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Defining “Aggression”: Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum

JENNIFER TRAHAN*

I. INTRODUCTION

In 1945 and 1946, the International Military Tribunals at Nuremberg and Tokyo indicted individuals for committing “crimes against peace.”¹ Fifty-five years later, on the eve of the International Criminal Court’s (“ICC”) inauguration,² many states agree in theory that the ICC should exercise jurisdiction over the crime of aggression. States, however, cannot agree on a definition

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1. MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL 1945–46: A DOCUMENTARY HISTORY* 57 (Katherine E. Kurzman et al. eds., Bedford Books 1997); Preparatory Commission for the International Criminal Court, Historical review of developments relating to aggression, prepared by the U.N. Secretariat, U.N. Doc. PCNICC/2002/WGCA/L.1, at <http://daccess-ods.un.org/doc/UNDOC/LTD/N01/709/63/PDF/N0170963.pdf?OpenElement> (last visited Oct. 28, 2002) [hereinafter Secretariat’s Historical Review] at 86.

2. Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9, Art. 126 (1998), at <http://www.un.org/law/icc/statute/romefra.htm> (last visited May 15, 2002) [hereinafter ICC Statute] (requiring sixty ratifications before the ICC Statute may enter into force). The required sixty instruments of ratification for the ICC to come into existence were obtained on April 11, 2002. See Message from the Convenor, What’s next after 60 ratifications, (April 11, 2002) at <http://www.iccnw.org/html/update20020411.html>. The ICC Statute entered into force on July 1, 2002. See website of the Rome Statute of the International Criminal Court, <http://www.un.org/law/icc/index.html> (last visited Oct. 2, 2002).

for aggression.³ Thus, when the ICC commences, it will have jurisdiction to prosecute aggression, but will be unable to do so since the crime lacks a definition.⁴ The difficulty of defining the crime relates in part to determining when the ICC would have jurisdiction to hear a case concerning aggression.⁵ Because the Charter of the United Nations ("U.N. Charter") charges the United Nations Security Council ("Security Council") with determining when a state has committed aggression, difficult questions arise. Should the ICC be able to prosecute an individual for aggression before the Security Council determines that the individual's state committed aggression? Additionally, what happens when the Security Council fails to make any determination at all?

Part I of this article provides an introduction to this topic and raises the questions that will be addressed. Part II examines the ways "aggression" has been defined in the charters of the International Military Tribunals at Nuremberg and Tokyo, and Resolution 3314⁶ of the United Nations General Assembly ("General Assembly"). It also explores the extent to which the ICC Statute currently addresses the issue of aggression. Part III examines the provisions of the U.N. Charter that grant authority to the Security Council to determine when a state has committed aggression, and how that could limit the ICC's ability to adjudicate cases regarding individual responsibility. Part IV reviews various alternatives presented at the meetings of the Preparatory Commission for the International Criminal Court ("Preparatory Commission"), including proposals on a substantive definition of the crime and proposals for determining when the ICC would exercise jurisdiction. Part V comments on the proposals, examines whether there are viable alternatives to prosecuting aggression, and analyzes whether there are methods to minimize the dangers of inconsistent and politically motivated decisions interfering with the ICC's jurisdiction over the crime.

This article concludes that under the U.N. Charter, it seems inevitable that the Security Council, or possibly the General

3. Lelia Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 437 (2000). See also *infra* Part II.C.

4. Sadat & Carden, *supra* note 3, at 437.

5. See *infra* Part IV.B.

6. G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142-43, U.N. Doc. A/9631 (1974) [hereinafter G.A. Res. 3314 or Resolution 3314].

Assembly, will be involved in determining state responsibility for aggression before the ICC can exercise jurisdiction. Involving political bodies in determining when the ICC will hear cases, however, could be problematic. While the International Court of Justice ("ICJ") could be involved in such determinations, it probably cannot be the sole decision-making body addressing state responsibility given the explicit wording of the U.N. Charter. States should, however, continue to work on defining the crime of aggression, with the goal of adopting a definition that is both consistent with the U.N. Charter and minimizes the potential for undue interference with the ICC's jurisdiction.

II. PREVIOUS ATTEMPTS TO DEFINE AGGRESSION

A. *The International Military Tribunals at Nuremberg and Tokyo*

The International Military Tribunal at Nuremberg ("Nuremberg Tribunal") prosecuted individuals for the crime of aggression.⁷ Additional prosecutions in Germany after World War II, pursuant to Allied Control Council Law No. 10, and prosecutions at the International Military Tribunal for the Far East ("Tokyo Tribunal") closely followed.⁸ The Nuremberg Tribunal convicted twelve defendants of "crimes against peace," seven of whom were hanged.⁹ Additionally, the Tokyo Tribunal convicted twenty-four defendants on the same charge,¹⁰ six of whom were hanged.¹¹

7. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 39 (Alfred A. Knopf, Inc. 1992). See generally Secretariat's Historical Review, *supra* note 1 (providing a comprehensive review of the history and development of law relating to aggression).

8. See generally M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 *IND. INT'L & COMP. L. REV.* 1, 4-7 (1991).

9. MARRUS, *supra* note 1, at 58-70, 261. Eight of the twelve defendants were also convicted of participating in a common plan or conspiracy to wage wars of aggression (Count 1). *Id.* Five other defendants were hanged for committing war crimes (Count 3) and/or crimes against humanity (Count 4). *Id.*

10. Sylvia A. Fernandez 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, 593 (2002).

11. See Elizabeth S. Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 *N.Y.U. J. INT'L. L. & POL.* 373, 442. A seventh defendant was hanged for ordering, authorizing or permitting atrocities (Count 54). *Id.*

Historians have suggested that a primary focus—in fact, probably the greatest focus of the trials before both tribunals—was on the crime of aggression.¹² The Nuremberg Tribunal explicitly emphasized the importance of prosecuting the crime of aggression, stating in its judgment:

The charges of the Indictment that the defendants planned and waged aggressive war are charges of the utmost gravity To initiate a war of aggression, therefore, is not only an international crime; it is *the supreme international crime* differing only from other war crimes in that it contains within itself the accumulated evil of the whole.¹³

Unfortunately, the indictments, the charters of the International Military Tribunals and the judgments fail to provide much guidance as to what constitutes “aggression” or “crimes against peace.” The Nuremberg Charter merely defines “crimes against peace” as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international law, treaties, agreements or assurances.”¹⁴ The Tokyo Charter only differs in that it covers wars both “declared or undeclared.”¹⁵ Neither charter, however, offers a specific definition for “aggression” or “a war of aggression.”¹⁶ Both charters also define as criminal “participation in a common plan or conspiracy [to accomplish a war of aggression].”¹⁷ Control Council Law No. 10 contains similar definitions.¹⁸

12. See TAYLOR, *supra* note 7, at 39. Fifty-two of the fifty-five counts of the indictment submitted to the Tokyo Tribunal related to crimes against the peace. See Secretariat’s Historical Review, *supra* note 1, ¶ 271, at 86.

13. Lawrence D. Egbert, ed. *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT’L L. 172, 186 (1947) (emphasis added).

14. Charter of the International Military Tribunal, in *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement)*, August 8, 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280, at art. 6, available at <http://www.umn.edu/humanrts/instree/imt1945.htm> (last visited May 15, 2002) [hereinafter *Nuremberg Charter*].

15. Charter of the International Military Tribunal for the Far East, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> (last visited May 6, 2002), at art. 5 [hereinafter *Tokyo Charter*].

16. *Nuremberg Charter*, *supra* note 14, at art. 6; *Tokyo Charter*, *supra* note 15, at art. 5.

