under the Statute of the International Criminal Court’, 14 *LJIL* (2001), pp. 414-415, 428, Jorgensen, Nina H. B, *The Responsibility of States for International Crimes*, p. 239.

¹³⁸ Müller-Schieke, Irina Kaye, ‘Defining the Crime of Aggression Under the Statute of the International Criminal Court’, 14 *LJIL* (2001), pp. 414-415

questioned if a customary international law rule providing for the crime of aggression existed prior to the Nuremberg Tribunal.

However, since the Nuremberg, Tokyo and related post-war trials not a single case of prosecution based on aggression entailing individuals has taken place. This might easily lead one to the assumption that aggression no longer constitutes an international crime entailing individual criminal responsibility. Constantine Antonopoulos challenges this assumption by explaining that the crime of aggression has not been refuted in State practice. He continues by comparing the situation to that of genocide. Despite the existence of the Genocide Convention since 1948¹³⁹, it was not until the creation of ICTY and ICTR that the crime of genocide was prosecuted. Thus, a lengthy lack of prosecution does not necessarily mean that the crime of aggression cannot be pursued as a crime entailing individual criminal responsibility.¹⁴⁰

Supporting the argument in result, one might feel that it is necessary to make a distinction between treaty-law and customary international law. The crime of genocide has been codified in the mentioned Convention and finds its support for prosecution in treaty-law. The crime of aggression, on the other hand, lacks a binding definition and must find its support for prosecution in customary international law, and can only persevere within its realm. Since customary international law is created by custom, it must also be possible to change or even terminate it by custom. Thus, if constant State practice, supported by *opinio juris*, were to show that the crime of aggression no longer holds this stature, then individual criminal responsibility for the crime of aggression would cease to exist. However, the crime of aggression cannot be said to have suffered this fate. The fact that no individual has been prosecuted for the crime of aggression since the end of World War II is not due to absence of *opinio juris* on the matter. Constantine Antonopoulos explains the lacking codification by problems of finding a feasible solution as to the definition of the crime, and the fact that action by the Security Council or regional organizations can be another way of dealing with a situation.¹⁴¹ Yoram Dinstein summarises it in a good way by stating that ‘The criminality of war of aggression means the accountability of human beings, not merely abstract entities’.¹⁴²

Having reached the conclusion that the crime of aggression could very well exist in customary international law, the next hurdle to climb is trying to find out what it in fact encompasses. As to this question, it has to be admitted that some question marks continue to linger on. The wide notion of ‘crimes against peace’, used in the Nuremberg Charter, seems to have become obsolete and has instead been replaced with the narrower notion of ‘the crime of aggression’. However, what acts can be said to be included in the latter notion?

¹³⁹ United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

¹⁴⁰ Antonopoulos, Constantine, ‘Whatever happened to crimes against peace?’, 6 *JCSL* (2001), pp. 34-35.

¹⁴¹ *Ibid*, pp. 35-36.

¹⁴² Dinstein, Yoram, *War, Aggression and Self-defence*, p. 125.

Some legal sources seem to assert the view that only acts amounting to a 'war of aggression' can be included in the crime. The Nuremberg Charter, the Allied Control Council Law No. 10 and the General Assembly Resolution 3314 all touch on this notion. In addition, different approaches have been used to come up with a definition of an act of aggression and consequently the crime of aggression. The definition has been constructed both in generic terms and by listing specific acts amounting to aggression. In the *Nicaragua* case, the ICJ held that at least some parts of Resolution 3314, using a form of mixed approach to define acts amounting to aggression, was declaratory of existing customary international law.¹⁴³ Even though Resolution 3314 is concerned with the conduct of a States, i.e. acts of aggression, it might still be of interest for the crime of aggression and individual criminal responsibility. As explained by the ILC in connection with its 1996 Draft, an act of aggression is required for the crime of aggression to arise. Hence, it is necessary to know when an act of aggression has been committed in order to know when a possible crime of aggression might exist. Furthermore, it seems fair to believe that the crime of aggression is a leadership crime, i.e. only individuals at the highest policy-making level can be perpetrators. This idea was introduced by the Nuremberg Tribunal and has been upheld in the work of the ILC.

It seems that the various legal resources do not present a unified picture of what acts can be said to constitute the crime of aggression. This is partly due to the fact that different terminology has been used when discussing the issue, and partly it is due to the fact that most of the time expression has been made on State responsibility and acts of aggression, rather than individual criminal responsibility and the crime of aggression. It seems appropriate to settle for that the crime of aggression do seem to exist in customary international law at this stage. It is also useful to note that there are strong indicators that an act of aggression by a State is required for the crime of aggression to arise and that it is limited to individuals at the highest policy-making level. However, exactly what acts it encompasses and how they are to be defined still needs some elaboration.

In conclusion, customary international law probably involves the concept of the crime of aggression and individual criminal responsibility for it. What needs to be resolved is exactly what acts can be said to be included in a definition of the crime.

¹⁴³ See *supra* chapter 2.3.3.

3 The International Criminal Court

Between 15 June and 17 July 1998, representatives from 160 States attended the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome (Rome Conference).¹⁴⁴ On the final day of the Conference, the Rome Statute of the International Criminal Court (Rome Statute) was adopted and opened for signature.¹⁴⁵ Article 5 deals with the crimes within the jurisdiction of the Court:

‘1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) *The crime of aggression.*

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.’¹⁴⁶

The crime of aggression is obviously included in the Rome Statute, but unlike the other crimes within the jurisdiction of the ICC, it lacks a provision setting out its content. This chapter will examine the discussion and the work carried out on the crime of aggression prior to, in direct relation to and subsequent to the Rome Conference. It will proceed by examining different proposals brought forward in relation to the crime of aggression. The main focus will be on the most recent work, i.e. the work conducted subsequent to the Rome Conference, as this period has not been sufficiently covered nor summarised in the present debate. The aim of this chapter is to point out the main obstacles encountered in the work of trying to find a feasible provision on the crime of aggression for inclusion in the Rome Statute. A future Review Conference will be kept in mind throughout, to arrive at in what direction the work is currently heading.

¹⁴⁴ Lee, Roy S., ‘The Rome Conference and its Contributions to International Law’ in Lee, Roy S. (ed.), *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, p. 14, 20 intergovernmental organizations, 14 specialized agencies of the UN and a coalition of some 200 NGOs also attended the Conference.

¹⁴⁵ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998.

¹⁴⁶ *Ibid*, Article 5 (italics added).

3.1 The First Steps Towards an ICC

The Rome Conference and the adoption of the Rome Statute was the culmination of a process that had started more than 50 years earlier. In the late 1940s, the establishment of an international criminal court was one of three major human rights projects within the realm of the General Assembly. The other two being a universal declaration on human rights and a convention to prevent genocide, both rapidly adopted in 1948. The General Assembly and the ILC made initial efforts to establish an international criminal court in the late 1940s and in the 1950s. However, the work was put on hold pending the adoption of a generally accepted definition of aggression, eventually achieved in General Assembly Resolution 3314, and then faced further postponement.¹⁴⁷

In 1989, the General Assembly revived the project by requesting the ILC to resume work on an international criminal court.¹⁴⁸ A Draft Statute was presented by the ILC in 1994.¹⁴⁹ Article 20(b) stipulated that a future court would have jurisdiction over ‘the crime of aggression’. The ILC explained that the inclusion of the crime of aggression was problematic since it, unlike genocide, lacked a treaty definition. Nevertheless, it argued that not to include the crime of aggression would be a retrogressive step, and that a contemporary court would be in a better position to define the customary international law crime of aggression than the Nuremberg Tribunal had been. Doubts as to what acts would amount to the crime of aggression, some members of the ILC claiming that the crime was limited to waging a war of aggression, resulted in that the crime remained undefined in the 1994 Draft Statute.¹⁵⁰

Furthermore, certain safeguards concerning the exercise of jurisdiction over the crime were included to recognise the special responsibilities of the Security Council under Chapter VII of the UN Charter. The ILC explained that the crime of aggression presupposed an act of aggression by a State and that it was for the Council to make such decisions on States. Therefore, Article 23(2) stated that a prior determination by the Security Council that an act of aggression had occurred was required for ‘a complaint of or directly related to an act of aggression’ to be brought under the Statute. The future court would then be allowed to make a decision on the involvement of a specific individual in the planning and waging of aggression.¹⁵¹

An Ad Hoc Committee was established by the General Assembly whose role was to discuss the issues emerging from the Draft Statute.¹⁵² In its Final Report, the Ad Hoc Committee summarised comments by the participating delegations on the inclusion of the crime of aggression under the jurisdiction

¹⁴⁷ Lee, Roy S., ‘The Rome Conference and its Contributions to International Law’ in Lee, Roy S. (ed.), *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, p. 2, see also *supra* chapters 2.3.2 and 2.3.4.

¹⁴⁸ General Assembly Resolution 44/39, UN Doc. A/RES/44/39, 4 December 1989.

¹⁴⁹ Draft Statute for an International Criminal Court, 1994 ILC Ybk. Vol. II Part 2, pp. 20-74.

¹⁵⁰ *Ibid.*, pp. 38-39.

¹⁵¹ *Ibid.*, pp. 43-44.

¹⁵² Ad Hoc Committee on the Establishment of an International Criminal Court, established by General Assembly Resolution 49/53, UN Doc. A/RES/49/53, 17 February 1995.

of an international criminal court. The supporters of an inclusion stressed the importance of continuity in prohibiting the use of force and warned about the danger of taking retrogressive steps, whilst the opposition focused on definitional difficulties and the role of the Security Council amongst other things.¹⁵³

Following in the line of the Ad Hoc Committee, the General Assembly went on to establish a Preparatory Committee to review the ILC Draft Statute.¹⁵⁴ At its sixth and final session, the Committee completed its work of preparing a consolidated text of a Statute for an International Criminal Court (1998 Draft Statute) for adoption at the Rome Conference.¹⁵⁵ Christopher K. Hall describes it as considerably longer than the 1994 ILC Draft Statute, containing various options submitted by States, but admits that the basic structure is similar.¹⁵⁶ The crime of aggression is included in Article 5(b) as one of the crimes within the jurisdiction of the court. The inclusion was briefly explained by stating that it 'reflects the view held by a large number of delegations that the crime of aggression should be included in the Statute'.¹⁵⁷ Especially two questions concerning the crime of aggression faced diverging views amongst delegations, namely the definition of the crime and the role of the Security Council in the exercise of jurisdiction over the crime by the court.

Concerning the definition of the crime, three different options were included in the 1998 Draft Statute. The first option provided for a generic approach to the definition. From the wording of the first option, it followed that the question of defining certain acts as aggression in reality would be left to the Security Council. The second option combined a generic approach to the definition with a list of acts possibly amounting to aggression, clearly resembling General Assembly Resolution 3314. As the result of informal consultations conducted by the German delegation to find a broadly supported approach, a third option was produced. It applied a generic approach but limited it to the most obvious cases of aggression, where acts perpetrated were in manifest contravention of the UN Charter and had 'the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State'.¹⁵⁸ Due to diverging views amongst delegations, all three different proposals were submitted to the Rome Conference for consideration.¹⁵⁹

¹⁵³ *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN Doc. A/50/22 (SUPP), 1 January 1995, pp. 13-15.

¹⁵⁴ Preparatory Committee on the Establishment of an International Criminal Court, established by General Assembly Resolution 50/46, UN Doc. A/RES/50/46, 18 December 1995.

¹⁵⁵ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Part One, UN Doc. A/CONF.183/2/Add.1, 14 April 1998.

¹⁵⁶ Hall, Christopher K., 'The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court', 92 *AJIL* (1998), pp. 548-556.

¹⁵⁷ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Part One, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 12, n. 6.

¹⁵⁸ *Ibid*, pp. 12-14..

¹⁵⁹ Hebel, Herman von; Robinson, Darryl, 'Crimes within the Jurisdiction of the Court' in Lee, Roy S. (ed.) *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, pp. 81-83.

The role of the Security Council in the exercise of jurisdiction over the crime by the court was dealt with in Article 10 of the 1998 Draft Statute. Article 10(4) presented two options on the issue. The first option permitted both a positive and a negative determination by the Council. Under the version of positive determination, the Council would have to determine that an act of aggression had occurred as a prerequisite for the court to exercise jurisdiction. Negative determination would require the Council to determine that an act of aggression has not occurred in order to block the court from exercising jurisdiction. Evidently the two versions of the first option would produce different outcomes if put into play. A positive determination would enable permanent members of the Council to cast a veto, resulting in interference with the jurisdiction of the court. It is not far-fetched to believe that this right might be abused in the interest of politics. A negative determination would only allow permanent members to permit jurisdiction contrary to the votes of the other members of the Council, but not obstruct it. Under the second option of Article 10 (4), it was simply put that a determination by the Council in accordance with Article 39 of the UN Charter 'shall be binding on the deliberation of the Court in respect of a complaint, the subject matter of which is the act of aggression'.¹⁶⁰

Concerning provisions relevant to the crime of aggression, the 1998 Draft Statute differentiates somewhat from the one produced by the ILC in 1994. Whereas the 1994 ILC Draft Statute lacked a definition of the crime, the 1998 Draft Statute produced a text including three options on how to define the crime. Both of the Draft Statutes seem to agree on that the Security Council has a role to play in the application of the crime by the court. The proposals put forward in the respective Draft Statutes might look similar at first glance, but there is one interesting and distinct difference. The Preparatory Committee included the possibility that the role of the Council could be one of negative determination. This proposal has the advantage of not giving too much weight to the veto power of the permanent members of the Council, but at the same time not excluding the involvement of the Council altogether. Such a solution might appeal to several States, with the obvious exception of the permanent members. As will be shown in the following parts of this thesis, the negative determination-proposal has not been a part of the discussion in recent years, but it should at least be noted as an interesting proposal.

The work of the ILC and the two Committees constituted the point of departure of the Rome Conference. In particular, the 1998 Draft Statute, containing 116 Articles, several of which contained more than one option and full of square brackets, was an extensive document for the delegations at Rome to consider. Even though the questions of a definition and the role of the Security Council remained unclear, there existed concrete proposals to consider at the Conference. For the definition of the crime there seemed to be a choice between a generic or a specific approach, or possibly a combination of the two into a mixed one. When considering the role of the Security Council, a predominant view was that it should have at least some part to play.

¹⁶⁰ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Part One, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 34.

3.2 The Rome Conference

The crime of aggression was discussed extensively at the Rome Conference and attending States expressed a great variety of positions. Press releases of statements made at the Rome Conference showed at least eight different positions. Views ranged from those supporting its inclusion to those opposing it on the grounds that the ICC ‘should steer clear of political issues such as the question of aggression’.¹⁶¹

The problems encountered at the Conference can be divided into three separate, but interrelated, questions concerning the crime of aggression. First, divergent views were expressed on whether to include the crime of aggression in the Rome Statute at all. A general objection raised against its inclusion was that it was superfluous, since offenders are also likely to be guilty of at least one of the other crimes within the jurisdiction of the ICC. Grant M. Dawson challenges this objection by stating that it ‘does not take into account the value of the criminalization of the aggression itself’.¹⁶² At the Rome Conference, promoters of an inclusion held that to exclude the crime would be a retrogressive step, keeping in mind the precedents of Nuremberg and Tokyo holding individuals criminally responsible for the crime more than 50 years ago. Opposing States, such as the United States and China, advanced reasons of national sovereignty and the unresolved role of the Security Council as obstacles. Controversial as it may have been at the time, the inclusion of the crime of aggression in the Rome Statute gathered the support of the majority of the delegations at the Conference.¹⁶³

However, the main problem was not that of whether to include the crime or not. Not surprisingly, the major problems faced were those of the second and third questions; namely what a definition of the crime would look like and what role the Security Council should play, if any, in the exercise of jurisdiction over the crime by the ICC. The same questions had been discussed extensively in the Preparatory Committee without a solution and when they re-emerged at the Rome Conference, diverging views were expressed between States supportive of an inclusion and those opposing it as well as within the respective groups.

Several proposals were put forward in concern to the definition. A group of Arab and African States insisted on a wide definition, based on General Assembly Resolution 3314, but in some parts formulated to encompass a wider range of situations. They suggested that situations ‘depriving other peoples of their right to self-determination, freedom and independence’ and ‘by resorting to armed force to threaten or violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those people’ were to be included in the definition.¹⁶⁴

¹⁶¹ Kittichaisaree, Kriangsak, *International Criminal Law*, 2001, pp. 208-209.

¹⁶² Dawson, Grant M., ‘Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?’ 19 *N.Y.L. Sch. J. Int’l & Comp. L.* (2000), p. 446.

¹⁶³ Kirsch, Philippe; Robinson, Darryl, ‘Reaching Agreement at the Rome Conference’ in Cassese, Antonio et al (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. 1*, p. 78.

¹⁶⁴ UN Doc. A/CONF.183/C.1/L.37, 1 July 1998, and UN Doc. A/CONF.183/C.1/L.56, 8 July 1998. States participating in submitting either or both of the two proposals were

Supporting a wide definition, Cameroon submitted a proposal under which any 'use of armed force...in manifest contravention of the Charter of the United Nations' constituted the crime of aggression.¹⁶⁵ States opposing a broad definition voiced their concerns that it might lead to politicised complaints. They offered their support instead to the approach held by Germany at the Preparatory Committee, who continued its work on a definition limited to only the most obvious cases of aggression.¹⁶⁶ Despite, or maybe just because, the fact that several proposals were brought forward at the Rome Conference, the delegates were unable to reach a compromise.

