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Prosecuting Aggression

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The Assembly of States Parties to the International Criminal Court will soon have its first opportunity to revise the Rome Statute and activate the latent crime of aggression, which awaits a definition of its elements and conditions for the exercise of jurisdiction. The working group charged with drafting a provision is scheduled to complete its task by 2008 or 2009, one year before the International Criminal Court's first review conference. Beginning with a history of the crime meant to put the current negotiations in the context of past initiatives, this article sets out the status of the negotiations and begins to forecast prosecutorial challenges created by alternative formulations. It concludes by identifying the main prosecutorial challenges common to all formulations to see how a case against a political or military leader for the crime of aggression will look.

INTRODUCTION

The Assembly of States Parties (“ASP” or “Assembly”) to the International Criminal Court (“ICC” or “Court”) will soon have its first opportunity to revise the Rome Statute and activate the latent crime of aggression, which awaits a definition. The ASP has empowered a special working group to produce a draft definition by the end of 2008, so as to give states time to consider and discuss the proposal at home and abroad before the Court’s 2009 or 2010 review conference. The Special Working Group on the Crime of Aggression (“SWGCA” or “Working Group”) has been meeting periodically in Princeton, New York City, and The Hague, and has made significant progress on the definition and the jurisdictional preconditions of the crime. However, there is no common framework from which to evaluate competing proposals, and interests have been playing as important a role as ideals in shaping the outcome.

One under-explored question in the definitional debate is what challenges the various formulations will create for the Prosecutor of the ICC as he or she prepares a case against an individual for the crime of aggression. Beginning with a history of the crime meant to put the current negotiations in the context of past initiatives, this article sets out, in detail, the status of the negotiations and begins to forecast prosecutorial challenges. Identifying future challenges is one way to evaluate competing proposals, foresee what an

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aggression case would look like, and begin to answer the question that underlies all others: is criminalizing aggression at this time and in this way a worthwhile endeavor?

I. THE HISTORICAL BACKGROUND OF THE CRIME OF AGGRESSION

As the 1998 Rome Conference on the Establishment of an International Criminal Court came to a close and the plenipotentiaries remained deadlocked over the crime of aggression, members of the Non-Aligned Movement proposed a temporary compromise.¹ Aggression would be included in article 5 of the Rome Statute establishing the ICC as a crime falling within the purview of the Court, but the definition and the conditions for the exercise of jurisdiction would be omitted, pending agreement at a future review conference to occur no earlier than seven years after the Statute came into force.² On July 17, 1998, 120 states voted in favor of the treaty, 7 voted against it, and 21 abstained, and the Statute was adopted. The crime of aggression became the ICC's latent crime.

The Rome Conference was not the first attempt to criminalize aggressive war. The crime of aggression repeatedly captured the twentieth-century legal imagination.³ Some initiatives were fruitful, others less so. In 1919, at the end of World War I, plans were made under article 227 of the Versailles Treaty of Peace to hold German Kaiser Wilhelm II criminally responsible for "a supreme offence against international morality and the sanctity of treaties."⁴ In his memoirs, English Prime Minister David Lloyd George recollects that during the interwar period there was "a growing feeling that war itself was a crime against humanity, and that it would never be finally eliminated until it was brought into the same category as all other crimes by the infliction of condign punishment on the perpetrators and instigators."⁵ The Kaiser ultimately took shelter in the Netherlands, which refused to extradite him to an international tribunal applying *ex post facto* law.⁶

1. Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 79, 85 (Roy S. Lee ed., 1999); see also Silvia A. Fernández de Gurmendi, *Completing the Work of the Preparatory Commission: The Working Group on Aggression at the Preparatory Commission for the International Criminal Court*, 25 FORDHAM INT'L L.J. 589, 589 (2002).

2. Rome Statute of the International Criminal Court arts. 5(2), 121, 123, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3. For a compilation of key documents, see Benjamin B. Ferencz, *Defining International Aggression: The Search for World Peace* (1975).

4. See Treaty of Peace between the Allied and Associate Powers and Germany art. 227, June 28, 1919, 225 Consol. T.S. 188; see also Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference* (1919), reprinted in 14 AM. J. INT'L L. 95, 116–17 (1920); James Brown Scott, *The Trial of the Kaiser*, in WHAT REALLY HAPPENED AT PARIS 231, 243–44 (Edward M. House & Charles Seymore eds., 1921).

5. DAVID LLOYD GEORGE, MEMOIRS OF THE PEACE CONFERENCE 55 (1939).

6. Benjamin B. Ferencz, *From Nuremberg to Rome: A Personal Account*, in JUSTICE FOR CRIMES AGAINST HUMANITY 31, 31 (Mark Lattimer & Philippe Sands eds., 2003).

The League of Nations prohibited recourse to war to resolve international disputes.⁷ In 1923, it sponsored the Draft Treaty of Mutual Assistance that stated, “aggressive war [i]s an international crime.”⁸ Likewise, the 1924 League of Nations Protocol for the Pacific Settlement of International Disputes (“1924 Geneva Protocol”) declared in its preamble, “a war of aggression constitutes . . . an international crime.”⁹ Outside the League of Nations framework, the 1928 General Treaty for the Renunciation of War (the Kellogg-Briand Pact), concluded among the heads of the United States the German Reich, and the French Republic, as well as other world leaders, provided for the renunciation of war as an instrument of national policy and included a pledge to resolve all disputes by pacific means.¹⁰ However, while these instruments made clear the increasingly accepted view of aggressive war as an international crime, their success was limited. For example, the 1924 Geneva Protocol was signed by the leading statesmen of the interwar period but was never ratified. In 1946, looking back at the negotiations culminating in the Draft Treaty of Mutual Assistance, the Nuremberg Tribunal recalled, “[t]he principal objection appeared to be in the difficulty of defining the acts which would constitute ‘aggression’, rather than any doubt as to the criminality of aggressive war.”¹¹

Moreover, the language of these interwar assurances was ambiguous as to the type of responsibility international aggression would attract and the entity to which responsibility would attach. Many, if not most, contemporary international law scholars challenge the interwar characterization of aggressive war as a crime attracting stigma and punishment rather than a delict giving rise to a tort claim for compensation. There was also uncertainty over whether aggression would involve individual responsibility, state responsibility, or both. No international prosecutor was ever appointed during this period or, it seems, even envisaged. Nevertheless, these interwar assurances later served as an important basis for the Nuremberg determination that the crime of aggression was customary international law prior to 1939.

In the wake of World War II, nations flagrantly violated the interwar prohibitions on international aggression with impunity, and the League collapsed under its own irrelevance. By 1943, when fighting raged all over Europe and the outcome of the contest was uncertain, the Allies began advocating for the trial of Axis leaders upon Axis defeat and established the U.N. War Crimes Commission to begin preparatory investigative work.¹² Accord-

7. Covenant of the League of Nations.

8. *Draft Treaty of Mutual Assistance*, 3 J. BRIT. INST. INT'L AFF. 45, 51 (1924).

9. Geneva Protocol for the Pacific Settlement of International Disputes, 19 AM. J. INT'L L. SUPP. 9 (1925).

10. General Treaty for the Renunciation of War arts. 1, 2, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

11. International Military Tribunal (Nuremberg), *Judgment and Sentences*, 41 AM. J. INT'L L. 172, 219 (1947) [hereinafter *Nuremberg Judgment*].

12. William A. Schabas, *Origins of the Criminalization of Aggression: How Crimes Against Peace Became the “Supreme International Crime,”* in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION

ing to the official U.N. history, “[b]y far the most important issue of substantive law to be studied by the [U.N. War Crimes] Commission and its Legal Committee was the question of whether aggressive war amounts to a criminal act.”¹³

After the Allied victory in World War II and a rigorous debate over the merits of the crime, international aggression was included as a Crime Against Peace under article 6(a) in the Charter of the International Military Tribunal.¹⁴ The provision empowered prosecutors at Nuremberg to investigate and prosecute Nazi “leaders, organizers, instigators and accomplices” for the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”¹⁵ Count one of the indictment addressed the common plan or conspiracy to commit crimes against peace and count two contained the charges relating to crimes against peace.¹⁶ The prosecution indicted twenty-four German defendants for one or both counts.¹⁷ The bench found twelve defendants guilty of at least one count.¹⁸ The prosecution’s primary challenge was not to capture suspects (unconditional German surrender gave the Allies free rein to arrest), select cases (the leading Nazi perpetrators were notorious), or acquire evidence linking the defendants to state/collective acts of aggression (the Nazis kept meticulous records), but to establish the legitimacy of the crime itself.¹⁹ The tribunal ultimately rejected defense claims of retroactivity and, on the basis of interwar treaties, found that the crime of

17, 22 (Mauro Politi & Giuseppe Nesi eds., 2002); see also Roger S. Clark, *Nuremberg and the Crime Against Peace*, 6 WASH. U. GLOBAL STUD. L. REV. (forthcoming 2007).

13. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 180 (1948), quoted in Schabas, *supra* note 12, at 22. See generally Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, 59 HARV. L. REV. 396 (1945–1946) (discussing the legitimacy of the crime of aggression).

14. Charter of the International Military Tribunal, Annexed to London Agreement for the Establishment of an International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 544, 82 U.N.T.S. 279 [hereinafter London Charter]. For details of the debate over the merits of the crime, see generally GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 147–205* (2000); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992); U.S. DEP’T OF STATE, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945 (1949) [hereinafter JACKSON]; Glueck, *supra* note 13.

15. London Charter, *supra* note 14, art. 6.

16. *Nuremberg Judgment*, *supra* note 11, at 186.

17. These defendants were Hermann Wilhelm Göring, Rudolf Hess, Joachim von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Krupp von Bohlen und Halbach, Karl Dönitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Franz von Papen, Artur Seyss-Inquart, Albert Speer, Constantin von Neurath, and Hans Fritzsche. *Nuremberg Judgment*, *supra* note 11, at 272–331. Robert Ley committed suicide in prison, and Gustav Krupp von Bohlen und Halbach was not tried because of his deteriorating physical and mental condition. *Id.* at 173.

18. Göring, Hess, von Ribbentrop, Hess, Keitel, Rosenberg, Raeder, Jodl, von Neurath, Frick, Funk, Dönitz, and Seyss-Inquart. *Id.* at 272–331.

19. See JACKSON, *supra* note 14; *Nuremberg Judgment*, *supra* note 11, at 186.

aggression—"the supreme international crime"—was customary international law prior to 1939.²⁰

Immediately following the judgment of the International Military Tribunal at Nuremberg, prosecutors built four cases charging crimes against peace in occupied Germany: the *I.G. Farben* case,²¹ the *Krupp* case,²² the *High Command* case,²³ and the *Ministries* case.²⁴ Within its zone of occupation, France prosecuted the *Roehling* case.²⁵ These successor trials adhered closely to the jurisprudence of the International Military Tribunal at Nuremberg on crimes against peace and built upon it.²⁶ With the legitimacy of the crime established by the Allied prosecutors at Nuremberg, the Cold War on the horizon, and German allegiance gaining strategic importance, the prosecutors' foremost challenge was independently and impartially prosecuting the Nazis according to the rule of law without unduly provoking a backlash in Germany.

In 1948, prosecutors at the International Military Tribunal for the Far East in Tokyo indicted twenty-eight high-level defendants for crimes against peace and related conspiracy charges.²⁷ The crimes against peace indictment was divided into five subject areas: counts one through five addressed the common plan or conspiracy; counts six through seventeen, the planning and preparation of wars of aggression; counts eighteen through twenty-six, the initiation of wars of aggression; counts twenty-seven through thirty-six, the waging of wars of aggression; and counts thirty-seven through fifty-two, individual responsibility for conspiracy to commit mur-

20. *Nuremberg Judgment*, *supra* note 11, at 186.

21. Charges were brought against 24 high-level officials of industry. The tribunal found that "[t]he evidence falls far short of establishing beyond a reasonable doubt that their endeavours and activities [the rearmament of Germany] were undertaken and carried out with the knowledge that they were thereby preparing Germany for participation in an aggressive war." 8 U.S. GOV'T PRINTING OFF., TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1081, 1123 (1952) [hereinafter NUREMBERG MILITARY TRIBUNALS]; see also JOSEPH BORKIN, *THE CRIME AND PUNISHMENT OF IG FARBEN* (1978).

22. Twelve high-level managers and officials in the Krupp firm were tried. The tribunal dismissed charges for lack of sufficient evidence. NUREMBERG MILITARY TRIBUNALS, *supra* note 21, at 1.

23. Fourteen officers holding high-level positions in the German military were charged with crimes against peace and conspiracy to commit crimes against peace. All of the accused were acquitted on the basis that they were "not at the policy level." *Id.* at 462, 491.

24. Twenty-one high-level officials in the government or Nazi Party were charged with crimes against peace, war crimes and crimes against humanity. Seventeen were charged with aggression and/or conspiracy to commit aggression. *Id.* at 308, 314, 323, 435.

25. The directors of the Roehling firm were charged with crimes against peace, namely encouraging and contributing to the preparation of aggressive war. The charges were dropped against all but Roehling, who was convicted. The Supreme Government Court of the French Occupation Zone in Germany reversed the conviction for crimes against peace because they "remained outside the boundary 'which has been fixed very high by the IMT.'" *Id.* at 1109–10.

26. See Preparatory Comm'n for the Int'l Crim. Ct., Working Group on the Crime of Aggression, *Historical Review of Developments Relating to Aggression*, at 44–45, PCNICC/2002/WGCA/L.1 (Apr. 8–19, 2002).

27. In re Hirota and Others, 15 ANN. DIG. 356, 362–63 (Int'l Mil. Trib. for the Far East, 1948).

der and actual unlawful killing or murder as crimes against peace.²⁸ The Tokyo Tribunal rejected the defendants' challenge that aggressive war is a state act that does not attract individual criminal responsibility under international law and, carefully distinguishing between the five subject areas in the indictment, the tribunal found most of the defendants guilty.²⁹ The judgment stands out in the history of the crime of aggression for the detail of its jurisprudence. However, over time, allegations of prosecutorial bias and political interference at the stage of case selection have undermined the authority of the Tokyo trial. According to MIT-based historian John Dower:

[E]ven Japanese activists who endorse the ideals of the Nuremberg and Tokyo charters, and who have labored to document and publicize Japanese atrocities, cannot defend . . . the American decision to exonerate the emperor of war responsibility and then, in the chill of the Cold war, release and soon afterwards openly embrace accused right-winged war criminals like the later prime minister Nobusuke Kishi.³⁰

The Allied victors of WWII met in 1944 in Dumbarton Oaks, Washington, to build a new international system centered around an enforceable prohibition on international aggression. The new U.N. system was designed to be more effective than the League of Nations by reflecting the political realities of the age and giving the world's five dominant nations—the Republic of China, the French Republic, the Union of Soviet Socialist Republics, the United Kingdom, and the United States—special powers and responsibilities relating to the prevention and suppression of acts of international aggression. Along with their enforcement responsibilities, the “Big Five” were granted permanent seats on the Security Council and a veto allowing them to block any Security Council action detrimental to their own interests.

Beginning soon after the creation of the U.N. system, and continuing for nearly twenty years, three successive U.N. General Assembly Special Committees on the Question of Defining Aggression attempted to define the crime: none succeeded.³¹ The Soviet Union, with an eye toward its vulnera-

28. U.S. GOV'T PRINTING OFF., TRIAL OF JAPANESE WAR CRIMINALS: DOCUMENTS 45 (1946) [hereinafter TRIAL OF JAPANESE WAR CRIMINALS: DOCUMENTS]. For the grouping of the counts into five subject areas, see *Historical Review of Developments Relating to Aggression*, *supra* note 26, at 87.

29. TRIAL OF JAPANESE WAR CRIMINALS: DOCUMENTS, *supra* note 28, at 23–24.

30. John Dower, *Embracing Defeat: Japan in the Wake of World War II* 562 (1999).

31. Benjamin B. Ferencz, *The United Nations Consensus Definition of Aggression: Sieve or Substance?*, 10 J. INT'L L. & ECON. 701, 707 (1975) [hereinafter Ferencz (1975)]. See generally U.N. Gen. Assembly, Special Comm. on the Question of Defining Aggression, Sixth Comm., *Report of the Special Committee on the Question of Defining Aggression*, U.N. Doc. A/9619 (1974); U.N. Gen. Assembly, Special Comm. on the Question of Defining Aggression, Sixth Comm., *Report of the Special Committee on the Question of Defining Aggression*, U.N. Doc. A/9019 (1973); U.N. Gen. Assembly, Special Comm. on the Question of Defining Aggression, Sixth Comm., *Report of the Special Committee on the Question of Defining Aggression*, U.N. Doc. 8719 (1972); U.N. Gen. Assembly, Special Comm. on the Question of Defining Aggression, Sixth Comm., *Report of Special Committee on the Question of Defining Aggression*, U.N. Doc. A/8419 (1971); U.N. Gen. Assembly, Special Comm. on the Question of Defining Aggression, Sixth Comm., *Report of the Special Committee on the Question of Defining Aggression*, U.N. Doc. A/8019 (1970); U.N. Gen. Assembly,

ble satellite territories, pressed for a wide definition of aggression that included a provision denying recognition of sovereignty over forcefully occupied territories.³² The United States, which regularly invoked an “inherent right of individual or collective self-defense” to justify its Cold War interventions, championed the Six-Power Draft, which would have emphasized this right and focused attention on the intention of the intervening state.³³ According to Umberto Leanza, head of the Legal Services of the Ministry of Foreign Affairs of Italy, “[e]ach draft reflected the particular visions and interests of the drafters.”³⁴ Looking back at this period, Chief Prosecutor in the Einsatzgruppen Trial at Nuremberg Benjamin Ferencz quipped, “[w]ith fighting going on all over the globe—including in India, Pakistan, Cyprus, the Congo, Cambodia, Vietnam and the Middle East—it was clear that it was easier to commit aggression than to define it.”³⁵ The Cold War produced its own logic of intervention, which froze multilateral efforts to define the crime, let alone empower an independent prosecutor to investigate and prosecute violations.³⁶

Frustrated by the deadlock in the Security Council, the U.N. General Assembly adopted the Uniting for Peace Resolution in 1950.³⁷ The Uniting for Peace Resolution, which was championed by the United States to thwart an expected Soviet veto of a Security Council resolution calling for collective action against North Korea, established a procedure whereby the General Assembly was required to immediately address threats to the peace to which the Security Council had failed to respond due to the exercise of veto power. Under the Uniting for Peace procedure, the General Assembly found that “China, by giving direct aid and assistance to those who were already committing aggression in Korea . . . has itself engaged in aggression in Korea,” but authorized economic sanctions rather than the use of armed force.³⁸ Subsequently, the General Assembly used the resolution to legitimize determi-

Special Comm. on the Question of Aggression, Sixth Comm., *Report of the Special Committee on the Question of Defining Aggression*, U.N. Doc. A/7620 (1969); U.N. General Assembly, Sixth Comm., Report of the Special Comm. on the Question of Defining Aggression, U.N. Doc. A/7402 (1968); G.A. Res. 2330 (XXII), U.N. Doc. A/6988 (Dec. 18, 1967) (thirty-five members); G.A. Res. 895 (IX), U.N. Doc. A/2890 (Dec. 4, 1954) (nineteen members); G.A. Res. 378/B (V), U.N. Doc. A/529 (Nov. 17, 1950) (fifteen members).

