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# Articles

## Aggression as International Crime: Unattainable Crusade or Finally Conquering the Evil?

Alberto L. Zuppi\*

### I. Introduction

During February and March of 2003, groups of demonstrators gathered around American and British military installations in the United Kingdom protesting these countries' imminent forceful intervention in Iraq.<sup>1</sup> Some protesters were detained because they trespassed onto military ports or airfield bases intending to damage installations or obstruct their activities.<sup>2</sup> At the subsequent proceedings, they all raised

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1. See *R. v. Jones*, [2006] UKHL 16, available at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060329/jones-1.htm> (last visited June 13, 2007).

2. See *id.*

the question whether the crime of aggression, if established in customary international law, is a crime recognized by or forming part of the domestic law of the United Kingdom. “The appellants acted as they did because they wished to impede, obstruct or disrupt the commission of that crime, . . . by Her Majesty’s Government or the Government of the United States against Iraq in the weeks and days before . . . hostilities began.”<sup>3</sup> In so doing, these defendants seem to have understood something that the vast majority of international law scholars continue to ponder: the meaning of aggression as a crime.

In fact, the crime of aggression remains one of the most critical, elusive, and vague concepts in international law. The problem is not a new one, but instead one that has been troubling international law scholars for decades.<sup>4</sup> This issue has acquired renewed importance since the establishment of the International Criminal Court (“ICC”) and the inclusion of aggression among the crimes within its jurisdiction.<sup>5</sup> Indeed, Article 5 of the Rome Statute<sup>6</sup> lists aggression among the most serious crimes of concern to the international community, but the Article does not explain what aggression means.<sup>7</sup> Neither the definition given by the Nuremberg Charter<sup>8</sup> nor the one elaborated by the United Nations

3. *Id.*

4. See JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 11 (University of California Press 1958).

5. See Rome Statute of the International Criminal Court art. 5.1(d), *opened for signature*, July 17, 1998, 2187 U.N.T.S. 90 (entering into force July 1, 2002) [hereinafter Rome Statute]. The Rome Statute entered into force July 1, 2002 with the deposit of the sixtieth ratification. As of November 2006, 104 States have ratified the Rome Statute. See Coalition for the International Criminal Court, <http://iccnow.org/> (last visited June 13, 2007) (relaying information about actual status of ratifications).

6. See Rome Statute, *supra* note 5, at art. 5.1(d). The first paragraph of Article 5 is entitled “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.

7. See *id.* The second paragraph of Article 5 of the Rome Statute explains:

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 part of the Charter of the United Nations.

8. See Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis art. 6, August 8 1945, 59 Stat. 1546, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter], available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm> (last visited June 13, 2007). See also *infra* II.B.

("UN") General Assembly ("GA") Resolution 3314(XXIX)<sup>9</sup> have been seen as sufficient or acceptable for its full inclusion by the delegates in Rome. A Special Working Group on the Crime of Aggression ("SWG") was established within the Assembly of States Parties of the ICC ("ASP"),<sup>10</sup> and after several formal and informal meetings held in The Hague, at Princeton, and at the UN Headquarters in New York some progress has been made, as will be explained in this Article.<sup>11</sup>

To date, three basic approaches to define international aggression have been considered; however, none of them have shown to be fully acceptable. The first outlook formulates some general definition of aggression. This approach is flawed because the lack of accuracy emerging from such a wide formula necessarily would imply the use of words which would need subsequent definitions in order to be correctly understood.<sup>12</sup> The second course considers a detailed enumeration of all possible behaviors which could be seen as aggressive action by a state. This second system proves to be impractical because it is impossible to list every possible case of aggressive behavior.

The third approach is any possible mixture of both alternatives. This method, which seems to be the one used by the UN in the GA Resolution 3314(XXIX), consists of a mixed system combining the general formula as a frame and a list of acts seen as aggressive. But such a system, rather than mixing the advantages of both approaches, has historically been seen as too general for being considered as a workable definition criterion.<sup>13</sup>

There is also a fourth approach that should be considered as a valid alternative for getting out of the current dead end. The British House of Lords seems to have used this method in *R. v. Jones*.<sup>14</sup> Under this

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9. See G.A. Res. 3314(XXIX), 29 U.N. GAOR Supp. (No. 31) at 142-44, U.N. Doc. A/9631 (1974), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement> (last visited June 13, 2007). See also *infra* III.A.

10. See Preparatory Comm'n for the Int'l Criminal Court, *Report of the Preparatory Commission of the International Criminal Court (continued): Part II Proposals for a provision on the crime of aggression*, PCNICC/2002/2/Add.2 (July 24, 2002); Assembly of States Parties, *Continuity of work in respect of the crime of aggression*, ICC-ASP/1/Res. 1 (Sept. 9, 2002) (establishing the Special Working Group).

11. See Special Working Group on the Crime of Aggression, *Report Annex*, ICC-ASP/5/SWGCA/3, (Jan. 29–Feb. 1, 2007). In its second paragraph the proposed draft explains: "For purposes of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution of an act of aggression . . ." (emphasis added).

12. See G.G. Fitzmaurice, *The Definition of Aggression*, 1 INT'L & COMP. L.Q. 137, 142 (1952).

13. See *infra*.

14. See *Jones*, *supra* note 1. This decision, decided on March 29, 2006, explains that the common feature of all the appellants before the House of Lords was the question of whether the crime of aggression is a crime recognized as forming part of the laws of

approach, no formal definition has been given, at least not in the sense that the mentioned former attempts have been trying to define the crime. Yet, all parties in this case have clearly referred to the crime of aggression, and all parties understood what they have meant with the noun. As will be explained in this Article, we might learn from this decision that even a tautological definition could be enough for putting the ICC in motion, which must be the objective beyond these different approaches.

Several questions attached to this crime remain to be considered. First, there is a collection of long-standing controversies concerning whether this crime can be perpetrated only by officials and state-sponsored actors, and what role the state plays. A second set of questions relate to who will decide what will be considered aggressive war or its threat, an old problem but with a refurbished frame after the establishment of the ICC. Is this a matter that may be resolved only by the Security Council (“SC”) of the UN acting under Chapter VII of the UN Charter, or could it be decided by intervention of other organs like the International Court of Justice (“ICJ”), the UN GA, or even the ASP?

To analyze these questions and problems this Article explores the history and legal reasoning behind the idea of criminalizing aggression as one of the most serious crimes giving rise to ICC jurisdiction. The Article begins with a brief overview of the fruitless efforts to obtain a definition prior to the Cold War. The analysis of the positions in relation to the crime of aggression assumed by the victorious Allies before and during the main Nuremberg Trial will help to understand how the swinging back and forth of political considerations and practical conveniences overwhelmed legal reasoning.

The experiences collected during the past will assist in comprehending the reluctance shown in recent times by the UN SC to label an act as aggressive. This will be the subject of the second part, which will consider the so-called “definition by consensus” obtained in 1973 by the UN GA in its Resolution 3314(XXIX), and its lack of application during the next decades which emptied its content of practical meaning. Finally, the Article will trace the developments of the concept of aggression since the establishment of the ICC refurbishing a list of unresolved questions and dilemmas requiring attention, keeping in

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the Kingdom. The appeals were dismissed. However, Lord Bingham considered that the core elements of the crime of aggression have been understood after the Second World War with sufficient clarity and that it would be “unhistorical” to suppose that what was clear in 1945 has since become obscure somehow. *See id.* at ¶¶ 12, 19. Concurring, Lord Hoffmann additionally affirmed that there was no doubt that aggression is a recognized crime in international law. *See id.* at ¶ 44. The rest of the voting members adhered to these opinions.

mind the next scheduled meeting of the State Parties in 2009, at which the question of aggression will be reintroduced.

## II. The Fruitless Quest for a Definition of International Aggression

### A. Attempts to Define Aggression Before 1945

In 1915, the sinking without warning of the *Lusitania*,<sup>15</sup> and the German invasion of Belgium, in spite of the latter's neutrality,<sup>16</sup> were seen as "criminal acts," and not just "acts of war."<sup>17</sup> The public opinion of that time was that the submariners, the Kaiser, and the Government of Germany must be held criminally responsible for these acts. In the case of Belgium, the Kingdom was devastated, Louvain was sacked, and the rules of war were set aside by the German commanders, who in their treatment of prisoners of war had "*outraged the consciences of mankind.*"<sup>18</sup>

After the war, public opinion seemed determined to put the Kaiser in front of a Tribunal to declare his guilt and impose a punishment. The "Preliminary Conference" of Versailles established a "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties."<sup>19</sup> The most relevant conclusion of the Commission was the

15. The *Lusitania* was a luxury line transatlantic. She was torpedoed on May 7, 1915 by a German submarine fifteen miles from the coast of Ireland. Near 1200 civilians sunk with the ship, and more than a hundred of the fatal victims were citizens of the neutral United States. It was seen as an outrageous act arousing the public opinion on both sides of the Atlantic. See Hans N. Götz, *Lusitania-Fall, Wörterbuch des Völkerrechts* 445 (Hans-J. Schlochauer ed., vol. II 1961) [hereinafter WdV]; James W. Garner, *Some Questions of International Law in the European War* 9 AM. J. INT'L L. 594, 608 (1915).

16. See Bd. Editors Am. J. Int'l L., *The Hague Conventions and the Neutrality of Belgium and Luxemburg*, 9 AM. J. INT'L L. 959, 959-60 (1915).

17. See *Germany and the Laws of War*, 220 EDIMBURGH R. OR CRITICAL J. 278-97 (July-Oct. 1914); Louis Renault, *De l'application du droit pénal aux faits de guerre*, 25 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 23 (1918); Ellinor von Puttkamer, *Die Haftung der politischen und militärischen Führung des Ersten Weltkriegs für Kriegsurheberschaft und Kriegsverbrechen*, 1 ARCHIV DES VÖLKERRECHTS 424, 428 (1948/1949).

18. See *Germany and the Laws of War*, *supra* note 17, at 296 (emphasis added).

19. See *Commission on the Responsibility of the Authors of War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95, 95-154 [hereinafter Preliminary Conference]. The Conference was integrated by prominent scholars like Robert Lansing, who was its president, Scialoja, and Politis. The Commission arrived at the conclusion that the war had been pre-meditated by Germany and Austria, and later by Turkey and Bulgaria. See *id.* at 107. The war was seen as the result of acts deliberately planned in order to make the conflict unavoidable. See Robert Lansing, *Some Legal Questions of the Peace Conference*, 13 AM. J. INT'L L. 631, 642 (1919). The Commission had no alternative than to recognize that, in spite of the fact that the Kaiser had committed what was seen as a great moral crime, no positive law existed at the time for declaring his offense criminal.

determination that all persons belonging to enemy countries, however high their positions, were subject to criminal prosecution for offenses against the laws and customs of war or the laws of humanity.<sup>20</sup> As a consequence of the conclusions suggested to the Peace Conference, Article 227 of the Treaty stated that the Allies arraigned the German Kaiser Wilhelm II of Hohenzollern “for a supreme offence against *international morality and the sanctity of treaties*.”<sup>21</sup>

The Allies requested the Kaiser’s extradition from The Netherlands where he was exiled. In response, the Dutch Kingdom refused to grant the request, pointing out, among other arguments, that the invoked offense had no correspondence with any criminal act recognized as such by the Kingdom.<sup>22</sup>

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This recognition was reached with reluctance because of the firm conviction that the German ruler was guilty “although his guilt was not of a nature which could be declared and punished by a judicial tribunal.” *Id.* at 643.