The question of the role of the Security Council was not as extensively discussed at the Conference. Partly this was the result of the fact that the question of a definition could not find a solution, and partly because of a lack of time. However, when indeed discussed, it remained a controversial question amongst delegations in Rome. Several States opposed any role for the Council in relation to the crime of aggression, and in some cases any reference to it throughout the Statute. Mexico submitted a proposal suggesting that 'the relevant principal organ of the United Nations' should replace all references to the Council in the Statute.¹⁶⁷ The permanent members of the Council regarded the role it had to play in relation to the crime of aggression as a necessary condition for the crime to be included in the Statute.¹⁶⁸ A proposal by Cameroon suggested that once a crime of aggression had been submitted to the court, it would have to refer the matter to the Council for a declaration 'that the aggression does or does not exist'. If the Council failed to act within a reasonable time, the court could commence an investigation.¹⁶⁹ Just like the question of a definition, the question of the role of the Security Council could not find a feasible compromise at the Rome Conference.

With the Conference closing in on its final week and the possibilities of finding a compromise looking slim, the Bureau of the Committee of the Whole, responsible for organising and coordinating all negotiations, felt that it needed to take action. In its Proposal of 10 July, the Bureau proposed that delegations should develop a generally acceptable provision by 13 July. In case of failure, the crime would be addressed in some other manner, 'for example, by a Protocol or review conference'.¹⁷⁰

This attempt to force a solution on the controversial questions turned out to be unsuccessful and was not well received amongst the delegations. Opposition was particularly strong amongst Arab and non-aligned States¹⁷¹

Algeria, Bahrain, Iran, Iraq, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen.

¹⁶⁵ UN Doc. A/CONF.183/C.1/L.39, 2 July 1998.

¹⁶⁶ Hebel, Herman von; Robinson, Darryl, 'Crimes within the Jurisdiction of the Court' in Lee, Roy S. (ed.), *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, pp. 84-85.

¹⁶⁷ UN Doc. A/CONF.183/C.1/L.81, 15 July 1998.

¹⁶⁸ Hebel, Herman von; Robinson, Darryl, 'Crimes within the Jurisdiction of the Court' in Lee, Roy S. (ed.), *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, p. 84.

¹⁶⁹ UN Doc. A/CONF.183/C.1/L.39, 2 July 1998.

¹⁷⁰ UN Doc. A/CONF.183/C.1/L.59, 10 July 1998.

¹⁷¹ The non-aligned movement (NAM) included a diversity of delegations supporting the inclusion of the crime of aggression in the Statute, although they did not necessarily agree

who had remained committed to the idea of including the crime in the Statute throughout the entire Conference. However, realising that a compromise on the controversial questions was unlikely to develop before the end of the Conference the non-aligned States suggested a new approach. In a proposal, they provided for the inclusion of the crime of aggression in the Rome Statute, but that the definition of the crime should be elaborated at a later stage. Until such a definition was in place, the ICC should not exercise jurisdiction over the crime.¹⁷²

It was against this background that the Bureau included the compromise text consisting of Articles 5(1)(d) and 5(2) in the final text of the Rome Statute.¹⁷³ In the words of Grant M. Dawson, the delegations at the Rome Conference ‘agreed to disagree’ to this compromise solution.¹⁷⁴ The explicit reference to the crime of aggression as a crime within the subject matter jurisdiction of the ICC is much due to the persistent work of some delegations at the Rome Conference, particularly those belonging to the non-aligned movement. Even though the final text of the mentioned Articles was largely based on the proposal of the non-aligned movement, there is one important difference between the two texts. In the final text of the Rome Statute, an additional sentence at the end of Article 5(2) was included, providing that the definition ‘shall be consistent with the relevant provisions of the Charter of the United Nations’.¹⁷⁵ This phrase has been interpreted as a reference to the role the Security Council ‘may or should play in relation to this crime’.¹⁷⁶

The result of this political compromise, consisting of Articles 5(1)(d) and 5(2), is that the crime of aggression is included *de iure* but not *de facto* within the jurisdiction of the ICC.¹⁷⁷ As stated by Article 5(2), not until an amendment ‘defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime’ is adopted in accordance with Articles 121 and 123 will the ICC be able to exercise jurisdiction over the crime of aggression.

The provisions on the crime of aggression included in the Rome Statute need to be interpreted together with the Final Act of the Conference.¹⁷⁸ In its Resolution F, paragraph 7, a Preparatory Commission was established to prepare proposals for a definition of the crime of aggression and the

on the definition of the crime, Kirsch, Philippe; Robinson, Darryl, ‘Reaching Agreement at the Rome Conference in Cassese, Antonio et al (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. 1*, pp. 70-72.

¹⁷² UN Doc. A/CONF.183/C.1/L.75, 14 July 1998.

¹⁷³ See *supra* chapter 3, for the text of the Articles.

¹⁷⁴ Dawson, Grant M., ‘Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?’ 19 *N.Y.L. Sch. J. Int’l & Comp. L.* (2000), p. 418.

¹⁷⁵ *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9.

¹⁷⁶ Hebel, Herman von; Robinson, Darryl, ‘Crimes within the Jurisdiction of the Court’ in Lee, Roy S. (ed.), *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, p. 85.

¹⁷⁷ Zimmermann, Andreas ‘Article 5’ in Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, p. 102.

¹⁷⁸ *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/10, 17 July 1998.

conditions for the exercise of jurisdiction. The Commission was to submit such proposals for consideration at a future Review Conference, with the aim of finding an ‘acceptable provision on the crime of aggression for inclusion in this Statute’.¹⁷⁹ The immediate establishment of the Preparatory Commission, with a mandate to elaborate on the crime of aggression, indicates that the discussion on *de facto* inclusion of the crime was not intended to be put on hold. Even though some might brush it aside as part of a larger political compromise, its inclusion at least shows an intention of keeping unresolved issues on the agenda with a view of finding feasible solutions to them. Before turning attention to the work conducted by the Preparatory Commission, and its successors, a brief presentation of the contents of the Rome Statute, including the process of a Review Conference, is called for.¹⁸⁰

3.3 The Rome Statute

First, it might be appropriate to note that the ICC differs from the ad hoc Tribunals, ICTY and ICTR, established by the Security Council.¹⁸¹ Whereas the former is the result of a multilateral treaty adopted voluntarily at the Rome Conference, the latter were created as enforcement measures under chapter VII of the UN Charter. Consequently, ICTY and ICTR can be seen as courts imposed on States, prescribing cooperation, while the ICC functions through the voluntary participation of States to fulfil what they have agreed upon in a treaty.

In addition, the ad hoc Tribunals were given jurisdiction for geographically limited situations taking place within a given time period, and was created after the crimes had been committed. The ICC, on the other hand, was created to deal with crimes not yet committed. According to Article 11(1) of the Rome Statute, the jurisdiction of the ICC *ratione temporis*, is limited to ‘crimes committed after the entry into force of this Statute’. For States becoming a Party to the Statute after its entry into force, jurisdiction is limited to crimes committed after the Statute has entered into force for that State. The Statute required sixty ratifications or accessions to enter into force, Article 126(1). Despite the apparent differences amongst delegations both prior to and during the Rome Conference, this was achieved somewhat rapidly. The Rome Statute of the International Criminal Court entered into force on 1 July 2002.¹⁸² Consequently, the ICC cannot exercise jurisdiction over crimes committed prior to this date, or for States becoming Parties after the entry into force of the Statute, the date of ratification or accession.

¹⁷⁹ Ibid.

¹⁸⁰ For a detailed summary of the entire Rome Statute, see for instance Cassese, Antonio et al (eds.), *The Rome Statute of the International Criminal Court: A Commentary Vol. 1*; Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*.

¹⁸¹ See *supra* chapter 2.3.1.

¹⁸² Status as of 30 August 2006: 139 Signatories, 102 Parties, UN Treaty database, <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>>, last visited 2006-08-30.

As further preconditions to the exercise of jurisdiction, Article 12 sets out the provisions on jurisdiction *ratione loci* and *ratione personae*. Article 12(2)(a) stipulates that the ICC has jurisdiction over crimes committed on the territory of States Parties, regardless of the nationality of the offender. According to the Statute, the concept of territory also includes crimes committed on board vessels or aircrafts registered in the State Party. The ICC also has jurisdiction over nationals of a State Party accused of a crime, in accordance with Article 12(2)(b). Finally, the ICC may also exercise jurisdiction over territory or nationals of non-Party States if they accept jurisdiction on an *ad hoc* basis, in accordance with Article 12(3). This is also true if the Security Council refers a situation acting under Chapter VII of the UN Charter, in accordance with Article 13(b). In addition, Article 16 establishes another role for the Council within the ICC's regime. It is given the opportunity to defer investigations or prosecutions by the ICC if it adopts a Resolution under Chapter VII of the UN Charter making a request to that effect. The suspension or prevention of such proceedings will be in force for a renewable period of 12 months. The adoption of a Security Council decision requires a minimum of nine affirmative votes. In theory, not even a uniform view by all five permanent members can block ICC proceedings, given that there are nine opposing votes from the other ten Council members.¹⁸³ However, in practice it is highly unlikely that such a situation will occur. Therefore, with the inclusion of Article 16, the Council is in principle given a right to let political decisions prevent prosecution.

An important feature of the ICC is that it is based on the principle of complementarity whereby the ICC will practice its work as a subsidiary or complementary organ to national courts. National courts enjoy the first taste of action in exercising jurisdiction, and the ICC may only assert its jurisdiction if special circumstances are at hand. The concept of complementarity is addressed in paragraph 10 of the Preamble and in Article 1, and further described in detail in Articles 17-19 as issues of admissibility. In short, these provisions prescribe primacy for the national courts unless a situation is referred to the ICC by the Security Council or the national organ exercising jurisdiction is 'unwilling or unable genuinely to carry out the investigation or prosecution', Article 17(1)(a).¹⁸⁴

The reasons for applying a complementarity regime were according to Antonio Cassese twofold. First, States considered it practical to avoid the ICC from being flooded with cases from all over the world. The ICC, with its limited resources, would most likely find such a situation hard to cope with. Likewise, national courts would probably have a better chance of collecting the necessary evidence and getting hold of the accused. Secondly, States raised their concerns on a more principle matter, namely the possible infringement on State sovereignty that the ICC would result in.¹⁸⁵ The

¹⁸³ Yee, Lionel, 'The International Criminal Court and The Security Council: Articles 13(b) and 16' in Lee Roy S., *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, pp. 150-151.

¹⁸⁴ See Williams, Sharon A., 'Article 17' in Triffterer, Otto (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, pp. 383-394, for a discussion on what is meant by 'unwilling or unable'

¹⁸⁵ Cassese, Antonio, *International Criminal Law*, p. 351.

principle of complementarity is a further feature distinguishing the ICC from the ICTY and ICTR seeing as the Statutes of the latter Tribunals state that they ‘shall have primacy over national courts’.¹⁸⁶

Part three of the Rome Statute, entitled ‘General principles of Criminal Law’, is of importance to the work conducted subsequent to the Rome Conference and therefore needs a brief explanation here. Articles 22 and 23 establish that the principle of *nulla poene, nullum crime sine lege* should apply to the Statute. Article 25 lists the different forms of participation in a crime that might result in individual criminal responsibility. Such participation can for example be in the form of committing the crime as the principal perpetrator, ordering the commission of the crime or aiding or abetting the commission of the crime. Besides the requirement of fulfilling the material element of a crime, an individual naturally needs to fulfil a mental element to be held criminally responsible, often referred to as the *mens rea* of the crime. For the purpose of the crimes within the Rome Statute, Article 30 stipulates that individual criminal responsibility requires that ‘the material elements are committed with intent and knowledge’. Intent is described as meaning to engage in the conduct and at least be aware of what would be the consequence in the ordinary course of events. Knowledge means the awareness of the existence of circumstance or the occurrence of a consequence in the ordinary course of events.

As has been previously noted, Article 5(2) restricts the ICC’s jurisdiction over the crime of aggression until a provision is adopted in accordance with Articles 121 and 123. The content of this is that only after the expiry of a period of seven years from the date the Statute entered into force, is it possible for a Review Conference to adopt an amendment to the Statute, setting out a definition of the crime and rules governing the conditions for exercise of jurisdiction over it.¹⁸⁷ Thus, no amendment concerning the crime of aggression can be entertained until 1 July 2009, i.e. seven years after the Rome Statute entered into force. According to Article 121(5), an amendment will then only enter into force for those States deciding to deliver an instrument of ratification or acceptance. It is with this future Review Conference in mind that this thesis will proceed to arrive at where the work on the crime of aggression needs to be heading and what the outlook is of finding a feasible provision in time for the Conference.

In conclusion, it is reasonable to say that the Rome Statute and the establishment of the ICC is a great achievement. For the first time in history, a permanent international criminal court is now operative with jurisdiction over individuals for ‘the most serious crimes of concern to the international community as a whole’. It is encouraging to see that a vast number of States have decided to become Parties to this new institution. Nevertheless, the question of the crime of aggression turned out to be a highly contentious issue, both prior to and at the Rome Conference. In the end, political interests assured that the crime had to face a compromise. In order for it to be included at all, it was decided that further elaborations on a definition and the conditions for exercise of jurisdiction were required.

¹⁸⁶ ICTY Statute, Article 9(2); ICTR Statute, Article 8(2).

¹⁸⁷ Gaja, Giorgio, ‘The Long Journey towards Repressing Aggression’ in Cassese, Antonio et al (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, p. 431.

3.4 The Search Continues

The work conducted on the crime of aggression subsequent to the Rome Conference has mainly been that of two different Working Groups. First, the Working Group on the crime of aggression, established within the Preparatory Commission, considered the question until the Rome Statute entered into force. It was succeeded by the Special Working Group on the crime of aggression, established by the Assembly of States Parties to the Rome Statute, which has been concerned with the question since and will continue to be so until the 2009 Review Conference.

3.4.1 Preparatory Commission

As previously noted, Resolution F of the Final Act of the Rome Conference established a Preparatory Commission with several tasks, one of which was to prepare proposals for a provision on the crime of aggression to be included in the Rome Statute. According to paragraph 8 of Resolution F, the work was to be concluded with the entry into force of the Rome Statute.

At the outset of the elaborations in the Commission, work progressed at a slow pace. Partly this was because it had no exact deadline for delivering a proposal, and partly because organisational issues were time-consuming. The organisational issues mainly concerned the question of how to establish a Working Group on the crime of aggression.¹⁸⁸ However, the establishment was achieved by the Commission's second session in August 1999.¹⁸⁹ In the early days of the Working Group, delegations tended to simply repeat statements of positions that had previously been put forward. Christopher K. Hall explains that two texts helped in turning the discussion into a more focused one; first, a consolidated text of proposals¹⁹⁰ and second, a discussion paper¹⁹¹ with a list of issues related to the crime of aggression that needed to be resolved. The Coordinator for the Working Group prepared both of these texts.

The issues of discussion rapidly crystallised into two main questions. First, diverging views were expressed on what a definition of the crime would look like. Preferences varied from those supporting a generic definition, to those supporting a specific approach containing a list of acts. Secondly, the question of the conditions under which the ICC should exercise jurisdiction over the crime caused debate amongst delegations. In the eyes of some, like the permanent members of the Security Council, a determination by the Council was necessary, while some saw a role for other UN organs, like the ICJ or the General Assembly, if the Council failed to act.¹⁹² That it was precisely these two questions that were at the centre of attention could not have come as a big surprise to the delegations. An

¹⁸⁸ Schabas, William A., 'The Unfinished Work Of Defining Aggression: How Many Times Must The Cannonballs Fly, Before They Are Forever Banned?' in McGoldrick, Dominic et al (eds.), *The Permanent International Criminal Court, Legal and Policy Issues*, p. 136.

¹⁸⁹ UN Doc. PCNICC/1999/L.4/Rev.1, 18 August 1999, p. 8, para. 8.

¹⁹⁰ UN Doc. PCNICC/1999/WGCA/RT.1, 9 December 1999.

¹⁹¹ UN Doc. PCNICC/2000/WGCA/RT.1, 29 March 2000.

¹⁹² Hall, Christopher K., 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court', 94 *AJIL* (2000), p. 787.

unfortunate line of continuous disagreement upon precisely these issues can be seen when looking back at the discussions taking place both prior to and during the Rome Conference.

Let us now turn our attention to some of the concrete proposals put forward in the Preparatory Commission. The two main questions, i.e. a definition and the conditions for the exercise of jurisdiction, will be addressed separately. First, one should note that the two main questions are profoundly interlinked. Not least, this follows from the fact that some of the proposals submitted mutually managed the questions. Nevertheless, it is believed that in the interests of clarity and coherence, the questions will benefit from being dealt with separately, and this approach will be applied throughout the remaining parts of this thesis.

3.4.1.1 Definition

Several proposals were discussed in the Preparatory Commission regarding the question of a definition of the crime of aggression. However, three or possibly four main alternative definitions can be said to have formed a basis of the discussions.

First, one option was to base the definition on the ‘crimes against peace’ provision in the Nuremberg Charter of 1945. The Russian Federation advocated this line and delivered a proposal describing the crime in a generic way as ‘any of the following acts: planning, preparing, initiating, carrying out a war of aggression’.¹⁹³ Limiting the crime to acts connected with a ‘war of aggression’ can be problematic. Roger S. Clark has pointed out that there is no indication whether the term goes beyond the types of acts of aggression listed in the General Assembly Resolution 3314. Thus, in his opinion, what amounts to a ‘war of aggression’ remains unclear and the term ‘seems an unhelpful concept’.¹⁹⁴

Under a second option, aggression would be given a generic definition combined with an exhaustive or illustrative list of acts amounting to aggression taken from Resolution 3314, seen as an authoritative source of existing customary international law. A group of Arab States produced a proposal including attacks ‘depriving other peoples of their rights to self-determination, freedom and independence’ in the generic part of the definition. This was combined with an illustrative list of acts taken verbatim from Article 3 of Resolution 3314, making it a kind of mixed approach.¹⁹⁵ Julius Stone commented as early as 1958 on the problems linked with a mixed approach, stating that the inclusion of a list of acts would result in ‘doubt as to the adequacy of the definition in the general clause’.¹⁹⁶ If the list is made exhaustive, Matthias Schuster has observed that it has the

¹⁹³ UN Doc. PCNICC/1999/DP.12, 29 July 1999.