32. Umberto Leanza, *The Historical Background, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 3, 6 (Mauro Politi and Giuseppe Nesi eds., 2004).

33. *Id.*; Benjamin Ferencz, *Defining Aggression: Where It Stands and Where It's Going*, 66 AM. J. INT'L L. 491, 495 (1972) [hereinafter Ferencz (1972)]. The Six Powers were Australia, Canada, Italy, Japan, the United Kingdom, and the United States.

34. Leanza, *supra* note 32, at 6.

35. Ferencz (1975), *supra* note 31, at 708.

36. *Id.*

37. Uniting for Peace Resolution, G.A. Res. 337(V), U.N. Doc. A/RES/377 (Nov. 3, 1951).

38. Intervention of the Central People's Government of the People's Republic of China in Korea, G.A. Res. 498 (V), U.N. Doc. A/RES/498 (Nov. 5, 1951).

nations of acts of aggression and/or calls for collective action on a few occasions, most decisively in the 1956 Suez Crisis.³⁹

In 1974, a fourth U.N. Special Committee on the Question of Defining Aggression⁴⁰ finally managed to produce a draft definition of aggression, which the General Assembly adopted unanimously without a vote.⁴¹ The core of the 1974 G.A. resolution is an introductory paragraph that contains a generic definition and a non-exhaustive, illustrative list of seven acts of aggression.⁴² Under this definition, the first use of armed force by a state in contravention of the Charter of the United Nations is *prima facie* evidence of an act of aggression, although the Security Council may conclude otherwise.⁴³ Another provision safeguards the right of peoples dominated by colonial, racist or alien regimes to struggle for self-determination.⁴⁴

The 1974 definition marked a watershed moment that Ferencz attributes, in large part, to a “new spirit of détente” between the United States and the Soviet Union and the effective personalities of the U.S. and Soviet representatives, Robert Rosenstock and D.N. Kolesnick.⁴⁵ However, some delegations, eager to downplay the significance of the consensus, insisted that the definition was designed as guidance to the U.N. Security Council, not as a basis for prosecution.⁴⁶ Looking back today, Ferencz relives his frustration that “[n]o one seemed to recall that the GA had mandated a code and court to serve as the basis for enforcing the Nuremberg principles.”⁴⁷ Others debated whether the definition was a suitable basis for criminalizing aggression⁴⁸—a debate that continues to this day in the Special Working Group on the Crime of Aggression. In the end, the consensus definition was regularly cited throughout the Cold War, but never as a basis for prosecution in a criminal trial⁴⁹ and never by the Security Council.

39. G.A. Res. 999, U.N. GAOR, 1st Emergency Spec. Sess., Supp. No. 1, U.N. Doc. A/3354 (Nov. 4, 1956); G.A. Res. 998, U.N. GAOR, 1st Emergency Spec. Sess., Supp. No. 1, U.N. Doc. A/3354 (Nov. 4, 1956); G.A. Res. 997, U.N. GAOR, 1st Emergency Spec. Sess., Supp. No. 1, U.N. Doc. A/3354 (Nov. 2, 1956).

40. A larger committee, established in 1967 with 35 participants. See G.A. Res. 2330 (XXII), U.N. Doc. A/RES/2330 (Dec. 18, 1967).

41. G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974).

42. *Id.* arts. 1, 3.

43. *Id.* art. 2.

44. *Id.* art. 7.

45. Ferencz (1975), *supra* note 31, at 708.

46. Ferencz (1972), *supra* note 33, at 493.

47. E-mail from Benjamin Ferencz to author (Apr. 4, 2007) (on file with author).

48. In 1996, the International Law Commission decided that the 1974 definition was not a suitable basis for criminalizing aggression, see *infra* note 56 and accompanying text, while Professor M. Cherif Bassiouni, writing at around the same time, took the opposite view. M. Cherif Bassiouni & Benjamin B. Ferencz, *The Crime Against Peace*, in INTERNATIONAL CRIMINAL LAW 313, 316 (M. Cherif Bassiouni ed., 2d ed. 1999).

49. See Nicolaos Strapatsas, *Rethinking General Assembly Resolution 3314 (1974) as a Basis for the Definition of Aggression Under the Rome Statute of the ICC*, in RETHINKING INTERNATIONAL CRIMINAL LAW: THE SUBSTANTIVE PART 155 (Olaoluwa Lousanya ed., 2007).

Not only was the Security Council ineffective at preventing international aggression during the Cold War and its aftermath, but it has even been reticent to name it. According to Nicolaos Strapatsas, an expert delegate on the Special Working Group on the Crime of Aggression, the Security Council, from its inception, has made express resolutions condemning aggression only thirty-one times: nineteen condemning South Africa for aggression against several African States (between 1976 and 1987); six condemning the minority regime of Southern Rhodesia for aggression against various African States (between 1973 and 1979); two condemning acts of aggression perpetrated against Seychelles (in 1981 and 1982); two condemning Israel for aggression against Tunisia (in 1985 and 1988); one condemning aggression against Benin (in 1977); and one condemning Iraq for aggression against diplomatic premises in Kuwait (in 1990).⁵⁰ However, since the Security Council was established in 1945, there have been many *prima facie* acts of aggression—the Korean War, the Falklands War, the Iran-Iraq War, and operations by and against Israel, to name just a few—that the Security Council labeled euphemistically or, due to its internal political dynamics, failed to name at all.

During the 1990s, scholars and activists, such as A.M. Warner, called for the prosecution of Saddam Hussein for the crime of aggression against Kuwait.⁵¹ In 1990, U.S. President George Bush and U.K. Prime Minister Margaret Thatcher discussed holding the Iraqi leader accountable for the invasion.⁵² According to Professor William Schabas, “[t]he idea later gained some purchase within the [European Union] before fading.”⁵³ It was clear that despite the contentiousness of the concept of aggression and the irrelevance of the 1974 definition in the chambers of the Security Council, the crime of aggression had captured the twentieth-century legal imagination. Ultimately, however, the victorious U.S.-led coalition chose sanctions for the Republic of Iraq after the first Gulf War rather than deposing and prosecuting Saddam Hussein.

There was also no prosecution for the crime of aggression in the aftermath of the Yugoslav and Rwandan atrocities. Though the International Military Tribunal at Nuremberg, which prioritized aggression, was the inspiration for the *ad hoc* tribunals for the former Yugoslavia and Rwanda, the statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda were silent on the supreme in-

50. See *id.*

51. Andrew M. Warner, *The Case Against Saddam Hussein—The Case for World Order*, 43 *MERCER L. REV.* 563 (1992).

52. William Schabas, *Issue #15: Should Saddam Hussein Be Prosecuted for the Crime of Aggression?*, Grotian Moment: The International War Crimes Trial Blog, Iraqi High Tribunals Trials, Case W. Res. U. Sch. L. (Oct. 19, 2005), http://www.law.case.edu/saddamtrial/entry.asp?entry_id=21 (last visited Oct. 11, 2007).

53. *Id.*

ternational crime.⁵⁴ These tribunals, *post hoc* judicial responses to predominantly intra-national rather than international violence, focused instead on genocide, crimes against humanity, and war crimes and were an acknowledgement by the Security Council of its poor track record at fulfilling its essential function: to prevent aggression and mass violence.

In 1996, the International Law Commission (“ILC”), which had been charged by the General Assembly in 1947 with formulating the principles of international law recognized in the Charter and judgment of the Nuremberg Tribunal,⁵⁵ rejected the General Assembly’s 1974 definition of aggression, arguing that it was overly political and lacked legal precision.⁵⁶ Commentary to the ILC’s Draft Code of Crimes Against the Peace identifies the Judgment of the Nuremberg Tribunal and the Charter of the United Nations, but not the 1974 definition, as “the main sources of authority with regard to individual criminal responsibility for acts of aggression.”⁵⁷ In place of the 1974 definition, the ILC offers article 16, which states that “[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.”⁵⁸ Despite fifty years of deliberation, the ILC definition had barely evolved except to include a reference to the U.N. Charter, and thus left many issues unresolved.⁵⁹ According to Professors Bassiouni and Ferencz, “a comparative analysis of the ILC’s . . . effort to define aggression demonstrates the inconclusiveness of this undertaking.”⁶⁰

The crime of aggression was among the most divisive issues on the agenda at the 1998 Rome Conference establishing the International Criminal Court (“ICC”).⁶¹ Many developing countries, particularly the non-aligned members and members of the Arab group, as well as some major industrialized powers, including Canada, Germany, Italy, Japan, and Greece, urged the inclusion of a definition of aggression in the Statute, while the United States and a number of its Western allies opposed it.⁶² The European Union and approximately thirty non-aligned states would not endorse an ICC without the supreme international crime, while others, including the United States

54. See Statute of the International Tribunal, 32 I.L.M. 1192, available at <http://www.un.org/icty/basic/statute/statute.htm>, adopted by S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 6, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203 [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, 33 I.L.M. 1602, available at <http://www.icttr.org/ENGLISH/basicdocs/statute.html>, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1600 [hereinafter ICTR Statute]; WAR CRIMES: THE LEGACY OF NUREMBERG (Belinda Cooper ed., 1999).

55. G.A. Res. 177(II), U.N. Doc. A/519 (Nov. 21, 1947).

56. See Int’l. L. Comm’n, *Report of the International Law Commission on the Work of its 48th Session*, May 6–July 26, 1996, at 83–85, U.N. Doc. A/51/10 (SUPP) (Jan. 1, 1996) [hereinafter *ILC Work Report*].

57. *Id.* at 85.

58. *Id.* at 83.

59. See *id.*

60. Bassiouni & Ferencz, *supra* note 48, at 342.

61. Von Hebel & Robinson, *supra* note 1, at 79, 81, 84.

62. Bassiouni & Ferencz, *supra* note 48, at 346.

and the United Kingdom, were adamantly opposed to the inclusion of the crime in the competence of the Court. In the closing hours of the conference, the chairman, veteran Canadian diplomat Philippe Kirsch, brokered a compromise whereby the crime of aggression was included as article 5(1)(d) of the Rome Statute, but the definition and the conditions for the exercise of jurisdiction were omitted pending agreement at a future review conference.⁶³ The plenipotentiaries deferred to a preparatory commission ("PrepCom"), which had been created by the U.N. General Assembly in 1995, to devise a draft definition.⁶⁴

Even in the absence of an ICC definition, the crime of aggression has influenced the course of domestic and international politics relating to the use of force. In the run-up to the U.S.-led invasion of Iraq in March 2003, the attorney general of the United Kingdom, Lord Goldsmith, sent a note to Prime Minister Tony Blair warning that, though the possibility of prosecution is remote, "aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognized by the common law which can be prosecuted in the U.K. courts."⁶⁵ On the eve of the invasion of Iraq, Elizabeth Wilmsburst, deputy legal adviser to the British Foreign Office and a member of the PrepCom working group defining aggression, resigned because she believed "an unlawful use of force on such a scale amounts to the crime of aggression."⁶⁶ The Security Council never passed a second resolution authorizing recourse to force, and on March 20, 2003, the U.S.- and U.K.-led coalition invaded Iraq.⁶⁷ To date, despite repeated calls in the media⁶⁸ and by opposition parties⁶⁹ for prosecution, no charges have

63. Rome Statute, *supra* note 2, arts. 5(1)(d), 5(2), 121, 123.

64. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–July 17, 1998, *Final Act*, at 9, U.N. Doc. A/CONF.183/10 (July 17, 1998).

65. Note from Lord Goldsmith, Attorney General, to Tony Blair, Prime Minister, Gov't of the U.K. (Mar. 7, 2003), available at <http://www.number10.gov.uk/output/Page7445.asp>. In 2006, the House of Lords, invited to rule on this exact question, came to the opposite conclusion. See *infra* note 76 and accompanying text.

66. *Wilmsburst Resignation Letter*, BBC NEWS ONLINE, Mar. 18, 2003, http://news.bbc.co.uk/2/hi/uk_news/politics/4377605.stm (last visited Nov. 13, 2007).

67. For differing arguments on the legality of the Iraq conflict, see generally *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT'L L. 553 (2003).

68. Richard Overly, Comment, Coalition in the Dock: There is a Strong War Crimes Case Against US and British Leaders, but Big Powers Have Immunity, *GUARDIAN* (London), Apr. 15, 2003, at 17; Robert Verkaik, Politics & Parliament: Court Studies Blair 'War Crimes' Claim, *INDEPENDENT* (London), Jan. 21, 2004, at 8; Thomas Walkom, Op-Ed., Tide Turns Against Bush, *TORONTO STAR*, Mar. 11, 2003, at A17.

69. The Green Party of Ohio passed a policy proposal at their January 2004 State Convention to try President George W. Bush, Vice President Richard Cheney, and Secretary of Defense Donald Rumsfeld for the crime of aggression against Iraq. Noting that there is no statute of limitations on war crimes, the Green Party pledged to "aggressively pursue US citizens . . . responsible for the March 2003 invasion of Iraq . . . when Green Party members hold public office." GREEN PARTY OF OHIO, WAR CRIMES PROPOSAL—2003 IRAQ INVASION (Jan. 31, 2004), http://www.ohiogreens.org/war_crimes_proposal.html. The proposal was forwarded to the 2004 Green Party of the U.S. National Convention for consideration.

been pressed domestically or internationally against coalition leaders for the crime of aggression.

In December 2003, Saddam Hussein was captured by American troops near Tikrit.⁷⁰ He was charged, *inter alia*, with the invasion of Kuwait.⁷¹ The trial was conducted domestically, not internationally. Rather than include aggression alongside genocide (art. 11), crimes against humanity (art. 12), and war crimes (art. 13), core international crimes appearing in this sequence in the Statute of the ICC, the drafters of the Statute of the Iraqi Special Tribunal placed it in part 5, "Violations of Stipulated Iraqi Laws." According to article 14(c):

The Tribunal shall have the power to prosecute persons who have committed the following crimes under Iraqi law:

...

(c) The abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country, in accordance with Article 1 of Law Number 7 of 1958, as amended.⁷²

By anchoring the prohibition on the use of force in domestic rather than international law, the drafters insulated coalition leaders against accusations that they had also committed the crime of aggression, as defined in the Statute of the Special Tribunal.⁷³ Though prosecutors indicted Saddam Hussein for the 1990 invasion of Kuwait, they prioritized the al-Dujail campaign that involved a range of crimes against humanity on Iraqi territory. Saddam Hussein was hanged before a case under article 14(c) got underway.

In March 2003, two peace activists snuck into a Royal Air Force base in Gloucestershire, England, and, in an attempt to prevent bombing in Iraq, used hammers and bolt cutters to damage fuel tankers and trailers.⁷⁴ At their trial, the activists cited a 1977 law providing that "a person may use such force as is reasonable in the circumstances in the prevention of crime," claiming that their actions were a legally justified attempt to prevent the crime of aggression.⁷⁵ The bench found that the crime of aggression is cus-

70. Press Release, White House Office of the Press Sec'y, President Bush Addresses Nation on the Capture of Saddam Hussein: Remarks by the President on the Capture of Saddam Hussein (Dec. 14, 2003), <http://www.whitehouse.gov/news/releases/2003/12/20031214-3.html>.

71. *Transcript: Saddam's Arraignment*, FOX NEWS, July 1, 2004, <http://www.foxnews.com/story/0,2933,124433,00.html>.

72. Statute of the Iraqi Special Tribunal art. 14(c), 2003, http://www.cpa-iraq.org/human_rights/Statute.htm.

73. José E. Alvarez, *Trying Hussein: Between Hubris and Hegemony*, 2 J. INT'L CRIM. JUST. 319, 319 (2004). For more on the *tu quoque* defense, see TAYLOR, *supra* note 14, at 400-01, 409 (Admiral Dönitz acquitted of illegal submarine warfare because he had produced an affidavit from U.S. Admiral Nimitz saying Nimitz had done the same thing).

74. *Peace Activists "Broke into Base"*, BBC NEWS, Sept. 4, 2006, http://news.bbc.co.uk/2/hi/uk_news/england/gloucestershire/5313020.stm (last visited Nov. 14, 2007).

75. *R v. Jones* [2006] UKHL 16 (appeal taken from Eng.), available at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060329/jones.pdf>.

tomary international law, but not U.K. criminal law absent legislative approval, and an attempt to prevent it is therefore not a legal justification at a criminal trial.⁷⁶ For proponents of the crime of aggression, *R v. Jones* was both a vindication and a setback.⁷⁷ It vindicated the crime of aggression as customary international law and put political and military leaders on notice that the United Kingdom considers the crime “sufficiently certain to be capable of being prosecuted in international tribunals.”⁷⁸ At the same time, the Lords retreated from Attorney General Goldsmith’s assertion that the crime of aggression is automatically part of the law of England, requiring the additional step of legislative approval before they would condone its enforcement in a U.K. court.