17. *Id.* The *Nuremberg Charter*’s use of the term “aggressive war” is anchored in other sources of International Law: the unratified 1923 draft Treaty of Mutual Assistance; the preamble to the 1924 Protocol for the Pacific Settlement of International Disputes; the 1927 resolution of the Assembly of the League of Nations; and the Sixth International

In 1946, the General Assembly affirmed in Resolution 95 "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."¹⁹ That Resolution also directed the Committee on Codification of International Law to codify "offences [sic] against the peace and security of mankind" or an "International Criminal Code," based on "the principles recognized in the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."²⁰

B. General Assembly Resolution 3314

While discussions of the definition of aggression continued at various special committees,²¹ the General Assembly passed a resolution defining aggression in 1973.²² The resolution focused, however, on determining state, not individual, responsibility.²³

Specifically, Resolution 3314 defines aggression as "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

Conference of American States in 1928. See Grant M. Dawson, *Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 413, 433 (2000).

18. Allied Control Council Law No. 10, art. 2(1)(a), available at <http://www.yale.edu/lawweb/avalon/imt/imt10.htm> (last visited Feb. 28, 2002). That law defines "crimes against peace" as:

[I]nitiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

Id. Military tribunals established in the American zone in Germany conducted 12 trials, four of which dealt with charges of crimes against the peace—the *I.G. Farben* case, the *Krupp* case, the *High Command* case, and the *Ministries* case. Secretariat's Historical Review, *supra* note 1, ¶ 119, at 44. France established a similar tribunal in the French zone of occupation; that tribunal adjudicated the *Roechling* case, which also involved such charges. *Id.* ¶ 120, at 44.

19. G.A. Res. 95(I), U.N. GAOR, 1st Sess., at 175, U.N. Doc A/Res/95 (1946).

20. *Id.*

21. De Gurmendi, *supra* note 10, at 594.

22. G.A. Res. 3314, *supra* note 6.

23. *Id.* at preamble (recommending that the Security Council "should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression."). The reference to "an act of aggression" clearly pertains to the act of a state since, as discussed further below, the U.N. Charter charges the Security Council with determining when a state has committed an act of aggression. See Part III *infra*.

this Definition.”²⁴ It then lists a series of acts that 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 . . . ;
- (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. . . .²⁵

The Resolution also provides that “[t]he acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.”²⁶

24. G.A. Res. 3314, *supra* note 6, at 143.

25. *Id.*

26. *Id.* In addition, it states:

[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 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.

Id.

C. The ICC Statute—Holding A Place Open For Aggression

In 1991, the International Law Commission ("ILC") published its Draft Code of Offenses Against the Peace and Security of Mankind.²⁷ Two years later, in 1993, the ILC drafted a proposal for an international criminal court.²⁸ The Code of Offenses, however, contained only a meager definition of aggression, stating: "An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression."²⁹ From 1994 until 1998, the international criminal court proposal was debated and changed, culminating in negotiations held in Rome in June and July of 1998, where the ICC Statute was finalized.³⁰

At the Rome Conference,³¹ delegates could not agree on a definition for the crime of aggression.³² They compromised by including aggression in the ICC Statute as one of the crimes over which the ICC will have jurisdiction³³ but did not provide a definition of aggression. The ICC Statute states:

27. Henry King Jr., *Commentary: The Modern Relevance of the Nuremberg Principles*, 17 B.C. THIRD WORLD L.J. 279, 281 (1997).

28. *Id.* at 281. The ILC's efforts took so long to reach fruition because the Cold War blocked progress on such efforts. See Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference*, 5 GLOBAL GOVERNANCE, Jan.-Mar. 1999, at 1-2. See Bassiouni, *supra* note 8, at 12 ("During the 'cold war' (1948-1989) countries on both sides of the then iron curtain perceived the exigencies of national security at [sic] precluding consideration of an international criminal court [T]he real reason was that the two superpowers engaged in acts violating international criminal law, as did their surrogates, satellites and respective friendly countries.")

29. *Crimes against the Peace and Security of Mankind: Report of the International Law Commission*, U.N. GAOR, 51st Sess., Supp. No. 10, at 83, U.N. Doc. A/51/10 (1996). See Rosemary Rayfuse, *The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission*, 8 CRIM. L.F. 43 (1997) (discussing the drafting of the Code of Crimes).

30. RUTH WEDGWOOD, *THE CONSTITUTION AND THE ICC, IN THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT* 119 (Sarah B. Sewall & Carl Kaysen eds., Rowan & Littlefield Publishers, Inc. 2000).

31. The "Rome Conference" refers to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. See generally *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* (Roy S. Lee, ed., Kluwer Law International 1999) (providing a background on the ICC Statute and the Rome Conference).

32. *Id.* at 84-85.

33. ICC Statute, *supra* note 2, at art. 5(1).

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.³⁴

Pursuant to Articles 121 and 123 of the ICC Statute, the member states may amend the statute seven years after it enters into force.³⁵

It was agreed that, at Preparatory Commission meetings following the Rome Conference,³⁶ states would resolve additional items needed before the ICC could commence operations, including the Rules of Procedure and Evidence, Elements of Crimes and other documents supplemental to the ICC Statute. During the ten Preparatory Commission sessions held,³⁷ states have agreed on, among other things, the Rules of Procedure and Evidence³⁸ and Elements of Crimes,³⁹ but have failed to agree on a definition of aggression. Because the Preparatory Commission meetings have now concluded, the issue of defining aggression will be handled by a "special working group on the crime of

34. *Id.* at art. 5(2).

35. *Id.* at art. 121, 123. At that time, any amendment would have to be voted in by two-thirds of the States Parties, and would enter into force only if ratified by seven-eighths of them, but, would not enter into force for states who did not accept the amendment. De Gurmendi, *supra* note 10, at 604 (citing ICC Statute, art. 121).

36. The Preparatory Commission was established by the General Assembly, as requested by, and with the mandate established in Resolution F of the Rome Conference. Benedetti & Washburn, *supra* note 28, at 3. In accordance with paragraph 2 of Resolution F, the Preparatory Commission consisted of representatives of States that signed the Final Act at the Rome Conference, and other States that were invited to participate at the Rome Conference. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Resolution F, at <http://www.un.org/law/ICC/prepcomm/prepfra.htm> (last visited May 15, 2002).

37. The tenth and final session of the Preparatory Commission was held at the United Nations from July 1 to July 12, 2002. See website of the Preparatory Commission for the International Criminal Court, at <http://www.un.org/law/icc/prepcomm/prepfra.htm> (last visited Oct. 2, 2002).

38. Finalized draft text of the Rules of Procedure and Evidence, adopted by the Preparatory Commission for the International Criminal Court at its 23rd meeting on June 30, 2000, at <http://www.un.org/law/icc/statute/elements/elemfra.htm> (last visited Oct. 10, 2002).

39. Finalized draft text of the Elements of Crimes, adopted by the Preparatory Commission for the International Criminal Court at its 23rd meeting on June 30, 2000, at <http://www.un.org/law/icc/statute/elements/elemfra.htm> (last visited Oct. 10, 2002).

aggression."⁴⁰ The goal is to eventually amend the ICC Statute to define the crime and allow prosecutions to occur.

III. THE MANDATE IN THE ICC STATUTE TO DEFINE AGGRESSION—DRIVEN BY THE U.N. CHARTER

As described above, the ICC Statute sets forth two separate mandates regarding the crime of aggression. They are (a) "defining the crime" and (b) "setting out the conditions under which the Court shall exercise jurisdiction with respect to th[e] crime."⁴¹ The ICC Statute also specifically requires that any provision "shall be consistent with the relevant provisions of the Charter of the United Nations."⁴² Upon examining the U.N. Charter, the reason for the two separate mandates becomes clear.

Article 2(4) of the U.N. Charter enshrines the basic principle of non-aggression.⁴³ It provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁴⁴ Article 24(1) of the Charter then gives "primary responsibility for the maintenance of international peace and security" to the Security Council.⁴⁵ Additionally, Article 39 provides:

The Security Council *shall determine the existence of any threat to the peace, breach of the peace, or act of aggression* and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.⁴⁶

40. It is planned that the working group, which would be open to all member States of the U.N., will meet during regular sessions of the Assembly of States Parties. See Draft resolution of the Assembly of States Parties on the continuity of work in respect of the crime of aggression, in Report of the Preparatory Commission for the International Criminal Court (continued), U.N. Doc. PCNICC/2002/2/Add.2, found at <http://www.un.org/law/icc/prepcomm/prepfra.htm> (last visited Oct. 17, 2002), at 2. That draft resolution was adopted at the first Assembly of States Parties.