20. See Preliminary Conference, *supra* note 19, at 117. In the evaluation of the war of aggression, the Commission’s report explains: “[A] war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal. . . .” *Id.* at 118. The American representative dissented with this conclusion of subjecting chiefs of states to a degree of responsibility unknown to municipal and international law for which no precedents were to be found in the practice of nations. Citing Justice Marshall’s vote in the case *Schooner Exchange v. McFaddon*, 11 U.S. 116 (182), the American position was opposed to giving jurisdiction to an international tribunal for offenses against the laws of humanity which were not certain. See Lansing, *supra* note 19, at 645.

21. The Treaties of Peace 1919-1923, Aug. 25, 1921, (emphasis added), available at <http://net.lib.byu.edu/~rdh7/wwi/versailles.html> (last visited July 2, 2007). Originally this phrase was referred to as the “most essential rules of justice,” meaning general breaches of international law. The phrase “international morality,” in spite of British origin attributed to Lord Curson, remained unclear and undefined. See von Puttkamer, *supra* note 17, at 442.

22. See GEORG SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 163 (Stevens & Sons 1971); Andreas L. Paulus, *Peace Through Justice? The Future of the Crime of Aggression in a Time of Crisis*, 50 WAYNE L. REV. 1, 7 (2004). The Dutch note of January 23, 1920, sent to the Peace Conference explained:

*Si, dans l’avenir, il était constitué par la société des nations une juridiction internationale, compétente de juger, dans le cas d’une guerre, des faits qualifiés de crimes et soumis à des sanctions par un statut antérieur aux actes commis, il appartiendrait aux Pays-bas de s’associer à ce nouveau régime. [If in the future an international jurisdiction would be established by the League of Nations, able to judge in case of war those facts seen as a crime and to subject them to punishment based in a previous law, it will appertain to The Netherlands to associate with such new regime.]*

See FONTES HISTORIAE IURIS GENTIUM 94 (Wilhelm G. Grewe ed., De Gruyter 1992); WHAT REALLY HAPPENED IN PARIS, THE STORY OF THE PEACE CONFERENCE 1918-1919 243 (Edward M. House & Charles Seymour eds., Simon 1921). However, since not only The Netherlands, but also the accepted law of nations, prescribed no sanctions for a vagueness like “*offences against international morality or the sanctity of treaties*,” it is unclear what kind of punishment, if any, an international tribunal could have imposed. Lacking any support in the current existent law, the accused offense was political and clearly not extraditable. See George A. Finch, *Editorial Comment. Retribution for War*

This failed intent to prosecute the German Kaiser for an offense related to waging a war of aggression initiated a movement to criminalize the crime. The Covenant of the League of Nations, established after the Peace Conference, undertook to protect the member states against acts of aggression, but without defining it.<sup>23</sup>

A second effort for criminalizing aggression could be seen in the work of the temporary Mixed Commission for the Reduction of Armaments and in the evolution of its production.<sup>24</sup> The draft produced declared that “*aggressive war is an international crime*,” but once again failed to define what should be understood as aggression.<sup>25</sup>

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*Crimes*, 37 AM. J. INT’L L. 81, 82 (1943). No tribunal ever judged the Kaiser, who died in exile in 1941. Hence, the first attempt in modern international history to prosecute for waging war failed.

23. See BENJAMIN B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION—THE SEARCH FOR WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS* 61 (Oceana 1975); see Paul Barandon, *Völkerbund, WdV* III, 597. For a chronological report, see George A. Finch, *The Peace Conference of Paris, 1919*, 13 AM. J. INT’L L. 159, 169 (1919). Article 10 of the Covenant of the League of Nations stated:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

24. See *League of Nations, Records of the First Assembly*, Third Committee, 10<sup>th</sup> Meeting, p. 764. See Marcel Sibert, *Le projet de traité d’assistance mutuelle de septembre 1923*, REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 597 (1924). This Commission had been established in the First Assembly of the League with the announced objective of drafting a “Treaty of Mutual Assistance” to help control aggression.

25. See FERENCZ, *supra* note 23, at 77-80 (emphasis added). The League decided to bring the draft to the attention of its members. The transcriptions of the replies of the governments consulted are reproduced by Ferencz. See *id.* at 86-123. The U.S. Government considered the main provisions of the Treaty without hesitation, but not being a member of the League, found it impossible to give adherence to the text. See *id.* at 97. Belgium presented a corrected draft where the word “aggression” was avoided in favor of a reference to “a war waged in violation of the provisions of the Covenant.” See *id.* at 90 (emphasis added). The Soviet Union denied the possibility of determining in the case of every international conflict which State is the aggressor and which is the victim. See *id.* The French government understood the difficulties in defining all cases of aggression. However, in its opinion, the French seemed to specify at least the most flagrant cases. See *id.* at 115. The German answer explained that in the draft the determination of the aggressor must be resolved through scientific inquiry after careful recognition and appreciation of all of the many intrinsic and extrinsic factors which could have contributed to originating the aggression. However, the draft gives only four days for such a determination. The impossibility of obtaining a decision in such a short time was enhanced by the political character of the institution entrusted with making the decision. This institution acts according to the instructions of the Governments which compose it. See *id.* at 102. In the Fifth Assembly, the draft, in spite of having been approved by eighteen member states, gave rise to several discussions that led to the adoption of a Resolution that was the basis of the Protocol for the Pacific Settlement of International Disputes. See UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE



The 1924 Geneva Protocol for the Pacific Settlement of International Disputes<sup>26</sup> copied several dispositions of the Draft Treaty of Mutual Assistance. Its preamble declared that a war of aggression was a violation of the required solidarity between the members of the international community and was an international crime. The signatory states agreed not to resort to war except in cases of resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations. Article 10 affirmed that every state which resorts to war in violation of the Covenant or the Geneva Protocol is an aggressor.<sup>27</sup> However, this Protocol never came into force.

The impulse to renounce resorting to war was continued by the ratification of the Treaties of Locarno at the end of 1925,<sup>28</sup> which retain only historical relevance for future developments. The parties undertook that they were not going to attack, invade or resort to war with each other except in the case of self defense. However, political reality at the time crushed these good proposals.<sup>29</sup>

The Briand-Kellogg Pact, or Treaty of Paris, was signed on August 27, 1928, by nine nations.<sup>30</sup> On its face, the Treaty included a renunciation of war as an instrument of national policy.<sup>31</sup> But at the

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UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 55 (HMSO 1948).

26. See FERENCZ, *supra* note 23, at 132-37.

27. See Waclaw Kormanicki, *La définition de l'agresseur dans le droit international moderne*, 75 CCAIL 5, 31 (1949).

28. See Treaties of Locarno, Dec. 1, 1925, 54 L.N.T.S. 289 (1925). The Locarno Treaties consisted of a group of five different agreements: the main Treaty of Mutual Guaranty between Germany, Belgium, France, Great Britain, and Italy and four treaties on arbitration. The Treaty of Mutual Guaranty or "Rhineland Pact" provided that Germany, on the one side, and France and Belgium on the other, mutually undertook that they were not going to attack, invade, or resort to war with each other, except in cases of self defense.

29. In March 1936, Germany occupied the *Rhineland* with troops, which had been demilitarized by the Treaty of Versailles. Germany claimed that the situation originally envisioned at Locarno had been changed by the posterior Franco-Soviet alliance of 1935, and declared that it was no longer bound by the Treaties. See Paul Barandon, *LOCARNO-VERTRÄGE VON 1925*, *WDV*, II, 421, 422. On its side, France regarded the German move as a "flagrant violation" of Locarno, but no immediate action was taken. The Locarno treaties contained no denunciation clauses. See Werner Morvay, *Locarno Treaties (1925)*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 330 (Rudolf Bernhardt & Max Plank Institut eds., North-Holland vol. 7 1981) [hereinafter "EPIL"].

30. See Briand-Kellogg Pact, Aug. 27, 1928, L.N.T.S. 2137 (1929). There were nine original signatories. France and Great Britain signed with considerable reservations, and several other countries provided interpretative comments. The original members were U.S.A., Germany, Belgium, France, Great Britain, Italy, Japan, Poland, and Czechoslovakia. In 1938, sixty-three states were already members of the Pact.

31. See Phillip M. Brown, *The Interpretation of the General Pact for the Renunciation of War*, 23 AM. J. INT'L L. 374 (1929); Edwin M. Borchard, *The Multilateral Treaty for the Renunciation of War*, 23 AM. J. INT'L L. 116, 119 (1929).

same time, it allowed war in self-defense<sup>32</sup> and against non-contracting parties to the Treaty. In fact, war was admitted as a tool of international policy since the agreed renunciation only related to *national* policy.<sup>33</sup> These loopholes to the main declaration of renouncing war represented a consistent weakness of the Pact.<sup>34</sup> It has been objected that “to condemn” and “to renounce” war was not an obligation to refrain from making war, but such interpretation was excluded.<sup>35</sup> War could not happen without violating the Pact, and the only justification for the use of force was self-defense. However, some scholars pointed out that it was impossible to accept the idea that war in violation of the Pact was illegal under international law at the time the Second World War began.<sup>36</sup> As happened with other well-intentioned agreements, the Briand-Kellogg Pact was superseded by the setbacks encountered by the system of the League of Nations.

Looking at the gaps and breaks of the Briand-Kellogg Pact it is appropriate to mention the first group of actions internationally qualified as aggressive. On July 3, 1933, a “Convention for the Definition of Aggression” was signed in London,<sup>37</sup> containing a list of conducts

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32. The parties were not only free to decide when self-defense was authorized, but they were also able to qualify accordingly further acts using force as lawful.

33. See YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 82 (Cambridge University Press 2d ed. 1994); ROBERT KOLB, *IUS CONTRA BELLUM. LE DROIT INTERNATIONAL RELATIF AU MAINTIEN DE LA PAIX* 39-40 (Bruylant 2003). The phrase ‘instrument of national policy’ is anyway vague enough to be void of any accurate meaning.

34. See HERSCH LAUTERPACHT, *INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 440-41 (Elihu Lauterpacht ed., Cambridge University Press 2004) (“Disputes, War and Neutrality—Parts IX-XIV”).

35. See Quincy Wright, *The Meaning of the Pact of Paris*, 27 AM. J. INT’L L. 39, 40 (1933).

36. See George A. Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT’L L. 20, 33 (1947); CHARLES C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 1684 (Little, Brown & Co. vol. III, 2d ed. 1945).