Between 1999 and 2002, the PrepCom met ten times to complete, among other things, a definition of the crime of aggression and the conditions for the exercise of jurisdiction for the purpose of article 5(1)(d) of the Rome Statute.⁷⁹ In 2002, the Coordinator of the PrepCom Working Group, Argentine diplomat and legal expert Silvia Fernández de Gurmendi, consolidated the most popular proposals from the ten meetings into a succinct “discussion paper” resembling the definition of a crime, but including various options to reflect the main points of contention.⁸⁰ Fernández de Gurmendi’s discussion paper was the closest anyone had come since the Nuremberg and Tokyo Trials to a workable definition for use by a criminal court. The discussion paper is reproduced here:

2002 Draft Definition of the Crime of Aggression and Conditions for the Exercise of Jurisdiction

1. For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

Option 1: Add “such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof.”

76. *Id.* at 7–14.

77. See Donald M. Ferencz, Introductory Note to United Kingdom House of Lords: *R v. Jones et al.*, 45 I.L.M. 988, 988–91 (2006).

78. *R v. Jones*, *supra* note 75, ¶ 99.

79. See Documents on the Crime of Aggression, Preparatory Commission for the Int’l Crim. Ct. (1999–2002), <http://www.un.org/law/icc/documents/aggression/aggressiondocs.htm>.

80. Preparatory Comm’n for the Int’l Crim. Ct., Working Group on the Crime of Aggression, July 1–12, 2002, *Discussion Paper Proposed by the Coordinator*, PCNICC/2002/WGCA/RT.1/Rev.2 (July 11, 2002) [hereinafter *Coordinator’s 2002 Discussion Paper*].

Option 2: Add “and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof.”

Option 3: Neither of the above.

2. For the purpose of paragraph 1, “act of aggression” means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, [The Definition of Aggression discussed above] which is determined to have been committed by the State concerned,

Option 1: Add “in accordance with paragraphs 4 and 5.”

Option 2: Add “subject to a prior determination by the Security Council of the United Nations.”

3. The provisions of articles 25, paragraphs 3 [listing types of individual criminal responsibility], 28 [on command responsibility] and 33 [on Superior orders and prescription of law], of the Statute do not apply to the crime of aggression.

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

Option 1: under Article 39 of the Charter of the United Nations [empowering the Security Council to determine the existence of an act of aggression and take measures to restore international peace and security].

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

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

Variant (a) or invoke article 16 [Security Council may defer an ICC investigation or prosecution for 12 months if it threatens international peace and security] of the Statute within six months from the date of notification.

Variant (b) [Remove variant a.]

Option 1: the Court may proceed with the case.

Option 2: the Court shall dismiss the case.

Option 3: the Court shall, with due regard to the provisions of Articles 12, 14 and 24 of the Charter [procedure to coordinate S.C. and G.A. functions regarding international peace and security], request the General Assembly of the United Nations to make a recommendation within [12] months. In the absence of such a recommendation, the Court may proceed with the case.

Option 4: the Court may request

Variant (a) the General Assembly

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

to seek an advisory opinion from the International Court of Justice, in accordance with Article 96 [provision empowering the Security Council, General Assembly or other specialized U.N. agency to request an ICJ advisory opinion] of the Charter and article 65 of the Statute of the International Court [procedure for requesting an advisory opinion from the ICJ], on the legal question of whether or not an act of aggression has been committed by the State concerned. The Court may proceed with the case if the International Court of Justice gives an advisory opinion that an act of aggression has been committed by the State concerned.

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

The 2002 draft definition revealed three core issues that states would need to negotiate and resolve in order for the crime of aggression to be conceptually complete and coherent. The finished crime would require a detailed description of the prohibited state/collective act—a contemporary answer to the historic debate over what constitutes an illegal or unjust war (paragraph 2). Next, the crime would require linking one or more individuals to the state/collective act and limiting the range of responsibility to a clearly defined set of perpetrators (paragraphs 1 and 3). Finally, a completed provision must harmonize the ICC and the existing international architecture—the Security Council, General Assembly, and International Court of Justice—regulating the use of force between states (paragraphs 4 and 5).

When the mandate of the PrepCom ended in 2002, the Assembly of States Parties created the Special Working Group on the Crime of Aggression (“SWGCA” or “Working Group”) composed of interested member states of the United Nations, specialized agencies, and accredited legal experts to negotiate, draft, and submit a proposal to the Assembly of States Parties for consideration at the first Review Conference of the Rome Statute.

ute.⁸¹ With the International Criminal Court up and running, a comprehensive definition in sight, and the most influential ICC skeptics self-selected out of the 2009 or 2010 plenary voting on the supreme international crime, crucial elements were in place to recapture the Nuremberg moment.

II. CONTOURS OF THE EMERGING CRIME

Under the leadership of Christian Wenaweser, Liechtenstein's permanent representative to the United Nations, and hosted by Princeton University's Liechtenstein Institute on Self-Determination, the SWGCA took up Silvia Fernández de Gurmendi's 2002 discussion paper, systematically addressing and debating points of contention.⁸² According to Jutta Bertram-Nothnagel, team leader on the crime of aggression for the non-governmental Coalition for the International Criminal Court, the Princeton venue was conducive to in-depth exchanges. The atmosphere of these meetings⁸³ was informal and, owing to an online discussion in the lead-up to the meetings that brought new delegates up to speed and alerted veterans to the latest proposals, the committee quickly delved into legal issues. In early 2007, Chairman Wenaweser disseminated a new discussion paper that built upon Fernández de Gurmendi's 2002 draft and reflected the progress of the Working Group to date.⁸⁴ Wenaweser's 2007 paper became the basis for the provision on the crime of aggression. The text of the discussion paper states, in relevant part:⁸⁵

2007 Discussion Paper on the Crime of Aggression Proposed by the Chairman

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

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

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

81. The Special Working Group on the Crime of Aggression is a subsidiary body of the Assembly of States Parties to the Rome Statute of the International Criminal Court. It is nevertheless open to all states "on an equal footing." ICC, Assembly of States Parties, 3rd plen. mtg., *Continuity of Work in Respect of the Crime of Aggression*, ¶ 2, ICC-ASP/1/Res.1 (Sept. 9, 2002), available at http://www.un.org/law/icc/asp/1stsession/report/english/part_iv_res_1_e.pdf.

82. See Coalition for the Int'l Crim. Ct., Issues and Campaigns, Crime of Aggression, <http://www.ICCnow.org/?mod=aggression> (last visited Nov. 14, 2007), for reports, documents, and notes on the Princeton meetings.

83. Three meetings were held in June 2004, 2005, and 2006.

84. ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, Resumed 5th Sess., New York, Jan. 29-Feb. 1, 2005, *Discussion Paper on the Crime of Aggression Proposed by the Chairman*, ICC-ASP/5/SWGCA/2 (Jan. 16, 2007), http://www.ICC-cpi.int/library/asp/ICC-ASP-5-SWGCA-2_English.pdf [hereinafter *Chairman's 2007 Discussion Paper*].

85. Internal references omitted.

over or to direct the political or military action of a State, that person (leads) (directs) (organizes and/or directs) (engages in) the planning, preparation, initiation or execution of an act of aggression/armed attack

Variant (b):

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

Continue under both variants:

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

2. For the purpose of paragraph 1, “act of aggression” means an act referred to in [articles 1 and 3 of] United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.⁸⁶

Under variant (a) above:

3. The provisions of articles 25, paragraph 3(f) [on attempts], and [28] [on command responsibility] of the Statute do not apply to the crime of aggression.

Under variant (b) above:

3. The provisions of articles 25, paragraph 3 [listing types of individual criminal responsibility], and [28] [on command responsibility] of the Statute do not apply to the crime of aggression.

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

5. Where the Security Council does not make such a determination within [six] months after the date of notification,

Option 1: the Court may proceed with the case.

Option 2: the Court may not proceed with the case.

86. For the text of articles 1 and 3 of U.N. General Assembly Resolution 3314, see *infra* text accompanying note 94.

Option 3: the Court may, with due regard to the provisions of articles 12, 14 and 24 of the Charter [procedure to coordinate Security Council and General Assembly functions regarding international peace and security], request the General Assembly of the United Nations to make such a determination within [12] months. In the absence of such a determination, the Court may proceed with the case.

Option 4: the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute [establishing the competence of the ICJ] that an act of aggression has been committed by the State concerned.

Silvia Fernández de Gurmendi's 2002 draft stimulated three distinct discussions and Christian Wenaweser's 2007 paper reflects progress made in these sub-fields, most importantly in turning intractable debates, such as the role of the Security Council in determining the jurisdiction of the ICC, into myriad gray-area options. In 2005, Christian Wenaweser assigned sub-coordinators to prepare discussion papers on each sub-field in order to structure the June 2006 meeting at Princeton. Discussion Paper 1, prepared by the German delegate Claus Kress, addressed the issue of individual criminal responsibility for the crime of aggression: "How will the proposed definition of the individual's conduct square with the provisions of article 25 (individual criminal responsibility), paragraphs 3(a) to (d) in the [Rome] Statute, which describe the forms of participation in a crime?"⁸⁷ Discussion Paper 2, drafted by the Swedish delegate Pal Wrangé, considered the conditions for the exercise of jurisdiction.⁸⁸ The third Discussion Paper, drafted by veteran Greek diplomat Phani Dascalopoulou-Livada, dealt with the definition of the state/collective act of aggression as an element of the individual crime of aggression.⁸⁹

These discussions can be advanced by considering competing positions from the perspective of the ICC Prosecutor's missions, of which there are three: (1) to fairly, effectively, and impartially investigate, prosecute, and conduct trials of the most serious crimes; (2) to contribute to long lasting respect for and the enforcement of international criminal justice, the prevention of crime, and the fight against impunity; and (3) to do so transparently

87. ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 4th Sess., Nov. 28-Dec. 2, 2005, *Discussion Paper 1: The Crime of Aggression and Article 25, Paragraph 3, of the Statute*, annex II.B, ICC-ASP/4/32, available at <http://www.icc-cpi.int/library/asp/annexes.pdf> [hereinafter *Discussion Paper 1*].

88. ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 4th Sess., Nov. 28-Dec. 2, 2005, *Discussion Paper 2: The Conditions for the Exercise of Jurisdiction with Respect to the Crime of Aggression*, annex II.C, ICC-ASP/4/32, available at <http://www.icc-cpi.int/library/asp/annexes.pdf> [hereinafter *Discussion Paper 2*].

89. ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 4th Sess., Nov. 28-Dec. 2, 2005, *Discussion Paper 3: Definition of Aggression in the Context of the Statute of the ICC*, annex II.D, ICC-ASP/4/32, available at <http://www.ICC-cpi.int/library/asp/annexes.pdf> [hereinafter *Discussion Paper 3*].

and efficiently.⁹⁰ Answering the question of the strategic challenges that will face the ICC Prosecutor as he or she prepares an aggression case under the different formulations is one way to begin to answer the broader question of what an aggression case will look like and, ultimately, the fundamental question of whether criminalizing aggression is a worthwhile endeavor. The remainder of this article will shed light on the first of these questions, touch on the second, and invite the reader to draw his or her own conclusions on the third.

A. *The Definition of the State/Collective Act of Aggression*

An act of aggression by a state or a group—a collective—must first be proven for an individual to be held responsible for the crime of aggression. The nature of an act of aggression is a controversial question that has been debated by generations of just war theorists and legal scholars.⁹¹ In 1974, the U.N. General Assembly adopted a consensus definition of aggression meant to guide the Security Council in its determinations.⁹² The core of this definition is a generic chapeau defining aggression and providing a non-exhaustive, illustrative list of aggressive acts. Despite the many criticisms raised against the 1974 definition by the International Law Commission and others, it is regularly cited as customary international law and therefore serves as the basis of the SWGCA discussion of the state/collective act.⁹³ It is reproduced below:

90. ICC, Assembly of States Parties, 5th Sess., Nov. 23–Dec. 1, 2006, *Strategic Plan of the International Criminal Court*, pt. IV, ICC-ASP/5/6 (Aug. 4, 2006), available at http://www.icc-cpi.int/library/asp/ICC-ASP-5-6_English.pdf.

91. For examples of the background literature, see JAMES TURNER JOHNSON, *JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY* (1981); JAMES TURNER JOHNSON, *THE HOLY WAR IDEA IN WESTERN AND ISLAMIC TRADITIONS* (1997); JAMES TURNER JOHNSON, *MORALITY & CONTEMPORARY WARFARE* (1999); MOHAMMAD TAGHI KAROUBI, *JUST OR UNJUST WAR? INTERNATIONAL LAW AND UNILATERAL USE OF ARMED FORCE BY STATES AT THE TURN OF THE 20TH CENTURY* (2004); *TRADITIONS OF INTERNATIONAL ETHICS* (Terry Nardin and David R. Mapel eds., 1993); James F. Childress, *Just War Theories: The Bases, Interrelations, Priorities, and Functions of Their Criteria*, 39 *THEOLOGICAL STUD.* 427, 427–45 (1978); James F. Childress, *Moral Discourse About War in the Early Church, in Peace, Politics, and the People of God* 117, 117–34 (Paul Peachey ed., 1986); Sohail Humayun Hashmi, *Interpreting the Islamic Ethic of War and Peace, in THE ETHICS OF WAR AND PEACE: RELIGIOUS AND SECULAR PERSPECTIVES* 146, 146–68 (Terry Nardin ed., 1996).

92. Strapatsas, *supra* note 49, at 159; AHMED RIFAAT, *INTERNATIONAL AGGRESSION* (1979); Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 *AM. J. INT'L L.* 224 (1977); 2 BENJAMIN B. FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* (1975).

93. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), available at <http://www.icj-cij.org/docket/files/70/9973.pdf>. The Court finds that article 3, paragraph (g) of the 1974 Definition of Aggression, “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State,” may “be taken to reflect customary international law.” *Id.* ¶ 195. In 2003 the attorney general of the United Kingdom concluded that aggression was a crime under customary international law, which automatically formed part of U.K. domestic law. Lord Goldsmith, *Iraq: Resolution 1441*, *GUARDIAN* (London), Mar. 7, 2003, ¶ 34, <http://image.guardian.co.uk/sys-files/Guardian/documents/2005/04/28/legal.pdf>.

**1974 Definition of Aggression: United Nations General
Assembly Resolution 3314 (XXIX)**

Article 1

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.

Article 2

The First use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity.

Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

Article 5

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.
2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.
3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Article 6

Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Article 7

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.⁹⁴

1. *Generic Versus Specific Definition*

Though the 1974 definition is mixed, combining a generic chapeau in article 1 with a non-exhaustive enumerative list of specific acts amounting to aggression in article 3, the SWGCA has not yet decided whether the definition of the state/collective act should be generic, specific, or mixed.

Delegates who support a generic definition argue that it is impossible to foresee all situations amounting to acts of aggression and include them in the definition. Furthermore, some add, if the Rome Statute is to contain a specific list, as opposed to a generic definition, it might encroach on the

94. G.A. Res. 3314, *supra* note 41, annex, arts. 1–8.

power of the Security Council to determine what amounts to an act of aggression. Delegates preferring the specific approach, on the other hand, argue that a list of acts is more likely to accord with the principle of legality for the sake of a criminal trial. Those promoting a generic definition reply that the provision could be drafted specifically enough to accord with the principle of legality. Proponents of the specific approach warn that it may be difficult to draft a generic definition that captures certain idiosyncratic acts of aggression included in the 1974 list, such as the blockade of ports.⁹⁵ The Working Group expressed its preference in 2005 for a generic definition, but in 2006 the tide shifted to a mixed model, including both a generic chapeau and a list.⁹⁶ The Chairman's 2007 Discussion Paper⁹⁷ and his 2007 Non-Paper on Defining the State Act of Aggression both include a generic chapeau and a list, indicating the dominance of the mixed model.⁹⁸

Delegates considered two formulations of the mixed model. In the first formulation, a generic chapeau is combined with an exhaustive list. The strength of this formulation is its specificity, while its weakness is that it does not resolve the question of emerging forms of aggression. The second formulation, mirroring the 1974 G.A. resolution, includes a generic chapeau and a non-exhaustive, illustrative list. This formulation accommodates emerging forms of aggression but, because of its open-endedness, threatens to violate the principle of legality. However, the fact that a generic chapeau with a non-exhaustive, illustrative list mirrors the formulation used in article 7 of the Rome Statute defining crimes against humanity has assuaged many delegates.⁹⁹ Proponents of the mixed approach with a non-exhaustive list contend that the chapeau could be drafted with sufficient clarity to ensure adherence to the principle of legality. The drafting of the Coordinator's 2007 Non-Paper on Defining the State Act of Aggression—"[a]ny of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression"—was ambiguous as to whether the

95. *Id.* annex, art. 3(c).

96. THE COALITION FOR THE INT'L CRIM. CT., INFORMAL INTER-SESSIONAL MEETING OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, LIECHTENSTEIN INSTITUTE ON SELF-DETERMINATION, WOODROW WILSON SCHOOL, PRINCETON UNIVERSITY, UNITED STATES, FROM 8 TO 11 JUNE, 2006, REPORT OF THE CICC TEAM REPORT ON AGGRESSION, at 4–5 (Aug. 26, 2006), http://www.ICCnow.org/documents/TeamReportOnIntersessionalMeeting_26Aug06.pdf [hereinafter CICC 2006 REPORT].

97. *Chairman's 2007 Discussion Paper*, *supra* note 84, ¶ 2.

98. *Non-Paper by the Chairman on Defining the State Act of Aggression*, in ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 6th Sess., Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, June 11–14, 2007, *Report of the Informal Inter-sessional Meeting of the Special Working Group on the Crime of Aggression*, annex IV, ICC-ASP/6/SWGCA/INF.1, available at http://www.ICC-cpi.int/library/asp/ICC-ASP-6-SWGCA-INF.1_English.pdf [hereinafter *2007 Non-Paper on Defining the State Act of Aggression*].

99. Roger Clark, the Rutgers Law Professor representing Samoa at SWGCA, claims that "the open-ended characteristics of Article 7(1)(k) which has to be read *ejusdem generis* with all that comes before" is "much more constricted than some of the generic approaches to aggression would have it." E-mail from Roger Clark to author (Apr. 27, 2007) (on file with author).

list that follows is open or closed.¹⁰⁰ This drafting ambiguity may help generate consensus among states, but it also creates uncertainty for a prosecutor deciding whether to investigate and prosecute unlisted acts of aggression.