41. ICC Statute, *supra* note 2, at art. 5(2).

42. *Id.*

43. U.N. CHARTER art. 2, para. 4.

44. *Id.*

45. *Id.* at art. 24.

46. *Id.* at art. 39 (emphasis added).

From these provisions stems the conundrum that has faced states at the Preparatory Commissions meetings.⁴⁷ First, if the Security Council “shall determine the existence of any . . . act of aggression,”⁴⁸ *i.e.*, an act of aggression *by a state*, while the ICC only has jurisdiction over “natural persons,”⁴⁹ what is the interrelationship between the ICC and the Security Council? Stated another way, can the ICC only adjudicate individual responsibility after the Security Council has determined that a defendant’s state committed aggression? If so, does the ICC commence its own factual inquiry as to whether aggression occurred, or is it bound to follow the Security Council’s determination? Second, what if the Security Council fails to make a determination? Under Article 24(1) of the U.N. Charter, the Security Council only has the *primary* responsibility of ensuring international peace and security.⁵⁰ Can another body such as the General Assembly or the ICJ act when the Security Council fails to do so?

IV. ATTEMPTS AT THE ICC’S PREPARATORY COMMISSION MEETINGS TO DEFINE AGGRESSION

In various proposals made at Preparatory Commission meetings, states have attempted to define the crime of aggression and establish procedures to trigger the ICC’s jurisdiction regarding the crime.

A. Attempts to Define the Crime

Most proposals for defining the crime address two issues: (1) the crime the individual commits, and (2) the act by the state of aggression. Thus, only when the individual commits the acts in the context of state aggression would criminal responsibility follow.

47. The argument has been made that the reason a determination whether a state committed aggression must be made prior to any determination of individual responsibility is that aggression is unlike any other crime: it is essentially something only a state can do to another state. Benjamin B. Ferencz, *Deterring Aggression by Law—A Compromise Proposal*, at <http://www.benferencz.org/defined.htm> (last visited Jan. 11, 2001).

48. U.N. CHARTER art. 39.

49. ICC Statute, *supra* note 2, at art. 25(1) (“[t]he Court shall have jurisdiction over natural persons pursuant to this Statute.”). Article 1 similarly provides that the Court “shall have the power to exercise its jurisdiction *over persons* for the most serious crimes of international concern . . .” *Id.* at art. 1 (emphasis added).

50. U.N. CHARTER art. 24 (emphasis added).

While there have been differences in terms of proposals regarding the individual's acts, the greatest conceptual differences concern the extent to which the state's act of aggression would be addressed. States have debated three basic approaches to defining the state's act of aggression. The first approach uses a generic definition that would define state aggression.⁵¹ The second approach is to adopt the approach taken by the General Assembly in Resolution 3314, and enumerate acts constituting state aggression.⁵² The third approach does not define the act of aggression at all, leaving the matter completely to the determination of the Security Council.⁵³

In addition to these overriding differences of approach, there are numerous other complex issues, including: (a) whether the definition should encompass only a "war of aggression," so that it is limited to the most serious instances of aggression, to the exclusion of less serious acts such as border skirmishes; (b) whether the definition, alternatively, should be couched in terms of the "use of [armed] force" or "an armed attack" since those terms are used in the U.N. Charter⁵⁴ and Resolution 3314;⁵⁵ (c) whether the crime should be a "leadership crime" and focus only on those in positions of control capable of directing political or military actions of the state; (d) whether attempts or threats to commit aggression should be criminalized; (e) whether there should be an explicit exception for self-defense of a state; (f) whether there should be a humanitarian exception if the rights and/or principle of self-determination of peoples are violated;⁵⁶ (g) whether the definition should cover non-state actors; (h) what type of *mens rea* is required; and (i) what type of *actus reus* triggers responsibility.⁵⁷

51. See *infra* Part IV.A.1.

52. See *infra* Part IV.A.2.

53. See *infra* Part IV.A.3.

54. U.N. CHARTER art. 2(4). See also *id.* at art. 51 (entitling a state to resort to individual or collective self-defense in response to an "armed attack").

55. G.A. Res. 3314, *supra* note 6, at art. 1.

56. For instance, Benjamin B. Ferencz has advocated for an explicit exception covering humanitarian intervention. See Ferencz, *supra* note 47.

57. For example, in terms of *actus reus*, it would need to be decided whether it would be criminal to "initiate or carry out" aggression, or also to "plan or prepare" to commit aggression. See U.N. Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/L.4/Rev. 1, at 13-14 [hereinafter Consolidated Proposal].

At the third Preparatory Commission session, a Consolidated Proposal was issued that reflected work done prior to, during and following the Rome Conference.⁵⁸ The Consolidated Proposal encompasses each of the various approaches to defining aggression. The proposed language in the different versions reflects some of the substantive issues implicated. Below are discussed: (1) the generic approach in which the act of aggression is newly defined; (2) the enumerative approach that relies on the approach taken by the General Assembly in Resolution 3314; and (3) an approach that leaves the definition of the act of aggression solely to the Security Council's discretion.

1. The Generic Approach

Variations 1 and 2 of Option 1 of the Consolidated Proposal use a generic approach. This generic approach would define the individual's crime (Option 1), and then define the required context – *i.e.*, the state's acts (Variations 1 and 2):

Option 1

1. For the purposes of the present Statute, [and subject to a determination by the Security Council regarding the act of a State,] the crime of aggression means [the use of the armed force, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action of a State, against the sovereignty, territorial integrity or political independence of a State in violation of the Charter of the United Nations.] any of the following acts committed by [an individual][a person] who is in a position of exercising control or capable of directing the political or military action of a State:

- (a) initiating, or
- (b) carrying out

Variation 1

[an armed attack] [the use of armed force] [a war of aggression] [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

58. For the full text of the relevant parts of the Consolidated Proposal, *see* Appendix A.

the foregoing] against another State [against another State, or depriving other peoples of their rights to self-determination], in [manifest] contravention of the Charter of the United Nations, to violate [to threaten or to violate] the [sovereignty,] territorial integrity or political independence of that State [or the inalienable rights of those people] [except when this is required by the principle of equal rights and self-determination of peoples and the rights of individual or collective self-defence [sic]]

Variation 2

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.⁵⁹

In addition, Greece and Portugal made a fairly well received proposal (the "Greece/Portugal Proposal") containing the following generic definition:

For the purposes of the present Statute, aggression means the use of armed force, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action of a State, against the sovereignty, territorial integrity or political independence of a State in violation of the Charter of the United Nations.⁶⁰

A somewhat more detailed, generic definition was proposed in the fall of 2001 by Bosnia, Herzegovina, New Zealand and Romania at the Eighth Preparatory Commission Session.⁶¹ That proposal, which clearly differentiates between the individual's crime and the state's act of aggression, states:

1. A person commits the crime of aggression who, being in a position to exercise control over or direct the political or military action of a State, intentionally and knowingly orders or

59. Consolidated Proposal, *supra* note 57, at 13.

60. The Greece/Portugal Proposal is identified as U.N. Doc. PCNICC/2000/WGCA/DP.5. It was previously identified as U.N. Doc. PCNICC/1999/WGCA/DP.1.

61. For the relevant parts of the Bosnia, Herzegovina, New Zealand and Romania proposal for the definition of the crime of aggression, see U.N. Doc. PCNICC/2001/WGCA/DP.2.

participates actively in the planning, preparation, initiation or waging of aggression committed by that State.

2. For the purposes of the exercise of jurisdiction by the Court over the crime of aggression under the Statute, aggression committed by a State means the use of armed force to attack the territorial integrity or political independence of another State in violation of the Charter of the United Nations.⁶²

2. The General Assembly's Enumerative Approach

Another approach contained in the Consolidated Proposal, and, most recently, the Coordinator's Discussion Paper from the Ninth and Tenth Preparatory Commission Sessions,⁶³ is to either incorporate the definition of state aggression contained in Resolution 3314, or to incorporate that resolution by reference. Thereby, the ICC would rely on the General Assembly's definition of state aggression.