¹⁹⁴ Clark, Roger S., ‘Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court’, 15 *LJIL* (2002), p. 878.

¹⁹⁵ UN Doc. PCNICC/1999/DP.11, 26 February.

¹⁹⁶ Stone, Julius, *Aggression and World Order*, p. 80.

‘disadvantage of not being able to conclusively list every possible situation in which aggression can be said to occur’.¹⁹⁷

Living in a world where the types of weapons and methods of warfare are developing more rapidly than probably ever before, one could surely find it adequate to support this conclusion. Certainly, it is not too far-fetched to believe that a situation could arise, not covered by an exhaustive list, where the acts committed bears the resemblance and guilt of a crime of aggression. Yet, if the ICC were to punish the individuals responsible in such a situation, it would run counter to the principle of *nulla poene, nullum crimen sine lege*. Unquestionably, the ICC wants to avoid such a situation.

As a third option, several States submitted proposals providing for a generic approach, focusing on the use of armed force against the sovereignty, territorial integrity or political independence in violation of the UN Charter. A joint proposal by Greece and Portugal followed this model:

‘For the purposes of the present Statute, aggression means the use of armed force, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action of a State, against the sovereignty, territorial integrity or political independence of a State in violation of the Charter of the United Nations.’¹⁹⁸

In an explanatory note to the proposal, it was explained that the generic approach was chosen with the intent of making it easier to reach agreement on a definition. It was held that a definition with an illustrative list was not suited for attributing individual criminal responsibility, and that it was difficult to include all potential acts amounting to aggression in an exhaustive list. Nevertheless, Resolution 3314 would remain relevant for the ICC when determining whether a particular act or course of action by an individual constituted aggression.¹⁹⁹

Following the line of a generic approach to a definition, Bosnia and Herzegovina, New Zealand and Romania delivered a somewhat innovative joint proposal. The novelty of the proposal was that it distinguished between the concepts of a crime of aggression, committed by an individual, and an act of aggression, committed by a State:

‘1. A person commits the crime of aggression who, being in a position to exercise control over or direct the political or military action of a State, intentionally and knowingly orders or participates actively in the planning, preparation, initiation or waging of aggression committed by that State.

2. For the purpose of the exercise of jurisdiction by the Court over the crime of aggression under the Statute, aggression committed by a State means the use of armed force to attack the territorial integrity or

¹⁹⁷ Schuster, Matthias ‘The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword’, 14 *CLF* (2003), p. 20, *but see* Ntanda Nsereko, Daniel D., ‘Aggression under the Rome Statute of the International Criminal Court’ 71 *NJIL* (2002), pp. 503-504, for a different opinion.

¹⁹⁸ UN Doc. PCNICC/1999/WGCA/DP.1, 7 December 1999, re-issued in UN Doc. PCNICC/2000/WGCA/DP.5, 28 November 2000, including explanatory notes.

¹⁹⁹ UN Doc. PCNICC/2000/WGCA/DP.5, 28 November 2000, pp. 1-3.

political independence of another State in violation of the Charter of the United Nations.’²⁰⁰

In a commentary to the proposal, the drafters admitted that a provision only needed to define the crime of aggression. However, they felt that a clarification of what acts of aggression could trigger individual criminal responsibility was necessary, since it worked as a precondition for the crime to arise. The terms ‘intentionally and knowingly’, introduced into the first paragraph to describe the necessary mental element, could be superfluous as it merely repeated the ‘intent and knowledge’ used in Article 30 of the Rome Statute. However, it was explained that the inclusion of a mental element could help in determining how the crime fits together as a whole. Furthermore, it was clarified that the definition in the second paragraph had no effects on international law on aggression, such as Resolution 3314, beyond the scope of the Rome Statute.²⁰¹ Silvia A. Fernández de Gurmendi, Coordinator of the Working Group on the Crime of Aggression, has explained that the proposal was seen by many delegations as ‘an important step forward, at least from a methodological point of view’.²⁰²

Finally, as a possible fourth option, included within the model of a generic approach, the German delegation reiterated the view held at the Preparatory Committee stages and delivered a proposal. The proposed definition was literally the same as had been delivered at the earlier stages, including a necessary link of that acts had to have the object or the effect of a military occupation or of an annexation of the territory of another State.²⁰³ Hans-Peter Kaul, Head of the German ICC Delegation, has admitted that the German approach ‘is a somewhat restrictive approach, probably too restrictive’ and that it does not take into account modern weapon technology.²⁰⁴

Even though the proposals indicate a wide range of views on what to include into a definition of the crime of aggression, at least two aspects of the crime appear to have achieved general agreement amongst participants in the Preparatory Commission. First, the crime of aggression is a ‘leadership crime’. In other words, there must be an individual who is in a position of control and leadership in the attacking State whose conduct played a part in the attack taking place. Secondly, individual criminal responsibility for the crime of aggression requires that an act of aggression, giving rise to State responsibility, has occurred.²⁰⁵

The Preparatory Commission had until the conclusion of the first meeting of the Assembly of States Parties to the ICC to come up with a final proposal. As it became evident that consensus could not be reached, the

²⁰⁰ UN Doc. PCNICC/2001/WGCA/DP.2, 27 August 2001.

²⁰¹ Ibid.

²⁰² Fernández de Gurmendi, Silvia A., ‘An Insider’s View’ in Politi, Mauro and Nesi, Giuseppe (eds.), *The International Criminal Court and the Crime of Aggression*, p. 182.

²⁰³ UN Doc. PCNICC/1999/DP.13, 30 July 1999, *see also supra* chapter 3.1.

²⁰⁴ Kaul, Hans-Peter, ‘The Crime of Aggression: Definitional Options for the Way Forward’ in Politi, Mauro and Nesi, Giuseppe (eds.), *The International Criminal Court and the Crime of Aggression*, p. 100.

²⁰⁵ *See for instance* *ibid.*, p. 98; Stancu, Ioana Gabriela, ‘Defining the Crime of Aggression or Redefining Aggression?’ in Politi, Mauro and Nesi, Giuseppe (eds.), *The International Criminal Court and the Crime of Aggression*, p. 88.

issue of finding a provision for the crime of aggression was deferred to the first Assembly of States Parties, to take place in September 2002. As a substitute for a completed proposal, the final work-product on the crime of aggression was a Discussion Paper proposed by the Coordinator of the Working Group (2002 Discussion Paper).²⁰⁶ In it, the methodological approach proposed by Bosnia and Herzegovina, New Zealand and Romania of distinguishing between ‘crime of aggression’ and ‘act of aggression’ was followed. The Coordinator has explained that the 2002 Discussion Paper intended to deal solely with the definition of the crime of aggression and deliberately avoided defining the acts of aggression entailing State responsibility. In her opinion, this meant that the controversial discussion of choosing between a generic or specific definition could be avoided.²⁰⁷

According to the first paragraph of the 2002 Discussion Paper, the basis for a definition would be found in a generic approach. Resembling an updated version of the formulation contained in the Nuremberg Charter, it reflected the common understanding of aggression as a leadership crime requiring the occurrence of an act of aggression:

‘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.’²⁰⁸

The above three different options referred to the gravity required for the crime of aggression to arise, often referred to as the issue of threshold.²⁰⁹ Option 2, resembling the proposal put forward by Germany, presented a very narrow case, requiring a war of aggression or alternatively a military occupation or annexation. Bearing a clear resemblance to the Greek-Portuguese proposal, option 3 opened for a rather broad definition. By

²⁰⁶ UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2. 11 July 2002 (included *infra* as ‘Annex’), carried forward in ‘Report of the Preparatory Commission for the International Criminal Court’, UN Doc. PCNICC/2002/2/Add.2, 24 July 2002.

²⁰⁷ Fernández de Gurmendi, Silvia A., ‘An Insider’s View’ in Politi, Mauro and Nesi, Giuseppe (eds.), *The International Criminal Court and the Crime of Aggression*, p. 186.

²⁰⁸ UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2. 11 July 2002 (included *infra* as ‘Annex’), carried forward in ‘Report of the Preparatory Commission for the International Criminal Court’, UN Doc. PCNICC/2002/2/Add.2, 24 July 2002.

²⁰⁹ Fernández de Gurmendi, Silvia A., ‘An Insider’s View’ in Politi, Mauro and Nesi, Giuseppe (eds.), *The International Criminal Court and the Crime of Aggression*, p. 186.

declining to include an additional threshold, it is enough for the conduct to constitute a flagrant violation of the UN Charter. Option 1, can be placed somewhere in-between the other options. The use of the terms ‘such as’ indicates that the specified acts are only examples of acts viable for punishment. However, the mere inclusion of these examples might be interpreted as an indication that an additional amount of gravity is required.

The second paragraph concerned acts of aggression and was based on the idea that acts of aggression were related to State responsibility and had already been defined through General Assembly Resolution 3314.²¹⁰ Thus, the Preparatory Commission did not have to define acts of aggression and the second paragraph simply referred to the Resolution, stating that:

‘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”.²¹¹

Option 1 and 2 concern the question of the conditions for the exercise of jurisdiction, which will be returned to shortly.

A reasonable conclusion on the work accomplished by the Preparatory Commission on the definitional part is that that it is possible to find both positive and negative aspects. On the downside, it must be seen as a disappointment that a final proposal could not be delivered to the Assembly of States Parties. The inability of participating States to reach a compromise resulted in that the contents of the crime of aggression remained unclear and that it continued to be linked to a high degree of uncertainty. On a positive note, the vast amount of proposals delivered showed that the question was still of great importance to many States. Furthermore, States had at least reached general agreement on parts of the crime, namely its character as a leadership crime and that it only exists in connection with an act of aggression. However, the most important breakthrough might have been the change in the methodological way of approaching the crime. The separation of the crime of aggression from the act of aggression presented an interesting way forward for future elaborations on the crime. The novelty of this methodological approach is that it indicates that States must focus on trying to find a definition for the crime of aggression rather than discussing when a State has committed an act of aggression.

3.4.1.2 Conditions for the Exercise of Jurisdiction

Like with the question of a definition, the question of the conditions for the exercise of jurisdiction over the crime of aggression was the object of

²¹⁰ Ibid, p. 187.

²¹¹ UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2. 11 July 2002 (included *infra* as ‘Annex’), carried forward in ‘Report of the Preparatory Commission for the International Criminal Court’, UN Doc. PCNICC/2002/2/Add.2, 24 July 2002.

several proposals at the Preparatory Commission negotiations. The basis of the negotiations can be divided into three main models.

First, one model was based on the view of the Security Council as the only organ authorised to make a determination that an act of aggression has occurred, in accordance with Article 39 of the UN Charter. Thus, the conditions for the exercise of jurisdiction were settled by giving the Council an exclusive role. The previously mentioned Russian proposal on a definition was made ‘subject to a prior determination by the United Nations Security Council’.²¹² A similar proposal was delivered by Germany.²¹³ Daniel D. Ntanda Nsereko has criticised this approach, claiming that the role of the Council for the maintenance of international peace and security is not exclusive. In his opinion, the ICC ‘must have power to pronounce for itself on the existence or non-existence of aggression for the purpose of seizing or declining to seize itself with jurisdiction over *individuals* – the architects of the crime’.²¹⁴

As a second model, the ICC would get a chance to step in if the Security Council failed to make a determination within a certain period. Proposals adhering to this model can be seen as compromise proposals. While admitting the primary responsibility of the Council, this model assures that the jurisdiction of the ICC is upheld in case of failure to act by the former. A joint proposal by Greece and Portugal followed this line, providing that the ICC must first seek whether the Council has made a determination and, if not, request such a determination. If the Council were to fail to act within 12 months, the proposal stipulated that ‘the Court shall proceed with the case in question.’²¹⁵

In an explanatory note to the proposal, the authors explained that if the Security Council were to make a determination in accordance with Article 39 of the UN Charter that aggression has occurred, it has to be taken into account by the ICC. The explanatory note also made clear that the role of the Council was not exclusive and that the proposed provision was an option, not an obligation, for the Council to act. In addition, the proposed period of 12 months was to be seen as ‘purely indicative and may be shortened’.²¹⁶ Daniel D. Ntanda Nsereko points out that the proposal tries to accord due recognition to the Security Council’s role in issues of aggression, without making it an exclusive one. Nevertheless, he argues that even where the Council has made a determination it should not be binding on the ICC.²¹⁷

Under a third model, other organs, such as the General Assembly or the ICJ, would be involved in the process of making the determination that an act of aggression has occurred. Bosnia and Herzegovina, New Zealand and Romania tabled a proposal following this model. It is by far the most

²¹² UN Doc. PCNICC/1999/DP.12, 29 July 1999.

²¹³ UN Doc. PCNICC/1999/DP.13, 30 July 1999.

²¹⁴ Ntanda Nsereko, Daniel D, ‘Aggression under the Rome Statute of the International Criminal Court’, 71 *NJIL* (2002), pp. 504-516 (italics in original, quote from p. 507).

²¹⁵ UN Doc. PCNICC/1999/WGCA/DP.1, 7 December 1999, re-issued in UN Doc. PCNICC/2000/WGCA/DP.5, 28 November 2000, including explanatory notes.

²¹⁶ UN Doc. PCNICC/2000/WGCA/DP.5, 28 November 2000, pp. 2-3.

²¹⁷ Ntanda Nsereko, Daniel D, ‘Aggression under the Rome Statute of the International Criminal Court’, 71 *NJIL* (2002), p. 516.

extensive and complex proposal delivered at the Preparatory Commission negotiations. In short, the ICC is allowed to proceed with a case if it is referred to them by the Security Council in accordance with Article 13(b) of the Rome Statute, but must in all other cases ascertain whether the Council has made a determination, acting under Article 39 of the UN Charter. There are three possible outcomes of the ICC's inquiries. First, if the Council has made a positive determination, the ICC may proceed with the investigation and possible prosecution. Secondly, in case of the opposite, i.e. that an act of aggression has not taken place, the ICC is barred from proceeding with the case. Finally, if no determination has been made, the ICC should notify the Council of the situation at hand so that action may be taken. The major innovation of the proposal is found in the fifth and sixth paragraphs. They contain a special mechanism in case the Council does not make any determination or invoke the deferral provision in Article 16 of the Rome Statute within six months from the date of notification. If that is the case, the ICC may request the General Assembly to seek an advisory opinion from the ICJ, in accordance with Article 96 of the UN Charter and Article 65 of the Statute of the ICJ, on the legal question of whether or not aggression has been committed by the State concerned. If the outcome of the ICJ advisory opinion is that there has been aggression, the ICC can exercise its jurisdiction over the crime of aggression.²¹⁸

Matthias Schuster has commented on a previous proposal by the same States containing the same innovative mechanism. In his opinion, the involvement of the General Assembly results in a disregard of the Security Council's responsibilities. In addition, there is a possibility that the ICJ could decide on matters without the consent of either State Party to the dispute, which could 'undermine the legitimacy of the International Court of Justice in the eyes of all States'.²¹⁹

In the Coordinator's 2002 Discussion Paper, the issue of the conditions for the exercise of jurisdiction was dealt with in paragraphs four and five and the multiple versions contained therein. Under the fourth paragraph the ICC should first ascertain whether the Council has made a determination, and if not, notify the Council so that appropriate action may be taken. The fifth paragraph tried to include all alternatives put forward during the negotiations concerning what course of action to take when there is no determination by the Security Council:

'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.

²¹⁸ UN Doc. PCNICC/2001/WGCA/DP.2/Add.2, 27 August 2001.

²¹⁹ Schuster, Matthias 'The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword', 14 *CLF* (2003), pp. 47-49.

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.²²⁰

The Coordinator has admitted that the 2002 Discussion Paper does not even attempt to reconcile the multiple proposals discussed during the negotiations in the Preparatory Commission. The outcome is a document that cannot be seen as very progressive. It merely lists all the different proposals put forward during negotiations. However, the acceptance in the fourth paragraph of the primary role of the Security Council in defining the act of aggression for the purpose of the crime might be seen as a step forward. It could help to clarify the ambivalent views reflected in the content of Article 5 of the Rome Statute.²²¹

The obvious disagreement on how to solve the issue of the conditions for the exercise of jurisdiction might be sought in the fact that the question can be seen as trying to interpret the UN Charter. A future provision cannot be in contravention of the UN Charter, as referred to in Article 5(2) of the Rome Statute and as a consequence of the primacy established in Article 103 of the UN Charter. However, the UN Charter does not really address the situation at hand. It merely declares that the Security Council has a primary responsibility for the maintenance of international peace and security and that it for the purpose of Chapter VII-action may determine the existence of an act of aggression. Therefore, the proposals put forward on the issue are characterised by their conflicting interpretations of the UN Charter, evidently influenced by their respective political interests.

²²⁰ UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2. 11 July 2002 (included *infra* as ‘Annex’), carried forward in ‘Report of the Preparatory Commission for the International Criminal Court’, UN Doc. PCNICC/2002/2/Add.2, 24 July 2002.

²²¹ Fernández de Gurmendi, Silvia A., ‘An Insider’s View’ in Politi, Mauro and Nesi, Giuseppe (eds.), *The International Criminal Court and the Crime of Aggression*, p. 187.