37. See Convention for the Definition of Aggression, July 3, 1933, 69 L.N.T.S. 3391 (1934). Initially, this treaty was between Afghanistan, Estonia, Latvia, Persia, Poland, Rumania, U.S.S.R., and Turkey. Later, in 1934, Finland signed its accession. Article II stated that the aggressor was considered the State which was the first to commit any of the following actions: 1) Declaration of War upon another State; 2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State; 3) Attack by its land, naval or air forces, without a declaration of war, on the territory, vessels or aircraft of another State; 4) Naval blockade of the coasts or ports of another State; 5) Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection. Article II stated that no political, military, economic or other consideration may serve as an excuse or justification for the aggression referred in Article II. In an attached annex to Article III, it excluded as justification for aggression the internal condition of the state, for example, the state’s political, economic, or social structure. The annex also excluded alleged defects in its administration, disturbances,

presumed as aggressive. Nevertheless, the meaning of this Convention is not conclusive for showing a clear trend in international law. It was followed by countries mainly under the Soviet influence, and its mention after the Second World War was recalled by supporters of the Soviet positions.<sup>38</sup> Despite its diminished influence, it is nevertheless significant as the first attempt to list a group of conducts objectively seen as aggressive.<sup>39</sup>

From a legal point of view these attempts to circumscribe aggression prior to the Second World War were just expressions of hope. No concrete prohibition ever evolved from these drafts, pacts and conventions, and no serious attempt to punish their violation was encouraged during this period.

### B. *Aggression in Nuremberg*

As early as March 27, 1941, Robert H. Jackson, acting as Attorney General of the United States, affirmed the notion that the act of waging an aggressive war constituted an international crime.<sup>40</sup> Jackson's

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revolutions or civil wars as reasons for aggression. Additionally, it excluded the international conduct of a state, like the rupture of diplomatic relations, and economic or financial boycotts.

38. See Gregory Rutenberg, *The Baltic States and the Soviet Union*, 29 AM. J. INT'L L. 598, 610 (1935); Yueng-Li Liang, *Notes on Legal Questions Concerning the United Nations*, 46 AM. J. INT'L L. 667, 673 (1952).

39. Later in 1935 the subject was the object of consideration by a research in International Law organized by the Faculty of the Harvard Law School. Philip Jessup of Columbia University, with the advice of Fenwick, and Wright among others, reported a draft of *Rights and Duties of States in Case of Aggression*, 33 AM. J. INT'L L. SUPP. 819 (1939). The draft was based upon the presumption that certain forceful acts constituted a violation of the obligation to resort to force only after the exhaustion of an attempt at peace settlement. Among the use of terms defined in Article 1, paragraph c) "aggression" was the "resort to armed force by a State when such resort has been duly determined, by a means which that State is bound to accept, to constitute a violation of an obligation."

40. See Robert H. Jackson, *International Order*, 35 AM. J. INT'L L. 348 (1941). The neutral state in his opinion should combine non-participation with active discrimination against the aggressor, and active assistance to the victim of aggression. He is quoted as saying:

To me, such an interpretation of international law is not only proper but necessary if it is not to be a boon to the lawless and the aggressive. A system of international law which can impose no penalty on a law-breaker and also forbids other states to aid the victim would be self-defeating and would not help even a little to realize mankind's hope for enduring peace.

*Id.* at 358. Jackson concluded that it was due to these considerations that he advised his Government with hope that its course may strengthen the sanctions against aggression and contribute to the goal for an international order under law. *Id.* at 359. See *Trial and Punishment of Nazi War Criminals*, Memorandum from Secretary of State Stettinius, Secretary of War Stimson, and Attorney General Biddle to President Roosevelt (Jan. 22, 1945). This memorandum is sometimes referred to as the "Yalta Memorandum." See Department of State, Publication 3080, Washington DC, 1949. The idea was undertaken

position was later repudiated by the Soviets and the French who strongly opposed the inclusion of initiating an aggressive war in the list of crimes which would be prosecuted.<sup>41</sup> The French did not consider launching a war of aggression as criminal conduct, and they took that into consideration when deciding what would otherwise constitute a violation of the *ex post facto* prohibition.<sup>42</sup> In spite of these objections, the strong support of the American Government to this position convinced the rest of the Allies.<sup>43</sup> In August 1945, the London Conference<sup>44</sup> rendered the so-called “Nuremberg Charter”<sup>45</sup> which ruled the constitution of the International Military Tribunal (“IMT”) and stated the crimes which would be under its jurisdiction.<sup>46</sup>

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by Jackson after his appointment by President Truman as the Representative of the U.S. and Chief of Counsel for preparing the charges against the major German criminals. See Robert Jackson, *The Significance of the Nuremberg Trials to the Armed Forces*, 10 *Military Affairs* 2, 3 n.4 (1946). On April 29, 1945, Jackson sent a Memorandum to President Truman suggesting the establishment of a military tribunal with participation of the main Allies. According to Jackson, filing charges against the Nazi misconduct during the war was not enough. It was also necessary to condemn the waging of aggressive war as a crime against international law. See Bernard D. Meltzer, *Robert H. Jackson: Nuremberg's Architect and Advocate*, 68 *ALB. L. REV.* 55, 57 (2004).

41. See M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 17 (Kluwer 2d ed., 1999). According to Bassiouni, the Allies devoted too much time, too many discussions, and too great an amount of ingenuity to defining “crimes against peace” and trying to find a legal basis to support it.

42. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, 65-6 (Little, Brown & Co. 1992).

43. See *id.* at 68-9. In the Report to President Truman of June 6, 1945, Jackson explained:

The United States is vitally interested in recognizing the principle that treaties renouncing war have juridical as well as political meaning. We relied upon the Briand-Kellogg Pact and made it the cornerstone of our national policy. We neglected our armaments and our war machine in reliance upon it. . . . We therefore propose to charge that a war of aggression is a crime, and modern International Law has abolished the defense that those who incite or wage it are engaged in illegitimate business.

Department of State, Publ. 3080, p. 53. Jackson affirmed that any legal position asserted on behalf of the United States would produce considerable effects in the future of international law.

44. See Nuremberg Trial Proceedings Vol. I, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm> (last visited July 3, 2007).

45. See Nuremberg Charter, Aug. 8, 1945, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> (last visited July 3, 2007).

46. See *id.* at art. 6. Article 6 of the Nuremberg Charter in the pertinent paragraph enunciates:

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

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or a conspiracy for the accomplishment of any of the foregoing; . . .

Leaders, organizers, instigators and accomplices participating in the execution

In the IMT trial in Nuremberg,<sup>47</sup> the indictment against the major representatives of Hitler's Nazi government consisted of three main charges: crimes against peace—which included the crime of waging aggressive war and its conspiracy, war crimes, and crimes against humanity. The main idea behind the plan was to outlaw aggressive war as a central principle of peace, making the man who wages or plans to wage aggressive war a criminal.<sup>48</sup>

Of the main counts comprised in the IMT accusation, the crimes against peace have been the object of important criticism because it has been alleged that this was a clear violation of an *ex post facto* prohibition,<sup>49</sup> which was going to be emphasized by all defendants.<sup>50</sup> Thus, the argument goes, as long as the world community has been composed by sovereign states which have recognized no mandatory legal norm derived from a superior authority and no authoritative organization existed, the regulation of the use of force has rested directly within the power of the state that decided to use it.

In the judgment, to plan and wage aggressive war was seen as a charge of the “utmost gravity.” According to the oft-quoted words of the

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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 plan.

47. See The case of the International Military Tribunal against the Major War Criminals, USA, France, UK, and USSR v. Hermann Göring et al. 1945-46 [hereinafter “IMT Trial”], available at <http://www.yale.edu/lawweb/avalon/imt/imt.htm> (last visited July 3, 2007).

48. Compare to Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 Foreign Affairs 179, 184.

49. See ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT—THEORIE UND PRAXIS* 265 § 442 (Duncker & Humblot 3d ed. 1984).

50. See the majority report of a Sub-Committee entrusted with a study of aggressive war as an international crime, in HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 181 (HMSO 1948). The defense maintained that at the time under applicable international law, the aggressor state had the same rights and duties in a war as the victim state. Such equivalence would not have been possible if aggression was outlawed. Additionally, the law of neutrality remained in force and fully applicable, and this would not be possible in the case of a prohibition of aggression. Those points were shown as clear examples of the wrongfulness of the prosecution. According to the existing law at the time of the beginning of the Second World War, no effective general rule of international law prohibited war. Some defendants affirmed the impossibility of the tribunal's examining the legality or illegality of a war, because the decision to wage war was a political one. However, how to do it was a military question. See Jodl's defense, *supra* note 47, at vol. XIX 20; see Hess defense, *id.* at 393-96. It should be pointed out that the defenses invoked the main prohibition of *nullum crimen sine lege*, which means that only those crimes that are exactly described in the law can be punished. However, since the Supplementary Law of June 28, 1935, this principle was abandoned in Germany. See ERICH SCHINNERER, *GERMAN LAW AND LEGISLATION* (Terramare 1938), available at [http://www.jrbooksonline.com/DOCS/German\\_Law\\_and\\_Legislation.doc](http://www.jrbooksonline.com/DOCS/German_Law_and_Legislation.doc) (last visited July 22, 2007).

**Tribunal:**

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from the other war crimes in that it contains within itself the accumulated evil of the whole.<sup>51</sup>

The Nuremberg Charter defined the planning or waging of aggressive war or war in violation of international treaties as a crime.<sup>52</sup> The blurred

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51. See IMT Trial, *supra* note 47, at 427.

52. The IMT found that several conventions and treaties have been violated by Germany's waging war characterizing the violations as aggression: the 1899 Hague Convention and the Convention for Pacific Settlement of International Disputes of 1907 had been violated by Germany. In the same sense several provisions of the Versailles Treaty as well as the 1925 Locarno Treaties signed with Belgium, France, Great Britain, and Italy were breached. Arbitration treaties were also executed by Germany at Locarno with Czechoslovakia, Belgium, and Poland that arranged that all disputes between the parties would be settled by diplomatic methods or submitted to an arbitral tribunal. Conventions of arbitration and conciliation were also entered into between Germany, the Netherlands, and Denmark in 1926, and with Luxembourg in 1929. Non-aggression treaties were signed by Germany with Denmark and Russia in 1939. Added to this list should be the 1928 Briand-Kellogg Pact and a 1934 Declaration for the Maintenance of Permanent Peace with Poland, explicitly based on this Pact. None of these documents were going to be honored by the Nazis. It should be pointed out that the Briand-Kellogg Pact, which was often invoked in the judgment and was supposed to be the source of the prohibition against aggression, was not applicable to Germany because it never ratified the Pact. Besides, the Pact did not contain any sanction. The London Agreement Related to Aggression of 1933, *see supra*, note 37, which was referred to as "*one of the most decisive sources of the law of nations*" was not even part of German law. The IMT questioned the legal effect of the Briand-Kellogg Pact concluding at the same time that those nations "who signed or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it." See IMT Trial, *supra* note 47, at 463 (emphasis added). It is interesting to recall that Germany had signed but not yet ratified the Pact, and in this regard, the IMT performed a questionable assimilation between the countries which had ratified and countries which just signed the Treaty. The traditional position was that a treaty was binding for the contracting parties, unless otherwise provided, from the date of its signature; the exchange of ratifications in such a case has a retroactive effect confirming the treaty from that date. See J. Mervyn Jones, *The Retroactive Effect of the Ratification of Treaties*, 29 AM. J. INT'L L. 51 (1935). See, e.g., the Inter-American Convention on Treaties adopted in 1928 in Havana, See 22 AM. J. INT'L L. SUPP. 138 (1928). Article 5: "Treaties are obligatory only after ratification by the contracting states, even though this condition is not stipulated in the full powers of the negotiators or does not appear in the treaty itself". This is also reflective of the U.S. position before the British-American Claim Tribunal in relation to the Iloilo Claims where the Tribunal decided that "*de jure there was no sovereignty over the islands until the treaty was ratified.*" See A. Nerinx, *American and British Claims Arbitration Tribunal: Iloilo Case (Philippine War Claims)*, 20 AM. J. INT'L L. 382, 384 (1926). Iloilo was affirmed to be under Spanish sovereignty and that the destruction of British property must be borne by Spain. According to the Treaty of Paris of December 1898 whereby Spain ceded to the U.S. the Philippine Islands, ratifications were not exchanged until 1899, after the disturbances occurred. According to CHARLES G. FENWICK, INTERNATIONAL LAW 334 (Appleton 1934), the formal ratification was an accepted part of the conclusion of a binding agreement that states were held to knowledge of the