In June 2006, former Nuremberg Prosecutor Benjamin Ferencz suggested an alternative generic definition that did not rely exclusively on G.A. Resolution 3314. Instead, Ferencz's model would empower ICC judges to look to the combined body of international and national jurisprudence and make a determination that an act of aggression had occurred:

In determining whether an individual has committed the crime of aggression, the ICC judges shall apply the following:

1. Relevant provisions of the UN Charter;
2. The Charter and Judgment of the International Military Tribunals as affirmed by the UN General Assembly in 1946;
3. The consensus definition of aggression in GA Res. 3314 of 1974;
4. The definition of aggression by the International Law Commission in 1996;
5. Rules for interpreting international law as laid down for the International Court of Justice established by the Charter of the United Nations;
6. Relevant judicial decisions by other competent international criminal tribunals;
7. National laws and decisions relating to the crime of aggression.¹⁰¹

Ferencz's proposal is reminiscent of the approach taken by the bench at the International Military Tribunal at Nuremberg. Both draw from a body of declarations and precedents rather than a single statutory definition as the basis for the state/collective act. Ferencz argues that states have already agreed to these instruments and hopes that "nations will be able to accept what they have already accepted and move forward from there."¹⁰² Opponents invoke the principle of legality and cite the lack of specificity of the Ferencz model, a familiar criticism leveled at the judgment of the International Military Tribunal at Nuremberg. The idea did not garner much support due to the vagueness of such a provision and it was left out of the Chairman's 2007 Discussion Paper and Non-Paper on Defining the State Act of Aggression.¹⁰³

100. ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 6th Sess., *Informal Inter-sessional Meeting of Special Working Group on the Crime of Aggression, held at Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, June 11-14, 2007*, ¶ 47, ICC-ASP/6/SWGCA/INF.1, available at http://www.ICC-cpi.int/library/asp/ICC-ASP-6-SWGCA-INF.1_English.pdf [hereinafter *SWGCA 2007 Report*].

101. Benjamin B. Ferencz, *Enabling the International Criminal Court to Punish Aggression*, pt. I.B (unpublished article), <http://www.benferencz.org/arts/90.html>.

102. *Id.*

103. 2007 *Non-Paper on Defining the State Act of Aggression*, *supra* note 98.

The debate about the approach to the definition of the state/collective act of aggression involves high political stakes. Delegates have competed to create a definition that prohibits the unfavorable military operations of their adversaries while permitting those advantageous for themselves. Not surprisingly, countries influential on the Security Council favor S.C. decision-making. The push by some Middle Eastern states to include G.A. Resolution 3314 in its entirety for the sake of articles 3(b)(c)(g) and article 7 constitutes another example of political calculations factoring into the debate.

At stake for the Prosecutor is the specificity and inclusiveness of the crime. A specific list would allow the Prosecutor to fit a fact pattern into a clearly defined contingency, such as the blockade of a port or the sending of armed bands into the territory of a rival, and a generic chapeau would empower him or her to argue for the inclusion of acts not already in the list, such as computer network attacks. A list would also enable the Prosecutor to make the argument that a certain unforeseen act fits loosely within one of the enumerated acts, rather than building the claim from scratch. In short, a Prosecutor would most benefit from a mixed model with a carefully worded chapeau that is general enough to include unforeseen acts, yet specific enough to accord with the principle of legality.

2. *Describing the State/Collective Act of Aggression*

At Princeton in 2006, delegates debated a number of terms describing the quality of the prohibited state/collective act, including “use of force,” “armed attack,” “act of aggression,” and “use of armed force.”¹⁰⁴ By the 2007 meeting in New York, the range was narrowed to two dominant options: “act of aggression” and “armed attack.” The former provides a clear body of precedents and documents on which parties will rely in building their case, while the latter raises several unanswered questions in this regard.

“Act of aggression” appeals to delegates because it is a key term in article 39 of the Charter of the United Nations, the lead provision in Chapter VII, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression. “Act of aggression” is also defined in G.A. Resolution 3314, so use of the term in the criminal provision would help harmonize the Rome Statute, the U.N. Charter, and G.A. Resolution 3314. “Armed attack,” a term used in article 51 of the U.N. Charter pertaining to self-defense, was taken to be narrower, capturing only the “gravest violations.”¹⁰⁵ It was also seen by most proponents as a self-contained alternative to “act of aggression,” rendering paragraph 2 of the chairman’s 2007 paper obsolete and disengaging the crime of aggression from the 1974 definition of the state act. Thus, if armed attack is the chosen term, the question becomes what precedents and documents the Prosecutor should rely on and the bench

104. CICC 2006 REPORT, *supra* note 96, at 5.

105. *Id.* at 6–7.

should consider when making a determination that an armed attack has occurred. To date, the Working Group has not provided any answers.

States unsympathetic to Resolution 3314 for military or political reasons therefore have a motivation to back “armed attack” over “act of aggression” as a way to phase out the 1974 definition. However, absent consideration of the components of “armed attack” and the documents that will give the term meaning, it is not possible to properly compare the political costs and benefits of the two options. The most that can be concluded is that “armed attack” is the narrower term, which excludes certain acts of aggression contained in the 1974 G.A. definition, such as the blockade of ports. A nation with a strong navy that prefers to leave the option open to resort to blockades has an impetus, among other considerations, to support “armed attack.”

The SWGCA has carefully avoided discussing the controversial distinction between “act of aggression” or “armed attack” on one hand, and “self-defense” on the other, preferring to leave the determination to the Security Council or the ICC judges rather than draft it into the provision. If the SWGCA decides that G.A. Resolution 3314 should be the basis for describing the state/collective act,¹⁰⁶ under article 2 the first use of armed force will constitute *prima facie* evidence of an act of aggression, but other considerations, such as a contrary Security Council determination or the fact that the acts concerned are not of sufficient gravity, will also be relevant. It seems clear that a conscientious defense team will attempt not only to portray their client as the victim of aggression, but also to expand the scope of the doctrine of self-defense to include anticipatory and possibly even preemptive self-defense. Similar tactics will likely ensue if the SWGCA embraces “armed attack,” though the precise placement of the burden of proof and the means by which a state would be able to overcome a *prima facie* case remain unclear.

The outcome of the debate over the term describing the state/collective act is of relevance to the Prosecutor since, insofar as he or she values predictability, he or she benefits from specific categories over general terms. The term “act of aggression,” which would link the crime to the 1974 G.A. definition, is broader than “armed attack,” but it is also more finely grained due to article 3, which sets out a list of prohibited acts. Whichever term is chosen, after the 2007 meeting in New York, it seems unlikely that the Prosecutor will be able to rely exclusively on a prejudicial determination by an outside organ as an element of the crime. To avoid shifting the burden of proof onto the defendant, any state/collective acts will have to be proven to the bench, meeting evidentiary and procedural standards and subject to rebuttal by the defense.

106. This seems highly probable.

3. *The Threshold*

Qualifiers are meant to raise the threshold on illegal acts of aggression so that spurious cases are filtered out. Though the majority of intervening delegations in the Working Group spoke out against a qualifier in 2006—a violation is a violation, they argued¹⁰⁷—there was still significant support for a qualifier and, in his 2007 discussion paper, the chairman included three threshold mechanisms as options that could be used independently or combined: (1) a violation of the U.N. Charter must be “flagrant” or “manifest” to attract individual criminal responsibility; (2) the violation must amount to a “war of aggression” and any act of aggression not meeting this demanding threshold would fail to attract individual criminal responsibility; and/or (3) the object or result of the acts of the aggressor must meet particular threshold standards, such as being aggression with the “object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof.”¹⁰⁸

The Coordinator’s 2002 Discussion Paper uses the “flagrant” threshold.¹⁰⁹ For a state/collective act of aggression to attract individual criminal responsibility, it must, “by its character, gravity and scale” constitute “a flagrant violation of the Charter of the United Nations.”¹¹⁰ By 2006, the delegates of the SWGCA were expressing a preference for the “manifest” qualifier over “flagrant” because they felt the meaning of the term “manifest”—clear, apparent, evident—was slightly more obvious than “flagrant.”¹¹¹ In his 2007 discussion paper, the chairman completely dropped “flagrant” and maintained “manifest.” Some delegates argue that there is no need to include either qualifier in the definition, since a threshold is already built into the preamble of the Rome Statute: the jurisdiction of the court is limited to “the most serious crimes of concern to the international community.” An act of aggression—the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state—is serious enough without further qualification.¹¹² Furthermore, because of their seriousness, the Statute does not include qualifiers for genocide (e.g., a “flagrant” or “manifest” genocide) and should not include a qualifier for aggression.¹¹³ However, states wishing to raise the threshold yet higher—some intending to distinguish humanitarian intervention from aggression—continue to promote the “manifest” or “flagrant” qualifier.

107. CICC 2006 REPORT, *supra* note 96, at 6.

108. *Coordinator’s 2002 Discussion Paper*, *supra* note 80, ¶ 1, options 1 and 2.

109. *Id.*

110. *Id.*

111. ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 5th Sess., *Report of the Special Working Group on the Crime of Aggression*, ¶ 8, ICC-ASP/5/SWGCA/1 (Nov. 29, 2006), available at http://www.icc-cpi.int/library/asp/ICC-ASP-5-SWGCA-1_English.pdf [hereinafter *SWGCA 2006 Report*].

112. G.A. Res. 3314, *supra* note 41, annex, art. 1.

113. CICC 2006 REPORT, *supra* note 96, at 6.

Though the “manifest” and “flagrant” mechanisms are primarily meant to filter out spurious referrals, adding one of these subjective terms to the chapeau would also grant the ICC Prosecutor another discretionary tool to withdraw or stop an ill-fated case. Delegates intending to equip the Prosecutor with an additional avenue to stop a case pressed to include the “flagrant” or “manifest” threshold, while those hoping to increase the deterrent impact of the crime of aggression by widening its scope preferred to omit the qualifier.

Most delegates viewed limiting ICC jurisdiction to “wars of aggression” or acts “tantamount to a war of aggression” as too restrictive in light of G.A. Resolution 3314, which, in article 3, includes acts not amounting to a war of aggression such as “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State” The argument for including the “war of aggression” threshold was that it would bring the ICC definition in line with customary international law as established by the Nuremberg precedent. However, the “war of aggression” qualifier raises challenging and divisive questions. In the absence of an explicit declaration of war, what criteria should ICC judges use to distinguish a war of aggression from an act—or a series of acts—of aggression? Are states the only collectives that can wage war, or are non-state actors also captured under the “war of aggression” qualifier? Can a state wage a war of aggression against a non-state entity, or do these operations fall into another category that does not attract individual criminal responsibility? These highly politicized issues are not unsolvable, but they pose added negotiation challenges.

Moreover, most delegates reject the insertion of the third proposed threshold mechanism, which includes the object or result of the act of aggression in the chapeau.¹¹⁴ They argue that including the object or result would encroach on *jus in bello*, whereas the crime of aggression is traditionally distinguished as *jus ad bellum*, a distinct area of law. In addition, argue the opponents, it would be difficult to reach agreement on an exhaustive list of prohibited objects or results. Delegates argued that the Security Council does not refer to the object or result of aggression in its resolutions, so neither should the International Criminal Court.¹¹⁵

Nevertheless, in addition to the “manifest” qualifier contained in the 2007 discussion paper, the chairman included another possible qualifier specifying the object or result of the prohibited state/collective act: “such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing the territory of another State or part thereof.”¹¹⁶ A number of states, presumably with Israel in mind, pressed to recognize acts seeking to or resulting in military occupa-

114. *Id.* at 6–7.

115. *Id.*

116. *Chairman’s 2007 Discussion Paper*, *supra* note 84, art. 1, ¶ 2.

tion in the definition so as to recognize the continuity of an act of aggression after an initial attack has occurred. One delegate characterized each day of an occupation as an independent act of aggression. Another delegate responded that G.A. Resolution 3314 conceives of military occupation as a continuum and simply incorporating Resolution 3314 into the definition of the crime of aggression would have the desired effect. Either proposal, if adopted, would expose to criminal prosecution the leaders of states that took territory before the crime of aggression came into force but continue to hold it when the Court is finally empowered to prosecute. Meanwhile, some delegates prioritized territorial annexation as an object or result attracting criminal responsibility in order to rule out prosecution in situations where the use of force was meant to serve a purpose unrelated to territorial acquisition, such as in the event of terror attacks.

4. *The Reference to General Assembly Resolution 3314 (XXIX)*

Should G.A. Resolution 3314 become the basis of the definition of the state/collective act, another consideration is whether it is preferable to include it in whole or in part. The definition of the crime of aggression can link with G.A. Resolution 3314 in one of three ways: (1) the definition can refer to the resolution generically, in its entirety; (2) the definition can make reference to specific parts of resolution 3314; or, (3) the definition can reproduce parts of the text of the resolution itself.¹¹⁷

The issue has not been resolved, but by January 2007 a large number of delegates appeared to favor the incorporation of a generic reference to Resolution 3314 in its entirety. A generic reference would preserve the integrity of the resolution and respect the interconnected nature of its provisions.¹¹⁸ Delegates supporting a reference to Resolution 3314 in its entirety remind the Working Group that the rule of interpretation for Resolution 3314 is contained in article 8 of the resolution itself: "In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions." Moreover, proponents of a generic reference to Resolution 3314 add that a piecemeal approach threatens to repeat the debate over which provisions should be included and excluded, a debate that took years to resolve in the run up to the adoption of the 1974 Resolution.

Those opposed to a generic reference argue that Resolution 3314 lacks the degree of specificity required in criminal law and would violate the principle of legality. In particular, they argue that incorporating article 4 of the 1974 definition, which establishes that the enumerated acts in article 3 are not exhaustive and that the Security Council may determine that other acts con-

117. *SWGCA 2006 Report*, *supra* note 111, at 8.

118. *Id.*

stitute aggression, would violate the maxim *nullum crimen sine lege*.¹¹⁹ the definition of the crime would impermissibly occur after the criminal act. Proponents respond by noting that a generic reference relates to the state/collective act, not the conduct of the individual perpetrator, and, because the state/collective act is a circumstantial element of the crime, a generic reference to Resolution 3314 would not violate the principle of legality. However, this response does not resolve the problem of selecting a definition of the state/collective act as an element of the crime itself.

Delegates critical of Resolution 3314 and delegates who prefer to prolong the negotiations have a stake in reopening this debate. Delegates who would reopen the debate come from various political positions: some would strengthen the resolution, while others would dilute it. Those delegates critical of the crime of aggression in whatever form it may take could delay the solution of the debate by encouraging the Working Group to reopen thorny issues.

Some articles of the 1974 Resolution significantly increase the certainty of the definition and thus facilitate the Prosecutor's task. For instance, according to article 2, "[t]he first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression" The "first use" criterion, though not decisive, would eliminate a great deal of wrangling over the characterization of an act of aggression and, insofar as legal certainty facilitates the Prosecutor's work, be beneficial. Article 5, which rules out every justification for aggression, "whether political, economic, military or otherwise," also makes the definition more certain.

5. *Attempt and Threat*

Including attempted or threatened aggression by a state/collective would broaden the range of acts covered by the crime. Most delegates rejected such expansion, preferring instead to narrow the range of acts resulting in liability. Still others argued that it was unnecessary to include state/collective attempts because they felt that attempt was already covered in the existing definitions of the state/collective act. They argued that the "use of armed force against the territorial integrity or political independence of another state"¹²⁰ does not require the crossing of a border or physical damage to amount to an act of aggression. Many delegates confused attempt in relation to the state/collective act of aggression with individual attempt, which pertains to article 25(3)(f) of the Rome Statute—"attempts to commit such a

119. Rome Statute, *supra* note 2, art. 22 ("*Nullum crimen sine lege*: 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court; 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.")

120. G.A. Resolution 3314, *supra* note 41, annex, art. 1.

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"—and refers to individual involvement in the planning, preparation, initiation or execution of an act of aggression/armed attack.

The inclination to exclude attempt from the definition of aggression has significant repercussions for an ICC Prosecutor building an aggression case. Attempted aggression has the potential to pose major evidentiary challenges. It is difficult enough to prove the existence of an attack, damage, and causal responsibility, let alone a failed act that has left little or no trace. Furthermore, the Security Council, already hesitant to adopt resolutions that overtly declare that aggression has occurred, can be expected to be even more reticent to determine the more dubious question of attempt.

By 2006, the prospect of including "threat of aggression" in the definition of the state/collective act was even less popular than in previous years. Delegates seemed intent on raising the threshold for the crime of aggression and did not spend much time considering how to incorporate threat, which they felt would lower the threshold. As a result of this emerging consensus, the "threat of aggression" was dropped from the Chairman's 2007 Discussion Paper. However, lack of enthusiasm in 2006 and 2007 does not mean that the idea is obsolete, and the issue of threats, a key element of article 2(4) of the U.N. Charter, deserves more examination by legal scholars than it has received to date.

B. Individual Participation in the Crime of Aggression

Article 25, paragraphs 3(a) to (d) of the Rome Statute, describes the forms of individual participation in genocide (Art. 6), crimes against humanity (Art. 7), and war crimes (Art. 8). The question facing the Working Group is whether article 25(3)(a)–(d) of the Rome Statute should apply to the crime of aggression and, if so, how. Article 25 of the Rome Statute on individual criminal responsibility provides in relevant part:

Individual criminal responsibility

[. . .]

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:

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

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

Article 25(3) of the Rome Statute has created a rift between so-called “monistic” and “differentiated” schools in the Working Group. Silvia Fernández de Gurmendi’s 2002 discussion paper reflects the dominance of the monistic school at the time, while Christian Wenaweser’s 2007 draft mirrors the tide shift towards the differentiated school. The monistic school would produce a draft that uniquely makes article 25(3) inapplicable to the crime of aggression. Instead, unlike the other crimes, the definition of the crime of aggression itself would include the different forms of culpable individual conduct. The conduct element of a monistic provision would be based on the following model:

For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person orders or participates actively in the planning, preparation, initiation or execution of an act of aggression/armed attack¹²¹

121. *Chairman’s 2007 Discussion Paper*, *supra* note 84, ¶ 1, variant (b).