Thus, Variation 3 of the Consolidated Proposal adds to Option 1 a list of acts that, when committed with sufficient gravity, would constitute aggression by a state.⁶⁴ The acts are essentially identical to those listed in Resolution 3314.⁶⁵ Brackets in the text of Variation 3 suggest that one possibility is to make the list closed-ended, thereby having the list contain all possible types of aggression. Another possibility is to leave it open-ended, making the list illustrative of the types of aggression but leaving open the possibility of including other forms of aggression.

The most recent formulation of this approach is contained in the Coordinator's Discussion Paper, which provides:

1. For the purposes 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

62. *Id.*

63. See Discussion Paper proposed by the Coordinator, in Report of the Preparatory Commission for the International Criminal Court (continued), U.N. Doc. PCNICC/2002/2/Add.2, found at <http://www.un.org/law/icc/prepcomm/prepfra.htm> (last visited Oct. 17, 2002) at 3-5 [hereinafter Coordinator's Discussion Paper].

64. Consolidated Proposal, *supra* note 57, at 14.

65. See *supra*, Part II.B. See Appendix A for the full text of Variation 3.

and scale, constitutes a flagrant violation of the Charter of the United Nations. . . .

2. For the purpose of paragraph 1, 'act of aggression' means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, which is determined to have been committed by the State concerned. . . .⁶⁶

3. The Leave-It-to-the-Security Council Approach

A final option contained in the Consolidated Proposal leaves the act of aggression solely to be determined and defined by the Security Council. This option provides:

Option 2

For the purposes of the present Statute and subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating or carrying out a war of aggression.⁶⁷

B. Conditions for the Exercise of Jurisdiction

The second and even more difficult issue is to establish conditions prefatory to the ICC's exercise of jurisdiction. Various proposals address this issue. The proposals include: (1) requiring the Security Council to make the determination of whether state aggression occurred, and if the Security Council did not find aggression occurred, the ICC could not act; (2) providing that the ICC can act if the Security Council fails to make a determination; (3) having the General Assembly make the determination if the Security Council does not; and (4) having the ICJ make the determination if the Security Council does not.

1. The Security Council Must Make the Determination

The first option is to require the Security Council to make a determination of whether a state has committed an act of

66. Coordinator's Discussion Paper, *supra* note 63, at 1–2. The word "effectively" was added to paragraph 1 based on a proposal of Belgium, Cambodia, Sierra Leone and Thailand, U.N. Doc. PCNICC/2002/WGCA/DP.5. The goal is to ensure that those who in fact control the state and military, and not those who do so in title alone, bear responsibility.

67. Consolidated Proposal, *supra* note 57, at 14.

aggression before the ICC could proceed. Thus, Option 1 of the Consolidated Proposal provides that “[t]he Security Council shall determine the existence of an act of aggression . . . before proceedings take place in the Court with regard to the crime of aggression.”⁶⁸ Under that option, the Security Council would have either six or twelve months from the ICC’s request to make its determination.⁶⁹ If the Security Council did not make a finding of aggression, the ICC could not hear the case.⁷⁰

2. If the Security Council Fails to Act, the ICC may Proceed

A second option is that if the Security Council does not act within a required time, the ICC may proceed. Thus, Variation 1 of Option 1 provides that in the absence of a Security Council decision within the required time frame, the ICC can proceed.⁷¹ It also states that “[t]he decision of the Security Council . . . shall not be interpreted as in any way affecting the independence of the Court in the exercise of its jurisdiction”⁷² The Greece/Portugal Proposal takes the same approach, providing that if the Security Council fails to make a determination within twelve months, the ICC can proceed.⁷³

3. If the Security Council Fails to Act, the Issue Goes to the General Assembly

A third option is that if the Security Council fails to act within a certain time, the matter would go to the General Assembly. Thus, Variation 2 of the Consolidated Proposal on the conditions

68. Consolidated Proposal, *supra* note 57, at 15. The Security Council has adopted resolutions condemning aggression by a state on several occasions. See Secretariat’s Historical Review, *supra* note 1, ¶¶ 383–88, 115–16 (discussing Security Council resolutions condemning aggression by Southern Rhodesia); *id.* ¶¶ 389–98, 117–19 (aggression by South Africa); *id.* ¶ 399, 120 (aggression against Benin); *id.* ¶¶ 400–402, 120–21 (aggression by Israel against Tunisia); *id.* ¶ 404, 121 (“aggressive acts” by Iraq against Kuwait).

69. Consolidated Proposal, *supra* note 57, at 15.

70. The Coordinator’s Discussion Paper also includes this option. See Coordinator’s Discussion Paper, *supra* note 63, ¶ 5, option 2.

71. Consolidated Proposal, *supra* note 57, at 15.

72. *Id.* Option 2 of the Consolidated Proposal on the conditions for the exercise of jurisdiction, which is not discussed herein, is similar to Option 1, Variation 1. Option 3 is also not discussed because it is similar to Option 1.

73. See Greece/Portugal Proposal, *supra* note 60, ¶ 4. This approach is also reflected in the Coordinator’s Discussion Paper, see Coordinator’s Discussion Paper, *supra* note 63, ¶ 5, option 1 (requiring action within six months).

for the exercise of jurisdiction provides that in the absence of Security Council action within the required time frame, the ICC may request the General Assembly to make a recommendation.⁷⁴ The General Assembly would have twelve months to act.⁷⁵ If it failed to do so, the ICC would be free to proceed.⁷⁶ Variation 2 further states that the recommendation of the General Assembly "shall not be interpreted as in any way affecting the independence of the Court in the exercise of its jurisdiction. . . ."⁷⁷

4. If the Security Council Fails to Act, the Issue Could Go to the International Court of Justice

A fourth option is that if the Security Council does not act within a certain time, the issue could go to the ICJ. Thus, under proposals by Bosnia, Herzegovina, New Zealand and Romania, the Security Council would be charged with determining whether a state had committed aggression. If the Security Council failed to make such a determination within a certain period of time, the ICC could request the General Assembly to ask the ICJ⁷⁸ for an advisory opinion.⁷⁹ The Coordinator's Discussion Paper provides that either the General Assembly or Security Council acting on vote of any nine members could ask the ICJ for an advisory opinion.⁸⁰

74. Consolidated Proposal, *supra* note 57, at 15–16. The General Assembly has adopted resolutions condemning aggression in a number of situations. For an example of such a determination, see Secretariat's Historical Review, *supra* note 1, ¶ 415, 123–24 (discussing resolutions condemning aggression by China against Korea).

75. Consolidated Proposal, *supra* note 57, at 15.

76. *Id.*

77. *Id.* at 15–16. This approach is also reflected in the Coordinator's Discussion Paper, see Coordinator's Discussion Paper, *supra* note 63, ¶ 5, option 3.

78. The ICJ has opined on issues related to aggression, especially in the context of ordering provisional measures. See Secretariat's Historical Review, *supra* note 1, ¶¶ 444–50, 132–34 (discussing cases). Both the General Assembly and the Security Council may request advisory opinions from the ICJ "on any legal issue." U.N. CHARTER art. 96

79. Under the first proposal, after the ICJ rendered its advisory opinion, the General Assembly could recommend that the ICC Prosecutor proceed. U.N. Doc. PCNICC/2001/WGCA/DP.1, ¶¶4–5 [hereinafter BH I Proposal]. The second proposal eliminates this step, enabling the ICC to proceed once the ICJ renders an advisory opinion determining that aggression occurred. U.N. Doc. PCNICC/2001/WGCA/DP.2, ¶6(a) [hereinafter BH II Proposal].