nature of these crimes was clearly evidenced by the lack of death penalties dictated in Nuremberg for what was understood as the supreme international crime.<sup>53</sup> Two of the main defendants' acquittals on these charges would have implications for the subsequent acquittals on the same charges of forty-nine of the fifty-two defendants in the following Nuremberg Tribunals.<sup>54</sup> The mentioned problems which arose in the IMT were going to be reproduced in the International Military Tribunal for the Far East ("IMFTE").<sup>55</sup> In the IMFTE the indictment for the crime of conspiracy concerned the decision to secure the military, naval, political and economic domination of East Asia, the Pacific and Indian Ocean, and waging war to obtain these purposes. The decision of the IMFTE, adopted by the majority of judges, was severely criticized by pointing out that the *dictum* on aggression was legally untenable in international law.<sup>56</sup> The lack of tangible recognition from the international community of the existence of the crime of aggression and the conspiracy to commit it, and the blurred elements of these offenses,

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constitutional requirements of the other party. On the other side, LASSA OPPENHEIM, *INTERNATIONAL LAW—A TREATISE* 903-04 (Longsman 6th ed. 1944), understood the treaty as adopted yet not perfected. Governments act, as a rule, by understanding the treaty is adopted as soon as the mutual consent is given by the representatives and they sign. The ratification is to be given subsequently. According to his view there is no legal obligation to ratify a Treaty.

53. Defendants Göring, Hess, Jodl, Keitel, Räder, Rosenberg, von Neurath and von Ribbentrop were convicted for conspiracy and crimes against peace, and defendants Dönitz, Frick, Funk, and Seyss-Inquart were convicted for crimes against peace but not conspiracy.

54. The acquittal by the IMT of Schacht, head of the *Reichbank*, and Speer, minister of armaments, of the charges of crimes against peace were weighty precedents which had necessarily affected all posterior decisions. The judges of the IMT somehow accepted the naïve alibi that these defendants, who were among Hitler's main partners in waging war, did not really know that the rearmament was intended for aggressive war. See Alberto L. Zuppi, *Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert*, 66 LA. L. REV. 495, 513 (2006); DIETRICH ÖHLER, *INTERNATIONALES STRAFRECHT* 616 § 1010 (Heymanns 1983); F.B. Schick, *The Nuremberg Trial and the International Law of the Future*, 41 AM. J. INT'L L. 770, 784 (1947); Finch, *supra* note 22, at 27 (explaining that if the aggression against Czechoslovakia was an international criminal act, all members of the Munich Agreement, including the British, were equally criminal, and the aggression against Poland should have also indicted the Russians).

55. See RICHARD MINEAR, *VICTOR'S JUSTICE—THE TOKYO WAR CRIMES TRIAL* 20 (Princeton 1971). The major war criminals of the Axis in the Pacific war were prosecuted by the IMFTE. The IMFTE was established in Tokyo by virtue of the so-called "Cairo Declaration" of 1943, the Declaration of Postdam in 1945, the surrender document signed in September 1945 and the Moscow Conference of December 1945.

56. All but two of the accused at the Tokyo trial were convicted by the majority of the tribunal for the crime of "conspiracy to wage aggressive war," and all with only one exception were found guilty of the crime of waging aggressive war. The judgment was rendered by the vote of eight of the eleven judges. The dissenting opinions of judges Röhlting and Pal were full of criticisms in relation to the crime against peace and conspiracy. See *THE TOKYO JUDGMENT* (B. Röhlting & C. Rüter eds., APA 1977).

undermined the legitimacy of the judgments rendered in both Nuremberg and Tokyo, with critics labeling the cases as “victor’s justice.”

### III. The Work of the United Nations

The international community was no better prepared for reaching consensus on a definition of aggression after the experiences of Nuremberg and Tokyo than it was before. At the San Francisco Conference,<sup>57</sup> the proposals for including a definition of aggression were defeated.<sup>58</sup> According to the draft finally accepted, cases where an act of aggression could be presumed remained within the jurisdiction of the UN SC which decided whether to act.<sup>59</sup>

Three of the cornerstones of the system created after World War II with the United Nations Organization and its Charter,<sup>60</sup> were the maintenance of international peace and security,<sup>61</sup> the general renouncement of the use of force contained in the Preamble<sup>62</sup> and Article 2.4<sup>63</sup> of the UN Charter, as well as the peaceful settlement of international disputes established in Chapter VI of that instrument.<sup>64</sup> The Charter referred to the term “aggression” several times, but in a vague and confusing way.<sup>65</sup> Since its establishment, the UN SC has used

57. See Archives of United Nations History, <http://www.un.org/aboutun/milestones.htm> (last visited June 27, 2007).

58. See STONE, *supra* note 4, at 41; Bengt Broms, *The Definition of Aggression*, 154 CCAIL 299, 315-16 (1977). In the Committee where these proposals were introduced, the majority felt that this was a task beyond the scope of the Conference and purposes of the UN Charter.

59. See LELAND GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 298 (Columbia University Press 1969). Behind the refusal to include a definition of aggression was the fact that it might have prevented the desired freedom of the permanent Members of the UN SC to block any decision appraised as politically undesirable with a veto.

60. See U.N. Charter, available at <http://www.un.org/aboutun/charter/> (last visited June 27, 2007).

61. See *id.* at art. 1.1.

62. See *id.* at preamble (“to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, . . .”).

63. See *id.* at art. 2.

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

....

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

64. See *id.* at chap. VI (“Pacific Settlement of Disputes”).

65. For example, Chapter VII of the UN Charter, titled “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression,” seems to enumerate three different alternatives. This view appears to be confirmed after reading Article 39 of the UN Charter. See Joachim Frowein, *Art. 39, in* CHARTA DER VEREINTEN



multiple characterizations for situations arising under Chapter VII of the UN Charter, such as “breach of international peace and security”<sup>66</sup> and “breach of the peace,”<sup>67</sup> including clear cases of invasions and attacks which were recognized as such for the resolutions, but was very reluctant to label an act of aggression.<sup>68</sup>

In the first session, the UN GA adopted Resolution 95(I), affirming the principles of international law recognized by the Charter of the IMT and the Nuremberg judgment.<sup>69</sup> In its second session, the GA entrusted the International Law Commission (“ILC”) with drafting the principles of international law which could be recognized in the Charter and judgment of the IMT.<sup>70</sup> In 1950, at the second meeting of the ILC, the “Principles of Nuremberg” were approved and submitted to the General Assembly.<sup>71</sup> The description of aggression included among the

NATIONEN 559, 560 (Bruno Simma ed., 1991) (stating in the *travaux préparatoires* of Article 39 clearly the idea of conceding an extended margin of interpretation to the UN SC for imposing sanctions was accepted). According to Article 39 of the UN Charter, the UN SC “shall determine the existence of any threat to the peace, breach of the peace, or act of aggression. . . .” (emphasis added). Here, the conjunction “or” is used to indicate the third of three different alternatives. To determine the existence of such fact is a necessary pre-requisite for any further action of the UN SC, i.e. making recommendations or deciding measures according to Articles 41 and 42 of the UN Charter. However, the enunciation of the purposes and principles of Article 1.1 reads: “to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace. . . .” (emphasis added). The conjunction “or” now seems to consider aggression merely as another form of “threat of the peace.” This lack of accuracy shown when the word “aggression” has been used in the Charter clearly demonstrates that the drafters were not pursuing a separate emphasized definition of this concept. See Gert Meier, *Der Begriff des bewaffneten Angriffs*, 18 ARCHIV DES VÖLKERRECHTS 375, 376 (1974/1975).

66. See S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990) (concerning the invasion of Kuwait by Iraq).

67. See S.C. Res. 82, U.N. Doc. S/RES/82 (June 25, 1950); S.C. Res. 83, U.N. Doc. S/RES/83 (June 25, 1950) (discussing the possibility of attack from North Korea to the Republic of Korea (South Korea)).

68. See, e.g., S.C. Res. 577, U.N. Doc. S/RES/577 (Dec. 6, 1985) (relating to South Africa, acts of aggression against Angola); see also S.C. Res. 660, *supra* note 67 (relating to the Iraqi invasion of Kuwait qualifying as a “breach of the peace”).

69. See G.A. Res. 95 (I) (Dec. 11, 1946), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/033/46/IMG/NR003346.pdf?OpenElement> (last visited June 27, 2007).

70. See G.A. Res. 177 (II) (Nov. 21, 1947) (“Formulation of the Principles recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal”) available at <http://www.un.org/documents/ga/res/2/ares2.htm> (last visited June 27, 2007). For the provocative discussions between the ILC members on the meaning of aggression and waging war, see *Formulation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal*, 1 Y.B. Int’l L. Comm’n 49 (1950), U.N. Doc. A/CN.4/22.

71. Principle VI declares:

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

Principles followed literally the vocabulary of the Nuremberg Charter. According to one source, the International Law Commission was concerned with a *lex lata* approach.<sup>72</sup>

UN GA Resolution 380(V) condemned aggression “as the gravest of all crimes against peace and security throughout the world.”<sup>73</sup> According to this Resolution, the maintenance of peace was indispensable, so as to prompt united action to meet aggression wherever it arose.<sup>74</sup> G.G. Fitzmaurice, as Representative of the United Kingdom before the Sixth Committee of the UN GA, affirmed that the legitimate effort by the ILC to define the subject failed because the concept of aggression “*is one which is inherently incapable of precise definition.*”<sup>75</sup> In spite of his opinion, the ILC in its sixth session in 1954 adopted the Draft Code of Offences Against the Peace and Security of Mankind<sup>76</sup> with the purpose of indexing a list of state conducts considered criminal. Article 2, paragraph 1 includes in this definition “*any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.*” After the Code was prepared, the UN GA appointed three other Special Committees on Defining Aggression between 1956 and 1967.<sup>77</sup>

#### A. A Definition of Aggression in UN GA Resolution 3314 (XXIX)

The 1967 Committee held more than a hundred meetings before establishing a working group of thirty-five members. Bengt Broms, who chaired the Committee, was able to draft a consolidated text with notes available in May 1973, and a consensus definition of aggression was

##### a. Crimes against peace:

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

72. See Shabtai Rosenne, *The International Law Commission 1949-59*, 36 BRIT. Y. B. INT'L L. 104, 153 et seq. (1960).

73. See G.A. Res. 380(V) (Nov. 17, 1950) (“Peace through Deeds”), available at <http://www.un.org/documents/ga/res/5/area5.htm>; D.H.N. Johnson, *The Draft Code of Offences Against the Peace and Security of Mankind*, 4 INT'L & COMP. L.Q. 445, 445-68 (1955). Johnson commented it as an unwise step to qualify so solemn and severely an act which was still not defined. See *id.* at 451.