In the monistic draft above, the words “orders or participates actively” are meant to replace the various forms of participation listed in article 25(3)(a)–(d) of the Rome Statute.

Under the now-dominant differentiated approach, the forms of individual participation listed in article 25(3)(a)–(d) of the Rome Statute are applied to the crime of aggression.¹²² The differentiated provision includes a conduct verb (e.g., leads, directs, organizes and/or directs, engages in) that links with article 25(3)(a)–(d). A differentiated provision would be based on the following model:

For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person (leads) (directs) (organizes and/or directs) (engages in) the planning, preparation, initiation or execution of an act of aggression/armed attack. . . .¹²³

In terms of draftsmanship, at stake in the debate over the monistic and the differentiated approaches is the simplicity versus the inclusiveness of the definition. A monistic definition would be parsimonious—“simple and coherent,” according to Claus Kress¹²⁴—while a differentiated definition, specifying the various forms of participation, has the potential to offer more detailed guidance and accord more strictly with the principle of legality.¹²⁵ The differentiated approach would also retain the consistency of the Rome Statute by treating aggression like the other crimes.¹²⁶ Under the differentiated approach, however, the drafters would need to pay particular attention to the compatibility of the definition of the crime with forms of individual participation in article 25(3) of the Rome Statute. Especially, the drafters must solve the problem of duplicate verbs in paragraph 1 of the crime and in article 25(3)(a)–(d). How does an individual aid and abet the organizing or directing of the state/collective act? The monistic approach, which uses the generic term “participates” to describe the prohibited conduct, sidesteps most compatibility problems.¹²⁷ The monistic approach also has the advan-

122. In 2007, the Chairman found “broad support” in the Working Group for the differentiated approach. *SWGCA 2007 Report*, *supra* note 100, ¶ 7.

123. *Chairman’s 2007 Discussion Paper*, *supra* note 84, ¶ 1, variant (a).

124. *Discussion Paper 1*, *supra* note 87, at 377.

125. The principle of legality requires an individual contemplating a crime to have enough guidance from a criminal prohibition to distinguish permitted and prohibited conduct.

126. *SWGCA 2007 Report*, *supra* note 100, ¶ 6.

127. For an example of a compatibility problem, see *Discussion Paper 1*, *supra* note 87, ¶ 3: “Take only one example: If the word ‘participate’ is used in the definition of the crime and if Article 25, paragraph 3(c) of the Statute is applied, the result would be that an aider in the crime of aggression would be someone who ‘aids in the participation in [the collective act]’. That would not seem to make much sense.”

tage of being more akin to the definition of aggression used at the Nuremberg trials, which is often cited as customary international law.¹²⁸

In January 2007, Chairman Wenaweser put forward two new differentiated proposals that successfully address many of the compatibility problems with the original.¹²⁹ The “Revised Proposal,” which is meant to replace variant (a) of paragraph 1 of the Chairman’s 2007 Discussion Paper, mirrors the grammatical structure of the other crimes in the Rome Statute:

For purposes of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression/armed attack¹³⁰

Because of its improved drafting, this “Revised Proposal” is further impetus for states to adopt the differentiated over the monistic approach. However, at this stage, in the midst of high political considerations, it is difficult to assess the degree to which sophisticated drafting will influence the choices of Foreign Offices at the ICC’s first Review Conference.

The key political factor in defining the crime of aggression in general is the scope of the crime. Some states prefer that the crime of aggression captures a wide array of perpetrators, while others negotiate to limit the jurisdiction of the ICC over aggression by narrowing the definition. The problem in terms of choosing a monistic or differentiated approach based on scope is that it is far from clear which approach is more restricted. For example, in variant (b) of the chairman’s 2007 paper, the monistic option fully captures the range of prohibited conduct in the short phrase, “that person orders or participates actively in.” Whether this phrase is narrower or broader than the hodgepodge of narrowing and expanding verbs in article 25(3)(a)–(d) of the Rome Statute—commits (individually, jointly, with another, through another), orders, solicits or induces, aids, abets or otherwise assists, provides the means for its commission, in any other way contributes to the commission of the crime by a group of persons acting with a common purpose—is difficult to ascertain, absent concrete jurisprudence on the issue.

As a result of this ambiguity, states’ political preferences regarding the reach of the crime do not translate predictably into preferences for monistic or differentiated approaches. Christian Wenaweser notes, “[m]any delegations indicated along those lines that they were flexible on this issue [monistic or differentiated], although they had expressed a preference for one of the two variants.”¹³¹

128. *R v. Jones*, *supra* note 75; *Strapatsas*, *supra* note 49, at 157.

129. *SWGCA 2007 Report*, *supra* note 100, annex II.

130. *Id.*

131. ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 5th resumed Sess., New York, Jan. 29–Feb. 1, 2007, *Annex II: Report of the Special Working Group on the Crime of Aggression*, ¶ 9, ICC-ASP/5/35, available at http://www.icc-cpi.int/library/asp/Report_SWGCA_English.pdf.

On the other hand, a leadership qualifier is an important component common to both the monistic and differentiated drafts, even though it is incontrovertible that the leadership qualifier yields a narrower crime. The vast majority of delegates from both monistic and differentiated schools agree that the leadership qualifier should be an integral component of the crime. The leadership qualifier, transposed from article 1 of the monistic 2002 discussion paper, ensures that only individuals “in a position to effectively exercise control over or to direct the military action of a state” are held responsible.¹³² The issue here is that the delegates disagree on whether it should be a jurisdictional requirement¹³³ or part of the definition itself.¹³⁴ As a jurisdictional condition, the leadership qualifier serves to raise the threshold on aggression cases that the ICC can try.¹³⁵ On the other hand, if the leadership qualifier is part of the definition itself, it shapes the very concept of the crime of aggression, so that aggression becomes a crime committed by leaders, not subordinates.

Because the definitions of crimes in the Rome Statute are meant to be incorporated into national criminal codes, but ICC-specific jurisdictional conditions are not, the leadership qualifier must be a component of the definition itself to penetrate domestic law. If the leadership qualifier remains only a jurisdictional requirement for ICC cases and not a component of the definition incorporated into national law, nation states could enlarge the scope of the crime of aggression in national jurisdictions to include subordinates, which is not a prospect the majority of Working Group delegates intends. Furthermore, because the evolution of customary international law is influenced by national legislation and the decisions of domestic courts, leaving the leadership qualifier out of the definition itself risks generating a rift between ICC law and customary international law over time, potentially “undermin[ing] the leadership nature of the crime,” and creating legal in-

132. *SWGCA 2007 Report*, *supra* note 100, annex II. For an argument that the leadership qualifier should also include private economic actors, see Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 *EUR. J. INT'L L.* (forthcoming 2007).

133. The proposal for alternative language in variant (a) prepared by the chairman in January 2007 reads as follows:

The Court shall have jurisdiction with respect to the crime of aggression when committed by a person being in a position effectively to exercise control over or to direct the political or military action of a State.

For purposes of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression/armed attack

SWGCA 2007 Report, *supra* note 100, annex II.

134. *Id.* The revised proposal for alternative language on variant (a) prepared by the chairman for the informal consultations is reproduced, *supra*, text accompanying note 130.

135. THE COALITION FOR THE INT'L CRIM. CT., INFORMAL INTER-SESSIONAL MEETING OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, LIECHTENSTEIN INSTITUTE ON SELF-DETERMINATION, WOODROW WILSON SCHOOL, PRINCETON UNIVERSITY, UNITED STATES, JUNE 11-14, 2007, REPORT OF THE CICC TEAM REPORT ON AGGRESSION, at 5 [hereinafter CICC 2007 REPORT] (on file with author).

determinacy.¹³⁶ Legal indeterminacy is problematic for the ICC Prosecutor insofar as he or she is unable to ascertain what standard he or she must meet when building an aggression case until the court rules.

As a possible solution, delegates intent on “deeply ingrain[ing]” the leadership clause in general criminal law and the legislation and jurisprudence of nations, suggested incorporating the clause into article 25(3) of the Rome Statute,¹³⁷ under the General Principles of Criminal Law.¹³⁸ Including the leadership clause under the General Principles is an effective way to limit the scope of prosecution by excluding secondary perpetrators. However, critics argue that this solution, which hinges on article 25(3), excludes the possibility of a monistic definition, undermines the coherence of the Rome Statute by inserting specific exceptions into the General Principles, and/or fails to fully capture the concept of the crime of aggression as a crime committed by leaders.

A crime capturing a broad scope of perpetrators opens strategic opportunities for an ICC Prosecutor intent on advancing his or her mandate in the most efficient way possible. For instance, in many national jurisdictions including the United States, it is common practice for a prosecutor to indict a secondary perpetrator, and then offer immunity in exchange for previously inaccessible evidence incriminating the primary perpetrator. And yet, a broad crime offering the Prosecutor strategic advantages must be defined with certainty for it to insulate the Prosecutor from de-legitimizing claims that he or she is exercising unfettered discretion in a biased and politicized manner.

A definition that is certain uses objectively (i.e., empirically) verifiable terms that allow the Prosecutor to anticipate what evidence and elements he or she must present in order to link the individual to the state/collective act of aggression. A certain definition also accords most closely with the principle of legality by forewarning potential perpetrators of what acts are prohibited with some degree of precision. Faced with a plethora of potential aggression cases, the criminal process corresponds optimally with the rule of law when the crime itself, rather than unfettered prosecutorial discretion, is the basis for eliminating potential targets.

The history of Nuremberg indictments based on article 6(a) of the London Charter is a warning to those drafting the contemporary crime of aggression. Article 6(a) is a remarkably broad provision with an uncertain scope, offering the Allied prosecutors little guidance, a vast domain of discretion, and potentially violating the principle of legality due to the vagueness of the undefined term, “war of aggression.” It reads: “CRIMES

136. *SWGCA 2007 Report*, *supra* note 100, ¶ 11.

137. *CICC 2007 REPORT*, *supra* note 135, at 7.

138. The suggestion reads, “Article 25: add new paragraph 3 *bis*: ‘With respect to the crime of aggression, the provisions of the present article shall only apply to persons being in a position effectively to exercise control over or to direct the political or military action of a State.’” *Id.*

AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”¹³⁹ The drafting of article 6(a) and its interpretation by the Allied prosecutors in the indictment against the Nazi leaders resulted in an exaggerated number of acquittals for charges of crimes against peace.¹⁴⁰ Nuremberg Prosecutor Robert Jackson sought to put the Nazi organizations themselves on trial, after which a simple finding of membership would result in liability for a targeted individual. Jackson’s interpretation was fully justified based on the plain language of 6(a), but the Nuremberg Tribunal ultimately rejected it in favor of a far narrower formulation, severely damaging the prosecutor’s case. Had article 6(a) been drafted narrowly, with certain terms, and in accordance with the principle of legality, the Allied prosecutors would have had the opportunity to build a much more stable case.

Because it is unclear which approach—monistic or differentiated—is broader or narrower, and whether a broader or narrower definition benefits the ICC Prosecutor, the line of inquiry based on scope offers little guidance to delegates at the review conference. In terms of certainty, however, the differentiated approach would increase the certainty of the provision and offer the Prosecutor a richer set of objective terms with which to describe the defendant’s conduct. Moreover, with successive judgments, the bench will have the opportunity to hone the conduct element of the crime of aggression further, bringing it still closer to the ideal of legality and giving the Prosecutor a clearer standard upon which to base future cases.

C. Conditions for the Exercise of Jurisdiction

The most contentious and politicized issue for successive working groups charged with defining the crime of aggression has been establishing the conditions that must be fulfilled in order for the Court to exercise jurisdiction. Beyond establishing a just and effective jurisdictional regime for the ICC, this discussion relates to the appropriate role of the Security Council in the contemporary international order.¹⁴¹ At issue in the debate is the balance to be struck between judicial process and political control.

139. London Charter, *supra* note 14, art. 6(a).

140. Only eight of twenty-two Nazi leaders charged with conspiracy were convicted. See Stanislaw Pomorski, *Conspiracy and Criminal Organization*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 213, 235 (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

141. See generally Paula Escarameia, *The ICC and the Security Council on Aggression: Overlapping Competencies?*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION*, *supra* note 13, at 133; Giorgio Gaja, *The Respective Roles of the ICC and the Security Council in Determining the Existence of an Act of Aggression*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION*, *supra* note 13, at 121; Marja Lehto, *The ICC and the Security Council: About the Argument of Politicization*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION*, *supra* note 13, at 145; Saeid Mirzaee Yengejeh, *Reflections on the Security Council in Determining an Act of Aggression*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION*, *supra* note 13, at 125.

Under article 39 of the U.N. Charter, “[t]he 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.” Article 5(2) of the Rome Statute acknowledges the primacy of the Charter and requires the definition of the crime of aggression to be “consistent with the relevant provisions of the Charter of the United Nations.”¹⁴² The interpretation of this provision is a matter of controversy in the Working Group.¹⁴³ Delegates have been debating whether the ICC, when faced with an aggression case, should proceed in the same way it does with the other crimes in accordance with article 13 of the Rome Statute (the general provision on the exercise of jurisdiction), or whether a special jurisdictional procedure involving the Security Council, the General Assembly, the International Court of Justice, or an expanded Pre-Trial Chamber is necessary to ensure compliance with the U.N. Charter. At Princeton in 2005, the Working Group divided the debate over U.N. Charter compliance into a number of questions,¹⁴⁴ of which four are central: (1) Should the ICC exercise jurisdiction over the crime of aggression only after another U.N. organ has accepted such exercise? (2) If the answer to the previous question is “yes,” which organ (the Security Council, General Assembly, International Court of Justice, or a combination) should first accept the exercise? (3) What sort of decision should be reached (a determination that a state act of aggression has occurred and/or an explicit “go-ahead” for the ICC to exercise jurisdiction)? (4) Should the decision that a state act of aggression has occurred be prejudicial (i.e., binding on the ICC judges)? The answers have important repercussions on the integrity of the international legal regime, the independence of the ICC, the rights of the accused, and the Prosecutor’s task.

1. *Should the ICC Exercise Jurisdiction over the Crime of Aggression Only After Another U.N. Organ Has Accepted Such Exercise?*

Delegates’ positions on this question divide roughly into three camps: those arguing that a prior determination by a particular U.N. organ should be required for the ICC to exercise jurisdiction, those convinced that the

142. “For those who opposed recognizing any role of the Security Council, any express mention to [sic] the Council in Article 5 would have been unacceptable.” Silvia A. Fernández de Gurmendi, *An Insider’s View*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION*, *supra* note 13, at 183.

143. For details on the Working Group debate, see *SWGCA 2006 Report*, *supra* note 111, ¶ 9; see also ICC, Assembly of States Parties, 4th Sess., Nov. 28-Dec. 3, 2005, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court*, annex II.C., ICC-ASP/4/32, available at <http://www.icc-cpi.int/library/asp/annexes.pdf>.

144. See *Discussion Paper 2*, *supra* note 88, at 386–87.

Court must be able to act independently, and those supporting one of the “gray area” proposals.¹⁴⁵

Delegates who favor a prior determination by a U.N. organ argue that article 5(2) of the Rome Statute requires U.N. involvement.¹⁴⁶ Proponents of the S.C. determination argue that articles 24 and 39 of the U.N. Charter specifically require S.C. authorization and that any alternative would be a violation. These arguments are buttressed by claims that the ICC should reinforce the existing institutional framework, not undermine it by seizing jurisdiction absent a determination by the appropriate U.N. organ, as well as by some delegates’ claims that a specialized U.N. organ would be better equipped than ICC judges to answer the public international law question of whether aggression has occurred.¹⁴⁷ Those who favor prior determination further note that requiring an outside determination by an authoritative U.N. body will insulate the ICC Prosecutor from accusations that an aggression case is politically motivated, since the Prosecutor would be proceeding on the basis of a determination by a duly empowered U.N. organ.¹⁴⁸

Those convinced that the ICC must be empowered to act independently counter that article 39 of the U.N. Charter contemplates determinations by the Security Council for the sole purpose of maintaining international peace and security, not for establishing criminal responsibility.¹⁴⁹ They invoke article 24 of the U.N. Charter, which refers to the *primary*, not *exclusive*, authority of the Security Council to maintain international peace and security, and conclude that the Security Council is not the only body with the authority to determine that an act of aggression has occurred.¹⁵⁰ Delegates taking this position also cite examples of determinations of acts of aggression by other U.N. organs, including the General Assembly, the International Court of Justice, and states themselves.

The criticism that ICC judges are not competent to evaluate the use of force by states is rebutted by pointing out that the Nuremberg Tribunal capably assessed acts of aggression and related defenses and that the *ad hoc* U.N. Tribunals for the former Yugoslavia and Rwanda ably made determinations of public international law. Moreover, those favoring ICC independence argue that there are methods other than a “go-ahead” issued by a

145. Australia proposed that the Security Council get “the first bite of the cherry, but not necessarily the last.” CICC 2006 REPORT, *supra* note 96, at 12. For various possibilities, see *Coordinator’s 2002 Discussion Paper*, *supra* note 80, art. 5.

146. There is a distinction between the issue of a predetermination for the sake of ICC jurisdiction and the issue of using this predetermination as a prejudicial, or binding, element of the crime itself. It would be possible, for instance, to draft a crime requiring a U.N. organ to give a “go-ahead” for the sake of jurisdiction, but then require the Prosecutor to independently prove the existence of a state/collective act of aggression for the sake of individual criminal responsibility.

147. See Lehto, *supra* note 141, at 186, *citing* Prof. Theodor Meron, U.S. Rep., Statement at the ICC Preparatory Commission, Working Group on the Crime of Aggression (Dec. 6, 2002).