80. Coordinator's Discussion Paper, *supra* note 63, ¶ 5, option 4. The approach of having nine members of the Security Council vote derives from a proposal by the Netherlands, U.N. Doc. PCNICC/2002/WGCA/DP.1 [hereinafter "Netherlands Proposal"]. Thus, the Security Council's voting would be treated as a procedural, not a substantive, matter. See U.N. CHARTER art. 27, para. (2)–(3) (voting on procedural

The BH II Proposal also permits the ICC to hear a case of aggression if the Security Council fails to make a determination and the ICJ, as part of a contentious case, decides that a state committed aggression.⁸¹

V. DISCUSSION OF THE PROPOSALS AND ALTERNATIVE IDEAS

At the Preparatory Commission meetings, states have engaged in extensive discussions of these and other proposals. Below is a discussion of some of the advantages and disadvantages of the proposals.

A. *Advantages and Disadvantages of the Proposals on the Definition of Aggression*

The generic approach to defining an act of aggression has various advantages and disadvantages. The generic approach is beneficial because it does not limit determinations to any specific instances and thus, is able to cover situations not specifically enumerated, and thus newly devised forms of aggression. There may be some concern whether a generic definition, however, would provide a defendant with sufficient notice of the acts covered to satisfy the principle of *nullum crimen sine lege*.⁸² Since the acts involved in planning aggression are not inherently bad acts and depend on context—*i.e.*, the same acts could be criminal if undertaken during an offensive military engagement, but legitimate if undertaken during a state's self defense—one must be especially mindful of such concerns.

The enumerative approach of Resolution 3314, especially if the list of acts covered is closed-ended provides clearest notice, but would restrict the ICC in the event a potential defendant commits another form of aggression. If states agree upon a closed-ended list, the Preparatory Commission must give serious consideration to whether the list of acts in Resolution 3314 is complete and

matters requires nine votes; voting on substantive matters requires nine votes and concurring votes of Permanent Members).

81. BH II Proposal, *supra* note 79, ¶ 6(b). This approach is also reflected in the Coordinator's Discussion Paper, *supra* note 63, ¶ 5, option 5.

82. The ICC Statute specifically recognizes this principle in a section entitled "General Principles of Criminal Law." Specifically, Article 22(2) provides that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy," and that "[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." ICC Statute, *supra* note 2, at art. 22(2).

thorough.⁸³ An open-ended list has the benefit of encompassing other forms of aggression, but would also raise questions as to notice regarding acts not specifically enumerated. Resolution 3314 is appealing because the General Assembly has already agreed on the list of acts it contains. The General Assembly, however, did not adopt Resolution 3314 with criminal responsibility in mind.⁸⁴ In fact, the concept of listing acts that *illustrate* aggression, as Resolution 3314 does, seems anathema to the specificity and completeness with which criminal law should be defined.⁸⁵

Option 2 of the definition of the crime⁸⁶ is more problematic because it essentially leaves the definition of the crime in the Security Council's hands. In Option 2, aggression is basically not defined.⁸⁷ Instead, it is left to the Security Council to determine whether aggression has occurred, with the ICC determining whether "planning, preparing, initiating or carrying out a war of aggression" has occurred. There is good reason to disfavor this option, which has not been included in any of the more recent proposals. First, Option 2 arguably fails to provide a potential defendant with notice of the acts constituting aggression. Second, Option 2 suggests that the Security Council determination binds the ICC, which presumably means the ICC could not make any independent inquiry into whether aggression occurred. If the ICC prosecutor does not need to prove that aggression occurred, serious concerns arise whether the defendant would be deprived of the presumption of innocence, the opportunity to rebut the case against him, and other fair trial protections.⁸⁸

83. See G.A. Res. 3314, *supra* note 6, at art. 3.

84. See *id.* at preamble.

85. Resolution 3314 also allows the Security Council to determine that acts that would otherwise constitute aggression do not if the acts are "justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity." *Id.* at art. 2. This type of language is also problematic for defining criminal responsibility.

86. See Consolidated Proposal, *supra* note 57, at 14.

87. *Id.* Option 2 on the definition of the crime is identical to Option 3 on the conditions for the exercise of jurisdiction. *Id.* at 16.

88. See ICC Statute, *supra* note 2, at art. 66 (presumption of innocence; onus on the prosecutor to prove guilt; requirement of proof beyond a reasonable doubt); *id.* at art. 67(1)(e); (the right to examine witnesses and raise defenses); *id.* at art. 67(1)(i); (defendant entitled not to have any reversal of the burden of proof or any onus of rebuttal). If a defendant is charged with aggression, one would expect proof that: (a) aggression occurred, and (b) the defendant, both in terms of his acts and his mental state, was sufficiently involved to warrant individual criminal responsibility. Thus, if the Security

As to the substantive wording of the definition, Germany issued a proposal addressing several important issues.⁸⁹ Germany argues that in the past, especially at Nuremberg and Tokyo, only a “war of aggression” was criminalized.⁹⁰ There is, however, merit in including more than full-scale wars in the definition. Aggression does not usually start out as a full-scale war and potential perpetrators could perceive criminalizing only a “war of aggression” as giving a green light to lesser forms of attack, such as border incursions. Moreover, the U.N. Charter not only prohibits wars of aggression, but prohibits “the threat or use of force”⁹¹ and provides that an “armed attack” justifies the use of self-defense.⁹²

Germany also endorses the widely accepted view that aggression should only be a “leadership crime.”⁹³ This is

Council solely determined the definition of aggression, it would seem to obviate proof of half the case, and deprive the defendant of the chance to rebut that proof.

89. U.N. Doc. PCNICC/2000/WGCA/DP.4 [hereinafter German Position Paper]. Germany’s labeling its paper a “proposal” is a misnomer, since the document contains no new proposal, but instead advances Germany’s views on various issues. *Id.*

90. *Id.* at 4–6. For a comprehensive discussion of when the following terms have been invoked as criminal in the context of the Nuremberg Tribunal, the Tokyo Tribunal, and trials pursuant to Control Council Law No. 10, see Historical Review of Developments Relating to Aggression, prepared by the Secretariat, Addendum, U.N. Doc. PCNICC/2002/WGCA/L.1/Add.1, <http://www.un.org/law/icc/prepcomm/prepfra.htm> (last visited May 16, 2002) [hereinafter Secretariat’s Historical Review Addendum], Table 1-2 (discussing the following terms: aggression, acts of aggression, act of war, act of aggressive war, war of aggression, war in violation of treaties, threat of force, armed attack, invasion, occupation, annexation or incorporation and war).

91. U.N. CHARTER art. 2(4).

92. U.N. CHARTER art. 51. Presumably, the ICC Prosecutor will not waste the ICC’s time with *de minimis* violations since the jurisdiction of the ICC only covers the “most serious crimes.” ICC Statute, *supra* note 2, at art. 1. Some states have suggested that only “manifest” breaches of the U.N. Charter be covered so that humanitarian intervention would not count as aggression. Consolidated Proposal, *supra* note 57, at 13. Not only is it unclear what breaches would be “manifest,” that goal could be achieved, however, in other ways. For example, if aggression is defined as involving action against the “territorial integrity or political independence” of a state that would presumably exclude humanitarian intervention, which should have neither aim.

93. German Position Paper, *supra* note 89, at 7. See also Proceedings of the Preparatory Commission at its Seventh Session (Feb. 26–Mar. 9 2001), U.N. Doc. PCNICC/2001/L.1/Rev.1 at 20 (noting that the principal that aggression is committed by political or military leaders seems to enjoy “widespread support”). Prosecuting those in a “leadership” position is also supported by the precedent of the Nuremberg and Tokyo Tribunals, which only prosecuted major war criminals. See, e.g., Secretariat’s Historical Review, *supra* note 1, at ¶ 123, 45. Prosecutors under Control Council Law No. 10 also were limited to persons holding high-level political, civil, military, financial, industrial or economic positions. *Id.*

In explaining why aggression should be a “leadership crime,” the decision in the *I.G. Farben* case states:

consistent with the ICC's jurisdiction to prosecute the "most serious crimes of international concern"⁹⁴ and presumably, those most responsible. Additionally, Germany argues that the definition should not include attempts to commit aggression.⁹⁵ Considering that a prerequisite to the ICC's exercise of jurisdiction will most likely be a determination that aggression by a state *has* occurred, it would make no sense to criminalize a "threat" or "attempt" that does not lead to such an act. Without an act of aggression, the ICC would not have jurisdiction to hear such a case.⁹⁶

B. Issues Concerning Proposals on the Conditions for the Exercise of Jurisdiction

Even more difficult issues are implicated regarding the conditions for the ICC's exercise of jurisdiction. Although a variety of issues in the different proposals warrant consideration,⁹⁷

We cannot say that a private citizen shall be placed in the position of being compelled to determine in the heat of war whether his Government is right or wrong, or, if it starts right, when it turns wrong. We would not require the citizen, at the risk of becoming a criminal under the rules of international justice, to decide that his country has become an aggressor and that he must lay aside his patriotism, the loyalty to his homeland and the defence [sic] of his own fireside at the risk of being adjudged guilty of crimes against peace on the one hand, or of becoming a traitor to his country on the other, if he makes an erroneous decision based upon facts of which he has but vague knowledge.