Two other approaches deserve mentioning, that were neither really discussed nor included in the 2002 Discussion Paper. First, Daniel D. Ntanda Nsereko has argued that the ICC itself should be able to make a determination for the purpose of establishing individual criminal responsibility for the crime of aggression. In his opinion, the right of the Security Council to request the ICC to defer investigation or prosecution according to Article 16 of the Rome Statute should be a sufficient safeguard. He believes that this would be consistent with the relevant provisions of the UN Charter and recognise the primary responsibility of the Council for the maintenance of international peace and security.²²²

Antonio Cassese has expressed a similar view when advocating that the ICC should be able to act without interference from the Council and initiate investigations into whether aggression has been committed. In his view, 'judicial review of aggression might prove a useful counterbalance to the monopolizing power of the Security Council'.²²³ Secondly, in the 1998 Draft Statute, prepared by the Preparatory Committee, the approach of a negative determination by the Security Council was included.²²⁴ Apparently, this idea did not receive much consideration in the Preparatory Commission, since it was not discussed in any proposal or discussion paper. Seeing as the approach of a negative determination is a rather interesting and distinct approach, one could argue that it is a bit unfortunate that the Preparatory Commission did not discuss it further.

3.4.1.3 Other Issues and Concluding Work

The Preparatory Commission was not only concerned with the questions of a definition and of the conditions for the exercise of jurisdiction. According to Resolution F of the Final Act of the Rome Conference, it was also to prepare proposals on the Elements of the crime of aggression.²²⁵ Even though a segment of the Elements was included in the 2002 Discussion Paper, based on a Samoan proposal, there was in actuality very little time devoted to discussing the question.²²⁶ Roger S. Clark, representative of the Samoan delegation to the Preparatory Commission, believes that the Elements are not only important for their own sake, but also 'equally important for the light that it might shed on technical aspects of the "definition" and "conditions,"'.²²⁷ Clark makes an interesting point

²²² Ntanda Nsereko, Daniel D, 'Aggression under the Rome Statute of the International Criminal Court', 71 *NJIL* (2002), p. 521.

²²³ Cassese, Antonio, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *EJIL* (1999), pp. 147-148.

²²⁴ See *supra* chapter 3.1.

²²⁵ *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, UN Doc. A/CONF.183/10, 17 July 1998.

²²⁶ UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2. 11 July 2002 (included *infra* as 'Annex'), carried forward in 'Report of the Preparatory Commission for the International Criminal Court', UN Doc. PCNICC/2002/2/Add.2, 24 July 2002, Samoan proposal in UN Doc. PCNICC/2002/WGCA/DP.2, 21 June 2002.

²²⁷ Clark, Roger S., 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', 15 *LJIL* (2002), p. 862.

when he points out that a shift in focus towards the more technical aspects of the crime might be one way to achieve a breakthrough on the other questions. It makes even more sense when one keeps in mind that the focus for the definitional part should be on trying to define the crime of aggression rather than dwelling on when a State has committed an act of aggression. A combination of these two ways forward could be of use for future discussions on the crime of aggression.

As previously mentioned, the Preparatory Commission did not succeed in delivering a final proposal on the crime of aggression to the Assembly of States Parties, but instead delivered a Report containing the 2002 Discussion Paper.²²⁸ The Report also contained the text of a Draft Resolution, calling for the creation of another Special Working Group. The new Special Working Group on the crime of aggression was to have an open-ended character, open not only to States Parties of the Rome Statute but also to all member States of the United Nations and specialized agencies. Resembling Resolution F, the Draft Resolution declared in the third paragraph that the Special Working Group should ‘submit such proposals to the Assembly for its consideration at a Review Conference’.²²⁹ In September 2002, the Assembly of States Parties decided to adopt the Draft Resolution and thereby the ‘Special Working Group on the Crime of Aggression’ (Special Working Group) was established.²³⁰ In conclusion, States once again ‘agreed to disagree’ on a provision on the crime of aggression and decided that further consultations on the crime were required.²³¹

3.4.2 Special Working Group on the Crime of Aggression

Work within the Special Working Group has progressed mainly through yearly inter-sessional meetings, held at Princeton University, United States. This work is examined below by presenting a brief view of the preliminary stages before turning attention to the core issues of a definition and the conditions for the exercise of jurisdiction in detail.

3.4.2.1 Preliminary Work

The work within the Special Working Group did not really take off until it was decided to hold an inter-sessional meeting at Princeton University in June 2004. The primary focus of the meeting was to address technical aspects of the crime of aggression that had not been previously addressed. Questions receiving the attention of the participants were for example the incorporation and placement of the provisions on aggression in the Statute and its relationship to general principles of criminal law as contained in Part three of the Rome Statute. As an example, diverging views were expressed

²²⁸ UN Doc. PCNICC/2002/2/Add.2, 24 July 2002.

²²⁹ Ibid, p. 2.

²³⁰ Resolution ICC-ASP/1/Res.1, UN Doc. ICC-ASP/1/3, 25 September 2002, p. 328.

²³¹ Dawson, Grant M., ‘Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?’ 19 *N.Y.L. Sch. J. Int’l & Comp. L.* (2000), p. 418.

on the question if Article 25(3) of the Rome Statute, listing different forms of participation, should be applicable to the crime of aggression. Some participants felt that a future provision on a definition of the crime could itself contain the different forms of participation and exclude the applicability of Article 25(3), as had been the case with the 2002 Discussion Paper. Others argued that Article 25(3) should remain applicable, either in its entirety or partially. Unlike a previous proposal in the Preparatory Commission²³², it was clarified that to include a mental element in the definition would be superfluous, as this was already contained in Article 30. The focus on technical aspects meant that the core issues of a definition and of the conditions for the exercise of jurisdiction, was left aside with the understanding that significant progress was unlikely. In conclusion, some points of consensus were reached in agreeing that a future provision on aggression be incorporated into the Rome Statute rather than in a separate instrument and that some provisions in Part three needed to be revisited at a later stage.²³³ Several of the participating States deemed the strategy to begin the work within the Special Working Group on technical aspects a success, as it helped in accelerating a constructive atmosphere.²³⁴

Little time was allocated to the Special Working Group for discussing the issues relating to the crime of aggression during the Third Session of the Assembly of States Parties. Most of the time was spent trying to get the delegates to adopt the 2004 Princeton Report; which resulted in that the Assembly of States Parties carried it forward as a working document and annexed it to its own Report of its Third Session.²³⁵

Nevertheless, some States found the time to offer opinions on the core issues. Concerning the definitional part, both Germany and Russia reiterated their support for a generic approach to a definition, though mindful of the importance of General Assembly Resolution 3314. Other opinions included Cuba's, expressing concern that the definition should cover the use of weapons of mass destruction, and Turkey, pointing to the fact that non-State actors could also be perpetrators. Concerning the question of the conditions for the exercise of jurisdiction, Russia reiterated its belief that Security Council involvement was necessary and exclusive, while New Zealand reminded everyone of the possible involvement of the ICJ.²³⁶ In conclusion, the limitations of time resulted in that the elaborations on a definition and the conditions for the exercise of jurisdiction cannot be said to have progressed much at the Third Session of the Assembly of States Parties.

²³² UN Doc. PCNICC/2001/WGCA/DP.2, 27 August 2001, *see supra* chapter 3.4.1.1.

²³³ Report of the Special Working Group on the 2004 Informal Inter-sessional Meeting, ICC-ASP/3/SWGCA/INF.1, 13 August 2004, pp. 4-15.

²³⁴ 'CICC Team Report on the Assembly of States Parties to the Rome Statute of the International Criminal Court Third Session, The Hague, 6-10 September 2004', at <http://www.iccnw.org/documents/ASP3_AggressionTeamReport_Dec14.pdf>, last visited 2006-08-30, pp. 3-5.

²³⁵ Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Third Session, 6-10 September 2004, ICC-ASP/3/25, Proceedings, para.41 and Annex II.

²³⁶ 'CICC Team Report on the Assembly of States Parties to the Rome Statute of the International Criminal Court Third Session, The Hague, 6-10 September 2004', at <http://www.iccnw.org/documents/ASP3_AggressionTeamReport_Dec14.pdf>, last visited 2006-08-30, pp. 5-6.

More recently, the core issues have received the increasing attention of the Special Working Group. Let us now proceed by considering the two questions separately.

3.4.2.2 Definition

In June 2005, delegations returned to Princeton to hold a second inter-sessional meeting. The discussions took off from where the previous meeting had ended in discussing technical issues of the crime, such as its relationship to general principles of criminal law as contained in Part three of the Rome Statute. Much time was spent discussing the link between the crime of aggression and Article 25(3) of the Rome Statute, concerning forms of participation resulting in individual criminal responsibility. The 2002 Discussion Paper was used as a starting point for discussions. In its first paragraph, the different forms of participation were incorporated into the Article defining the crime, and consequently the third paragraph excluded the applicability of Article 25(3).²³⁷

Several delegations questioned this approach, and contemplated on an approach allowing the applicability of Article 25(3) to the crime of aggression. The idea was to keep the definition of the crime rather narrow and to insert a new subparagraph to Article 25(3), clarifying that it was applicable to the crime of aggression insofar as it was compatible with the leadership nature of the crime. The reason for the emphasis on a new paragraph was that then the leadership requirement needed to be fulfilled in all cases, whereas Article 25(3) contained alternative requirements set forth in subparagraphs (a)–(d).²³⁸ Two proposals were presented for a rewording of the first paragraph of the 2002 Discussion Paper, containing the insertion of new subparagraph to Article 25(3):

‘Proposal A

Definition, paragraph 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 participates actively in an act of aggression ...”

Article 25, paragraph 3

Insert a new subparagraph (d) bis:

“In respect of the crime of aggression, paragraph 3, sub paragraphs (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.”

Proposal B

²³⁷ UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2. 11 July 2002 (included *infra* as ‘Annex’), carried forward in ‘Report of the Preparatory Commission for the International Criminal Court’, UN Doc. PCNICC/2002/2/Add.2, 24 July 2002.

²³⁸ Report of the Special Working Group on the 2005 Informal Inter-sessional Meeting, ICC-ASP/4/SWGCA/INF.1, 29 June 2005, pp. 7-8.

Definition, paragraph 1:

“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].”

Article 25

Insert a new paragraph 3 bis

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

(Article 25, paragraph 3, does apply to the crime of aggression.)²³⁹

The proposed approach to apply Article 25(3) to the crime of aggression evidently resulted in a new way of formulating the definition of the crime. As previously noted, Roger S. Clark held that consideration of technical aspects might aid in finding a definition of the crime.²⁴⁰ In the case of the 2005 Princeton Report, he appears to be correct. Considerations of technical aspects resulted in two interesting proposals that approached the definition in a new way. The new approach appears to be to focus the definition on the principal conduct amounting to a crime of aggression and to let Article 25(3) handle the various forms of participation. As a result, a slimmer definition is introduced. However, a possible problem could be to find a suitable term describing the punishable conduct. In the case of the two proposals, ‘engaging a State’ and ‘participates actively’ are used.

Following in the line of the methodological approach envisaged by the 2002 Discussion Paper, the definition of acts of aggression was dealt with separately. The general view expressed at Princeton was that a generic approach was preferable when considering acts of aggression.²⁴¹ It was felt that a specific approach containing an illustrative list would oppose the principle of legality, and that an exhaustive list would be difficult to produce.²⁴²

In the end of 2005, the Special Working Group gathered for the Fourth Session of the Assembly of States Parties and adopted the 2005 Princeton Report. Furthermore, three Discussion Papers were introduced covering different aspects of a provision on the crime of aggression. The intention of the Discussion Papers was to highlight areas that needed further

²³⁹ Ibid, Annex I, p. 18 (emphasis in original).

²⁴⁰ Clark, Roger S., ‘Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court’, 15 *LJIL* 2002, p. 862, *see also supra* chapter 3.4.1.3.

²⁴¹ Report of the Special Working Group on the 2005 Informal Inter-sessional Meeting, ICC-ASP/4/SWGCA/INF.1, 29 June 2005, p.14.

²⁴² ‘CICC Team Report on the inter-sessional meeting of the Special Working Group on the Crime of Aggression (13 to 15 June 2005)’, at <http://www.iccnw.org/documents/CICC_IntersessionalReport_CrimeOfAggression_June2005.pdf>, last visited 2006-08-30, p. 12.

consideration.²⁴³ The Assembly of States Parties took note of the Special Working Groups report and decided to annex the 2005 Princeton Report as well as the three Discussion Papers to its own Report.²⁴⁴

Discussion Paper 1 concerns the relationship between the crime of aggression and Article 25(3) of the Rome Statute. It describes the approach contained in the 2002 Discussion Paper as a ‘monistic approach’. Such an approach includes the individual conduct linking the individual to the State act of aggression, the *conduct element*, into the definition to cover all potential perpetrators and to cover all forms of participation and excludes the applicability of Article 25(3). The approach advocated at the 2005 Princeton meeting is dubbed a ‘differentiated approach’, and differs in that it focuses on the conduct of the principal perpetrator in the definition of the crime. To cover other forms of participation it applies Article 25(3) (a)-(d), to the crime of aggression.²⁴⁵

Both approaches are explained to have their respective merits and flaws. The monistic approach is a rather simple approach in that it tries to cover all individuals by using a general formula of participation in the State act of aggression. On the downside, by excluding certain provisions of Part 3 of the Rome Statute, it would differ from the drafting technique used for the other crimes under the Statute. The differentiated approach has the obvious appeal of being well suited for the drafting technique used for the Statute. A differentiated approach would require the drafters to come up with a suitable term to describe the conduct element of the crime in the definition. In other words, it must be defined what the commission of the crime of aggression means, in accordance with Article 25(3)(a). Only then will it be possible to attribute the other forms of participation.²⁴⁶

However, it is explained that finding a suitable term to describe the conduct element is difficult. Three alternatives have been up for discussion, ‘*participates* [...] in [the collective act]’ and ‘*engages* a State in [the collective act]’, as presented in the Princeton 2005 Report, and ‘*directs* the [collective act]’, discussed in the margins of the 2005 Princeton meeting. According to the sub-Coordinator responsible for Discussion Paper 1, the last of these alternatives deserves more attention. In conclusion, it is suggested that the monistic approach is rewarded more attention and that the final choice as to which approach is preferable should not be made until both approaches have been fully considered.²⁴⁷

Discussion Paper 3 involves the question of a definition of aggression in the context of the act committed by a State and like at the 2005 Princeton meeting, a generic approach is advocated. Yet again, the argument is raised that a specific approach containing an illustrative list would run counter to the principle of *nullum crimen nulla poene sine lege*, and that an exhaustive

²⁴³ Report of the Special Working Group to the Fourth Session of the Assembly of States Parties, ICC-ASP/4/SWGCA/1, 1 December 2005.

²⁴⁴ Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, 28 November-3 December 2005, ICC-ASP/4/32, Proceedings pp. 7-8 and Annex II. A-D.

²⁴⁵ Ibid, Annex II.B, pp. 376-377, initially informally distributed in the Special Working Group under the symbol number ASP/4/SWGCA/NP.1.

²⁴⁶ Ibid, pp. 381-382.

²⁴⁷ Ibid, pp. 377-380.

list would be difficult to achieve. Without expressing a preference, several alternatives on how to define aggression by a State are listed: ‘Use of force’, ‘Armed attack’, ‘Act of aggression’, ‘Use of armed force’, all of which are taken from different parts of the UN Charter and the General Assembly Resolution 3314.²⁴⁸

The aim of the Discussion Papers was that they would work as a tool for the Special Working Group, helping it to focus on concrete questions that needed a solution. The trend to separate the crime of aggression from acts of aggression continues in the Discussion Papers. As previously argued, this could be a useful way forward in trying to find a future provision. Focus needs to be on trying to find a definition for the crime of aggression rather than on what acts of State amount to an act of aggression.

A third inter-sessional meeting took place at Princeton in June 2006. Throughout the meeting, particular attention was given to the issues identified in the mentioned Discussion Papers, which along with the 2002 Discussion Paper formed the basis for the work. Concerning the question of a definition, a great deal of time was spent discussing the individual’s conduct and how to define it. In line with Discussion Paper 1, it was discussed in terms of either a monistic or a differentiated approach. As it had been the trend at the previous inter-sessional meeting, it was agreed that a differentiated approach was preferable in that it treated the crime of aggression in the same way as the other crimes under the jurisdiction of the ICC. However, the differentiated approach needed further elaboration, and consequently the monistic approach, as in the 2002 Discussion Paper, should not be entirely rejected.²⁴⁹

As there was a preference for the differentiated approach, focus was on defining the conduct of the principal perpetrator, as Article 25(3) of the Rome Statute would cover the other forms of participation. There was agreement on that the crime was a leadership crime and reference should be made to the ability to influence policy. Another point of agreement was to avoid the term ‘participates’ to define the conduct element under the differentiated approach, since it might overlap with other forms of participation under Article 25(3). However, delegations disagreed on what term to use in its place and several suggestions were presented. The terms ‘organize and direct’, ‘direct’ and ‘order’ were suggested, with the notion that these were frequently used in counterterrorism conventions and as such established in the context of international criminal law. Other suggestions presented were different forms of ‘engage’, as had been suggested at the 2005 Princeton meeting, and ‘lead’, argued by some as the most accurate description of the conduct of a leader, and thus underlining the leadership role of the principal perpetrator. Concerns were raised that the latter might be too narrow and merely include a head of State or Government as principal perpetrator. Finally, disagreement also surfaced on whether to keep or delete the phrase ‘planning, preparation, initiation or execution’. Supporters of keeping the phrase pointed to the fact that it reflected the

²⁴⁸ Ibid, Annex II.D, pp. 388-389, initially informally distributed in the Special Working Group under the symbol number ASP/4/SWGCA/NP.3.