148. See *id.*

149. See, e.g., Yengejeh, *supra* note 141, at 132.

150. See *id.*

U.N. organ that could be employed to insulate the Prosecutor from claims of politicized prosecution. For example, in January 2007, Belgium proposed a jurisdictional filter whereby an aggression case referred by a state party or initiated by the Prosecutor *proprio motu* could only be instigated if authorized by the Pre-Trial Chamber of the ICC convening in full session.¹⁵¹

The “gray area” proposals are compromises meant to garner a broader consensus among competing camps. One such proposal is found in paragraph 5 of the 2007 Discussion Paper. According to this proposal, the Security Council has what one delegate called “the first bite of the cherry.”¹⁵² There are then four options if the U.N. Security Council fails to make a determination that an act of aggression has occurred. Under option 1, the court may proceed with a case. Under option 2, the court may not proceed with the case.¹⁵³ Under option 3, the cascade continues and the court requests the General Assembly to make a recommendation within a certain number of months. In the absence of a recommendation to the contrary, the court may proceed with the case. Option 4 involves the International Court of Justice. In option 4, the ICC may proceed if it ascertains that the ICJ has made a finding in a contentious case that an act of aggression has been committed.

In May 2007, at an international justice conference in Turin, David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues, put forth two additional proposals aimed at compromise while still granting substantial control to the Security Council. Scheffer’s first proposal expands the scope of Security Council language capable of triggering a case against an individual for the crime of aggression beyond “act of aggression”—a term the Security Council rarely uses—to include, for example, “threats to or breaches of international peace and security” and “unlawful use of force.”¹⁵⁴ In Scheffer’s second proposal, the Security Council has three ways to trigger a case: (1) It can make a determination that a state has committed an act of aggression; (2) it can refer a situation in which the crime of aggression appears to have been attempted or committed to the ICC, which then looks to the Security Council or the General Assembly for a resolution, or the International Court of Justice for a decision or advisory opinion;¹⁵⁵ or (3) it can

151. *Proposal Presented by Belgium on the Question of Jurisdiction of the Court with Respect to the Crime of Aggression*, in ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 5th Sess., The Hague, Jan. 29–Feb. 1, 2007, *Official Records of the Assembly of States Parties to the Rome Statute*, ICC-ASP/5/SWGCA/WP.1 (Jan. 29, 2007).

152. *See supra* note 145.

153. Option 2 thus gives the Security Council final say and is no compromise at all.

154. E-mail from the Turin conference chairman Judge Roberto Bellelli, containing David Scheffer’s Proposal, to author (May 24, 2007 4:09:16 PM GMT+02:00) (on file with author). The proposal is also available in ICC, Assembly of States Parties, 6th Sess., *Policy Issues Under the United Nations Charter and the Rome Statute*, at 30, ICC-ASP/6/INF.2 (Aug. 21, 2007), available at http://www.iccnw.org/documents/Turin_Report_English_21-08-07_ADVANCE_COPY.pdf [hereinafter Scheffer Proposal].

155. According to Scheffer, (2) and (3) are compromises because they entail “passing the buck” to other bodies, but in a way that remains within the initial control of the Security Council. *See* Scheffer Proposal, *supra* note 154, at 2.

explicitly require for the initiation of the investigation the ICC's judgment whether an act of aggression has been committed by the State concerned. While Scheffer's first proposal addresses the issue of S.C. reluctance to make explicit determinations that an act of aggression has occurred, and the second creates the possibility that the ICC itself could make this determination, neither option resolves the potential problem of S.C. veto-holders shielding their own or allied political and military leaders.

The debate over the need for authorization from a U.N. body is of great political and prosecutorial significance, as it is essentially a debate about the independence of the court versus the court's position within the existing "institutional architecture for global security."¹⁵⁶ An independent court—one able to act without a go-ahead from a U.N. body—raises concerns about a rogue prosecutor launching criminal cases to advance political agendas. However, the numerous checks and balances built into the Rome Statute, including the gate-keeping role of the Pre-Trial Chamber and the Security Council's ability under article 16 to defer an investigation for twelve-month renewable intervals, mitigate these concerns. Furthermore, the Prosecutor's long-term legitimacy and effectiveness are contingent upon his or her independence and impartiality. Making the ICC dependent on the political wrangling of the veto-holding members of the Security Council may undermine the fair administration of justice and, ultimately, the Prosecutor's legitimacy. It is conceivable that the Prosecutor's legitimacy would be diminished if a majority of the Security Council agreed that an act of aggression occurred but prosecution was blocked by a single veto-holding member. On the other hand, the alternative view is that if the Council decides not to make a determination, there is probably a sensible political reason for the decision, and responsibility for such decisions should rest fully with the Security Council.¹⁵⁷

2. Which United Nations Organ Is Best Suited to Make the Determination?

Most Working Group delegates agree that the Security Council has "primary" (i.e., initial) responsibility for determining whether an act of aggression has occurred.¹⁵⁸ Disagreement revolves around the appropriate next step in the event that the Council declines or fails to make a determination. Besides those delegates who feel that the ICC should proceed on its own or,

156. CICC 2006 REPORT, *supra* note 96, at 10. For a summary of the various positions of the Preparatory Commission members, see Escarameia, *supra* note 141, at 139.

157. In response to this claim, one delegate reminded the Working Group of the failure of the Security Council to act decisively and prevent the 1994 genocide in Rwanda.

158. See Coordinator's 2002 Discussion Paper, *supra* note 80, ¶¶ 4–5; Non-Paper Submitted by the Chairman on the Exercise of the Jurisdiction, in ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 6th Sess., *Informal Inter-sessional Meeting of the Special Working Group on the Crime of Aggression, held at Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 11 to 14 June 2007*, annex III, ICC-ASP/6/SWGCA/INF.1, available at http://www.icc-cpi.int/library/asp/ICC-ASP-6-SWGCA-INF.1_English.pdf.

alternatively, that the ICC should drop the case absent a Security Council go-ahead, there are others who argue that one of the other U.N. organs should be asked for a determination. Each supports their preferred organ, guided by legal ideals or political interests.

It is not unusual for states without a powerful presence in the Security Council to press for a determination by either the General Assembly or International Court of Justice. Proponents of the General Assembly support the third option of paragraph 5 of the 2007 Discussion Paper, which, in the absence of a Security Council determination within six months, empowers the Assembly to make the determination instead. They invoke the Uniting for Peace Resolution of 1950,¹⁵⁹ whereby the General Assembly, faced with recurrent Security Council deadlocks, exerted authority over determinations relating to the use of force and subsequently condemned armed attacks in a number of violent crises.¹⁶⁰ Proponents of I.C.J. authorization advance option 4 of the 2007 draft, which involves the World Court in a determination that an act of aggression has occurred. Proponents of I.C.J. involvement remind the Working Group that the International Court of Justice is experienced at making legal determinations related to acts of aggression and point to the recent Armed Activities on the Territory of the Congo,¹⁶¹ the 1996 Nuclear Weapons Advisory Opinion,¹⁶² the 1986 Nicaragua Case,¹⁶³ and the 1962 Certain Expenses of the United Nations¹⁶⁴ in support of this view.

Opponents of G.A. or I.C.J. involvement argue that the procedural and evidentiary standards of these U.N. organs differ significantly from rigorous ICC standards and are therefore inappropriate. However, delegates who would involve the Assembly or the World Court if the Security Council fails to act point out that the procedural or evidentiary standards of the Council are less rigorous than the standards of the International Court of Justice. Furthermore, some add, as political determinations, Security Council resolutions are less representative of world opinion than G.A. resolutions.

The decision among the Security Council, ICC, General Assembly, and the International Court of Justice has important prosecutorial consequences because it affects the degree of international cooperation—an essential ingredient for a successful case—from which the Prosecutor will benefit.¹⁶⁵ As-

159. See Uniting for Peace Resolution, *supra* note 37.

160. Eric Stein & Richard C. Morrissey, *Uniting for Peace Resolution*, 5 ENCYCLOPEDIA OF PUB. INT'L L. 380 (1983).

161. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 244 (Dec. 19), available at <http://www.icj-cij.org/docket/files/116/10455.pdf>.

162. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), available at <http://www.icj-cij.org/docket/files/95/7495.pdf>.

163. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), *supra* note 93.

164. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 163 (July 20), available at <http://www.icj-cij.org/docket/files/49/5259.pdf>.

165. On the need for the "full and unconditional cooperation of states and organizations" in order to ensure the "swift fulfillment of the mandate of the Office of the Prosecutor," see *Third Report of the*

suming that the organ making the declaration of aggression will also be inclined to cooperate with the ICC, the Prosecutor would benefit most from a Security Council or G.A. resolution. Security Council cooperation is advantageous because the Council wields enforcement powers under chapter VII of the U.N. Charter. Arrest and evidence-sharing are but two ways that the Council can facilitate the Prosecutor's task. Meanwhile, the General Assembly is the most representative U.N. body. It can help the Prosecutor garner voluntary support from states parties that take exception to increasing the authority of the Security Council. Reliance on the International Court of Justice is problematic because I.C.J. decisions require time to draft and publish and thus potentially affect the rights of the accused to a prompt trial. Nor do I.C.J. decisions garner the degree of consensus that a successful G.A. resolution does, and the Court does not have the enforcement powers that the Security Council does. However, an I.C.J. decision would be advantageous to the Prosecutor if it contains full-fledged legal arguments that can be used by him or her when attempting to establish that a state/collective act of aggression has occurred as an element of the crime.

Since 2007, a large number of states have begun to support formulations of the crime of aggression that increase the authority of the ICC to make independent determinations. The Chairman's 2007 Non-Paper on the exercise of jurisdiction would require the Prosecutor to seek authorization by the Pre-Trial Chamber for an investigation into the commission of the crime of aggression.¹⁶⁶ Following a procedure closely resembling the one contained in article 15 of the Rome Statute for the initiation of *proprio motu* investigations by the Prosecutor, the Pre-Trial Chamber looks for one of three triggers: (1) a Security Council determination that the state identified by the Prosecutor has committed an act of aggression;¹⁶⁷ (2) whether the Security Council has decided not to object to an investigation;¹⁶⁸ or (3) a G.A. or an I.C.J. determination that an act of aggression has been committed.¹⁶⁹ In the absence of one of these three triggers, the Pre-Trial Chamber notifies the U.N. Secretary-General of the Prosecutor's request to initiate an investigation, and passes on all relevant information or documents. If no S.C., G.A., or I.C.J. decision is made after a predetermined time period after the date of notification, the Pre-Trial Chamber may proceed to authorize the Prosecutor's investigation. By giving all three U.N. organs a role in triggering ICC jurisdiction, and directing the Prosecutor to the Pre-Trial Chamber, the chairman's non-paper proposal dilutes the influence of the Security Council in relation to earlier proposals, while still giving the Council primary re-

Prosecutor of the International Criminal Court to the U.N. Security Council Pursuant To UNSCR 1593 (2005) (June 14, 2006), available at http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf.

166. 2007 *Non-Paper on Defining the State Act of Aggression*, *supra* note 98, ¶ 2.

167. *Id.* ¶ 3(a).

168. *Id.* ¶ 3(b).

169. *Id.* ¶ 3(c).

sponsibility for determining acts of aggression. It also distances the Prosecutor from the Security Council by directing him or her to the Pre-Trial Chamber for a jurisdictional go-ahead. While the proposed jurisdictional procedure insulates the Prosecutor from the political process, it also risks reducing his or her influence in the Council absent informal avenues of interaction, potentially jeopardizing cooperation.

3. *What Sort of Decision Triggers ICC Jurisdiction?*

Though most delegates agree that the Security Council should have primary (i.e., initial) responsibility for determining whether an act of aggression has occurred, they disagree over the type of determination that should trigger ICC jurisdiction.

Delegates have considered three alternative procedures for moving a case from the Security Council to the ICC, but none commanded enough support to be included as the prevailing preference in the Chairman's 2007 Discussion Paper. In order for the Prosecutor to proceed with a case under the first alternative, the Council would need to determine that an act of aggression had occurred and then refer the situation to the ICC in accordance with the provision for S.C. referrals contained in article 13(b) of the Rome Statute. Under the second option, a determination by the Council that an act of aggression had occurred would be sufficient and no referral would be necessary. Under the third option, the Council could refer a situation in which the crime of aggression appears to have been committed to the ICC under article 13(b) of the Rome Statute without determining that an act of aggression had occurred. It would then be incumbent on the Court to answer the legal question of whether an act of aggression had occurred for the sake of establishing the criminal responsibility of the accused. All three options give preferential treatment to the five veto-holding members of the Security Council, which can ensure that a case against a local or allied political or military leader is blocked before it reaches the Court.

The advantage of the first option—a Security Council determination plus a referral—for the Prosecutor would be increased certainty that the Council intended him or her to proceed with the case. Presumably, a decisive Council would be more cooperative with the Prosecutor than an indecisive one. At the same time, this double requirement would make the Prosecutor dependent upon S.C. consensus for the trigger. Security Council paralysis when confronted with a clear case of aggression risks eroding the authority of the Prosecutor, who, in the absence of a determination and a “go-ahead,” would be barred from proceeding.

Under the second option—in which a Council determination alone would be sufficient—the ICC could proceed under any one of the three avenues contemplated in article 13 of the Rome Statute: state referral, Council referral, or invocation of the Prosecutor's *proprio motu* power. In the case of a state referral or Pre-Trial Chamber authorization, this option would allow the

Prosecutor to proceed with a case should the Security Council be resolved that aggression had occurred but deadlocked on the merits of criminal prosecution.

Under the third alternative, the Council could refer a situation to the ICC and leave it open for the court to determine whether one of the crimes under its jurisdiction had occurred. Some delegates argued that this alternative would offer the Council new tools to deal with aggression. For example, there are instances when the Council might prefer to remain silent but grant responsibility to the ICC to judge that aggression had occurred. In addition to giving the Security Council another power, this option would offer the Prosecutor the most freedom to formulate criminal charges since a referral that does not specify the alleged crime invites the Prosecutor to investigate any crime within ICC jurisdiction. An open Council referral of this type would, at the same time, leave the Prosecutor vulnerable to accusations that the charges were politically motivated. Alternative options such as requiring nine members of the Security Council to agree on a referral or making the veto inapplicable in relation to ICC referrals were unpopular because they would interfere with the Council's powers to establish its own procedures.

Beyond the debate over a one- or two-step process by the Security Council, the Working Group discussed a number of ancillary procedural questions related to the specifics of the triggering resolution: (1) Should the decision be taken under chapter VII of the U.N. Charter, an enforcement action responding to a threat to the peace, breach of the peace, or act of aggression? (2) Could such a decision be regarded as a procedural question under article 27(2) of the U.N. Charter, thus circumventing the veto? and (3) Should the decision or the determination be made only in an operative or, alternatively, in a preambular paragraph of a Council resolution?¹⁷⁰ Regarding question (3), a number of alternatives were discussed. Could the determination be a decision in an operative paragraph using the word "determines" instead of "decides"? Would an explicit determination in a preambular rather than an operative paragraph be sufficient? Could the Council determination be implicit—identifying a state act as "aggressive," for instance? Answers to these questions would impact the work of the Prosecutor at two key points: when claiming ICC jurisdiction and when proving the elements of the crime—the state/collective act in particular—in court. The answers to these questions are relevant to the ICC Prosecutor insofar as a wider array of permissible S.C. determinations will presumably increase the range of potential situations to investigate.

Those delegates prepared to invoke the authority of the General Assembly in the absence of a Council determination debated the required majority—one-half or two-thirds of the Assembly—for the sake of ICC jurisdiction. They were undecided as to whether a determination must be made in an

170. *Discussion Paper 1*, *supra* note 87, at 386.

operative paragraph or if it might also be made in the preamble to a G.A. resolution. Questions about the effect of implicit determinations arose in relation to G.A. resolutions, as they had with Security Council determinations. Meanwhile, in the run-up to the 2010 Review Conference, recourse to the General Assembly became increasingly unpopular because the Assembly, without primary enforcement capacity or a judicial function, provided few tangible advantages over the Security Council or the International Court of Justice.

Delegates supporting the involvement of the International Court of Justice did not manage to reach a consensus on the question of whether an advisory opinion or a judgment would trigger ICC jurisdiction. Delegates familiar with I.C.J. procedures raised doubts about the propriety of sanctioning the ICC to accept a determination in an I.C.J. advisory opinion, since the question of international aggression relates to a dispute between states, and disputes between states at the International Court of Justice are only adjudicated with the consent of the states involved.¹⁷¹ Nor could the delegates decide whether an explicit request to the International Court of Justice, an operative decision (*ratio desiderata*), or a decision made in the reasons (*obiter dictum*) would suffice. Also unresolved was whether the characterization of the act of aggression by the International Court of Justice should be explicit, or whether an implicit characterization would be enough to trigger jurisdiction. While an I.C.J. decision concerning the state/collective act of aggression at the jurisdictional phase would facilitate the Prosecutor's task when proving the elements of the crime, involving the Prosecutor in an I.C.J. case or advisory opinion seems another distraction from his or her primary responsibilities in the field and the courtroom of the ICC.

4. *Should the Decision That a State Act of Aggression Has Occurred Be Prejudicial?*

In the Working Group discussion, a prior determination by an outside organ is prejudicial if it is binding on the ICC and cannot be reviewed by the Court. If a determination that a state/collective act of aggression occurred is prejudicial, the Prosecutor need only to show that the determination was made in order to meet the jurisdictional precondition and to satisfy the state/collective act of aggression element of the crime. Neither the Prosecutor nor the defense can debate the content of a prejudicial determination. Legal questions concern only its procedural validity. Today, there is consensus in the working group that a prejudicial determination would violate the due process rights of the accused, that the Prosecutor must prove to the

171. *Discussion Paper 1*, *supra* note 87; *2007 Non-Paper on Defining the State Act of Aggression*, *supra* note 98. The Proposal for alternative language on variant (a) was prepared by the chairman in January 2007, and the Revised Proposal for alternative language on variant (a) was prepared by the chairman for the informal consultations.