Secretariat's Historical Review, *supra* note 1, ¶ 137, at 49, quoting *United States v. Krauch* (the *I.G. Farben* case), in *Trials of War Criminals before the Nürnberg Military Tribunals*, United States Government Printing Office (1952), vol. VIII, at 1126. For a compilation of past jurisprudence regarding the responsibility of leaders, policy makers, decision makers and high level officials, see Secretariat's Historical Review Addendum, *supra* note 90, Table 5 (concluding that "the relevant criterion is not a person's title, rank or position but rather the ability to exercise the attributes of power that accompany a high-level position").

94. ICC Statute, *supra* note 2, at art. 1.

95. German Position Paper, *supra* note 89, at 7.

96. The Coordinator's Discussion Paper appropriately proposes that certain articles of the Rome Statute, including article 25(f)(3), which provides that taking "a substantial step" to committing a crime that does not occur creates criminal exposure, would not apply to the crime of aggression. See Coordinator's Discussion Paper, *supra* note 63, ¶ 3.

97. For instance, as to Option 1, Variation 1 of the Consolidated Proposal on the conditions for the exercise of jurisdiction and the Greece/Portugal Proposal, a question arises whether any automatic fallback to the ICC without a prior determination that a state committed aggression would violate the U.N. Charter's requirement that the Security Council make such determinations. Consolidated Proposal, *supra* note 57, at 15; Greece/Portugal Proposal, *supra* note 60, ¶ 4. As to the BH I Proposal and BH II Proposal, there are concerns whether it would be consistent with the ICJ Statute to have the ICJ render an advisory opinion regarding aggression vis-à-vis a state that had not

a more overriding problem is inherent in all the proposals. All the proposals, to some degree, run the risk of politicized and inconsistent determinations, and thus, piecemeal application of the law. These risks, however, may be unavoidable given the mandates of the U.N. Charter.

1. Does Involving a Political Body in the Process Allow for Neutral Application of Justice?

The notion of a court, such as the ICC, having to obtain approval from a political body such as the Security Council or the General Assembly, before it may proceed with a case seems contrary to the goal of achieving justice. Justice should apply equally to all on an apolitical basis.⁹⁸ There is a clear danger that aggression might occur, but, for political reasons, the Security Council (for example, due to the veto of a Permanent Member) or the General Assembly does not denominate it as such. Consequently, ICC prosecution would be blocked based on a political decision, having little or nothing to do with culpability.⁹⁹

consented to the ICJ's jurisdiction. Comments of the United States on the BH I Proposal, Notes of the Seventh Preparatory Commission Meeting, Session on the Crime of Aggression, prepared by the Coalition for an International Criminal Court ("CICC") (Mar. 6, 2001) (notes of the author); see BH I Proposal, *supra* note 79; BH II Proposal, *supra* note 79. Several states have also expressed concern whether using the ICJ would unduly delay proceedings. See ICC Statute, Art. 67(c) (requiring trial "without undue delay").

98. Cf. THEODOR MERON, *International Criminalization of Internal Atrocities, in WAR CRIMES LAW COMES OF AGE* 229-230 (Clarendon Press-Oxford 1998) (discussing, in the context of international humanitarian law, the importance of a "uniform and definite corpus" of law "that can be applied apolitically . . . everywhere.").

99. This is not the only situation where political determinations could impact upon the ICC. Under Article 16 of the ICC Statute, an ICC investigation or prosecution may be deferred for twelve-month renewable periods by request of the Security Council. See ICC Statute, *supra* note 2, at art. 16. Under the ICC Statute the deferral must be made by the Security Council "in a resolution adopted under Chapter VII." *Id.* Thus, deferrals should only occur where necessary for international peace and security. An Article 16 deferral poses less of a threat to judicial independence than a decision regarding an act of aggression. A positive vote of the Security Council (subject to veto by the permanent members) could be required to defer a prosecution, whereas, regarding an act of aggression, a positive vote (subject to veto by the permanent members) would be required to proceed. The Security Council has also given a one year exemption from ICC jurisdiction for peacekeepers from states that have not ratified the ICC Statute. See Security Council Resolution 1422 (2002). The United States is also in the process of demanding that states sign bilateral agreements not to turn over U.S. citizens to the ICC. See United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements, Human Rights Watch, at <http://hrw.org/campaigns/icc/docs/>

To analogize to the U.S. justice system, it would be as if for a certain type of crime, the Executive branch or Congress would be able to decide whether individual prosecutions should occur. This situation, however, would constitute overreaching by the Executive branch or Congress and violate the separation of powers doctrine.

Although, with the Security Council, there would be no question of overreaching since the U.N. Charter empowers the Security Council to determine acts of aggression¹⁰⁰ and there is at least some basis for the General Assembly acting,¹⁰¹ there are still concerns about undermining the ICC's independence and preventing consistent and impartial application of the law. Although Variations 1 and 2 of the Consolidated Proposal on the conditions for the exercise of jurisdiction state that decisions by the Security Council or General Assembly "shall not be interpreted as in any way affecting the independence of the Court,"¹⁰² it is unclear why such decisions would not affect the ICC's independence. If a clear case of aggression never reached the ICC because of the actions (or inactions) of those bodies, it

art98analysis.htm (last visited Oct. 28, 2002) (arguing such agreements are inconsistent with obligations of States Parties under the Rome Statute).

100. See U.N. CHARTER art. 39.

101. There is a basis for permitting the General Assembly to act if the Security Council fails to do so. Article 10 of the U.N. Charter empowers the General Assembly to "discuss any questions or any matters within the scope of the present Charter" and "make recommendations" regarding them, "except as provided in Article 12. . . ." U.N. CHARTER art. 10. Article 12 provides that the General Assembly may not act "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter. . . ." U.N. CHARTER art. 12. Thus, in theory, if the Security Council is not exercising the functions assigned to it, the General Assembly could do so. Article 24 also provides that the "[m]embers confer on the Security Council" only "primary responsibility for the maintenance of international peace and security. . . ." U.N. CHARTER art. 24 (emphasis added). Moreover, in the so-called "Uniting for Peace" Resolution, precedent was set for permitting the General Assembly to act in situations of Security Council deadlock:

[I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations . . . for collective measures

G.A. Res. 377(V), U.N. GAOR, Supp. No. 20, at 84, U.N. Doc. A/1775 (1950) (emphasis added). See also *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 163 (July 20) (stating "[t]he Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security.").

102. Consolidated Proposal, *supra* note 57, at 15–16.

would affect the ICC's independence. Accordingly, the credibility of the ICC regarding prosecutions for aggression would very much depend on the way the Security Council and/or General Assembly make determinations as to state responsibility.