74. See G.A. Res. 380(V), *supra* note 73, at point 2.

75. See Fitzmaurice, *supra* note 12, at 138 (emphasis added).

76. See 1 Y.B. Int'l L. Comm'n 123 (1954), U.N. Doc. A/1858, A/2162 A/CN.4/85.

77. For a survey of the work of these Committees, see U.N. Doc. A/AC.134/1 (March 24, 1968).

adopted by the UN GA.<sup>78</sup> A vague statement in the Preamble takes for granted that a clearer definition of aggression would help to implement measures to suppress aggressive acts.<sup>79</sup> Because it was rendered as a resolution of the UN GA it was seen as a mere recommendation without any binding character.<sup>80</sup> The resulting text consisted of a preamble and eight articles. Article 1 defines aggression as follows: "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition."

The first use of force in contravention of the UN Charter shall constitute *prima facie* evidence of aggression.<sup>81</sup> The Resolution enumerates a group of acts considered aggressive, but at the same time, it explains that the list is not exhaustive. The UN SC may determine other acts that constitute aggression. A war of aggression will give rise to international responsibility, unjustified under any political, economic, military, or other consideration. No territorial acquisition or advantage resulting from aggression shall be recognized as lawful.<sup>82</sup> However, in the opinion of one scholar, the obtained definition appears "to have codified into itself (and in some respects extended) all the main 'juridical loopholes and pretexts to unleash aggression' available under pre-

78. See G.A. Res. 3314(XXIX), *supra* note 9.

79. See *id.* at Preamble.

Convinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim[.]

80. A declaration has been seen as binding when it recites rules already recognized as customary international law, or when it reproduces a norm of a mandatory treaty, and finally when the international consensus shown during its approval amounts to a conviction equal to the subjective element of *opinio iuris sive necessitatis*, which anticipates a rule of customary international law. See ALFRED VERDROSS & BRUNO SIMMA, *supra* note 49, at 405; PHILIP C. JESSUP, A MODERN LAW OF NATIONS 41 (Macmillan 1959) (explaining that resolutions are persuasive evidence of the existence of the rule of law which they enunciate).

81. See G.A. Res. 3314 (XXIX), *supra* note 9, at art. 3. Article 3 enumerates seven different acts which might qualify as an act of aggression: a) The invasion, attack, or any annexation by the use of force of part of all the territory of another state; b) The bombardment or use of weapons against the territory of another state; c) The blockade of ports or coasts; d) An attack on armed forces or fleets of another state; e) The use of the armed forces in contravention with the agreement allowing their presence in another state territory; f) The state that allows the use of its territory, by another state for the objective of an act of aggression against a third state; and g) The sending of armed bands, mercenaries that carry out acts of armed force against another State.

82. See *id.* at art. 5. The rest of the Resolution contains declarations referring to the untouched scope of the UN Charter including the lawful use of force, the unimpaired right of self-determination, and the necessity to interrelate its provisions.

existing international law, as modified by the Charter.”<sup>83</sup>

In fact, UN GA Resolution 3314(XXIX) did not provide any solution to the unlawful use of force under the UN Charter’s system,<sup>84</sup> and the results following its adoption can only be described as disappointing.<sup>85</sup> The UN SC, which was not bound by a UN GA resolution, applied it scarcely.<sup>86</sup> It was never embodied in an international convention or even recognized as a scholarly achievement.<sup>87</sup> The best accomplishment that can be attributed to the Definition of Aggression’s Resolution can be seen in the consideration obtained during the Rome Conference for the establishment of the ICC, which will be analyzed later in this Article.

Somehow the international courts received the existence of Resolution 3314(XXIX) more favorably than scholars or the UN SC itself. In 1970, in a *dictum* that revolutionized international law, the ICJ mentioned the outlawing of acts of aggression as the first of a list of examples of obligations *erga omnes*.<sup>88</sup> Again, in 1984, in spite of the lack of world-wide recognition or practical acceptance of UN GA Resolution 3314(XXIX) defining aggression, the ICJ gave it a new impulse acknowledging that the list of acts amounting to aggression enumerated in Article 3 of the Resolution reflected customary international law.<sup>89</sup> As such, they are mandatory principles applicable *erga omnes*. However, the practical meaning of such jurisprudence

83. JULIUS STONE, *CONFLICT THROUGH CONSENSUS—UNITED NATIONS APPROACHES TO AGGRESSION* 123 (John Hopkins University Press 1977).

84. *But see* Benjamin B. Ferencz, *Defining Aggression: Where it Stands and Where it’s Going*, 66 AM. J. INT’L L. 491 (1972); *A Proposed Definition of Aggression: By Compromise and Consensus*, 22 INT. & COMP. L.Q. 407 (1973); *Defining Aggression—The Last Mile*, 12 COLUM. J. TRANSNAT’L L. 430 (1973); *The United Nations Consensus Definition of Aggression: Sieve or Substance*, 10 J. INT’L L. & ECON. 701 (1975).

85. *See* Jack I. Garvey, *The U.N. Definition of ‘Aggression’: Law and Illusion in the Context of Collective Security*, 17 VA. J. INT’L L. 177, 198 (1976–1977); Mark S. Stein, *The Security Council, The International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council’s Power to Determine Aggression?*, 16 IND. INT’L & COMP. L. REV. 1, 8 et seq. (2005).

86. *See e.g.*, S.C. Res. 577, *supra* note 69 (condemning South Africa’s aggression against Angola); S.C. Res. 573, U.N. Doc. S/RES/573 (Oct. 4, 1985) (relating Israel and Tunisia).

87. Among the major accomplishments of international law in the last decades of the Twentieth Century were the creation of both *ad hoc* International Tribunals for the Former Yugoslavia, *see* S.C. Res. 827, U.N. Doc. S/RES 827 (May 25, 1993), and for Rwanda, *see* S.C. Res. 955, U.N. Doc. S/RES/955 (November 8, 1994). However, the statutes of both international tribunals do not include the crime of aggression among the offenses opening their jurisdiction.

88. *Barcelona Traction, Light and Power, Limited (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

89. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27) [hereinafter *Nicaragua Case*].

would hibernate until the creation of the Rome Statute.

### B. *The International Law Commission*

The ILC first encountered the crime of aggression through the 1950 adoption of the Principles of Nuremberg.<sup>90</sup> Principle VI characterized “crimes against peace” with the same words used by the Nuremberg Charter.<sup>91</sup> The Commentary on the related Principle explained that some delegates feared that some concepts were too vague and broad and anybody taking part in a war, including ordinary soldiers, would be considered to be “waging” such a war. Conversely, the Commentary following the Nuremberg Charter narrows the understanding as referring to high-ranking military personnel and State officials.<sup>92</sup>

One of the major contributions of the ILC to international law was the successive versions of its Draft Articles of State Responsibility. Article 19.3.a of the 1976 Draft version proposed that a violation of the prohibition on aggression was an example of a serious breach of an international obligation of essential importance for the maintenance of international peace and security.<sup>93</sup>

In 1981, the UN GA requested that the ILC resume its work on the Draft Code of Crimes against the Peace and Security of Mankind.<sup>94</sup> In 1996, a text was finally approved.<sup>95</sup> It recognized that crimes against peace and security of mankind were crimes under international law punishable as such, regardless of their punishment in domestic law.<sup>96</sup> According to Article 4 of the Draft Code, the responsibility of the offender does not prejudice any question on the responsibility of the State itself. The jurisdiction over the crime rested in an international

90. See *Formulation of Nürnberg Principles*, II Y.B. Int'l L. Comm'n 181 (1950), U.N. Doc. A/CN.4/22.

91. See *id.* at 377.

Principle VI

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

a. Crimes against peace:

(i) Planning, preparation, initiation or waging of a war in violation of international treaties, agreements or assurances;

(ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

92. See *id.* at 186.

93. See *Report of the International Law Commission on the Work of its Twenty-Eighth Session*, II (part Two) Y.B. Int'l L. Comm'n 95 (1976), U.N. Doc. A/31/10.

94. See G.A. Res. 36/108 A/RES36/108 (Dec. 10, 1981).

95. See *Draft Code of Crimes Against the Peace and Security of Mankind*, II (Part Two) Y.B. Int'l Comm'n 15 (relaying the text adopted by the ILC's forty-eighth Session in 1996).

96. See *id.* at art. 1. Article 2.2 recognizes that an individual shall be responsible for the crime of aggression.

tribunal.<sup>97</sup> The crime of aggression, according to Article 16 of the Draft, is referred to in the following terms “[a]n 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.”

The commentary to this Article<sup>98</sup> explains that the definition of aggression by a state is a question not addressed, as it was considered to be beyond the scope of the Code. But at least it recognized one fact clearly: to wage a war of aggression is a state’s decision, yet its responsibility is attributed to individuals.

In Article 20 of the Draft Statute for an International Criminal Court,<sup>99</sup> adopted by the ILC in 1994, aggression was included as a crime within the jurisdiction of the proposed court.<sup>100</sup> The draft text explained that a complaint of the act of aggression may not be brought unless “the Security Council ha[d] first determined that a State ha[d] committed the act of aggression which is the subject of the complaint.”<sup>101</sup> Thus, there is a clear surrender to a prior decision of the SC in order to determine the existence of an act of aggression, which proved to be unacceptable to the delegates to the Conference, as will be explained in the next point. The Preparatory Committee on the Establishment of an International Criminal Court met from March 16 to April 3, 1998, during which time it

97. *See id.* at art. 8. Establishment of jurisdiction:

Jurisdiction over the crime set out in article 16 shall rest with an international criminal tribunal. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

However, this Article has been correctly criticized for attempting to bar national jurisdiction. *See* Jean Allain & John R. W. D. Jones, *A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind*, 8 EUR. J. INT’L L. 100 (1997), available at <http://www.ejil.org/journal/Vol8/No1/art6.html> (last visited June 27, 2007).

98. *See Draft Code of Crimes Against the Peace and Security of Mankind*, *supra* note 96, at 43.

99. *See Draft Statute for an International Criminal Court*, available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_4\\_1994.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf) (last visited June 27, 2007).

100. *See id.* at art. 20

Crimes within the jurisdiction of the Court

The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) The crime of aggression;
- (c) Serious violations of the laws and customs applicable in armed conflict;
- (d) Crimes against humanity;
- (e) Crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.