Court that the state/collective act of aggression occurred as an element of the crime, and that the accused must have an opportunity to respond.¹⁷²

At stake politically in the debate over whether a determination should be prejudicial was the authority of the Security Council vis-à-vis the Court. An ICC decision at odds with a Security Council resolution determining that an act of aggression has or has not occurred risks undermining the authority of either or both institutions. Initially, proponents of the Council proposed preventing this contingency by making S.C. determinations prejudicial. By 2006, a growing focus in the Working Group on the rights of the accused had helped soften their positions. States critical of Council involvement in ICC decisions reminded the Working Group of situations where the Council had failed to act in the face of grave threats to international peace and security, invoking the 1994 Rwanda genocide in particular. Implicit in the arguments of some delegations against prejudicial S.C. determinations was the hope that the ICC, unconstrained by the political pressures facing the Council, would produce a more objective and transparent assessment of acts of aggression, possibly even serving as a benchmark to evaluate S.C. decisions.

For the Prosecutor, the outcome affects 1) the ease with which he or she can establish the jurisdictional preconditions to start a case;¹⁷³ 2) the facility of proving that a state/collective act of aggression, as an element of the crime, has occurred; 3) the degree to which the provision insulates the Prosecutor from accusations that he or she has abused his or her discretion; and 4) the effect of the jurisdictional component of the aggression provision on the overall legitimacy of the ICC. The more jurisdictional hurdles confronting the Prosecutor at the preliminary stages of the case—making a jurisdictional case to the General Assembly or International Court of Justice would be particularly demanding—the fewer the resources available for other aspects of the case. In a related way, if an outside organ is responsible for establishing the existence of the state/collective act of aggression as an element of the crime, this reduces the burden on the Prosecutor. However, making the outside determination prejudicial invites the accused to challenge the fairness of the provision and, in effect, the Prosecutor's case, as a violation of internationally recognized due process standards. A prejudicial determination made after the crime is seen by many delegates as a violation of the principle of legality because the contours of the crime remain unclear until the post-crime determination has been made.

The Working Group framed the discussion as a dilemma: the desire for harmony among different international institutions versus the due process rights of the accused.¹⁷⁴ According to Jutta Bertram-Nothnagel, by 2006,

172. See CICC 2007 REPORT, *supra* note 135, at 9, 10, 13, 44, 48–49.

173. The more central the outside determination is in establishing the existence of the state/collective act, the less work the Prosecutor will have in proving it on the basis of evidence collected in the field.

174. CICC 2006 REPORT, *supra* note 96, at 28.

“the latter was the stronger value.”¹⁷⁵ In June 2006, there was consensus that a prior determination by an outside organ must not be prejudicial. Delegates agreed that a prejudicial decision, while ensuring harmony between the ICC and the U.N. organ making the determination, would compromise the rights of the accused, particularly the presumption of innocence. Under articles 66 and 67 of the Rome Statute, the burden of proof must be on the prosecution, and cannot be shifted to the defendant. Furthermore, with time, new evidence might emerge that casts doubt on the determination that an act of aggression had occurred. Barring the ICC from reviewing new and exculpatory evidence seemed to many delegates to be an unreasonable burden on the accused. The Working Group seemed prepared to empower the ICC to reconsider the state/collective act of aggression in accordance with its own definition, thresholds, and standards of due process.¹⁷⁶

Protection of the ICC’s ability to make its own determination of whether an act of aggression has occurred is likely to come in the form of a variant on a proposal put forth by Chairman Wenaweser at Princeton in 2007.¹⁷⁷ In his discussion paper, the chairman attempted to assuage the concerns of those delegates promoting harmony among different international institutions and those guarding the due process rights of the accused. To accomplish this goal, the chairman separated the provisions defining the crime of aggression from the provision on jurisdiction into two distinct articles, 8 *bis* and 15 *bis*, respectively. This opened the possibility of a self-contained definition of the crime in 8 *bis*, immune from political interference and holding strictly to the principle of legality, while retaining a role for an outside U.N. organ—whichever organ is decided upon, whether it be the Security Council, General Assembly, or the International Court of Justice—in 15 *bis*, a new provision governing the exercise of jurisdiction over the crime of aggression. In this two-step process, an outside decision would function as a jurisdictional “go-ahead” or “green light.”¹⁷⁸ Pursuant to the “go-ahead” or “green light,” the Prosecutor would still need to prove to the Court that state/collective aggression meeting ICC thresholds occurred as an element of the crime. According to Jutta Bertram-Nothnagel, the Chairman’s 2007 Discussion Paper, by separating the definition and the jurisdictional conditions, is “a major step forward.”¹⁷⁹ Those options incorporating prejudicial determinations—dropped in the Chairman’s 2007 Working Paper—would have been advantageous for their capacity to limit the Prosecutor’s discretion, insulating him or her from accusations of political bias at the stage of case selection. But linking the ICC’s aggression case to an outside organ makes

175. *Id.*

176. “No one argued that a prior determination had to be prejudicial.” *Id.*

177. See *Non-Paper Submitted by the Chairman on the Exercise of the Jurisdiction*, *supra* note 158.

178. *Id.* at 19, 24.

179. E-mail from Jutta Bertram-Nothnagel to the delegation of experts of the Special Working Group on the Crime of Aggression (Apr. 16, 2007) (on file with author).

the legitimacy of the court's decision contingent upon the legitimacy of that organ and its determination.

D. *The Direction of Future Compromise*

In June 2006, one delegate listed seven possible ways that the Security Council could affect ICC jurisdiction. The Council could (1) determine that an act of aggression had occurred; (2) refer a case without a determination; (3) make a referral and a determination; (4) refer a case and specifically empower the ICC to determine whether an act of aggression has occurred; (5) request the Court, under article 16 of the Rome Statute, to suspend the proceedings; (6) explicitly determine that no act of aggression had been committed by the State concerned; or (7) do nothing.¹⁸⁰

Another delegate suggested designing alternative jurisdictional preconditions that coincide with the three Rome Statute article 13 trigger mechanisms—state referral, S.C. referral, and *proprio motu*. For instance, a state referring its own case, he suggested, should not be required to acquire a Council determination that aggression had occurred to initiate the process. If states are concerned about the Prosecutor instigating frivolous cases under 13(c), *proprio motu*, they can design a provision requiring an outside body to make a determination before the Prosecutor can present a *proprio motu* case to the Pre-Trial Chamber. The suggestion to align the jurisdictional preconditions with article 13 of the Rome Statute will most likely increase the complexity and sophistication of upcoming SWGCA discussions in the lead-up to the 2009 or 2010 Review Conference. Already, Belgium has put forth a proposal with alternative jurisdictional triggers designed to coincide with the different referral procedures.¹⁸¹ Increasing the sophistication of the gray-area options improves the probability of a compromise at the review conference, a prospect not every state is keen to promote.

III. THE PROSECUTOR'S CHALLENGE

Part II demonstrated that many essential aspects of the definition of the crime of aggression no longer give rise to disagreement and that the main areas of contention, such as the consequence of the S.C. determination of an act of aggression, have been translated into a myriad of gray-area options designed to garner consensus and bring the Working Group closer to an eventual definition. The exercise in Part II of examining, in detail, the status of the definition to date also allows us to foresee the contours of the crime with some clarity.

Part III forecasts the key challenges that all of the proposed definitions present for the Prosecutor. These challenges are drawn from the emerging

180. CICC 2006 REPORT, *supra* note 96, at 22.

181. *See supra* note 151.

definition of the crime described in Part II, the history of aggression cases since Nuremberg, related experience prosecuting the other international crimes, and the unique characteristics of the Rome Statute. The Prosecutor is likely to encounter key challenges in (1) prompting the referral; (2) selecting the case; (3) linking the suspect to the state act; (4) arresting suspects; and (5) establishing the legitimacy of the crime itself.

1. *Prompting the Referral*

Reflecting on the main challenges faced during his initial three years in office, ICC Prosecutor Luis Moreno-Ocampo identified his first challenge as beginning cases.¹⁸² It is foreseeable that the highly divisive nature of the crime of aggression will exacerbate the challenges.

There are various political reasons why states parties or the Security Council would fail to refer a *prima facie* aggression case to the ICC. A draft S.C. referral may be blocked by a veto-holding member protecting one of its own leaders or an allied nation accused of aggression. States parties may be unwilling to risk the diplomatic fallout of independently referring an aggression case against the leader of a powerful nation or an individual protected by such a nation. If the Prosecutor acts independently, *proprio motu*, with only the authorization of the Pre-Trial Chamber, he or she might not be in a position to galvanize the necessary international cooperation to investigate and arrest a suspect. Though referrals are within the power of states parties and the Security Council, and the absence of a referral in the face of a clear case of aggression is not the fault of the Prosecutor, the biased application of international criminal law is a threat to the legitimacy and effectiveness of the system as a whole, a system the Prosecutor is mandated to safeguard.

Though states parties and the Security Council are responsible for referrals, the first three years of ICC operations demonstrate that the Prosecutor has some influence over the process. In 2003, with many of the worst international crimes within the ICC's jurisdiction occurring in the Democratic Republic of Congo, and no state or Council referral pending, Prosecutor Moreno-Ocampo evoked the prospect of his *proprio motu* power in the Security Council chambers to successfully encourage—some would say compel—a self-referral from the national government itself. In January 2004, Moreno-Ocampo succeeded in negotiating a second self-referral, this time from the government of Uganda, in a twenty-year conflict where Uganda's own political and military leaders would be vulnerable to prosecution. In December 2005, in spite of American hostility, Russian and Chinese reticence, and Sudanese resistance to the ICC, the Security Council decided to

182. ICC, Office of the Prosecutor, *Report on the Activities Performed During the First Three Years (June 2003–June 2006)* (Sept. 12, 2006), available at http://www.icc-cpi.int/library/organs/otp/OTP_3-year-report-20060914_English.pdf.

refer Darfur to the Court, largely due to quiet diplomatic efforts on the part of Moreno-Ocampo, who galvanized the Council—nine of fifteen members were parties to the Rome Statute—and a coalition of NGOs and lobby groups to push the referral through.¹⁸³

Whatever jurisdictional trigger is ultimately incorporated for the crime of aggression, the Prosecutor's task will be greatly facilitated by including the option of a state self-referral under article 14 of the Rome Statute. This would invite successor regimes to surrender ousted political and military leaders who planned, prepared, initiated, or executed illegal acts of aggression and trigger a case, supplying evidence of wrongdoing.¹⁸⁴ Cases against Slobodan Milošević, Saddam Hussein, and Augusto Pinochet were all instigated by successor regimes, and the majority of high-level cases in international criminal law since the creation of the U.N. *ad hoc* tribunals for the former Yugoslavia and Rwanda have also been triggered in this way. The Prosecutor's best strategy for initiating an aggression case is to collaborate with domestic allies.

2. *Selecting the Case*

More perpetrators have committed crimes within the jurisdiction of the ICC than a Prosecutor can conceivably try. The crime of aggression, unless tailored narrowly, will exacerbate the "impunity gap."¹⁸⁵ Meanwhile, drafting the aggression provision too narrowly risks limiting the Prosecutor's discretion when selecting the cases that will most effectively advance his or her mandate. At the same time, however, a crime drafted to give the Prosecutor ample discretion at the level of case selection makes him or her vulnerable to accusations of bias. When it comes to the crime of aggression, the Prosecutor's challenge is to devise a principled, transparent, and legitimate approach to case selection, while still leaving himself or herself enough flexibility to effectively advance his or her mandate. Attuned to these challenges, Prosecutor Moreno-Ocampo has drafted a policy paper that sets out his approach to case selection.¹⁸⁶

The Prosecutor's guiding principles in selecting situations and cases are independence (the Office of the Prosecutor ("OTP") "shall not seek or act on instructions from any external source"),¹⁸⁷ impartiality ("the OTP conducts its selection analysis in a nonpartisan manner, applying the same methodology and standards for all groups"),¹⁸⁸ objectivity ("the Office will

183. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

184. With legislation implementing the Rome Statute into domestic law, the state could also try its own leaders.

185. ICC, Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor*, at 3 (Sept. 2003), available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.

186. *Id.*

187. Rome Statute, *supra* note 2, art. 42(1).

188. ICC, Office of the Prosecutor, *Criteria for Selection of Situations and Cases*, at 2 (June 2006) (draft policy paper on file with author) [hereinafter *OTP Selection Criteria*].

investigate and consider incriminating and exonerating circumstances equally, in order to establish the truth”),¹⁸⁹ and nondiscrimination (“the selection process of the Office does not draw any adverse distinction founded on grounds such as gender, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”).¹⁹⁰

In addition, gravity, described in detail in the policy paper, is the Prosecutor’s key selection criteria which does the most work in both situation and case selection once the basic jurisdiction and admissibility preconditions are met. According to the policy paper, the relevant factors in assessing gravity are the scale (the number of victims and the geographic and chronological spread of the crime), the nature (with deliberate killing and rape composing the highest level of gravity), the manner of commission (“systematic, organized or planned course of action, elements of particular cruelty, crimes against particularly vulnerable victims, crimes involving discrimination on grounds referred to in Article 21(3), and abuse of *de jure* or *de facto* power”), and the impact of the crimes (“on the community and on regional peace and security, including longer term social, economic and environmental damage”).¹⁹¹ The OTP considers the four factors jointly, and does not assign fixed weight to them.¹⁹²

Meanwhile, trends in the Working Group indicate that the definition of the crime of aggression will include additional gravity-based admissibility criteria above and beyond the other crimes—a veritable “super-threshold” specially designed for the supreme international crime.¹⁹³ But sometimes it is less effective to prosecute the “big fish” than it is to prosecute the “small fry.”¹⁹⁴ It may be logistically impossible to collect reliable evidence on top political and military leaders due to an ongoing conflict, the Prosecutor’s inability to ensure the safety of victims and witnesses in a particular region, or insufficient cooperation by national and transnational actors. States may not be willing to cooperate to investigate or prosecute the political or military leader of a powerful state for fear of diplomatic countermeasures, or jeopardize their own troops for the sake of international justice. The investigation of particular crimes such as the enlistment and conscription of children into active hostilities,¹⁹⁵ arguably less grave than large-scale massacres, for instance, may contribute more effectively to the prevention of the crime, advancing the Prosecutor’s mission of prevention. Prosecuting a mid-rank-

189. *Id.*

190. Rome Statute, *supra* note 2, art. 21(3).

191. *OTP Selection Criteria*, *supra* note 188, at 4–6.

192. *Id.* at 5.

193. See *supra* Part II.A.3.

194. Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1754 (2005).

195. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007), available at http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN_English.pdf.

ing official may lay the doctrinal or evidentiary foundations for a case against his political masters.

The main risk, particularly with the crime of aggression, is that the Prosecutor will not have the capacity to bring the gravest perpetrators to justice and will undermine the legitimacy of the ICC if he or she tries and repeatedly fails. One mechanism within the crime itself that would help mitigate this problem and which is already likely to be included is the required pre-determination by an outside organ or the Pre-Trial Chamber, convening in full session. This would reduce the number of situations available to the Prosecutor from which to draw his or her cases while presumably maximizing international cooperation to investigate and arrest. The weakness of this mechanism is that the Prosecutor has less discretion to select the “small fry” cases that best advance his or her mandate.

3. *Linking the Suspect to the State Act*

Contrasted with conventional crimes conducted by a single person or small cabal, state atrocities are instead often the product of collective, systematic, bureaucratic activity, made possible only by the collaboration of massive and complex organizations in the execution of criminal policies initiated at the highest levels of government. How, then, is individual responsibility to be located, limited, and defined within the vast bureaucratic apparatuses that make possible the pulling of a trigger or the dropping of a gas canister in some far-flung place?¹⁹⁶

The answer to David Cohen’s question in *Beyond Nuremberg* is now being negotiated by the SWGCA. The outcome will determine how the Prosecutor links the suspect to the state/collective act.

The drafters of the London Charter of 1945 wrestled with, and finally incorporated, the idea of organizational guilt, whereby organizations themselves would be prosecuted and individuals who had joined voluntarily could be punished on the basis of membership alone.¹⁹⁷ But the Nuremberg judges ultimately curbed the Allied Prosecutors’ theory of collective responsibility and held that membership alone was not sufficient—to be found guilty, the defendant must have *known* that the organization was engaged in the crime.¹⁹⁸

Taking a more sophisticated approach, the ICTY and ICTR recognize two forms of individual criminal responsibility linking an individual to the

196. David Cohen, *Beyond Nuremberg: Individual Responsibility for War Crimes*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 53 (Carla Hesse & Robert Post eds., 1999).

197. London Charter, *supra* note 14, arts. 9, 10.

198. Even in 1945, the doctrine was highly problematic. According to Telford Taylor, “The conspiracy case . . . bid fair to swallow the greater part of the entire case.” TAYLOR, *supra* note 14, at 80. In the end, “[t]he practical and moral difficulties proved overwhelming” and the judges rejected much of the conspiracy case, except, notably, in relation to crimes against peace. *Id.* at 75.

state/collective act—superior responsibility¹⁹⁹ and participation in a joint criminal enterprise (“enterprise participation”).²⁰⁰ The emphasis of superior responsibility, points out Professor Mark Osiel, is on the chain of command, while enterprise participation is more “consonant with the differing dimensions of mass atrocity, where malevolent influence travels through informal and widely dispersed networks.”²⁰¹ In order to prove superior responsibility, the Prosecutor must demonstrate that the superior possessed the requisite *mens rea* (the superior “knew or had reason to know”) that a superior-subordinate relationship existed and that the superior failed to prevent or punish the subordinates’ wrongs.²⁰² Enterprise participation, on the other hand, requires the Prosecutor to show “a common plan, design or purpose which amounts to . . . the commission of a crime provided for in the Statute.”²⁰³ The three forms of enterprise participation are a shared intent to bring about a certain offense,²⁰⁴ organized systems of repression and ill-treatment,²⁰⁵ and criminal acts beyond the common design but which are “a natural and foreseeable consequence” of the actions taken.”²⁰⁶

The ICC includes both superior responsibility²⁰⁷ and enterprise participation.²⁰⁸ From the perspective of an international Prosecutor, however, both are troublesome. The two modes of individual responsibility have been refined somewhat based on the jurisprudence of the *ad hoc* tribunals, but the refinements do not resolve the essential prosecutorial dilemma identified by Osiel and others²⁰⁹—superior responsibility is narrow and difficult to prove, while enterprise participation is broad but “dangerously illiberal.”²¹⁰

For the ICC Prosecutor, the strategic advantages of enterprise participation over superior responsibility are overwhelming. Enterprise participation has the potential to capture individuals joined in informal networks, civilian participants outside the chain of command (e.g., former Bosnian Serb leader Radovan Karadzic), members of independently operating paramilitaries or cells, private military contractors, industrialists, the broker between organizations (e.g., Željko Ražnatović, leader of the notorious Serb paramilitary

199. ICTY Statute, *supra* note 54, art. 7(3); ICTR Statute, *supra* note 54, art. 6(3).

200. ICTY Statute, *supra* note 54, art. 7(1); Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶¶ 185–229 (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf> [hereinafter Tadic]; ICTR Statute, *supra* note 54, art. 6(1); Prosecutor v. Ntakirutimana, Case No. ICTR-96-19-A, Judgment, ¶ 468 (Dec. 13, 2004). The ICTR Statute eliminates much of the need for joint criminal enterprise by including conspiracy to commit genocide.