A second, subordinate risk of having a determination of aggression made by two different bodies is the risk of inconsistent determinations. The language in Variations 1 and 2 of the Consolidated Proposal, which states that a prior decision as to an act of aggression should not be interpreted as "affecting the independence" of the ICC¹⁰³ implies that the ICC should commence its own inquiry as to whether aggression occurred for purposes of determining individual responsibility. Additionally, the ICC Prosecutor arguably needs to prove that aggression occurred in order to prove a case against a defendant, and give the defendant an opportunity to rebut that proof.¹⁰⁴ Yet, having the ICC re-evaluate whether aggression occurred clearly risks the ICC coming to a different conclusion.¹⁰⁵

Involving the ICJ does not fully solve either problem. Under both the BH I Proposal and BH II Proposal, the General Assembly could refer the question of whether state aggression occurred to the ICJ for an advisory opinion.¹⁰⁶ While that is advantageous because a judicial body, not a political one, would decide the matter, it does not entirely eliminate the potential for politicization of the issue since the General Assembly apparently would retain the *option* of referring the issue. Thus, under these proposals, to some extent, the risk of a politically motivated decision would shift to the General Assembly.¹⁰⁷

103. *Id.*

104. *See supra* note 88 and accompanying text.

105. This risk is further heightened by the possibility that one body such as the Security Council or General Assembly would apply one definition of aggression—for instance, the definition in Resolution 3314—and the ICC would apply a different definition. *See, e.g.*, Coordinator's Discussion Paper, *supra* note 63, ¶¶ 1–2 (proposing different definitions of aggression to be used by the Security Council and ICC). Some states argue that any definition the ICC adopts should not attempt to define aggression for purposes of state responsibility, as that should be the province of the Security Council. Comments of New Zealand, Ninth Preparatory Commission Session, Working Group on the Crime of Aggression (April 15, 2002) (notes on file with the author). Yet, not adopting a definition for state responsibility inherently implies that the Security Council or General Assembly would apply a test such as Resolution 3314, and the ICC could be applying a different test.

106. *See supra* Part IV.B.4.

107. The BH I Proposal risks politically-motivated determinations at another stage because, under it, after the ICJ makes its decision, the matter would *go back* to the

The BH II Proposal and option 5 of the Coordinator's Discussion Paper eliminate the problem in one situation by providing that, if the Security Council fails to act, and the ICJ determines in a contentious case that a state committed aggression, the matter would go directly to the ICC.¹⁰⁸ While that process would eliminate one step in which politically motivated decisions could interfere, it is unclear whether that part of the proposal would violate Article 39 of the U.N. Charter, which provides that the Security Council¹⁰⁹ or arguably, the General Assembly as its proxy, must make determinations of state responsibility for aggression.¹¹⁰ Having the ICJ render either an advisory opinion or a decision in a contentious case also would not cure the risk of inconsistent determinations. Therefore, utilizing the ICJ does not provide a complete solution.

2. Other Viable Alternatives?

Since involving another entity, such as the Security Council, General Assembly or even the ICJ, in the determination of a state's responsibility for aggression is so problematic, one must ascertain if there are viable alternatives.

a. Have the ICC Determine When an Act of Aggression Occurred?

There is great initial appeal to the argument that the ICC itself should determine when a state has committed an act of aggression for purposes of going forward with an individual prosecution. Upon closer examination, however, that approach seems unrealistic.

First, there is a strong argument that such an approach would violate Article 39 of the U.N. Charter which provides that the "Security Council *shall* determine the existence of any threat to the peace, breach of the peace, *or act of aggression . . .*"¹¹¹ The counter-argument for why the ICC should be able to make such

General Assembly to decide whether to refer the matter to the ICC. See BH I Proposal, *supra* note 79, ¶ 5.

108. BH II Proposal, *supra* note 79, ¶ 6(b). Coordinator's Discussion Paper, *supra* note 63, option 5.

109. U.N. CHARTER art. 39.

110. The argument in favor of the proposal would be that the ICJ would only be acting after the Security Council failed to make a determination under Article 39. See BH II Proposal, *supra* note 79, ¶¶ 5-6. Thus, the ICJ would be acting as the Security Council's proxy in the same way that the General Assembly may sometimes do. See *supra* note 101.

111. U.N. CHARTER art. 39 (emphasis added).

determinations would be that Article 39 is part of Chapter VII, which covers enforcement measures and the Security Council's role in maintaining international peace and security, and nothing in Chapter VII relates to determinations of individual responsibility;¹¹² thus, the ICC should be free to make its own determinations on jurisdictional issues or individual responsibility. The problem, however, is that even a jurisdictional decision on state responsibility would arguably violate the U.N. Charter, because such a jurisdictional determination would inherently imply that a state did in fact commit aggression.

Second, as a practical matter, members of both the Security Council and General Assembly would most likely oppose a proposal that allowed the ICC to make its own initial determinations of aggression, for it would entirely eliminate both bodies from the decision-making process.¹¹³ There probably is good reason for such opposition. Initial determinations of aggression by the ICC have the potential for (a) undermining the credibility of the Security Council if, for instance, the ICC determines aggression has occurred at a state level but the Security Council has done nothing about it, and (b) giving the ICC a far greater role in political decision-making than was intended.

b. Prosecute for Other Crimes

When faced with a situation where aggression has likely occurred but prosecution for aggression is not possible, an alternate approach might be to prosecute the aggressor for another crime. This becomes possible if either (a) aggression is defined, but for some reason reference to the ICC is not made (e.g., the Security Council or General Assembly determine that aggression did not occur, fail to make any determination regarding aggression, or fail to make a referral to the ICJ) or (b) if aggression is never defined thus eliminating aggression prosecutions.

112. U.N. CHARTER Ch. VII.

113. The BH I Proposal and BH II Proposal are more preferable in that respect because under them, the ICJ renders an opinion only if the Security Council does not act. See BH I Proposal, *supra* note 79, ¶ 4. See also BH II Proposal, *supra* note 79, ¶¶ 5-6. Such a situation is far easier to defend under the U.N. Charter than one in which another body, either the ICC or ICJ, would hear the matter without the Security Council first being given the option to act.

If a state commits aggression, other crimes within the ICC's jurisdiction will likely occur, especially if the aggression results in a full-scale war. For example, "crimes against humanity" consist of certain acts, including murder, when "committed as part of a widespread or systematic attack directed against any civilian population."¹¹⁴ States and other actors, unfortunately, target civilians all too frequently during hostilities. If that practice were widespread or systematic, the ICC might prosecute a perpetrator for crimes against humanity instead of aggression.

War crimes may also occur during aggression. War crimes are defined as various acts in particular when "committed as a part of a plan or policy or as part of a large-scale commission of such crimes."¹¹⁵ The covered acts (which vary depending on whether the conflict is international or internal) include, *inter alia*:

- directing attacks against the civilian population,¹¹⁶
- [a]ttacking . . . towns, villages, dwellings or buildings which are undefended and . . . not military objectives,¹¹⁷ and
- [i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹¹⁸

Thus, a possible alternative to prosecuting aggression would be to instead prosecute these other crimes. The advantage of such prosecutions is that they would eliminate the need for any initial determination prior to the ICC's exercise of jurisdiction because the ICC Statute already defines these crimes. One negative consequence, however, would be that not all perpetrators of aggression necessarily have committed these other crimes.¹¹⁹

114. ICC Statute, *supra* note 2, at art. 7.

115. *Id.* at art. 8(1).

116. *Id.* at art. 8(2)(b)(i).

117. *Id.* at art. 8(2)(b)(v).

118. *Id.* at art. 8(2)(b)(iv). These acts are covered in the context of an international conflict. Similar acts are covered if there is an internal armed conflict. *See id.* at art. 8(2)(c), (e).