²⁴⁹ Report of the Special Working Group on the 2006 Informal Inter-sessional Meeting, (Advanced Copy), 29 June 2006, p. 15.

typical features of aggression as a leadership crime, and those arguing for a deletion simply stated that Article 25(3) already covered it.²⁵⁰ The discussions resulted in an updated paper based on proposals A and B of appendix I of the 2005 Princeton Report:

‘Proposal A

For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person **[leads] [directs] [organizes and/or directs] [engages 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.

Proposal B

For the purpose of the present Statute, “crime of aggression” means **[directing] [organizing and/or directing] [engaging a State/the armed forces or other organs of a State in]** an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations, when being in a position effectively to exercise control over or to direct the political or military action of a State.

Under both proposals:

Article 25, paragraph 3

Insert a new subparagraph (d) bis:

“In respect of the crime of aggression, 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.”

(Article 25, paragraph 3, does apply to the crime of aggression. See also Elements of Crimes, paragraph 8 of the general introduction.)²⁵¹

The main difference between the two proposals is that the phrase ‘planning, preparation, initiation or execution’ is included in Proposal A, but deleted in Proposal B. Proposal B also uses the term ‘means’ in the initial phrase to bring it in line with the definitions of the other crimes within the jurisdiction of the ICC. It was clarified that this model could also be applied to Proposal A. Furthermore, the participants explained that the two Proposals merely reflected possible approaches to the conduct element under the differentiated approach, and different alternatives remained open for discussion.²⁵²

As concerns defining the conduct of States, i.e. acts of aggression, the delegations followed the line of previous years. The majority favoured a generic approach, arguing that it was the most pragmatic approach, seeing as it would be difficult to cover all potential cases with a specific approach

²⁵⁰ Ibid, pp. 15-16.

²⁵¹ Ibid, Annex I, p. 19.

²⁵² Ibid, pp. 16-17.

and that the latter would be hard to combine with the respect of the principle of legality. Supporters of a specific approach argued that it was better suited to ensure legal clarity and consistency with the definitions of the other crimes within the ICC's jurisdiction. In the end, delegations settled on agreeing 'that the principle of legality should be safeguarded'.²⁵³

In line with Discussion Paper 3, delegations at Princeton also discussed the question of how to describe the aggression by a State. Most delegates seemed to prefer to retain the notion of an 'act of aggression', while there was some support for using the term 'armed attack'. However, participants pointed out that the practical implications of using different words might be limited since all of the four notions were used in different parts of Resolution 3314. In addition to discussing the quality of the act, there was also a brief discussion on the intensity of the act, encompassed in the qualifier 'flagrant or manifest'. The phrase 'which, by its character, gravity and scale, constitutes a *flagrant* violation of the Charter of the United Nations' was used in paragraph 1 of the 2002 Discussion Paper.²⁵⁴

Delegations were unable to reach a general agreement on whether such a qualifier was required, but held that if a qualifier was to be included the term 'manifest' was preferred over 'flagrant'. Furthermore, a majority view held that the object or the result of an act of aggression, referred to in Options 1 and 2 of the 2002 Discussion Paper, should not be included in the first paragraph. The first paragraph concerned a definition of the crime of aggression. It was felt that, if included, the object or the result of an act of aggression related to the definition of an act of aggression, which should be contained exclusively in paragraph 2 of the 2002 Discussion Paper.²⁵⁵ In other words, a majority supported that the definition of the crime of aggression, contained in paragraph 1, should be separated from the definition of an act of aggression, exclusively dealt with in paragraph 2.

It seems that Proposals A and B delivered at the 2006 Princeton meeting reflect an evolving discussion on a definition for the crime of aggression. There now seems to be a majority favouring the differentiated approach, at least in the Special Working Group. The present discussion focuses on trying to define the individual's conduct, as a principal perpetrator, applying Article 25(3) to cover other forms of participation. Even though an appropriate term outlining the conduct element might be hard to come up with, it is still fair to say that the direction of the present discussions is encouraging. In addition, the methodological approach of distinguishing the individual and the related crime of aggression from the State and the related act of aggression, originally suggested in the Preparatory Commission, seems to have bared fruit. Interesting and important work is currently being done to try to find a feasible definition for the crime of aggression, alongside and separated from the discussions of what acts of States amount to an act of aggression.

²⁵³ Ibid, pp. 3-4.

²⁵⁴ UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2. 11 July 2002 (included *infra* as 'Annex'), carried forward in 'Report of the Preparatory Commission for the International Criminal Court', UN Doc. PCNICC/2002/2/Add.2, 24 July 2002.

²⁵⁵ Report of the Special Working Group on the 2006 Informal Inter-sessional Meeting, (Advanced Copy), 29 June 2006, pp. 4-6.

3.4.2.3 Conditions for the Exercise of Jurisdiction

At the 2005 Princeton meeting, different aspects were discussed at length concerning the question of the conditions for the exercise of jurisdiction. First, when considering the rights of the accused, States expressed general, but not total, agreement on that a potential determination by another organ on the occurrence of an act of aggression should not be binding on the ICC. Even though this might result in undesirable and conflicting findings by the ICC and the Security Council, if it was considered the appropriate organ to make such a determination, it was necessary to safeguard the rights of the accused.²⁵⁶ Justin Hogan-Doran and Bibi T. van Ginkel have commented on potential interference by the ICC in the activities of the Security Council. In their opinion, ‘whatever the short-term or conflict-specific concerns about the ‘interference’ of the Court’s role in the peacemaking activities of the Security Council, in the longer term the consensus of opinion is that it can only serve to reduce the resort to armed conflict by States’.²⁵⁷ It must be admitted that the potential of conflicting findings between the ICC and the Council would not be an ideal solution. However, this should not result in the infringement upon the rights of the accused. One must not forget that while the Council is concerned with the conduct of States, the ICC deals exclusively with individuals.

The delegations went on to consider whether a determination by another organ, generally viewed to be not binding on the ICC, was at all necessary and if it was, what organ should make such a determination. In the discussions, reference was made to Article 5(2) of the Rome Statute, requiring that a future provision on the crime of aggression need to be consistent with the UN Charter. States agreed on that this in fact required a future provision to be in line with the UN Charter, but disagreed on whether this implied that a determination of an act of aggression was necessary and whether the Security Council had the exclusive competence to make such a determination.²⁵⁸

Two main approaches emerged during the discussions. One side favoured the exclusive competence of the Security Council, and the other recognised such competence for other organs as well, such as the General Assembly, ICJ and the Assembly of States Parties. Whereas supporters of the former approach voiced familiar arguments of the exclusive competence granted to the Council by Article 39 of the UN Charter, supporters of the latter approach held that an organ guided by political rather than legal considerations, was not well suited to make a determination. Furthermore, there was no reference to Article 39 of the UN Charter in Article 5(2) of the Rome Statute, and in any event, the role given to the Council was merely one of primary rather than exclusive competence. Finally, the participants also considered what would happen if the Council failed to act, where it was

²⁵⁶ Report of the Special Working Group on the 2005 Informal Inter-sessional Meeting, ICC-ASP/4/SWGCA/INF.1, 29 June 2005, p. 12.

²⁵⁷ Hogan-Doran, Justin and van Ginkel, Bibi T., ‘Aggression as a crime under international law and the prosecution of individuals by the proposed international criminal court’, 43 *NILR* (1996), p. 346.

²⁵⁸ Report of the Special Working Group on the 2005 Informal Inter-sessional Meeting, ICC-ASP/4/SWGCA/INF.1, 29 June 2005, pp. 12-14.

vested with exclusive competence. No agreement could be reached on what course of action to apply if that were to be the case, but it was argued that the Prosecutor should be able to seize the Council or another competent organ with the question to proceed with the investigation. Only in the case where the Council made use of the procedure under Article 16 of the Rome Statute, barring investigation or prosecution for a period of 12 months, would her hands be tied.²⁵⁹

The main contribution of the 2005 Princeton meeting to the question of the conditions for the exercise of jurisdiction appears to be the idea that a potential determination by another organ should not be binding on the ICC. As concerns other aspects of the question, it did not add anything substantial to the previous discussions. Arguments were reiterated from previous discussions on the issue. In comparison to the work being done on a definition on the crime of aggression at the same time, progress must be said to have evolved considerably slower on the question of the conditions for the exercise of jurisdiction.

Of the three Discussion Papers introduced at the Fourth Session of the Assembly of States Parties, only Discussion Paper 2 is concerned with the conditions for the exercise of jurisdiction. Rather than discussing concrete drafting proposals, it tried to clarify the issues involved to enable agreement at a later stage, and included a long list of questions related to the issue. However, the most urgent questions were those linked to the issue of whether the Security Council had the exclusive right to determine that an act of aggression has occurred. The questions are based on a twofold approach and divided into two clusters of questions, A and B. Cluster A concern the option that a prior decision by another organ is necessary for the ICC to exercise jurisdiction. Such a decision can either be in the form of a determination that aggression has occurred or of an explicit ‘go ahead’ for the ICC to proceed, with or without a determination of aggression by that organ. Cluster B concern the option that a decision by another body is not required for the ICC to *start* exercising jurisdiction, such as initiating investigations. However, the question is asked if it at a later stage should be up to another body to determine the occurrence of an act of aggression. If another body were indeed handed this right, such a determination would be binding for the ICC. With this line of thought, ‘the “go ahead” for the ICC to proceed and the judicially relevant determination of an act of aggression are not necessarily the same thing’.²⁶⁰

In order to clarify this line of reasoning it might be appropriate to list the potential options resulting from the questions asked. To be able to do that, two of the questions listed in Discussion Paper 2 are given below:

- A. Should the ICC exercise jurisdiction of the crime of aggression only after another organ has accepted such exercise?

²⁵⁹ Ibid.

²⁶⁰ Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, 28 November-3 December 2005, ICC-ASP/4/32, Annex II.C, pp. 385-386, initially informally distributed in the Special Working Group under the symbol number ASP/4/SWGCA/NP.2.

B. Should the determination of the state act be made by another organ prejudicially?²⁶¹

The involvement of another organ in Question A covers both the case of a determination that an act of aggression has occurred, and an explicit ‘go ahead’ for the ICC to exercise jurisdiction. Whether answering both the questions with a yes or a no, there are four alternative outcomes. First, the Prosecutor might be allowed initiate investigations without a decision by another organ, but any judgment would have to build on a determination of an act of aggression by another organ (No to A, Yes to B). The second and opposite option would require a decision by another organ to initiate investigation or prosecution, but it would be up to the ICC itself to determine whether an act of aggression, as a necessary element of the crime, has occurred (Yes to A, No to B). Under a third alternative, the ICC would require a decision by another organ to initiate investigations, and would also be bound by the determination of an act of aggression by another organ (Yes to A, Yes to B). Finally, there is the alternative that the ICC works independently from involvement of other organs (No to A, No to B). For clarification, this line of reasoning presupposes that an act of aggression must be determined before the existence of a crime of aggression can be determined; which is logical seeing as this assumption has not been challenged throughout the course of the Special Working Group.²⁶²

The Discussion Paper presented on the issue of conditions for the exercise of jurisdiction is a rather brief document. Nevertheless, by breaking the issue down to explicit questions it may be a good point of departure for structuring the discussions on the issue. Its main contribution appears to be its twofold approach to a potential decision by another organ. On one hand, it must be decided whether such a decision is required even for the ICC to commence the exercise of jurisdiction, such as an investigation. On the other hand, it must be decided whether a determination of the occurrence of an act of aggression will be binding on the ICC, and thus have one of the decisive elements of the crime be definitively decided by an organ outside the ICC. Future work within the Special Working Group concerning the conditions for the exercise of jurisdiction need to explore the different alternatives and decide on a preferred position. The Discussion Paper might prove a useful tool in achieving that goal.

At the 2006 Princeton meeting, delegations apparently took note of the formula contained in Discussion Paper 2 and focused their discussions on the issues contained therein. One issue focused on was whether a decision by another organ was necessary for the ICC to commence its exercise of jurisdiction. The question was considered on the understanding that such a decision would consist of a determination that an act of aggression has occurred. Not surprisingly, States disagreed as to whether such a determination by the Security Council or another organ would work as a precondition for the ICC to exercise jurisdiction. Some delegations argued that the crime of aggression should be treated in line with the other crimes under the jurisdiction of the ICC, and therefore a prior determination by

²⁶¹ Ibid, p. 386, (originally questions A.1 and B.1).

²⁶² Ibid, p. 385.

another organ would not be necessary. Others argued that a prior determination by another organ was a possibility but that it should not be a precondition. On the opposite side were those expressing that a prior determination was indeed required, with a majority expressing a preference for the Security Council as the appropriate organ based on the role prescribed by the UN Charter. However, the role of the Council was questioned by delegations opposing a prior determination and others advocating a role for organs other than the Council. They held that the Rome Statute in Articles 13(b), the possibility for the Council to refer matters to the Prosecutor, and 16, the right to defer for a period of 12 months, already adequately dealt with the role of the Council. In addition, the well-known arguments of the Council's role as being primary rather than exclusive resurfaced. In any case, that other organs might have the competence to make such a determination could not be disregarded.²⁶³

Mark S. Stein disagrees with the majority of the delegations advocating a prior determination, favouring the Security Council based on UN Charter arguments. He presents an interesting opinion in stating that there are powerful Charter-based arguments in favour of denying the Council this right. According to Article 2(1) of the UN Charter, the principle of *sovereign equality* should form a basis for the member States, including the right of juridical equality. A prior determination by the Council would allow permanent members to shield their leaders from prosecution of the crime of aggression by making use of its veto. Such consequent immunity would be in contravention to the principle of sovereign equality as established by the UN Charter. However, recognising that a political compromise protecting the permanent members might be necessary, a compromise proposal is delivered. This would allow the ICC to proceed through preliminary stages without Council approval, only for it to be required to hold a trial.²⁶⁴

Delegations at the 2006 Princeton meeting went on to confront the issue from the hypothetical view that a Security Council decision was required for the ICC to exercise jurisdiction. Such a decision apparently did not have to be in the form of a determination of an act of aggression but could also take the form of a 'go ahead'. Diverging views were expressed on what would be the preferred position, with those advocating the latter claiming it could be seen as handing the Council a useful additional policy option. In addition, they left the question of the final determination of the occurrence of an act of aggression open to the possibility that either the ICC itself or the Council could make such a determination. Others criticised this view and reiterated the idea that a clear determination that an act of aggression had occurred by the Council was a necessary precondition from the outset of the exercise of jurisdiction by the ICC.²⁶⁵

²⁶³ Report of the Special Working Group on the 2006 Informal Inter-sessional Meeting, (Advanced Copy), 29 June 2006, pp. 9-11.

²⁶⁴ Stein, Mark S., 'The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?', 16 *IICLR* (2005), pp. 5-11 and 34-36.

²⁶⁵ Report of the Special Working Group on the 2006 Informal Inter-sessional Meeting, (Advanced Copy), 29 June 2006, pp. 11-12.

Finally, the prejudicial nature of a potential determination of an act of aggression by another organ was considered. In other words, would the determination work as a legally binding determination that could not be refuted in court by the accused. There seemed to be a majority favouring the idea of a non-binding character letting the determination be open for review by the ICC. Foremost of the arguments advocating this idea was the necessity to safeguard the defendant's right to due process. It was noted that it should always be possible for the defence to challenge the case of the Prosecutor on all grounds. New evidence might emerge after a determination had been made by another organ and the defence should be free to use this and the ICC to consider it. The potential conflict with a decision by another organ, such as the Security Council, was highlighted by admitting that States needed to be aware of its potential implications.²⁶⁶

Like had been the case all through the work of the Special Working Group, the 2002 Discussion Paper formed the basis for discussion. In paragraph 5, it included various options in the case that the Security Council failed to make a determination of an act of aggression. When reviewed by the delegations at Princeton various views were presented on what line to follow in case of the Council's failure to act. Even though, most States favoured deleting options 3 and 4 in the 2002 Discussion Paper, they did so for different reasons and none of the options can be said to have completely lost their relevance.²⁶⁷

Aided by Discussion Paper 2 in focusing the discussions on concrete questions, the 2006 Princeton meeting did indeed bring about a much-needed discussion on the question of the conditions for the exercise of jurisdiction. Valid points were raised on whether prior approval is required for the ICC to exercise jurisdiction and if a final determination by another organ should have a binding character. As a point of encouraging consensus, there now appears to be a general view that a determination by another organ should be open for review by the ICC. However, reading the 2006 Princeton Report on the segment covering the question of the conditions for the exercise of jurisdiction is for the most part merely a reiteration of arguments heard long before. The process of developing a future provision setting out the conditions for the exercise of jurisdiction, consistent with the relevant provision of the UN Charter, appears to be moving along at a rather hesitant pace. The Special Working Group clearly needs to step up the pace a few notches with the 2009 Review Conference approaching rapidly.

3.4.2.4 Roadmap to the Review Conference

At the 2005 Princeton meeting, delegations agreed on a roadmap setting out the work of the Special Working Group up until the 2009 Review Conference. Work was to be concluded at the latest 12 months prior to the Review Conference. This would allow for necessary domestic political considerations needed for the adoption of a provision on the crime of

²⁶⁶ Ibid, pp. 12-13.

²⁶⁷ Ibid, pp. 14-15.

aggression at the Conference.²⁶⁸ Furthermore, a proposed timetable for the future work of the Special Working Group reveals that it now has less than 20 days to prepare a final set of proposals, to submit to the Assembly of States Parties for consideration at the 2009 Review Conference.²⁶⁹

3.4.2.5 Reflections

The work conducted by the Special Working Group on the crime of aggression has seen some encouraging and some less encouraging results. In the case of a definition of the crime of aggression, the discussion has progressively developed in an encouraging way. There now seems to be general agreement that a definition of the crime of aggression should be separated from the definition of the act of aggression. It is difficult to be entirely convinced that discussing what acts by a State amount to an act of aggression should be allocated so much time within the Special Working Group. A useful instrument, General Assembly Resolution 3314, already exists in this field of law. Nevertheless, it is encouraging to see that the focus of the discussion seems to be on defining the crime of aggression. This is what the Special Working Group needs to be doing, since the ICC is concerned with individual criminal responsibility and Article 5(2) of the Rome Statute is concerned with finding a provision for the crime of aggression. Admittedly, the crime of aggression may have some significant features of the involvement of a State, but this should not be used to steer away from defining the crime linked to the individual. In addition, the emerging preference for a differentiated approach will probably be useful in helping to reach consensus over a future proposal.