201. Osiel, *supra* note 194, at 1770.

202. ICTY Statute, *supra* note 54, art. 7(3).

203. Prosecutor v. Kupreskic et al., Case No. IT-95-16-T, Judgment, ¶ 772 (Jan. 14, 2000), available at <http://www.un.org/icty/kupreskic/appeal/judgement/kup-tj000114e.pdf>.

204. Tadic, *supra* note 200, ¶ 196.

205. *Id.* ¶ 202.

206. *Id.* ¶ 204.

207. Rome Statute, *supra* note 2, art. 28.

208. *Id.* art. 25(3)(d).

209. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005).

210. Osiel, *supra* note 194, at 1772.

group known as Arkan's Tigers), and many others beyond the reach of the superior responsibility doctrine.²¹¹ But, as the Nuremberg experience and the jurisprudence of the ICTY have demonstrated,²¹² the legitimacy of the doctrine of enterprise participation is under siege. Since there is no telling when a skeptical panel of international judges will rein it in, the doctrine of enterprise participation is an insecure basis upon which to present valuable evidence acquired at considerable risk to ICC investigators and witnesses.

One way the Working Group can manage the problem and facilitate the Prosecutor's task is by selecting the differentiated approach, which includes a provision on enterprise participation (article 25(3)(d)), while also including a leadership qualifier that limits responsibility to top-tier individuals with the requisite *mens rea* who lead, direct, organize and/or direct, or engage in the planning, preparation, initiation, or execution of an act of aggression/armed attack.²¹³ However, including a leadership qualifier in the definition of the crime effectively eliminates the possibility of a case based on superior responsibility: if aggression is a leadership crime, superior responsibility, whereby superiors are held responsible for the criminal acts of their subordinates, becomes unintelligible.²¹⁴ While eliminating one avenue for linking the individual to the vast bureaucratic apparatus of the state, the leadership qualifier and *mens rea* requirement would, to a large extent, transform this "dangerously illiberal" and, for the ICC Prosecutor, highly unpredictable doctrine into something more liberal and reliable.

4. Arresting Suspects

According to Professor Gary Bass, "the single biggest challenge for international war crimes tribunals has been the unwillingness of even liberal states to endanger their own soldiers either by arresting war criminals or in subsequent reprisals."²¹⁵ Bass argues that "[o]ne of the most important—and crude—reasons for the triumph of Nuremberg was that it did not require any additional risks for Allied soldiers, since the Allies had demanded an unconditional Axis surrender before settling on a war crimes policy."²¹⁶ An outstanding feature of the NATO arrest raids to capture indicted ICTY suspects "has been their trepidation about taking risks. Unpopular and marginal war crimes suspects may get nabbed, but not a well-defended and popular figure like Mladic."²¹⁷

211. *Id.* at 1786.

212. *Id.* at 1764 (referring to Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, ¶¶ 54–57 (July 29, 2004), available at <http://www.un.org/icty/blaskic/appeal/judgement/bla-aj040729e.pdf>, and Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment, ¶¶ 237–239 (Apr. 19, 2004), available at <http://www.un.org/icty/krstic/Appeal/judgement/krs-aj040419e.pdf>).

213. *Chairman's 2007 Discussion Paper*, *supra* note 84, art. 1.

214. Under this proposal, article 28 of the Rome Statute, *supra* note 2, on "Responsibility of commanders and other superiors," would need to be modified or excluded.

215. Bass, *supra* note 14, at 277.

216. *Id.*

217. *Id.*

The ICC Prosecutor has neither a mandate nor resources to arrest suspects. However, in a 2006 policy paper, Moreno-Ocampo recognized galvanizing arrest as one of the key objectives the ICC Prosecutors should pursue:

[T]he experience gained so far demonstrates that the Office can and should deploy substantial efforts to gathering information on the whereabouts of suspects, galvanizing support and cooperation for arrest and surrender, and promoting coordination among national and international parties potentially involved in a successful arrest.²¹⁸

And yet, the victorious aggressors in armed conflicts will often be well-defended, and sometimes popular, making it exceptionally difficult for the Prosecutor to galvanize the necessary cooperation. The first three years of ICC activity confirm Bass's insight that states are fearful of placing their soldiers at risk for the sake of international justice. It has proven extremely challenging for the Prosecutor to generate state cooperation to arrest even politically and militarily compromised suspects for the most reprehensible crimes. In a 2006 op-ed, Moreno-Ocampo made an earnest appeal to arrest the indicted leaders of the Lord's Resistance Army, asserting that "to do justice and re-establish security in the region, the justice network has to arrest the LRA commanders."²¹⁹ At the time of writing, in spite of Moreno-Ocampo's repeated petitions to the Security Council, ICC member states, international police networks, transnational business leaders, nongovernmental organizations, local communities, and the media, the indicted LRA leaders are still at-large.

Hermann Göring once predicted that "[t]he victor will always be the judge, and the vanquished the accused."²²⁰ Not a single recorded historical example exists of a victorious leader being arrested for his behavior during wartime. Unless the ICC Prosecutor manages to galvanize states to arrest victorious perpetrators of the crime of aggression—highly unlikely due to the states' reticence to even arrest compromised leaders for uncontroversial crimes to date—the law will be applied unequally, compromising its legitimacy. Clever defendants like Slobodan Milošević and Saddam Hussein will continue to capitalize on the apparent injustice, turn the tables on the victors, and put the tribunal itself on trial to advance their political agenda.

Members of the SWGCA, recognizing that it will be particularly difficult for the Prosecutor to galvanize cooperation to arrest aggression suspects, have sought to facilitate the task by proposing jurisdictional triggers that engender consensus and/or prevent a case from proceeding absent the requisite support. The assumption is that if the Security Council, the General Assembly, or the International Court of Justice triggers an aggression case,

218. *OTP Selection Criteria*, *supra* note 188, at 8.

219. Luis Moreno-Ocampo, *A Global Web of Justice Is Up and Running*, INT'L HERALD TRIB., June 12, 2006, available at <http://www.iht.com/articles/2006/06/11/opinion/edocampo.php>.

220. G.M. GILBERT, NUREMBERG DIARY 4 (1947).

ICC states parties will be more motivated to cooperate with the court and enforce its arrest warrants. This empirical assumption cannot be evaluated without implementing the provision and monitoring cooperation. But if the will of a duly empowered U.N. body to trigger a case in fact correlates with the will of member states to commit resources and arrest indicted persons, the best body to involve, from the perspective of the Prosecutor, would be the Security Council because of its capacity to authorize the use of force in carrying out arrests.

5. *Establishing the Legitimacy of the Crime Itself*

The Nuremberg judgment is a warning to an ICC Prosecutor building a case against the perpetrators of the crime of aggression—he or she must be prepared to defend the legitimacy, and possibly the legality, of the crime itself. At the International Military Tribunal (“IMT”) at Nuremberg, the defendants raised three challenges to the legitimacy of the aggression provisions that were never conclusively resolved in the judgment.²²¹ They claimed that (1) the crime against peace, as the crime of aggression was known in 1945, was illegitimate because it was not prohibited at the time the defendants acted; (2) the accusers had committed the same crime and were not prosecuted; and (3) the tribunal itself was illegitimate because it was dispensing victor’s justice and was biased. Even today, these attacks on the legitimacy of the crime of aggression resonate among scholars studying the Nuremberg judgment.²²²

The first challenge to the legitimacy of the crime at Nuremberg, *nullum crimen sine lege*, or “no crime without law,” is a formulation of the principle of legality that excludes criminal sanctions for acts that were not prohibited at the time of their commission.²²³ The Nazi defendants at Nuremberg argued that the charges of crimes against peace violated the principle because, prior to the London Charter, there was no criminal prohibition on war—sovereigns held a *droit de guerre*, or right of war—and, in any event, they were immune from prosecution for crimes committed while in office under the doctrine of sovereign immunity. Rejecting these contentions, the tribunal found that the prosecution’s argument that the crime predated the act was justified, based on a number of treaties of non-aggression signed by German statesmen prior to World War II.²²⁴ The tribunal also rejected the

221. London Charter, *supra* note 14, art. 6.

222. *Developments in the Law: International Criminal Law*, 114 HARV. L. REV. 1943, 1982 (2001); Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 858–61 (1990); Jeremy Peterson, *Unpacking Show Trials: Situating the Trial of Saddam Hussein*, 48 HARV. INT’L. L.J. 258, 275 (2006).

223. International Covenant on Civil and Political Rights, art. 15(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”).

224. “Occupying the positions they did in the Government of Germany, the defendants or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the

defense assertion that “where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State,” holding that international law applies to individuals as well as states.²²⁵

Although the Nuremberg judgment is taken as a watershed and a key precedent in international criminal law, many scholars today question the veracity of the second holding, considering it *lex ferenda* rather than *lex lata*. The school of thought that questions the legitimacy of this aspect of the IMT judgment is still present and any defense lawyer would be remiss not to make both arguments—act of state and sovereign immunity—on his or her client’s behalf. Thus, the Prosecutor should expect a *nullum crimen sine lege* challenge under article 22 and be prepared with a response.²²⁶ Besides the Nuremberg judgment establishing aggression as a crime in international law, the fact that aggression is a crime in the Rome Statute is a strong, though not necessarily decisive, argument for the enforcement of the prohibition.

The ICC Prosecutor can also expect the defense to raise the *tu coque* challenge on behalf of his or her client. The *tu coque* argument holds that because the accusers have committed the same crime as the accused without being punished, it is therefore unjust to punish the defendant. One of the most damaging legacies of Nuremberg was that nations providing judges were sometimes led by statesmen and soldiers who had committed similar crimes as the accused. German defendants were convicted of conspiracy to wage aggressive war against Poland, but there was no mention of the 1939 Hitler-Stalin Pact according to which Poland was to be partitioned.²²⁷ However, the Allied judges ultimately rejected the Nazi leaders’ *tu coque* argument accusing the Allies of the crime of aggression and found the defendants guilty.

Though the *tu coque* defense has never won an international criminal law case, it has been raised on several occasions, including during the trials of Slobodan Milošević and Saddam Hussein. The *tu coque* defense undermines the overall legitimacy of the tribunal and potentially its effectiveness when well-formulated and supported by compelling evidence. The strongest counter-argument that the ICC Prosecutor has at his or her disposal is that

settlement of international disputes, they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim [*nullum crimen sine lege*] has no application to the present facts.” *Nuremberg Judgment*, *supra* note 11, at 217.

225. *Id.* at 220.

226. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

Rome Statute, *supra* note 2, art. 22.

227. See BASS, *supra* note 14, at 200.

the *tu coque* defense is irrelevant to the guilt or innocence of a particular accused for the crimes listed in the indictment.

The Prosecutor can protect the legitimacy of the ICC from such accusations at the outset by investigating and prosecuting powerful and well-connected suspects as well as vanquished aggressors. However, by accumulating a list of indicted individuals accused of the crime of aggression whom no state is willing to arrest, the Prosecutor risks the legitimacy of the ICC in a different way. In this sense, the Prosecutor's duties of impartiality and effectiveness are likely to come into conflict when prosecuting the crime of aggression. It will be his or her challenge to strike the balance that best safeguards the legitimacy of the ICC amidst accusations of bias on the one hand and impotence on the other.

Beyond the three historic challenges raised at Nuremberg, subsequent working groups on the crime of aggression have unearthed additional doubts about the legitimacy and legality of the crime. In particular, depending upon the way the crime is defined, it may violate the presumption of innocence or be void for vagueness and, on one of these bases, be altered, marginalized, or struck down by the ICC judges.

Article 66 of the Rome Statute guarantees that the accused shall be presumed innocent until proven guilty and that the onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt.²²⁸ Under the Rome Statute, the presumption of innocence applies to every aspect of the charges, and the burden of proof cannot be shifted to the accused at any point.²²⁹ Nevertheless, the Working Group is considering empowering an outside body to make a determination that an act of aggression has occurred as a jurisdictional precondition and/or as an element of the crime.²³⁰ Models representing the greatest threat to the presumption of innocence also make the outside determination prejudicial (i.e. non-reviewable) by the Court. Incorporating an element of the crime that the accused must refute, or worse, that is non-refutable, violates the presumption of innocence and makes the crime of aggression, and any case the Prosecutor bases upon it, vulnerable to defeat by the bench.²³¹

Another basis for challenging the legitimacy and legality of the crime is its definitional vagueness. A crime that is defined too vaguely violates the rights of the accused because he or she had no basis to distinguish permissible from impermissible behavior. There are several aspects of the crime of aggression that might render it void for vagueness. The first is the state/collective act of aggression itself. According to the U.N. Charter, the deter-

228. Rome Statute, *supra* note 2, art. 66.

229. *See id.* art. 67(1)(i).

230. *See supra* Part II.C.

231. The worst violation of the presumption of innocence makes the prejudicial outside determination that an act of aggression has occurred an element of the crime. It is a gray area whether an outside determination for the purpose of jurisdiction violates the presumption so badly as to violate the principle of legality.

mination that an act of aggression has occurred is a political rather than a legal judgment made primarily by the Security Council. The lack of a legal definition of the state/collective act makes the crime as vague as can be. In addition, the Working Group seems prepared to incorporate G.A. Resolution 3314, the 1974 definition of aggression, into the crime, in whole or in part.²³² But this definition was designed to assess aggression by states, and some authorities, most notably the International Law Commission in its 1996 Draft Code, do not consider it to be precise enough to serve as the basis for a criminal trial for the crime of aggression.²³³

Another aspect of the proposed crime of aggression that renders all of the models vague is the incorporation of “dangerously illiberal” modes of individual criminal liability—enterprise participation in particular—which to date has no predictable built-in or jurisprudential limitations.²³⁴ Discussing the vagueness problem in relation to the doctrine of enterprise participation at the ICTY, Osiel observes that “defense counsel receives no fair notice of the case she must refute, for it is not really until closing argument that she can have any clear idea of the target at which she must aim.”²³⁵ For the Prosecutor to be able to rely on the crime of aggression when constructing his or her case, the crime itself must be precise enough to withstand judicial scrutiny.

IV. CONCLUSION

It would be optimistic to wait expectantly for the ICC’s Assembly of States Parties to incontrovertibly resolve the question of individual responsibility for aggressive war in 2010. The history of twentieth century attempts to define the supreme international crime is a history of failure, punctuated by rare glimpses of success. These glimpses include the signing of the idealistic but ill-fated interwar assurances, the 1945 Nuremberg watershed and its successor trials, the General Assembly’s 1974 consensus definition of aggression, the creation of the U.N. *ad hoc* tribunals, the drafting of the Rome Statute with its provision on aggression, and the emergence of a functioning International Criminal Court. Gradually, precedents, institutions, doctrine, and procedures have amassed, and with periodic ICC review conferences scheduled, the machinery is in place to define and implement the crime, if not in 2010, then at a subsequent opportunity.

From the perspective of the ICC Prosecutor, it is important that the Working Group produce a draft provision that maximizes his or her effectiveness while insulating him or her from accusations of political bias. This tension recurs throughout many of the drafting proposals. The foremost,

232. See *supra* Part II.A.

233. See ILC Work Report, *supra* note 56.

234. See Osiel, *supra* note 194, at 1772.

235. *Id.* at 1803.

though not exclusive, factor in mitigating the tension is the jurisdictional trigger and, in particular, the statutory relationship between the Prosecutor and the organ making the determination whether a state/collective act of aggression has or has not occurred, be it the Security Council, the General Assembly, the International Court of Justice, or an expanded Pre-Trial Chamber. However the determination is made, it is clear that unless the determination is made reviewable by the ICC as an element of the crime, the provision will be compromised and the Prosecutor's case will become unstable.

Foreseeing prosecutorial challenges common to all formulations is one way to imagine how an aggression case will look. The challenges in prompting the referral, selecting the case, linking the suspect to the state act, arresting suspects, and establishing the legitimacy of the crime itself will be key struggles likely to occupy much of the Prosecutor's attention. These struggles will play out in the Prosecutor's office, diplomatic meetings, courts, and the media.

The criminalization of aggression is a worthwhile endeavor if it reduces human suffering and mitigates harm. Proponents hope that a widely accepted minimum standard will function as a focal point to help coordinate actions—domestic, international, transnational—that will deter or prevent leaders from resorting to state/collective violence. But there are a number of risks. The standard may deter the wrong sort of violent actions, actions that reduce human suffering such as the unauthorized use of force to prevent genocide. A related risk inherent in any prohibition is the implicit permission contained within. If the threshold is set too high, the crime of aggression may in fact legitimize objectionable acts of violence by not capturing them. Furthermore, mandating the ICC to prosecute aggression may undermine its effectiveness in domains of other crimes within its jurisdiction.

Another key consideration for states evaluating the crime is the legitimacy of the system established by the Rome Statute. As states evaluate the drafts in the run-up to 2009 or 2010, they should remind themselves that it was the prohibition on the use of force and its repeated violation—with no recourse—that undid the League of Nations. Finally, it is far from clear whether an operational crime of aggression will bolster or undermine diplomatic avenues for world peace. Against the backdrop of all the concerns surrounding the crime of aggression, the value of the crime will ultimately be judged by its capacity, in the hands of an able Prosecutor, to galvanize cooperation and compel compliance.