101. *See id.* at art. 24.2.

completed the draft of the Rome Statute, which was transmitted to the Conference.<sup>102</sup>

#### IV. The Rome Statute: At the Beginning Again

The support of the related committees for the inclusion of this crime was not enthusiastic.<sup>103</sup> In fact, there is widespread recognition among scholars and participants in the Rome Conference that the question of including aggression among the crimes for which the ICC is to have jurisdiction was one of the most contentious issues discussed at that meeting.<sup>104</sup> There were two main reasons for this conflict. First, despite the fact that the inclusion of aggression as an international crime within the jurisdiction of the ICC obtained considerable support from the representatives gathered at Rome, this support was subordinated to the need to attain a workable definition.<sup>105</sup> The second reason for the conflict was the already-mentioned question of the role of the UN SC in determining whether an act of aggression has occurred.<sup>106</sup> Indeed, even those states accepting the inclusion of the crime were divided between

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102. See A/CONF.183/2/Add.1, from April 14, 1998 available at <http://www.un.org/icc/index.htm> (last visited June 27, 2007).

103. M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT 155 (Transnational vol.1 2005) [hereinafter THE LEGISLATIVE HISTORY]. He considered that aggression was listed within the jurisdiction of the ICC for its symbolic meaning. Tendencies between the participants in the Committees were divided between those firmly opposed to the crime of aggression, and those who consented somehow to its inclusion. According to other sources, it was largely the non-aligned countries who insisted that aggression remain within the jurisdiction of the ICC and added aggression as a generic crime pending its definition for a future time. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 31 (Cambridge University Press 2004) [hereinafter AN INTRODUCTION TO THE ICC]; Rahim Kherad, *La question de la définition du crime d'agression dans le Statut de Rome—Entre pouvoir politique du Conseil de Sécurité et Compétence Judiciaire de la Cour Pénale Internationale*, 109 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 331, 344 (2005).

104. See, e.g., Giorgio Gaja, *The Long Journey Towards Repressing Aggression*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 427, 431 (Antonio Cassese et al eds., Oxford 2002); Pietro Gargiulo, *The Controversial Relationship Between the International Criminal Court and the Security Council*, in ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 67, 92 et seq. (Flavia Lattanzi & William Schabas eds., II Sirente vol. I 1999); Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT. THE MAKING OF THE ROME STATUTE 79, 81 (Roy Lee ed., Kluwer 1999); William A. Schabas, *The Unfinished Work of Defining Aggression: How Many Times Must the Cannonballs Fly, Before They are Forever Banned?*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT 123, 134 (Dominic McGoldrick et al. eds., 2004) [hereinafter *The Unfinished Work of Defining Aggression*].

105. See THE LEGISLATIVE HISTORY, *supra* note 103, at 128; *The Unfinished Work of Defining Aggression*, *supra* note 104, at 123.

106. Philippe Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 67, 78 (Antonio Cassese et al. eds., Oxford 2002).

those who conceived the crime of aggression as occurring only when previously determined by the UN SC and those opposed to any intervention of the UN SC in any matter concerned with an independent judicial body such as the ICC.<sup>107</sup> In spite of the clear political implications of any activity of the UN SC on this matter, the participants at the Rome Conference agreed to compromise, adopting an emergency brake allowing the UN SC to stop a proceeding in course for a period of 12 months.<sup>108</sup>

Several different approaches to the definition of aggression were considered at the Conference but none were conclusive.<sup>109</sup> Some representatives even considered the possibility of leaving the question open for a future conference, which in fact happened. On the final day of the conference, with the strong support given by the group of Arab States and some of the Non-Aligned Movement, consensus was reached giving the ICC jurisdiction over the crime<sup>110</sup> once it is defined and its scope

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107. The chairwoman of the related Committee, considering the proposals in the PrepCom, distinguishes between a “generic” approach following the Nuremberg Charter, and a “list” approach that enumerated the specific acts constituting aggression. See Silvia A. Fernández de Gurmendi, *The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 *FORDHAM INT’L L.J.* 589, 595 (2001-2002). In 1994, the first draft of the Rome Statute imposed, as a precondition for the prosecution of this crime, the prior determination of the UN SC that a state had committed an act considered aggressive. See *THE LEGISLATIVE HISTORY*, *supra* note 103, at 136; Dan Sarooshi, *The Peace and Justice Paradox: The International Criminal Court and the UN Security Council*, in *The Unfinished Work of Defining Aggression*, *supra* note 104, at 95, 110; *AN INTRODUCTION TO THE ICC*, *supra* note 103, at 32; Pietro Gargiulo, *supra* note 104, at 100. It should be recalled that in addition to the interference from a foreign executive body to determine a crime within the competence of the ICC three permanent members of the UN SC—the U.S.A., Russia and China—are not state parties of the ICC. Despite not being members of the ICC, these states will be allowed to utilize their veto power to stop any non-desired incrimination taking place in the ICC once the crime of aggression has been defined. The United States has formerly been an active impelling force for considering aggression as an international crime. During the discussion of the ICC, rather than refusing the idea of this crime, the main efforts of the United States delegation were toward maintaining linkage with the UN SC’s determination for asserting what could be considered as a crime of aggression.

108. See Rome Statute, *supra* note 5, at art. 16—Deferral of investigation of prosecution:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

109. See *AN INTRODUCTION TO THE ICC*, *supra* note 103, at 33 et seq. See Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/13 [hereinafter PrepCom Report], available at [http://www.un.org/law/icc/rome/proceedings/E/Rome%20Proceedings\\_v3\\_e.pdf](http://www.un.org/law/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf) (last visited June 27, 2007).

110. See Rome Statute, *supra* note 5, at art. 5. Article 5 Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of



designated in a manner consistent with the purposes of the ICC's Statute.<sup>111</sup> The final act of the Conference left the drafting of future proposals related to this crime in the hands of a commission.<sup>112</sup>

Consequently, the jurisdiction of the ICC will be exercised only when the crime of aggression has been properly defined, without any retroactive effect before the moment of its adoption. Presumably, when that moment arrives some articles of the ICC will require further amendment for including the obtained definition of aggression and for modifying the former reference to the crime. Article 121 of the Rome Statute established special dispositions related to amendments to the crimes within the jurisdiction of the ICC, making the reforms applicable only for the member states that accept such amendments, which will open the path to a long ratification process.<sup>113</sup> On the other hand, a new

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concern of 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.

111. See AN INTRODUCTION TO THE ICC, *supra* note 103, at 31. According to one source opponents and proponents of the definition of aggression had to admit that "negotiations had ended in a tie and accepted a 'codified impasse.'" Fernández, *supra* note 107, at 589. Some delegations supported the inclusion of the crime following the Nuremberg Charter as well as UN Resolution 3314(XXIX). Other delegations were opposed to the inclusion of the crime, because they questioned the possibility of arriving at any definition in the given time. They also feared the circumstance that aggression would not be considered a crime under their domestic laws and the practical difficulty of bringing political leaders to trial for this crime. See THE LEGISLATIVE HISTORY, *supra* note 103, at 33. It has been affirmed that due to the fact that the norms related to aggression had been incorporated in the text at the last moment and because they were not the result of proper negotiations, those provisions are not necessarily clear. See Annex III ICC-ASP/4/SWGCA/INF.1.

112. See Annex I of the Final Act letter F p.105:

The Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute.

113. See Rome Statute, *supra* note 5, at art. 121.5.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the

member state acceding to the ICC will receive the text as it was finally amended according to Article 12.1 of the Rome Statute.<sup>114</sup>

The ASP decided at its first session to establish a “Special Working Group on the Crime of Aggression” (“SWG”) with the idea of preparing an agenda for a future meeting which will end with the preparation of a draft contemplating several of the main problems arising with this crime.<sup>115</sup> Interestingly, the SWG could include any member state of the UN, not necessarily members of the ICC. This will place non-member parties on equal footing with state parties.<sup>116</sup> The work of the SWG will be properly appreciated in 2009 when the planned reform Conference will take place. However, a serious drafting effort harmonizing different positions could already be seen.<sup>117</sup> During the last formal meeting of the SWG between January 29 and February 1, 2007, it became clear that there was a conflict between what it should consider as an “act of aggression” and what should be seen as the “crime of aggression.” The former is the exclusive competence of the UN SC when acting under Chapter VII of the UN Charter or under GA Resolution 3314(XXIX);<sup>118</sup> but the existence of an act of aggression could also be verified by the UN GA under Articles 10, 11 and 13 of the UN Charter, as well as by any other institution empowered to qualify an act as aggression in order to initiate a prosecution by the ICC. On the other hand, the existence of a “crime of aggression” will be the exclusive competence of the ICC when the requisites of the final paragraph of Article 5 of the Rome Statute have been fulfilled. It seems that some tautological beginning of a definition has been accepted, at least, for future work, as it appeared from the draft

deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.

114. *See id.* at art. 12.

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

115. *See* ASP Point 23.a, U.N. Doc. ICC-ASP/1/Res.1, available at [http://www.un.org/law/icc/asp/1stsession/report/english/part\\_i\\_e.pdf](http://www.un.org/law/icc/asp/1stsession/report/english/part_i_e.pdf) (last visited June 28, 2007). The Special Working Group held several formal and informal inter-sessional meetings where some notable advances were produced despite some new inconveniences like the lack of participation of all member states, difficulties with the translation and the circumstance that some delegations were not authorized to be present during the informal meetings.

116. *Id.*

117. *See* ASP SWG ¶ 75, U.N. Doc. ICC-ASP/4/SWGCA/INF.1 [hereinafter Report of the Fourth Session], available at [http://www.icc-cpi.int/asp/documentation/doc\\_4thsession.html](http://www.icc-cpi.int/asp/documentation/doc_4thsession.html) (last visited June 28, 2007). *See* ASP SWG, U.N. Doc. ICC-ASP/5/SWGCA/INF.1 (report of the Fifth Session), available at [http://www.icc-cpi.int/library/asp/ICC-ASP-5-SWGCA-INF1\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-SWGCA-INF1_English.pdf) (last visited June 27, 2007).

118. *See* G.A. Res. 3314(XXIX), *supra* note 9, at art. 2, 4.

proposed by the Chair of the SWG,<sup>119</sup> which has been considered and reformulated in June 2007 during the informal meeting at Princeton University and later during the next formal meeting at the United Nations headquarters in New York. The discussion continued between the so-called differentiated approach and the monistic approach.<sup>120</sup> However, the proposed text in both variants has enough ingredients for initiating the ICC proceeding, which must be praised. Still, some persisting problems exist which must be considered by the SWG in order to obtain a consistent text at the end of its mandate.<sup>121</sup>

#### A. *Persisting Problems: Consistency with the UN Charter*

The last phrase of Article 5.2 of the Rome Statute states that any definition adopted by the future ASP “*shall be consistent with the relevant provisions of the Charter of the United Nations.*” “Consistent” means congruous, compatible, non-contradictory.<sup>122</sup> How could a definition of aggression not be consistent with the UN Charter? Should the definition keep in mind Chapter VII of the UN Charter, and consequently, give the UN SC a determining role in qualifying conduct as “aggression?” Some authors have argued that this phrase is a clear indication of such an understanding because the crime of aggression would be impossible to be labeled without a prior qualification of the

119. See ASP SWG, U.N. Doc. ICC-ASP/5/SWGCA/2 (Jan. 16, 2007) [hereinafter Resumed Fifth Session], available at [http://www.icc-cpi.int/library/asp/ICC-ASP-5-SWGCA-2\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-SWGCA-2_English.pdf) (last visited June 27, 2007). The proposed text has two variants:

Variant (a):

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

Variant (b):

1. For the purpose of the present Statute, a person commits a ‘*crime of aggression*’ when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person orders or participates actively in the planning, preparation, initiation or execution on an *act* of aggression. . . .