119. For instance, a civilian leader might make the decision to invade. Whether or not a civilian leader would share criminal responsibility regarding war crimes or crimes against humanity committed during the invasion would depend on whether the criteria for imposing individual or command responsibility were met. *Compare id.* at art. 28(2) (civilian command responsibility is met if the person had effective authority and control

In considering whether states should abandon attempts to include aggression in the ICC Statute and solely use the ICC to prosecute other crimes, or prosecute other crimes only where the mechanism to trigger the ICC's jurisdiction regarding aggression fails, arguably the latter is the better approach. It would be unfortunate for states to fail to define aggression, thereby creating the perception that individual perpetrators of aggression may act with impunity. It would also constitute acknowledgment of the international community's failure to come to grips with this most serious crime.¹²⁰ Perhaps the best scenario would be to define aggression while recognizing that the definition may work imperfectly because of the way the ICC's jurisdiction is triggered, and that when the ICC's jurisdiction is not triggered, alternative charges may be possible.

c. Attempt to "Depoliticize" the Political Process

Another question arises as to whether anything can be done to "depoliticize" the process and achieve a neutral application of the law, given the apparent need to involve the Security Council (and/or General Assembly) in determining when a state committed aggression.¹²¹ In a different context, a noted scholar has stressed the need for "clarity and transparency" as "so important for criminal law."¹²² It is precisely some notion of clarity and transparency that must be instilled into the decision-making to achieve consistency in application. If the Security Council faces a decision as to whether a state committed aggression, it should state what criteria it is applying. Ideally, the Security Council would also offer an explanation of which criteria

over the military; knew or consciously disregarded information about the crimes; and failed to take necessary and reasonable measures to prevent them); *with id.* at art. 28(1) (stating a different standard for military commander).

120. Although the U.N. Charter provides various mechanisms for dealing with states that commit aggression, it is clear those mechanisms do not create a sufficient deterrent. As the Cameroons so eloquently argued at a recent session, aggression is a truly international crime because it is the only crime states cannot address within their internal legal systems. Comments of the Cameroons, Ninth Preparatory Commission Session, Working Group on the Crime of Aggression (April 16, 2002) (notes on file with the author).

121. As one author bluntly stated: "It would defeat the purpose of the ICC to have only those nations not members or friends of the permanent five as potential defendants in the Court." Sadat & Carden, *supra* note 3, at 443.

122. See MERON, *supra* note 98, at 242 (discussing the "grave breaches system" in the Geneva Conventions of 1949).

were violated and why. These explanations could prevent the perception that the Security Council was acting arbitrarily. Moreover, use of such precedent might even prompt the Security Council to act consistently when making determinations regarding aggression. Ample referrals to the ICJ could also help achieve a more neutral and less politically-motivated process. In this respect, the proposal, originally presented by the Netherlands, to have referrals to the ICJ made by nine members of the Security Council seems quite useful.¹²³ Above all, it is pivotal to continue exploring methods of achieving consistency as to when the ICC would hear cases regarding the crime of aggression.¹²⁴

VI. CONCLUSION

It is difficult to define the crime of aggression. Yet, the greater challenge involves establishing procedures to trigger the ICC's jurisdiction. If a political body (the Security Council or General Assembly) decides when a case of aggression reaches the ICC, the potential for politically motivated decisions threatens to undermine the ICC's credibility. At the same time, it is extremely important to define aggression so that perpetrators may be prosecuted and would-be perpetrators potentially deterred. While aggression goes unpunished, a part of the legacy of the Nuremberg Tribunal remains unfulfilled, and one of the core principles in the U.N. Charter continues to be violated. With the historic advent of the ICC's creation, the world will have a chance to fulfill this legacy. Much work, though, remains to be done so that aggression may be defined in a way that is both consistent with the U.N. Charter *and* minimizes the dangers of politicizing the process.

123. See Netherlands Proposal, *supra* note 80; see also Coordinator's Discussion Paper, *supra* note 63, option 4(b).

124. It is also hoped that the Security Council and General Assembly will act decisively in determining whether aggression has occurred. A potential problem may occur if, for instance, the Security Council resolutions condemn situations as threatening "international peace and security," but fail to use the word aggression. If denominating a situation as "aggression" creates individual exposure to criminal charges, the Security Council may grow even more wary of condemning acts as "aggression." For this reason also, it is important to have adequate fallback mechanisms.

APPENDIX A

Excerpted from the Preparatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, U.N. Doc. PCNICC/2000/WGCA/L.4/Rev.1, with the permission of Anne Cunningham at the United Nations.

Crime of aggression

[Original: English]

(Prepared on the basis of the discussion papers proposed by the Coordinator)¹

Consolidated text of proposals on the crime of aggression**Definition of the crime of aggression****Option 1**

1. For the purposes of the present Statute, [and subject to a determination by the Security Council regarding the act of a State,] the crime of aggression means [the use of the armed force, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action of a State, against the sovereignty, territorial integrity or political independence of a State in violation of the Charter of the United Nations.] any of the following acts committed by [an individual] [a person] who is in a position of exercising control or capable of directing the political or military action of a State:

- (a) initiating, or
- (b) carrying out

Variation 1

[an armed attack] [the use of armed force] [a war of aggression] [a war of aggression, or a war in violation of international treaties,

1. The consolidated text of proposals on the crime of aggression was issued at the third session of the Preparatory Commission and the preliminary list of possible issues relating to the crime of aggression was issued at the fourth session.

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agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] against another State [against another State, or depriving other peoples of their rights to self-determination], in [manifest] contravention of the Charter of the United Nations, to violate [to threaten or to violate] the [sovereignty,] territorial integrity or political independence of that State [or the inalienable rights of those people] [except when this is, required by the principle of equal rights and self-determination of peoples and the rights of individual or collective self-defence]

Variation 2

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.

Variation 3

Add the following paragraph to paragraph 1, variation 1, above:

2. Provided that the acts concerned or their consequences are of sufficient gravity, [acts constituting aggression include] [the use of the armed force includes] [are] the following [whether preceded by a declaration of war or not]:

(a) The invasion or attack by the armed forces of a State of a 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;

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(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 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 before, or its substantial involvement therein.

3. When an attack [the use of armed force] under paragraph I has been committed, the

- (a) planning
- (b) preparing, or
- (c) ordering

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thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.

Option 2

For the purposes of the present Statute and subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating or carrying out a war of aggression.

Conditions for the exercise of jurisdiction**Option 1**

1. The Court shall exercise its jurisdiction with regard to the crime of aggression in accordance with the provisions of article 13 of the Statute.

2. The Security Council shall determine the existence of an act of aggression perpetrated by the State whose national is concerned in accordance with the relevant provisions of the Charter of the United Nations before proceedings take place in the Court with regard to the crime of aggression.

3. The Security Council, acting in accordance with article 13 (b) of the Statute of the International Criminal Court, shall first make a decision establishing that an act of aggression has been committed by the State whose national is concerned.

4. The Court, upon receipt of a complaint relating to the crime of aggression under article 13 (a) or (c), shall, with due regard to the provisions of Chapter VII of the Charter of the United Nations, first request the Security Council to determine

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whether or not an act of aggression has been committed by the State whose national is concerned.

5. The Security Council shall make a decision upon this request within [6] [12] months.

6. Notification of this decision shall be made by letter from the President of the Security Council to the President of the International Criminal Court without delay.

Variation 1

7. In the absence of a decision of the Security Council within the time frame referred to in paragraph 5 above, the Court may proceed.

8. The decision of the Security Council under paragraph 5 above shall not be interpreted as in any way affecting the independence of the Court in the exercise of its jurisdiction with regard to the crime of aggression.

Variation 2

7. Notwithstanding the provisions of paragraph 2 above, in the absence of a decision by the Security Council within the time frame referred to in paragraph 5 above, the Court shall, with due regard to the provisions of articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make a recommendation.

8. The General Assembly shall make such a recommendation within [12] months.

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9. Notification of this recommendation shall be made by letter from the President of the General Assembly to the President of the International Criminal Court without delay.

10. In the absence of such a recommendation within the time frame referred to in paragraph 8 above, the Court may proceed.

11. The decision of the Security Council under paragraph 5 above or the recommendation of the General Assembly under paragraph 8 above shall not be interpreted as in any way affecting the independence of the Court in the exercise of its jurisdiction with regard to the crime of aggression.

Option 2

1. The Court shall exercise its jurisdiction with regard to the crime of aggression subject to a determination by the Security Council in accordance with article 39 of the Charter, that an act of aggression has been committed by the State concerned.

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

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

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Option 3

For the purposes of the present Statute and subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating or carrying out a war of aggression.