The work conducted on the question of the conditions for the exercise of jurisdiction has seen less encouraging results. True, there appears to be a majority advocating the non-binding character of a potential determination by another organ. However, in general delegations appear to be stuck on arguments dating back to the Rome Conference and beyond. Even though there have been extensive discussions, especially during the 2006 Princeton meeting, they have neither been very concrete nor progressing. Evidently, the main question to resolve is what role, if any, the Security Council should play. It is difficult to see how one could disagree with those claiming that the role envisaged for the Council by the UN Charter is a primary and not exclusive one. Furthermore, the competence to determine an act of aggression stipulated in Article 39 of the UN Charter must be interpreted to be limited to action in accordance with Chapter VII of the same Charter. Therefore, an exclusive role or even a role at all, for the Council in relation to ICC's jurisdiction over the crime of aggression is not evident.

Nevertheless, it must be admitted that a possible future provision on the issue will most certainly be one of political compromise and reality. It appears obvious that no single approach will be undisputedly accepted. Therefore, what needs to be worked out and agreed on is a political

²⁶⁸ Report of the Special Working Group on the 2005 Informal Inter-sessional Meeting, ICC-ASP/4/SWGCA/INF.1, 29 June 2005, p. 16, para. 90.

²⁶⁹ Report of the Special Working Group to the Fourth Session of the Assembly of States Parties, ICC-ASP/4/SWGCA/1, 1 December 2005, p. 3.

compromise within the range of possible approaches. Such a political compromise might be hard to reach without admitting any role at all for the Security Council. In any case, the work conducted by the Special Working Group, and predecessors such as the Preparatory Commission, has indicated that one issue appears to be a bit more complicated and contentious than the other ones. That is the issue of conditions for the exercise of jurisdiction, and especially the question of what role the Security Council should play in relation to the crime of aggression. Consequently, the Special Working Group needs to put a lot of effort into trying to find a feasible compromise on this issue, with the 2009 Review Conference just around the corner.

4 Sovereignty of States

Why did it take more than 50 years for the international community to create a permanent International Criminal Court? Why is the question of finding a feasible provision on the crime of aggression for inclusion in the Rome Statute still such a contentious issue yet to be resolved? The answer to these questions might be found in the sovereignty of States. This chapter will present a brief introduction of the concept and then proceed to elaborate on its potential conflicts with the crime of aggression and the ICC.

4.1 Generally

International law has traditionally been based on a set of rules protecting the sovereignty of States and establishing their formal equality in law. As noted previously, the classical system of international law considered the sovereign State to be the only subject of international law, with an unlimited right to wage war to protect sovereign interests.²⁷⁰ The adoption of the UN Charter in 1945 amounted to a significant change in international law by banning the use of force and setting out a number of fundamental principles by which all the member States of the UN were to abide. According to Article 2(1), ‘The Organization is based on the principle of the sovereign equality of all its Members’. In 1974, the General Assembly Friendly Relations Declaration, as a General Assembly Resolution not binding *per se*, extended the principle of sovereign equality to all States, including States not members of the UN.²⁷¹

Antonio Cassese has described sovereign equality as ‘the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest’.²⁷² To describe the general rules of the concept, he divides it into two logically distinct notions, sovereignty and legal equality. Sovereignty includes the right to exercise authority over all individuals living in the territory and to freely use the territory under the State’s jurisdiction and perform activities beneficial to the population living there. In addition, State representatives acting in their official capacity and acts performed by the State in its sovereign capacity enjoys immunity from jurisdiction practised by foreign States. Legal equality means that States, irrespective of size or power, share the same juridical capacities and functions. In other words, all members of the international community must be treated on the same footing.²⁷³

Even though the principle of the sovereignty of States is firmly established within international law, States are certainly not equal as regards to power, territory and resources. States act within the context of an international order, but at the same time, they act on a basis of national policy. The action practised by a State in a given situation is often referred to by that State as the exercise of their sovereign right to act accordingly.

²⁷⁰ See *supra* chapter 2.1.

²⁷¹ General Assembly Resolution 2625 (XXV), 24 October 1970.

²⁷² Cassese, Antonio, *International Law*, p. 88.

²⁷³ *Ibid*, p. 88-91.

Occasionally, question marks may arise if the action, exercised in line with national policy, is congruent with evolving international law. Admittedly, that the principle of the sovereignty of States is a rather complicated issue. However, in the following we will settle for States as sovereign communities, with the related rights and duties, and equal to each other as subjects of international law.

The nexus between the crime of aggression and the principle of the sovereignty of States lies in the nature of the crime. The act of aggression by a State is a necessary precondition for the crime of aggression to arise. Consequently, the notion of the sovereignty of States has several areas that it touch upon the field of law related to the crime of aggression, such as acts pursued by States as a means of a sovereign right.

4.2 Limiting the Sovereignty of States?

One of the difficulties in the work of finding a feasible provision on the crime of aggression is that States cannot be fully aware of what acts of State will potentially be included in a future provision. Not until a provision is in place and the ICC is exercising jurisdiction over it, will States be able to find out what acts of State will be pursued for the purpose of holding individuals responsible for the crime of aggression. In the decades following the adoption of the UN Charter, the world has seen numerous examples of States resorting to the use of force. In explaining their action, States have used various headings, such as self-defence, including anticipatory and pre-emptive self-defence, and humanitarian intervention. Not surprisingly, States practising such means feel cautious about ICC's potential jurisdiction over the crime of aggression. That a future provision could include such acts cannot be ruled out. In that case, States might argue that the provision is an infringement upon their sovereign rights. To illustrate the problem, a few concepts of international law will be presented below, such as anticipatory and pre-emptive self-defence and humanitarian intervention. This area of international law could by itself easily fill an entire thesis, and it is not the aim to describe it in detail. It will merely be used to illustrate possible conflicts with the crime of aggression in its relation to the sovereignty of States.

4.2.1 Anticipatory and Pre-emptive Self-defence

Article 51 of the UN Charter stipulates that the 'inherent right of individual or collective self-defense' is limited to situations where it appears as a response to an 'armed attack'. Naturally, before acts of self-defence can be employed an actual armed attack must have occurred. However, a debate exists on whether anticipatory or pre-emptive self-defence is permitted under Article 51, or possibly as a parallel rule of customary international law. Anticipatory self-defence can be described as employing a 'pre-emptive strike once a State is certain, or believes, that another State is about to attack it militarily'.²⁷⁴ The concept of anticipatory self-defence is

²⁷⁴ Ibid, p. 307.

particularly interesting in a world where several States possess modern weaponry, capable of launching rapid attacks without notice. The employment of pre-emptive strikes in self-defence has been used on a few occasions. For example, Israel employed such action, both in the 'Six Days War' of 1967 against its Arab neighbours, and again in 1981 against an Iraqi nuclear reactor.²⁷⁵ Antonio Cassese, while admitting that there may be justification on moral and political grounds, holds that 'it is more judicious to consider such action as *legally prohibited*'.²⁷⁶

Following the 11 September 2001 terrorist attacks, the United States now indicates support of an even more expanded right to pre-emptive self-defence. A statement of policy on the issue was presented as part of the US National Security Strategy, often referred to as the 'Bush Doctrine'.²⁷⁷ In it, mere threats, in particular those presented by terrorists and the potential use of weapons of mass destruction, are deemed to be sufficient for the employment of a right to pre-emptive self-defence.²⁷⁸

In conclusion, whether called anticipatory or pre-emptive self-defence, at present the concept is evidently a part of international law. States practising it obviously believe that the use of such means is within their sovereign right to employ self-defence. Without expressing a view on whether the employment of such self-defence is permissible or not, its existence has to be noted. It is by no means impossible that a future provision on the crime of aggression could cover acts held to be committed in the name of such self-defence. Therefore, States practising it may feel reluctant to find a provision for the crime of aggression or even to support the ICC, basing their concerns on possible infringements on the sovereignty of States.

4.2.2 Humanitarian Intervention

The latter part of the twentieth century witnessed the development of humanitarian intervention, positioning itself as a possible exception to the prohibition of the use of force. In short, the idea of the concept is that intervention in another State to protect the lives of persons living there, even though not nationals of the intervening State, may be permissible in certain situations. Such a situation is generally linked to the existence of gross violations of human rights in the State of intervention. The use of force in the name of a humanitarian intervention is not easily reconciled with the prohibition on the use of force against the 'territorial integrity' in Article 2(4) of the UN Charter. Accepting humanitarian intervention as an exception to the prohibition on the use of force would probably subject weaker States to the subjective opinions of more forceful States.²⁷⁹

A recent example raising the issue of humanitarian intervention is the Kosovo crisis of 1999. In brief, NATO forces, acting out of area and

²⁷⁵ Dinstein, Yoram, *War, Aggression and Self-defence*, pp. 186, 192

²⁷⁶ Cassese, Antonio, *International Law*, pp. 310-311 (italics in original).

²⁷⁷ 'The National Security Strategy of the United States of America', 20 September 2002, at <<http://www.whitehouse.gov/nsc/nss.pdf>>, last visited 2006-09-29.

²⁷⁸ Dinstein, Yoram, *War, Aggression and Self-defence*, pp. 182-183.

²⁷⁹ *Ibid*, pp. 70-73; Shaw, Malcolm, *International Law*, pp. 1045-1046.

without UN authorisation, instigated a bombing campaign in the former Yugoslavia to protect the ethnic Albanian population. To justify its acts, NATO stated that action was taken in the name of humanitarian necessity. Following the use of force employed by NATO forces, the Security Council rejected a Resolution condemning the action, and instead passed a Resolution welcoming the withdrawal of Yugoslav forces from the territory. However, it is hard to draw the conclusion that this is an example that unilateral humanitarian intervention is permissible. Malcolm Shaw summarises the issue when he states that humanitarian intervention was invoked in a crisis situation and received neither condemnation nor support. He concludes by stating that 'It is not possible to characterise the legal situation as going beyond this'.²⁸⁰

Without expressing an opinion on whether humanitarian intervention is reasonable or justifiable²⁸¹, yet again it is sufficient to take note of its existence. States pursuing acts in the name of humanitarian intervention, for whatever reason, may feel reluctant to find a provision on the crime of aggression. With the possibility of a future provision covering such acts, they may feel that it amounts to a limitation on their sovereign right to act within the international community. If nothing else, the ongoing debate on humanitarian intervention, involving the interpretation of the rules governing the use of force and the sovereignty of States, may add to the difficulties in finding a feasible provision on the crime of aggression.

4.2.3 Other issues

In addition to anticipatory and pre-emptive self-defence and humanitarian intervention, a few other issues related to the crime of aggression and its relationship to the sovereign equality of States might be of interest.

The crime of aggression, like any international crime, requires a *mental element* to make the performance of a particular act into a crime. This was the position at the Rome Conference and the Special Working Group on the Crime of Aggression explained that Article 30 of the Rome Statute, covering the mental element, was applicable to the crime of aggression. Matthias Schuster has argued that the special nature of the crime of aggression, with its necessary link to the act of a State, makes a determination of the mental element hard to come by. As the crime is restricted to individuals at the policy making level, it might be difficult to separate their possible mental element from that of the State itself. An additional problem is that it is hard to pinpoint whom the actual leaders are, i.e. to separate policy-making from policy-executing decisions.²⁸²

Since it is impossible for a State to have a mental element, some confusion and difficulty may arise in trying to determine the mental element

²⁸⁰ Ibid.

²⁸¹ See for instance Holzgrefe, J. L., 'The humanitarian intervention debate' in Holzgrefe, J. L. and Keohane, Robert O. (eds.), *Humanitarian Intervention, Ethic, Legal, and Political Dilemmas*, pp. 36-49, for a brief introduction to different approaches to the legality of humanitarian intervention.

²⁸² Schuster, Matthias, 'The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword', 14 *CLF* (2003), pp. 21-22, 24-27.

of individuals at the policy-making level. The formation of States as sovereign entities makes the issue even more complicated. A future provision needs to be aware of this, and must be precise on what exactly the mental element of the crime entails.

The necessary involvement of a State in the commission of the crime has also raised the question of what to do about acts perpetrated by *non-State actors*. Grant M. Dawson has observed that ‘terrorist or revolutionary groups can plan, initiate, and wage aggressive war with impunity’.²⁸³ In addition, Matthias Schuster has questioned why the regime used for war crimes, including acts perpetrated in internal armed conflicts, was not applied to the crime of aggression and notes that the majority of the conflicts following World War II have been of an internal nature. He sees an answer in that States fear an infringement upon their sovereignty by an international tribunal targeting their own citizens. However, it is admitted that such worries are intended to be washed away by the principle of complementarity applied to the Rome Statute, giving the State the first bite of the apple.²⁸⁴

Arguments that the crime of aggression is at fault by excluding non-State actors do not appear to be entirely convincing. The historical development of the crime of aggression into a crime entailing individual criminal responsibility has been on the basis that an act of aggression by a State is necessary prior to being able to hold an individual responsible. The idea to suddenly include non-State actors into the crime is neither feasible nor desirable; as such progress should develop gradually. Furthermore, certain acts of terrorism were discussed for inclusion in the Rome Statute as separate crimes. One could easily argue that crimes by non-State actors, such as terrorism, are better off being discussed separately from the crime of aggression. Those supporting its inclusion into the Rome Statute should work for an amendment of the Statute at a future Review Conference to include it as a separate crime, rather than trying to include it within the concept of a crime of aggression or make use of the Conventions already existing in that field of international law.

4.3 The example of the United States

Even though the ICC has received widespread support, some States remain rather sceptical. Issues of sovereignty, such as those just explained, might largely account for the negative attitude. One State opposing the ICC is the United States, which will be used below as an example to illustrate concerns raised against the ICC and action taken in the interest of upholding sovereign rights. While doing this, it is necessary to be fully aware of the unique political and military power that the United States possesses.

Whether or not looking to ratify it at some point, the United States in fact signed the Rome Statute as one of the final acts performed by the

²⁸³ Dawson, Grant M., ‘Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?’ 19 *N.Y.L. Sch. J. Int’l & Comp. L.* (2000), p. 444.

²⁸⁴ Schuster, Matthias, ‘The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword’, 14 *CLF* (2003), pp. 22-23.

Clinton administration. After taking office, the new Bush administration showed a negative attitude towards the ICC and expressed its wish not to become a party to the treaty in a communication filed with the Secretary General in mid-2002.²⁸⁵

The United States' general opposition towards the ICC has shown itself in various forms during the recent years. For example, bilateral agreements have been concluded with several States to protect United States nationals from the ICC. They are usually referred to as Article 98 agreements, because of Article 98(2) of the Rome Statute preventing the ICC to proceed with a request to surrender an accused if this would require the requested State to breach an international agreement that it has made with another State. Intended to recognise status of forces agreements, granting a kind of immunity to foreign military forces based in another State, the United States have used the Article to shield all its nationals within States accepting such agreements. Furthermore, in July 2002 Security Council Resolution 1422 was adopted, invoking Article 16 of the Rome Statute to defer potential cases concerning personnel from a State not Party to the Rome Statute arising from a United Nations established or authorised operation.²⁸⁶ The Resolution was created at the initiative of the United States threatening to otherwise veto against future peacekeeping and collective security operations. Its agreement with Article 16 can be questioned, since it contemplates a specific situation or investigation rather than a blanket case exclusion of a whole group of persons. Finally, in August 2002, the American Service Members' Protection Act was signed into United States law, authorising the use of force to free any citizen detained or imprisoned by the ICC. It was rapidly branded the 'Hague Invasion Act' by those opposing it, contemplating the bizarre scenario of United States troops invading the Hague to free its citizens.²⁸⁷

In addition, the United States has also expressed its particular concerns about the crime of aggression. David Scheffer, leader of the United States Delegation at the Rome Conference, expressed that the United States were concerned about the inclusion of the crime of aggression in the final text of the Rome Statute. They were concerned of the risk that a future provision would not contain the necessary linkage to a prior Security Council determination that an act of aggression has occurred. Therefore, legitimate use of military force may be hindered by targeting individuals. In his opinion, 'This issue alone could fatally compromise the ICC's future credibility'.²⁸⁸ A better solution would have been to follow the 1994 ILC Draft Statute, where action by the Security Council was required before any alleged crime of aggression could be prosecuted against an individual.²⁸⁹

²⁸⁵ Schabas, William A., *An introduction to the International Criminal Court*, p. 21.

²⁸⁶ UN Doc. S/RES/1422, 12 July 2002.

²⁸⁷ Schabas, William A., *An introduction to the International Criminal Court* pp. 22-24, 83-85.

²⁸⁸ Scheffer, David, 'The United States and the International Criminal Court', 93 *AJIL* (1999), p. 21.

²⁸⁹ *Ibid*, p. 14.

Others sharing this view include William K. Lietzau and Ruth Wedgwood.²⁹⁰

The position of the United States towards the ICC in general and the crime of aggression in particular should be interpreted in view of the fact that it participates extensively in peacekeeping missions, sometimes claimed to be humanitarian interventions, and adheres to a right of pre-emptive self-defence. The United States may feel that it is not within their national interest to give the ICC, with a potential jurisdiction over the crime of aggression, the possibility to intrude on what they believe to be sovereign rights. The prevailing view seems to be that it is up to the United States alone to try individuals accused of a crime in connection with its international efforts.