(emphasis added).

120. See *id.* Variant (b) transcribed. These alternatives were already considered during the Rome Conference. See Rhaim Kherad, *supra* note 103, at 349; Resumed Fifth Session, *supra* note 119.

121. The SWG pretends to present its final report one year in advance to the Reform Conference which will be presumably held in 2009. However, there are clear indications that the final date for that Conference is still undecided. This point was underlined at the last meeting of the SWG in New York by several representatives.

122. See THE NEW SHORTER OXFORD ENGLISH DICTIONARY 486 (Lesley Brown ed., vol. I 1973).

conduct by the UN SC.<sup>123</sup> In case the institution entrusted with the analysis of the state's behavior is the UN SC, it must be recognized that it is composed of members chosen with a political or diplomatic perspective, who follow the instructions of their governments. They are not going to be independent arbiters who will decide the question of aggression according to their impartial judgment. The permanent members will continue exercising their veto power.

The discussed phrase has been seen as the "carefully constructed" result of political compromise arrived at in the discussions.<sup>124</sup> A recent advisory opinion of the ICJ, however, brings another perspective.<sup>125</sup> In the *Wall Case*,<sup>126</sup> the ICJ analyzed in depth its jurisdiction for rendering an advisory opinion upon a request of the UN GA based on Articles 12<sup>127</sup> and 14<sup>128</sup> of the UN Charter. The ICJ understood that the interpretation of Article 12 has evolved with an increasing tendency of the UN SC and the UN GA to work in parallel.<sup>129</sup> Consequently, in situations contemplated by an emergency session, the ICJ will not refuse its competence because a decision of the UN SC has been impeded by the veto of some of its permanent members.<sup>130</sup>

Could it be suitable to apply the same reasoning for a possible qualification of aggression? The reading of the opinion clearly seems to show an affirmative answer to this question. Several problems, however, remain unresolved. Even in the case where the UN SC or an alternative

123. See Gaja, *supra* note 104, at 432.

124. See von Hebel & Robinson, *supra* note 104, at 85.

125. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 43 ILM 1009 (2004) [hereinafter *The Wall Case*].

126. See *id.*

127. See UN Charter, *supra* note 60.

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

128. See *id.* at art. 14.

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

129. See *The Wall Case*, *supra* note 123, at ¶ 27 (accepting consequently the jurisdiction for the advisory opinion in ¶ 42).

130. See *id.* at ¶ 31.

entity will be able to qualify particular state conduct as aggressive, the main concern will be initiating the criminal prosecution and not just establishing the state's civil liability for damages. The UN SC has exclusive competence when acting under Chapter VII to determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations, or decide what measures shall be taken to maintain or restore international peace and security.<sup>131</sup> Certainly, it would be desirable to include a prompt qualification of aggression by the UN SC in a given case for putting in motion the ICC system. While this option will always be available, it would be naïve to ignore the political difficulties and possible veto implications any time the UN SC, which has in the past been reluctant to use the word "aggression," is involved. The only feasible solution is to give additional powers to some other international body. Some representatives in the SWG expressed concerns regarding the UN SC's exclusive vote in determining aggression.<sup>132</sup> However, such concern is misplaced. The exclusivity of the UN SC is directly related to the qualifications enlisted in Chapter VII which have the main objective of maintaining or restoring international peace and security, and should not be understood as undermining the work of other distinctive institutions for determining when aggression as crime has been committed, and consequently triggering the ICC jurisdiction.

A candidate for filling that position could be the ASP of the ICC. For such a role to be fulfilled, a consistent majority of the member states would have to be of the opinion that a certain state's conduct constituted *prima facie* evidence that the crime of aggression had occurred within the jurisdiction of the ICC.<sup>133</sup> Such a decision by the ASP, or any other institution, to qualify a conduct as aggressive would do nothing more than put the ICC machinery into movement, as will be the case with any other crime listed in Article 5 of the Rome Statute. Once a situation has been referred to it, the ICC will look after its procedural admissibility according to Articles 17 through 19 of the Rome Statute. The ICJ can also help achieve this objective by issuing an advisory opinion in case a specific situation calls for it. However, this alternative does not consider the problem of burdening an already overloaded ICJ with additional

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131. See UN Charter, *supra* note 60, at art. 39.

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

132. See Report of the Fourth Session, *supra* note 117, at 13 ¶ 66.

133. Such possibility would imply modifying Article 13 for including this alternative in the case of aggression.

work.<sup>134</sup>

Certainly, one could imagine a situation in which the ASP concludes that the same state behavior amounts to aggression, and thereby urges the prosecution of the crime, even though the UN SC has not qualified it as such under Article 39 of the UN Charter. Such a situation would certainly be undesirable, but it seems possible that an aggressive criminal act could be committed even though the UN SC might, for political or diplomatic reasons, decide not to act in accordance with Chapter VII of the UN Charter. It is important to recall that under Article 29 of the Rome Statute, no statute of limitations will bar prosecution for crimes within the ICC's jurisdiction.<sup>135</sup> Notwithstanding the criminal prosecution, the conduct of the State in question could have lost the necessary urgency for putting in motion the proceeding of Chapter VII of the UN Charter.

### B. *The State as Offender*

The crime of aggression has traditionally been seen as requiring the involvement of state decision makers. In the opinion of some scholars, it would be impossible for this crime to be committed in a private capacity.<sup>136</sup> According to this viewpoint, an individual could be accused of being the leader of a plan to commit aggression or for inciting its perpetration, but the accusation would always presuppose the commission of the crime by the state's government.<sup>137</sup> This presumption, however, begins from a wrong premise: a state, as a legal entity or institution, cannot commit a crime and, consequently, cannot be held *criminally* (as opposed to civil liability) responsible.<sup>138</sup> The idea of criminal collective guilt is contrary to the mere essence of the law of nations. When the responsibility of the State alone is considered, it

134. "Unreal" alternative according to Torsten Stein, *Aggression als Verbrechen im Statut des Internationalen Strafgerichtshofes—A Bridge Too Far?*, in Festschrift für HEIKE JUNG 934, 944 (Festschrift für Heike Jung et al eds., Nomos 2007).

135. See Rome Statute, *supra* note 5, at art. 29 ("The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.").

136. See, e.g., Mauro Politi, *The Debate Within the Preparatory Commission for the International Criminal Court*, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION 43, 46 (Mauro Politi & Giuseppe Nesi eds.).

137. See generally Jones, *supra* note 1.

138. But see Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 10 EUR. J. INT'L L. 425 (1999). Pellet uses the term "crimes" in an ordinary and not a technical sense assuming for example, that Nazi Germany and Hussein's Iraq committed "crimes" and were "criminal states." See also Marina Spinedi, *State Responsibility v. Individual Responsibility for International Crimes: Tertium Non Datur?*, 13 EUR. J. INT'L L. 895 (2002). Spinedi presumes that to recognize a crime committed in a private capacity would mean to declare the state not responsible assimilating criminal with civil responsibility.

implies civil liability for damages, but from the criminal law perspective, only individuals belonging to the state and with the capacity to make decisions will be considered perpetrators. Therefore, it is impossible in international criminal law to talk of crimes of aggression carried out by a state. Such expression would be better used in terms of a civil law claim as opposed to a criminal one.

Aggression is a crime for state leaders and state officials—for people at the peak of the state power pyramid hierarchy; individuals with at least enough aptitude to engage the state's forces into aggressive action. The quality of the possible perpetrator of this crime shows a clear and unavoidable difference with the perpetrators of other crimes considered in Article 5 of the Rome Statute where the leadership requirement will be more flexible. But aggression is a crime that necessarily implies the quality of effective leadership: a requirement which limits criminal participation to those who have decided to engage in the aggressive act with the power to fulfill their decision, and not extending criminal responsibility to their inferiors and subordinates or those holding only honorific positions. This understanding of the crime of aggression represents an exception from the norms of Article 25.3 of the Rome Statute<sup>139</sup> and has the effect of deactivating Articles 33.1 and 33.2.<sup>140</sup>

Article 27 of the Rome Statute mentions the irrelevance of any official capacity and immunity in attempting to bar the ICC from exercising jurisdiction over the offender.<sup>141</sup> This norm should be read together with the provision contained in the first paragraph of Article

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139. See Rome Statute, *supra* note 5, at art. 25.3.

140. See *id.* at art. 33.

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey order of the Government or the superior in question;

(b) The person did not know that the order was unlawful; and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

141. See *id.* at art. 27.

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

98,<sup>142</sup> which subordinates ICC jurisdiction to the waiver of immunity of the related country. The idea of raising the shield of immunity has been traditionally admitted after Nuremberg. The fact that a state's official has committed a crime transfers civil liability to the state and could constitute an exception to the foreign immunity to which the state may try to resort.<sup>143</sup> It is irrelevant that the state official has been abusing his office or public power. As stated in the Commentary to the 2001 ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts,<sup>144</sup> where such a person acts in an apparently official capacity, or under color of authority, the actions in question for civil liability purposes will be attributable to the State.<sup>145</sup>

Finally, the significance of qualifying a conduct as aggressive requires that the act be completed. Consequently, no attempted conduct could be the object of prosecution in spite of Article 25.3.f of the Rome Statute.<sup>146</sup> This assertion relies on practical reasons. It would be complicated enough to reach consensus for determining the crime when already accomplished, and would be near impossible when the conduct has only been attempted.

142. *See id.* at art. 98.

Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. . . .

143. *See* G.A. Res. 2625(XXV) (Oct. 24, 1970). "Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations:" A war of aggression constitutes a crime against peace, for which there is responsibility under international law.

144. *See Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, II (Part Two) Y.B. Int'l L. Comm'n 91 (2001), available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) (last visited June 27, 2007).

145. *See id.* However, it should be underlined that in a conflictive but majority opinion for one vote in the *Al-Adsani case*, 41 ILM 536 (2002), the European Court of Human Rights ("ECHR") privileged state immunity rather than prosecuting state officials for a crime against imperative norms, as it happens in cases of tortures.

146. *See* Rome Statute, *supra* note 5, at art.

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

....

(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.



### C. *Transforming Aggression in Domestic Law*

There is another question that must concern the future assembly of Member States for the reform of the ICC Statute. Any possible definition of the crime of aggression, when obtained, must be ratified and transformed into domestic law by each member state.<sup>147</sup> There are numerous legislative approaches for implementing the Rome Statute in municipal law.<sup>148</sup> Some countries belonging to the common law tradition like the United Kingdom,<sup>149</sup> Canada,<sup>150</sup> and Australia<sup>151</sup> drafted detailed acts for its implementation. This also happened in the mixed jurisdiction of South Africa.<sup>152</sup> Other states belonging to the Roman tradition, like Holland<sup>153</sup> and Germany,<sup>154</sup> rendered compact laws qualifying those behaviors not defined domestically and resolving the questions concerning the extradition to the ICC by listing the pertinent modifications to be introduced into their codes of criminal law and criminal proceedings. Still some countries such as Austria,<sup>155</sup> Belgium,<sup>156</sup> France<sup>157</sup> and Italy<sup>158</sup> produced modifications concerned only

147. See Rome Statute, *supra* note 5, at art. 121.5.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment *one year after the deposit of their instruments of ratification or acceptance*. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

(emphasis added).

148. See generally THE ROME STATUTE AND DOMESTIC LEGAL ORDERS GENERAL ASPECTS AND CONSTITUTIONAL ISSUES (Claus Kress & Flavia Lattanzi eds., Nomos vol. I 2000); ROY S. LEE, STATE'S RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW (Transnational Pub. 2005).

149. See *International Criminal Court Act 2001—Chapter 17*, available at <http://www.legislation.hms.gov.uk/acts/acts2001/20010017.htm> (last visited June 27, 2007).

150. See Canadian S.C. 2000—Chapter 24, Bill C 19, June 29, 2000.

151. See *International Criminal Court (Consequential Amendments) Act 2002, Nr. 42 (2002)*, available at <http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm> (last visited June 27, 2007).

152. *International Criminal Court Bill, B42-2001, section 75 Bill, Government Gazette No. 22456*, July 4, 2001.

153. See the Dutch Project in a non-official translation, available at <http://www.iccnw.org/resourcestools/ratimptoolkit/nationalregionaltools/legislationdebates/NL.IntCrAct.pdf>; see Göran Sluiter, *Implementation of the ICC Statute in the Dutch Legal Order*, 2 J. INT'L CRIM. JUSTICE 1, 159 (2004).

154. Available at <http://www.bmj.bund.de/media/archive/143.pdf>.

155. See Federal Law for the Cooperation with the ICC in 1168 d.B. (XXI. GP), available at [http://www.parlament.gv.at/pls/portal/docs/page/PG/DE/XXI/I/I\\_01168/frame\\_000705.pdf](http://www.parlament.gv.at/pls/portal/docs/page/PG/DE/XXI/I/I_01168/frame_000705.pdf).

156. See the text submitted to the Conseil d'Etat, available at <http://www.iccnw.org/resourcestools/ratimptoolkit/nationalregionaltools/legislationdebates/BelgiumProvisional>

with those questions not already resolved by domestic law. Finally, another group of states such as Switzerland, divided the implementation of the Rome Statute into several laws modifying different parts of domestic legislation.<sup>159</sup> In those nations which have codified their criminal laws in a penal code, such codes usually contain a chapter concerned with the crime of incitement of war<sup>160</sup> or carrying out hostile actions against a foreign state.<sup>161</sup> In some cases the crimes considered as international are only related to the due respect of foreign national symbols or protected persons.<sup>162</sup> A few jurisdictions, however, considered the preparation of war of aggression itself as a crime. This happens, for example, in the Penal Code of Germany where the preparation of a war of aggression itself is seen as punishable.<sup>163</sup> This text was copied by Article 271 of the Penal Code of Paraguay.<sup>164</sup> The German article was never applied by the judiciary until recently when a German Federal tribunal declared the illegality of German participation in the war in Iraq, a war that in its opinion presented grave concerns in terms of international law.<sup>165</sup>

Fren.pdf; Damien Vandermeersch, *The ICC Statute and Belgian Law*, 2 J. INT'L CRIM. JUSTICE 1, 133-57 (2004).

157. See *Loi no 2002-268* February 26, 2002 modifying article 627 of the French Code of Criminal Procedure, published in the *Journal Officiel de la République Française* of February 27, 2003, pp. 3684-3687, available at <http://www.legifrance.gouv.fr/WAspad/LeRtf?cid=394949&table=LEX>; see Julien Cantegreil, *Sur la seconde loi française d'adaptation du statut de Rome*, in *REVUE DE SCIENCE CRIMINELLE ET DE DROIT PENAL COMPARE*, 803 n.4, 2004.

158. See text submitted to the legislative, available at [http://www.camera.it/\\_dati/leg14/lavori/stampati/pdf/14PDL0028880.pdf](http://www.camera.it/_dati/leg14/lavori/stampati/pdf/14PDL0028880.pdf).

159. Available at <http://iccnow.org/countryinfo/europecis/switzerland.html/>.

160. See Colombia Penal Code art. 114; Chile Penal Code art. 106; Italian C.P. art. 244; Nicaragua Penal Code art. 546; Portugal Penal Code art. 236; Uruguay Penal Code art. 133.1.

161. See Guatemala Penal Code art. 362 and 372; El Salvador Penal Code art. 354; Panama Penal Code art. 312.

162. See, e.g., Argentina Penal Code arts. 219-225; Swiss Penal Code art. 270; Bolivia Penal Code art. 141; Spanish C.P. art. 606.

163. See § 80 and § 80a StGB. Under the title *Friedensverrat* or betrayal of the peace, the German Penal Code punishes the preparation of a war of aggression, which was already prohibited by article 26.1 of the German Constitution.

164. "1. El que preparara una guerra de agresión en la cual la República sea la agresora, será castigado con pena privativa de la libertad hasta 10 años. En estos casos, será castigada también la tentativa." [1. The one who prepare a war of aggression where the Republic would be the aggressor, it will be punished with prison until 10 years. In that case the attempt will be also punished.]

165. Decision from May 21, 2005, BVerwG 2 WD 12.04, available at <http://www.bverwg.de/files/65a04cb42f2e0fffa5c82baedf43ba31/3059/2wd12-u-04.pdf>.

A war of aggression according to art. 26.1 first paragraph of the Constitution is unconstitutional with independence of the subjective purpose of its pursuance.

*Id.* at 43.

The war that begun in March 20, 2003 by the USA and the UK against Iraq

#### D. *Universal Jurisdiction and the Crime of Aggression*

All gross human rights violations, which are already within the jurisdiction of the ICC, are recognized as crimes giving rise to universal jurisdiction.<sup>166</sup> That means that in cases involving the crime of genocide, crimes against humanity and war crimes, the perpetrator may be prosecuted by any country without any connection with the place where the crime was perpetrated, nor the nationality of the victim or the perpetrator. The only nexus required to exercise this jurisdiction would be to have the alleged offender present in the territory. In theory, however, even this requirement could be overcome by the principle of *aut dedere aut iudicare* which obliges the extradition of the criminal to the requesting country in case the requested state was either unable to, or preferred not to, prosecute the offender.<sup>167</sup>

If universal jurisdiction is recognized for those crimes that affect the whole of mankind and its prohibition could be opposed *erga omnes*, it is logical to conclude that those crimes already listed in the Rome Statute will also be subject to universal jurisdiction, despite the fact that the German proposal to this effect was defeated at the Rome Conference. Should aggression be viewed under the same perspective? If a definition is ultimately agreed to, will this allow the crime's prosecution under universal jurisdiction? Again, theoretically, the answer should be in the affirmative. However, it would be naïve to ignore the political implications of conceding the extradition of somebody arrested in one state at the request of the universal jurisdiction of another state having no link to the arrested person or the victims of the crime. The national constitutions drafted after the Second World War, even by those countries where some of its officers were charged with the commission of crimes against peace, have not remained unchanged through successive movements against aggression described *supra*. Even among

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originated, and continues to generate serious legal reflections in relation with the prohibition of the use of force of the UN Charter and the rest of the applicable international law.

*Id.* at 72 et seq. See the complaints received by the German Attorney General for prosecuting the German Chancellor on this offense in a comment by Nikolaus Schultz, *Case Note—Was the War on Iraq Illegal?—The Judgment of the German Federal Administrative Court of 21<sup>st</sup> June 2005*, 7 GERMAN L. J. (2006), available at <http://www.germanlawjournal.com/print.php?id=684>.

166. See AN INTRODUCTION TO THE ICC, *supra* note 103, at 73; ALBERTO L. ZUPPI, *LA JURISDICCION EXTRATERRITORIAL Y LA CORTE PENAL INTERNACIONAL* (La Ley, 2001). But see Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party Status*, 64 LAW & CONTEMP. PROBS. 13, 28 (Winter 2001).

167. See Rome Statute, *supra* note 5, at art. 17.1 and 2. See M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT IUDICARE THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (Nijhoff 1995).

the constitutions of the former Axis powers of World War II, expression of a general prohibition of waging war can be found. For example, Germany prohibited the preparation of aggressive war,<sup>168</sup> Italy repudiated war,<sup>169</sup> and Japan renounced belligerency.<sup>170</sup> To prohibit war as an expression of mandatory law with liability arising in case of its violation is one thing.<sup>171</sup> To prosecute aggression as an international crime is something else entirely different and certainly more difficult to attain. This understanding, rather than being pessimistic, is simply realistic. Additionally, the system created in Rome relies on the principle of complementarity of the ICC. Under this principle, the ICC will admit an issue only when it is not being prosecuted or investigated by another member state having jurisdiction to do it.

## V. Conclusion

Lauterpacht,<sup>172</sup> who encouraged all efforts to define the crime of aggression in spite of its inherent difficulty, trusted to leave the final result to the skill of the draftsmen and the wisdom of the courts. He hoped that international lawyers would not be deterred by the difficulties of this task. That expectation was seen as a fallacy by Stone,<sup>173</sup> who did not believe in any “*juristic push-button*” definition, or in an international urge for inventing one. Hope for finding a definition for this crime continues to be a deceptive mirage today. The tracks of hope and political reality do not seem to run in the same direction. The result obtained in the ICC Conference was, in some way, more frustrating and disappointing than previous attempts to define the crime of aggression. Despite the prior history and the existence of a definition of aggression, presumably reached by consensus already in 1973, the only tangible result was enlisting nominally the crime of aggression, without defining it. Since then the crime has been seen as hibernating until a definition

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168. See GERMAN GG art. 26.

(1) Activities tending and undertaken with the intent to disturb peaceful relations between nations, especially to prepare for aggressive war, are unconstitutional they shall be made a punishable offense.

169. See ITALIAN CONST. art. 11.

170. See JAPANESE KENPŌ, art. 9.

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. . . . In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

171. *Nicaragua Case*, *supra* note 89, at 100 ¶ 189.

172. HERSCH LAUTERPACHT, THE PACT OF PARIS AND THE BUDAPEST ARTICLES OF INTERPRETATION 200-01 (Transactions of the Grotius Society, vol. XX).

173. See STONE, *supra* note 4, at 11.

can be reached.<sup>174</sup> Skepticism is simply unavoidable, despite the promising results of the SWG. The case of *Jones*,<sup>175</sup> mentioned at the beginning of this Article, shows that the elusiveness of a definition does not impede a court from ruling about the legal question involved. A more serious and difficult dilemma will be determining whether the international community has the will to finally resolve this matter.

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174. See AN INTRODUCTION TO THE ICC, *supra* note 103, at 31.

175. See *Jones*, *supra* note 1.