In addition, the position needs to be interpreted with the United States as a permanent member of the Security Council in mind. Being in a position to veto Council decisions, its possibilities to manoeuvre within the international community are extensive. In fact, William A. Schabas has claimed that it is precisely concerns about the role of the Council, with the possibility that the Rome Statute could reduce its role and prerogatives that explains the hostility towards the ICC.²⁹¹ From a political science perspective, it has been argued that the United States, by rejecting the Rome Statute and the ICC, expresses a preference for 'hegemonic instability'. In short, this means that instability derives from the supposed hegemon, the United States, who finds itself in conflict with international institutions supported by other major States. This results in that other States only have the threat of negative sanctions from a weak institution or extralegal threats from the hegemon to consider, making it more likely that they continue to violate international criminal law with impunity.²⁹²

In any case, it is unfortunate that the United States appears to have an increasingly hostile attitude towards the ICC and the crime of aggression.

4.4 Consequences

One cannot exclude the possibility that issues of sovereignty might lead to the crime of aggression remaining undefined and beyond the jurisdiction of the ICC. Therefore, it might be appropriate to examine how the crime of aggression can be pursued if this was to be the outcome.

As previously noted, customary international law might include the crime of aggression and the individual criminal responsibility for it.²⁹³ However, without a provision defining the crime of aggression for the Rome Statute, an international institution with de facto jurisdiction over the crime

²⁹⁰ Lietzau, William K., 'International Criminal Law after Rome: Concerns from a U.S. Military Perspective', 64 *Law & Contemp. Probs.* (2001), pp. 124-125 and Wedgwood, Ruth, 'The United States and the International Criminal Court: The Irresolution of Rome', 64 *Law & Contemp. Probs.* (2001), pp. 208-211.

²⁹¹ Schabas, William A., 'United States Hostility to the International Criminal Court: It's All About the Security Council', 15 *EJIL* (2004), pp. 719-720.

²⁹² Johnson, Sterling, *Peace Without Justice: Hegemonic Instability or International Criminal Law?*, pp. 57-60.

²⁹³ See *supra* chapter 2.4.

will be lacking. This would leave two, possibly three, options for punishing individuals for the crime of aggression.

First, there is a possibility of States using the universality principle as grounds for jurisdiction within its national courts, giving each and every State jurisdiction over a limited amount of crimes. Crimes generally seen as within the universality principle include for example piracy, war crimes and torture, because of either customary international law or multilateral treaties. It is not entirely clear whether the crime of aggression falls under this category. According to the prevalent opinion, only the State where the accused is in custody is free to prosecute him or her.²⁹⁴

However, several problems arise from this option. Seeing as the crime of aggression is a leadership crime, the rules governing immunity will come into play if a foreign national court intends to prosecute someone high up in the hierarchy. In the *Case Concerning the Arrest Warrant of 11 April 2000*, Belgium had issued an international arrest warrant against the foreign minister of the Democratic republic of Congo for war crimes and crimes against humanity. The ICJ held that serving foreign ministers would benefit from personal immunity in order to ensure the effective performance of their functions on behalf of their States. The absolute immunity enjoyed, i.e. for acts in official as well as private capacity, would also apply with regard to war crimes and crimes against humanity.²⁹⁵ In addition, persons accused of such grave crimes may be difficult to physically apprehend if they are being sheltered by their home States, i.e. outside of executive jurisdiction.

A second option would be for the victim State of an act of aggression to exercise jurisdiction over the crime. However, this option has the obvious problem that a State recovering from an act of aggression might not be in a position to commence trial. It is possible, if not probable, that a victim State could be mentally and physically in ruins.

Another option would be for the Security Council to take action in accordance with chapter VII of the UN Charter. The problems with this has been emphasised throughout this thesis and will be briefly restated here. The Security Council is a political organ that takes action with States and not individuals as the primary objects. It has been very hesitant in branding potential acts of aggression as such, and has the obvious problem that a veto by one of its permanent members can block action.

However, it has employed the use of ad hoc Tribunals in the cases of the former Yugoslavia and Rwanda to try individuals for their involvement in the respective conflicts. The ad hoc Tribunals were created during the course of conflict under chapter VII of the UN Charter, which meant that the States involved could not choose whether to accept its potential infringement upon their sovereignty or not. Working as form of political intervention bearing international criminal law characteristics, competence of the ad hoc Tribunals to try their nationals merely had to be accepted. The case with the ICC is different. It is created by a multilateral treaty and States are free to choose whether to accept its competence or not by becoming a Party. As has been shown by the above discussion on issues related to the

²⁹⁴ Cassese, Antonio, *International Criminal Law*, pp. 284-291.

²⁹⁵ *Case Concerning Arrest Warrant of 11 April 2000*, Judgement of 14 February 2002, ICJ Rep. 2002, paras. 53-58.

sovereignty of States, some States may feel that the infringement on their sovereignty is too considerable and therefore decide not to become a Party. Nevertheless, in the *Tadic* case the ICTY delivered a noteworthy statement; ‘the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they (the crimes within the jurisdiction of the ICTY) affect the whole mankind’.²⁹⁶ The main question is how this right should be exercised, with the ICC working as a strong candidate of being the suitable forum.

4.5 Outlook

In conclusion, the mere existence of the ICC and its potential jurisdiction over the crime of aggression in particular has several areas of potential conflict with the concept of the sovereignty of States. One explanation to the conflict could be that the sovereignty regime set up by the UN Charter did not take into account the potential individual criminal responsibility for acts such as the crime of aggression. In fact, it has been noted that ‘the drafting of the wide and powerful prerogatives of the Council did not necessarily foresee the role of the future institutions such as the ICC’.²⁹⁷

When examining the UN Charter, it is hard to disagree with this notion. Consequently, the existence of a permanent international criminal court like the ICC with a potential jurisdiction over the crime of aggression will probably always be questioned with arguments of sovereignty. The question is if concerns regarding the crime of aggression, particularly those of sovereignty, in the end will be too great to overcome. There appears to be a general view within the literature on the subject that it is highly unlikely that States will arrive at an agreement some time soon.²⁹⁸ Matthias Schuster even goes as far as proposing to remove the crime of aggression from the Rome Statute, as ‘the crime inherently defies attempts to define it’.²⁹⁹ Admittedly, concerns of infringements on sovereignty combined with the generally time-consuming work of finding a compromise for a feasible provision amounts to a difficult hurdle to climb. Nevertheless, the recent work of the Special Working Group has shown signs of improvement. In any event, only time will tell if it amounts to an impossible hurdle to climb, when arriving at the 2009 Review Conference.

²⁹⁶ *Prosecutor v. Tadic*, Case No. IT-94-1-AR 72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, 2 October 1995, para. 59 (brackets added).

²⁹⁷ Goma, Mohammed A., ‘The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime in Politi, Mauro and Nesi, Giuseppe (eds.), *The International Criminal Court and the Crime of Aggression*, p. 77.

²⁹⁸ See for instance Zimmermann, Andreas ‘Article 5’ in Triffterer, Otto (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, p. 106; Schabas, William A., ‘The Unfinished Work Of Defining Aggression: How Many Times Must The Cannonballs Fly, Before They Are Forever Banned?’ in McGoldrick, Dominic et al (eds.), *The Permanent International Criminal Court, Legal and Policy Issues*, 2004, pp. 139-141, Cassese, Antonio, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’, 10 *EJIL* (1999), p. 147.

²⁹⁹ Schuster, Matthias, ‘The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword’, 14 *CLF* (2003), p. 2, see also *ibid* pp. 16-17 and 49-51.

5 Concluding Remarks

This thesis opened with a statement of purpose and the presentation of principle questions. This chapter concludes this thesis by a presentation and clarification of the conclusions arrived upon. This will be done by dealing with the conclusions separately, followed by a segment containing reflections and recommendations for the future work on the crime of aggression.

5.1 Conclusions

For centuries, the involvement of individuals in acts of aggression pursued by States was not of particular interest in a legal sense. Focus was entirely devoted to whether the action by the State itself was reprehensible or not. The concept of just or unjust wars surfaced early on, followed by the Westphalian system where acts of aggression were pursued as ‘the continuation of diplomacy by other means’. The end of World War II, coinciding with the adoption of the UN Charter, brought about a change in this area of international law. Tribunals were established, such as those of Nuremberg and Tokyo, to try individuals accused of involvement in several heinous acts of aggression committed during the war.

The Rome Statute establishing the ICC builds upon this by including the crime of aggression as a crime within the jurisdiction of the Court, yet leaving it undefined. It should be fair to say that the crime of aggression probably exists as a crime of international law with the possibility of holding individuals criminally responsible. In fact, there appears to be a generally accepted view that it is leadership crime, i.e. only individuals at the policy-making level can be perpetrators, and that an act of aggression by a State is necessary for the possible crime of aggression to occur. Nevertheless, without a complete provision in the Rome Statute and the lack of courts trying individuals on counts of the crime of aggression, the question of what involvement by individuals is in fact punishable remains unclear. In any case, without de facto jurisdiction for the ICC over the crime of aggression, perpetrators are likely to escape prosecution, as it would be left to States relying on the universality principle or the State being the target of the acts of aggression to try them.

As a second question, this thesis set out to examine and pinpoint the main difficulties in trying to find a feasible provision on the crime of aggression for the Rome Statute. The answer can be sought in Article 5(2) of the same Rome Statute, stipulating that a future provision must come up with a definition of the crime and set out the conditions under which the ICC shall exercise jurisdiction over it. These two issues, a definition and the conditions, have largely been dealt with separately and have steered discussions on a future provision. As concerns the definition, the difficulty has consisted of whether to opt for a generic or specific approach, the latter containing an illustrative or exhaustive list of acts amounting to aggression. The development in recent years to consider the issue in light of the technical aspects of the crime has seen a growing attitude towards accepting

a generic approach. In any case, the definitional issue has seen constant development within the different Working Groups.

With regard to the conditions, the issue of whether it is necessary that another organ, like the Security Council, first determine the existence of an act of aggression has caused difficulty. It continues to be a highly contentious issue with divergent views of States that are not easily reconcilable. Even though positions appear to be locked, there have been some developments with an apparent consensus on that a potential determination by another organ will not be binding on the ICC. Nevertheless, solving the conditions under which the ICC shall exercise jurisdiction over the crime of aggression remains hard work. As aggravating circumstances, issues of the sovereignty of States come into play when discussing a future provision on the crime of aggression. States could potentially feel that a provision on the crime of aggression will work as an infringement upon rights flowing from their sovereignty, such as anticipatory or pre-emptive self-defence.

The question of whether it is desirable or likely that a feasible provision is produced at the 2009 Review Conference is better suited for inclusion in the following discussion and will be dealt with accordingly.

5.2 Reflections and Recommendations

The conclusion that the crime of aggression probably does exist in customary international law is a positive thing. Perpetrators of such heinous acts should not escape with impunity. It is important that perpetrators of such acts are pursued for the crime they have actually committed, namely the crime of aggression. However, the possible existence in customary international law is of less use if it has to rely on States applying the universality principle or the exercise of jurisdiction by the victim State. In that case, there is an overwhelming risk that the crime of aggression will continue to be committed with impunity. The ICC as a permanent international criminal court with a potential jurisdiction over the crime of aggression based on the territoriality principle or nationality principle, has a much better chance of making sure that the crime does not go unpunished. Thus, the work conducted on trying to find a feasible provision for the crime of aggression for the Rome Statute is highly important, as it must be of interest to the whole community of States that such acts do not escape scrutiny.

Concerning the definition itself, it is difficult to be entirely convinced on which approach would be preferable, a generic or a specific one. The respective approaches both have their merits and flaws. However, seeing as the generic approach has a growing number of supporters it is difficult to find arguments against why one could not well settle for it. What needs to be settled is not the perfect definition in a legal sense. It is indeed highly questionable whether such a definition even exists. Instead, it is necessary to find a political compromise among several possible legal interpretations and with the generic approach enjoying the support of the majority; it is probably a useful point of departure. Furthermore, a generic approach would benefit from following the differentiated line envisaged by the Special

Working Group. Even though the crime of aggression undoubtedly possesses some particular features, such as the necessary involvement of an act of aggression committed by a State, there is a value in applying the individual criminal responsibility regime of Article 25 to it. For instance, its coherence with the other crimes within the jurisdiction of the ICC on this issue could help in clarifying precisely what involvement by an individual is punishable, and thus satisfying the principle of legality. In addition, it helps in keeping focus on the crime of aggression rather than trying to redefine acts of aggression.

Undeniably, much work still needs to be done to find a feasible political compromise on a definition on the crime of aggression, such as finding a proper term to describe the conduct element and consequently what conduct to punish. Nevertheless, the arguments presented indicate that the Special Working Group should follow the route entered upon. It is not impossible to believe that this will result in a feasible proposal on a definition of the crime of aggression. If not in time for the 2009 Review Conference, then at least in the not too distant future.

The conditions for the exercise of jurisdiction by the ICC over the crime of aggression has without a doubt turned out to be the major obstacle of finally de facto including the crime. Article 5(2) of the Rome Statute with its ambiguous wording that a future provision 'shall be consistent with the relevant provisions of the Charter of the United Nations' has certainly not been of any help. Above all, the issue of the relationship between the ICC and the Security Council has been a constant point of controversy. The debate on the issue has seen a wide range of positions and States do not appear to be very flexible. However, the apparent consensus on that a potential determination by another organ should be of a non-binding nature gives some hope of compromise.

Just as with the definitional part, it is necessary for States to understand that a perfect legal interpretation probably does not exist and that political compromise is important. The frustratingly slow pace of the issues development indicates that the Special Working Group needs to allocate much time to the issue. A suggested way forward is to try to find minor points of consensus, or compromise, to move forward, just as with the non-binding nature of a determination by another organ. However, it must be admitted that this might be difficult to achieve where States are reluctant to give up sovereign prerogatives, particularly those States that at the same time act as permanent members of the Security Council. It is highly unfortunate if concerns of sovereignty will work as an obstacle to achieving a consensus on the conditions for the exercise of jurisdiction by the ICC over the crime of aggression. Punishing individuals for heinous acts amounting to the crime of aggression should be in the best interest of justice for everyone, and should not stall on concerns of sovereignty. However, it must be admitted that at the present such concerns in particular do work as an obstacle difficult to manage.

In conclusion, the main problem does not appear to be how to define the crime of aggression and to point out what individuals can be the perpetrators of it. Work on a definition is progressing and there is a general agreement that it is a crime entailing the individual criminal responsibility of

individuals at the policy-making level. The problem is to solve the relationship with the Security Council in the potential exercise of jurisdiction over the crime by the ICC. In addition, States hoping to arrive at a feasible provision for inclusion in the Rome Statute also face an uphill challenge of trying to convince opposing States to forget about their fears of the crime of aggression as a limitation to their sovereignty..

So where does that leave that state of affairs with the 2009 Review Conference rapidly approaching? Is it likely or even desirable that a provision will be adopted when arriving there? The answer to whether the adoption of a provision is desirable must be that it depends. If a proposal of high quality can be delivered that even prior to the Conference enjoys the support of a vast amount of States Parties, then the answer is yes. However, if the contentious issues related to a future provision cannot be worked out in proper time before arriving at the Conference, then the answer is no. To deliver a heavily disputed proposal at the Conference would probably entail the risk of doing more harm than good. The result could be that States would stand even firmer on their positions and feel even more reluctant to finding a political compromise. That would not be the ideal route to finally reaching the goal that this thesis has considered; a feasible provision on the crime of aggression for inclusion in the Rome Statute. As the Special Working Group according to the roadmap adopted are to conclude its work in 2008, there is not much time left to consider the issues of divergence. Aware of the fact that some of the issues are progressing at a snail's pace, if progressing at all, it is hard to disagree with the general view in the literature that it is highly unlikely that a provision will be agreed upon in time for the Review Conference. Consequently, it is not very likely that a provision on the crime of aggression will be adopted at a future Review Conference.

Supplement A

United Nations

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

Preparatory Commission for the International Criminal Court

July 11, 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 Article 25, paragraphs 3, 28 and 33 of the Statute do not apply to the crime of aggression.

4. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court so that the Security Council may take action, as appropriate:

Option 1: under Article 39 of the Charter of the United Nations.

Option 2: in accordance with the relevant provisions of the Charter of the United Nations.

5. Where the Security Council does not make a determination as to the existence of an act of aggression by a State:

Variant (a) or invoke Article 16 of the Statute within six months from the date of notification.

Variant (b) [Remove variant a.]

Option 1: the Court may proceed with the case.

Option 2: the Court shall dismiss the case.

Option 3: the Court shall, with due regard to the provisions of Articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make a recommendation within [12] months. In the absence of such a recommendation, the Court may proceed with the case.

Option 4: the Court may request

Variant (a) the General Assembly

Variant (b) the Security Council, acting on the vote of any nine members,

to seek an advisory opinion from the International Court of Justice, in accordance with Article 96 of the Charter and Article 65 of the Statute of the International Court, on the legal question of whether or not an act of aggression has been committed by the State concerned. The Court may proceed with the case if the International Court of Justice gives an advisory opinion that an act of aggression has been committed by the State concerned.

Option 5: the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.

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

Precondition

In addition to the general preconditions contained in article 12 of the present Statute, it is a precondition that an appropriate organ¹ has determined the existence of the act of aggression required by element 5 of the following Elements.

Elements

1. The perpetrator was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression as defined in element 5 of these Elements.
2. The perpetrator was knowingly in that position.
3. The perpetrator ordered or participated actively in the planning, preparation or execution of the act of aggression.
4. The perpetrator committed element 3 with intent and knowledge.
5. An “act of aggression”, that is to say, an act referred to in 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.

* 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.

References

Bibliography

- Antonopoulos, Constantine, 'Whatever Happened to Crimes Against Peace', 6 *Journal of Conflict and Security Law* (2001), pp. 33-62.
- Bassiouni M. Cherif (ed.), *International Criminal Law 1. Crimes*, Second Edition, New York: Transnational Publishers 1999.
- Bassiouni, M. Cherif, 'Historical Developments of Prosecuting Crimes Against Peace' in Bassiouni, M. Cherif (ed.), *International Criminal Law 3. Enforcement*, pp. 25-27.
- Bassiouni, M. Cherif and Ferencz, Benjamin B., 'The Crime Against Peace' in Bassiouni, M. Cherif (ed.), *International Criminal Law 1. Crimes*, pp. 313-347.
- Bassiouni, M. Cherif (ed.), *International Criminal Law 3. Enforcement*, New York: Transnational Publishers 1987.
- Brownlie, Ian, *International Law and the Use of Force by States*, Oxford: Oxford University Press 1963.
- Cassese, Antonio, *International Criminal Law*, Oxford: Oxford University Press 2003.
- Cassese, Antonio, *International Law*, Oxford: Oxford University Press 2001.
- Cassese, Antonio, 'The Statute of the International Criminal Court: Some Preliminary Reflections', 10 *European Journal of International Law* (1999), pp. 144-171.
- Cassese, Antonio, Gaeta, Paola and Jones, John R.W.D. (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol.1*, Oxford: Oxford University Press 2002.
- Clark, Roger S., 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', 15 *Leiden Journal of International Law* (2002), pp. 859-890.
- Dawson, Grant M., 'Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?', 19 *New York Law School Journal of International and Comparative Law* (2000), pp. 413-452.
- Dinstein, Yoram, *War, Aggression and Self-Defence*, Fourth Edition, Cambridge: Cambridge University Press 2005.
- Ferencz, Benjamin B., *Defining International Aggression, The Search for World Peace Vol. 1*, New York: Oceana Publications 1975.
- Ferencz, Benjamin B., 'The Crime of Aggression' in Kirk McDonald, Gabrielle and Swaak-Goldman, Olivia (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Vol. 1: Commentary*, pp. 37-62.
- Fernández de Gurmendi, Silvia A., 'An Insider's View' in Politi, Mauro and Nesi, Giuseppe (eds.), *The International Criminal Court and the Crime of Aggression*, pp. 175-188.
- Gaja, Giorgio, 'The Long Journey towards Repressing Aggression' in

- Cassese, Antonio et al (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol. 1*, pp. 427-441.
- Gomaa, Mohammed A., 'The Definition of the Crime of Aggression and the ICC Jurisdiction over that Crime' in Politi, Mauro and Nesi, Giuseppe (eds.), *The International Criminal Court and the Crime of Aggression*, pp. 55-78.
- Hall, Christopher K., 'The First Five Sessions of the UN Preparatory Commission for the International Criminal Court', 94 *American Journal of International Law* (2000), pp. 773-789.
- Hall, Christopher K., 'The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court', 92 *American Journal of International Law* (1998), pp. 548-549
- Hebel, Herman von and Robinson, Darryl, 'Crimes within the Jurisdiction of the Court' in Lee, Roy S. (ed.), *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, pp. 79-141.
- History of the United Nations War Crimes Commission, and the Development of the Law of War*, compiled by the UN War Crimes Commission, London: His Majesty's Stationery Office 1948.
- Hogan-Doran, Justin and van Ginkel, Bibi T., 'Aggression as a Crime under International Law and the Prosecution of Individuals by the Proposed International Criminal Court', 43 *Netherlands International Law Review* (1996), pp. 321-351.
- Holzgrefe, J. L. and Keohane, Robert O. (eds.), *Humanitarian Intervention, Ethic Legal, and Political Dilemmas*, Cambridge: Cambridge University Press 2003.
- Holzgrefe, J. L., 'The humanitarian intervention debate' in Holzgrefe, J. L. and Keohane, Robert O. (eds.), *Humanitarian Intervention, Ethic, Legal, and Political Dilemmas*, pp. 15-52.
- Johnson, Sterling, *Peace Without Justice: Hegemonic Instability or International Criminal Law?*, Aldershot: Ashgate 2003.
- Jorgensen, Nina H. B, *The Responsibility of States for International Crimes*, Oxford: Oxford University Press 2000.
- Kaul, Hans-Peter, 'The Crime of Aggression: Definitional Options for the Way Forward' in Politi, Mauro and Nesi Giuseppe (eds.), *The International Criminal Court and the Crime of Aggression*, pp. 97-108.
- Kirk McDonald, Gabrielle and Swaak-Goldman, Olivia (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, Vol.1: Commentary*, The Hague: Kluwer Law International 2000.
- Kirsch, Philippe and Robinson, Darryl, 'Reaching Agreement at the Rome Conference' in Cassese, Antonio, Gaeta, Paola and Jones, John R.W.D.(eds.), *The Rome Statute of the International Criminal Court: A Commentary, Vol.1*, pp. 67-91.
- Kittichaisaree, Kriangsak, *International Criminal Law*, Oxford: Oxford University Press 2001.
- Lee, Roy S. (ed.), *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, The Hague: Kluwer Law International 1999.

- Lee, Roy S., 'The Rome Conference and its Contributions to International Law' in Lee, Roy S. (ed.), *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, pp. 1-39.
- Leys, Simon, *The Analects of Confucius*, New York/London: W. W. Norton 1997.
- Lietzau, William K., 'International Criminal Law after Rome: Concerns from a U.S. Military Perspective', 64 *Law & Contemporary Problems* (2001), pp. 119-140.
- McGoldrick, Dominic, Rowe, Peter and Donnelly, Eric (eds.), *The Permanent International Criminal Court, Legal and Policy Issues*, Oxford: Hart Publishing 2004.
- Müller-Schieke, Irina Kaye, 'Defining the Crime of Aggression Under the Statute of the International Criminal Court', 14 *Leiden Journal of International Law* (2001), pp. 409-430.
- Ntanda Nsereko, Daniel D., 'Aggression under the Rome Statute of the International Criminal Court', 71 *Nordic Journal of International Law* (2002), pp. 497-521.
- Politi, Mauro and Nesi, Giuseppe (eds.), *The International Criminal Court and the Crime of Aggression*, Aldershot: Ashgate 2004.
- Rifaat, Ahmed M., *International Aggression: A Study of the Legal Concept – Its Development and Definition in International Law*, Stockholm: Almqvist & Wiksell International 1979.
- Schabas, William A., *An introduction to the International Criminal Court*, Second Edition, Cambridge: Cambridge University Press 2004.
- Schabas, William A., 'The Unfinished Work Of Defining Aggression: How Many Times Must The Cannonballs Fly, Before They Are Forever Banned?' in McGoldrick, Dominic, Rowe, Peter and Donnelly, Eric (eds.), *The Permanent International Criminal Court, Legal and Policy Issues*, pp. 123-141.
- Schabas, William A., 'United States Hostility to the International Criminal Court: It's All About the Security Council', 15 *European Journal of International Law* (2004), pp. 701-720.
- Schuster, Matthias, 'The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword', 14 *Criminal Law Forum* (2003), pp. 1-57.
- Shaw, Malcolm N., *International Law*, Fifth Edition, Cambridge: Cambridge University Press 2003.
- Stancu, Ioana Gabriela, 'Defining the Crime of Aggression or Redefining Aggression?' in Politi, Mauro and Nesi, Giuseppe (eds.), *The International Criminal Court and the Crime of Aggression*, pp. 87-91.
- Stein, Mark S., 'The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?', 16 *Indiana International & Comparative Law Review* (2005), pp. 1-36.
- Stone, Julius, *Aggression and World Order: A Critique of United Nations Theories of Aggression*, Berkley: University of California Press 1958.
- Stone, Julius. 'Hopes and Loopholes in the 1974 Definition of Aggression', 71 *American Journal of International Law* (1977), pp. 224-246.
- Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International*

- Criminal Court: Observers' Notes, Article by Article*, Baden-Baden: Nomos Verlagsgesellschaft 1999.
- Wedgwood, Ruth, 'The United States and the International Criminal Court: The Irresolution of Rome', 64 *Law & Contemporary Problems* (2001), pp. 193-213.
- Williams, Sharon A., 'Article 17' in Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, pp. 383-394
- Yee, Lionel, 'The International Criminal Court and The Security Council: Articles 13(b) and 16' in Lee, Roy S. (ed.), *The International Criminal Court: the Making of the Rome statute: Issues, Negotiations and Results*, pp. 143-152.
- Zimmerman, Andreas, 'Article 5' in Triffterer, Otto (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, pp. 97-106.

Internet Sources

Ferencz, Benjamin B., 'Can Aggression be Deterred by Law?', <<http://www.derechos.org/nizkor/doc/articulos/ferencz1.html>>, last visited 2006-08-30

'CICC Team Report on the Assembly of States Parties to the Rome Statute of the International Criminal Court Third Session, The Hague, 6-10 September 2004', <http://www.iccnw.org/documents/ASP3_AggressionTeamReport_Dec14.pdf>, last visited 2006-08-30.

'CICC Team Report on the inter-sessional meeting of the Special Working Group on the Crime of Aggression (13 to 15 June 2005)', <http://www.iccnw.org/documents/CICC_IntersessionalReport_CrimeOfAggression_June2005.pdf>, last visited 2006-08-30

Status of ratification for the Rome Statute, UN Treaty database: <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>>, last visited 2006-08-30.

UN and ICC Documents

General Assembly Resolutions:

- Resolution 174 (II), 21 November 1947.
- Resolution 177 (II), 21 November 1947.
- Resolution 377 (V), 3 November 1950.
- Resolution 498 (V), 1 February 1951.
- Resolution 2625 (XXV), 24 October 1970.
- Resolution 3314 (XXIX), 14 December 1974.
- Resolution 36/106, UN Doc. A/RES/36/106, 10 December 1981.
- Resolution 44/39, UN Doc. A/RES/44/39, 4 December 1989.
- Resolution 49/53, UN Doc. A/RES/49/53, 17 February 1995.
- Resolution 50/46, UN Doc. A/RES/50/46, 18 December 1995.
- Resolution 56/83, UN Doc. A/RES/56/83, 12 December 2001.

Security Council Resolutions:

UN Doc. S/1501, 25 June 1950.
UN Doc. S/1511, 27 June 1950.
UN Doc. S/RES/387, 31 March 1976.
UN Doc. S/RES/411, 30 June 1977.
UN Doc. S/RES/445, 8 March 1979.
UN Doc. S/RES/573, 4 October 1985.
UN Doc. S/RES/577, 6 December 1985.
UN Doc. S/RES/611, 25 April 1988.
UN Doc. S/RES/660, 2 August 1990.
UN Doc. S/RES/667, 16 September 1990
UN Doc. S/RES/827, 25 May 1993.
UN Doc. S/RES/955, 8 November 1994.
UN Doc. S/RES/1422, 12 July 2002.

International Law Commission:

1950 ILC Ybk. Vol. II.
1951 ILC Ybk. Vol II.
1954 ILC Ybk. Vol. II (1954 Draft Code of Offences against the Peace and Security of Mankind)
1976 ILC Ybk. Vol. I.
1976 ILC Ybk. Vol. II Part 1.
1984 ILC Ybk. Vol. II Part 2.
1991 ILC Ybk. Vol. II Part 2 (1991 Draft Code of Crimes against the Peace and Security of Mankind).
1994 ILC Ybk. Vol. II Part 2 (1994 Draft Statute for an International Criminal Court)
1996 ILC Ybk. Vol. II Part 2 (1996 Draft Code of Crimes against the Peace and Security of Mankind)
'Draft Articles on Responsibility of States for Internationally Wrongful Acts', adopted by the ILC at its fifty-third session (2001), and by the General Assembly in UN Doc. A/RES/56/83, 12 December 2001.

Ad Hoc Committee:

Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22 (SUPP), 1 January 1995.

Preparatory Committee:

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Part One, UN Doc. A/CONF.183/2/Add.1, 14 April 1998.

Rome Conference:

UN Doc. A/CONF.183/C.1/L.37, 1 July 1998.
UN Doc. A/CONF.183/C.1/L.39, 2 July 1998.
UN Doc. A/CONF.183/C.1/L.56, 8 July 1998.
UN Doc. A/CONF.183/C.1/L.75, 14 July 1998.
UN Doc. A/CONF.183/C.1/L.59 of 10 July 1998.
UN Doc. A/CONF.183/C.1/L.81, 15 July 1998.

UN Doc. A/CONF.183/9, 17 July 1998 (Rome Statute).
UN Doc. A/CONF.183/10, 17 July 1998 (Final Act of the Rome Conference).

Preparatory Commission:

UN Doc. PCNICC/1999/DP.11, 26 February 1999.
UN Doc. PCNICC/1999/DP.12, 29 July 1999.
UN Doc. PCNICC/1999/DP.13, 30 July 1999.
UN Doc. PCNICC/1999/L.4/Rev.1, 18 August 1999.
UN Doc. PCNICC/1999/WGCA/DP.1, 7 December 1999
UN Doc. PCNICC/1999/WGCA/RT.1, 9 December 1999.
UN Doc. PCNICC/2000/WGCA/RT.1, 29 March 2000.
UN Doc. PCNICC/2000/WGCA/DP.5, 28 November 2000.
UN Doc. PCNICC/2001/WGCA/DP.2, 27 August 2001.
UN Doc. PCNICC/2001/WGCA/DP.2/Add.2, 27 August 2001.
UN Doc. PCNICC/2002/WGCA/L.1, 24 January 2002.
UN Doc. PCNICC/2002/WGCA/DP.2, 21 June 2002.
UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2, 11 July 2002.
UN Doc. PCNICC/2002/2/Add.2, 24 July 2002.

Assembly of States Parties to the Rome Statute:

Resolution ICC-ASP/1/Res.1, UN Doc. ICC-ASP/1/3, 25 September 2002.

Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Third Session, 6-10 September 2004, ICC-ASP/3/25.

Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, 28 November-3 December 2005, ICC-ASP/4/32.

Special Working Group on the Crime of Aggression.

Report of the Special Working Group on the 2004 Informal Inter-sessional Meeting, ICC-ASP/3/SWGCA/INF.1, 13 August 2004.

Report of the Special Working Group on the 2005 Informal Inter-sessional Meeting, ICC-ASP/4/SWGCA/INF.1, 29 June 2005.

Report of the Special Working Group to the Fourth Session of the Assembly of States Parties, ICC-ASP/4/SWGCA/1, 1 December 2005.

Report of the Special Working Group on the 2006 Informal Inter-sessional Meeting, (Advanced Copy), 29 June 2006, available at <http://www.icc-cpi.int/library/asp/ASP_Advancecopy_Aggression200629jun.pdf>, last visited 2006-08-30.

Treaties and Instruments

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis', 8 August 1945, *reprinted in 39 American Journal of International Law* (1945), pp. 257-258.

‘Allied Control Council Law No. 10’, 20 December 1945, *reprinted in* Ferencz, Benjamin B., *Defining International Aggression, The Search for World Peace vol. 1*, pp. 491-496.

‘Charter of the International Military Tribunal’ (Nuremberg Charter), *reprinted in* 39 *American Journal of International Law* (1945), pp. 258-264.

‘Charter for the International Military Tribunal for the Far East’ (Tokyo Charter), *reprinted in* Ferencz, Benjamin B., *Defining International Aggression, The Search for World Peace Vol. 1*, pp. 522-527.

Charter of the United Nations, San Francisco 26 June 1945, UNTS XVI.

Covenant of the League of Nations, 1919, *reprinted in* Ferencz, Benjamin B., *Defining International Aggression, The Search for World Peace vol. 1*, pp. 61-69.

General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), 1928, 94 LNTS 57.

Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998.

Statute of the International Court of Justice, San Francisco 26 June 1945, 1 UNTS XVI.

Statute of the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of the International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted by Security Council Resolution 955 (ICTR Statute).

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, adopted by Security Council Resolution 827 (ICTY Statute).

United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

Table of Cases

Case Concerning Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgement of 14 February 2002, ICJ Reports, 2002.

Case concerning the Factory at Chorzów (Claim for Indemnity), Merits, Permanent Court of International Justice Series A, No. 17.

Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Reports 1997.

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment of 26 November, ICJ Reports 1984.

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, ICJ Reports 1986.

Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment of 24 May 1980, ICJ Reports 1980.

Certain Expenses of the United Nations, Advisory Opinion of 20 July, ICJ Reports 1962.

In Re Hirota and Others (International Military Tribunal for the Far East), 15 Annual Digest and Reports of Public International Law Cases (1948), p. 356-376.

In re Krauch and Others (I.G. Farben Trial), 15 Annual Digest and Reports of Public International Law Cases (1948), pp. 668-680.

In re von Leeb and Others (High Command Trial), 15 Annual Digest and Reports of Public International Law Cases (1948), pp. 376-398.

In re von Weizsaecker and Others (Ministries Trial), 16 Annual Digest and Reports of Public International Law Cases (1949), pp. 344-362.

LaGrand Case (Germany v. United States of America), Judgment of 27 June 2001, ICJ Reports 2001.

Prosecutor v. Tadic, Case No. IT-94-1-AR 72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, 2 October 1995.

Rainbow Warrior (New Zealand v. France), France-New Zealand Arbitration Tribunal, 82 International Law Reports, p. 499.

The Corfu Channel Case (United Kingdom v. The People's Republic of Albania), Merits, Judgment of 9 April 1949, ICJ Reports 1949.

‘Trial of the Major War Criminals, Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences (Nuremberg Judgment), reprinted in 41 *American Journal of International Law* (1947), pp. 172-332.