Defining the Crime of Aggression Under the Statute of the International Criminal Court

Irina Kaye Müller-Schieke*

Keywords: aggression; International Criminal Court; Security Council.

Abstract. Article 5 of the Statute of the International Criminal Court verifies the four most serious crimes to the international community as a whole upon which the Court shall have jurisdiction. Though it includes the crime of aggression the Statute lacks a definition of that crime. The purpose of the article is to offer a sustainable definition. It discusses the constitutive elements of the crime, focussing on the crucial points in a debate that has been actively engaged in for the past 50 years. Certainly, the crux of the matter lies in the role the Security Council should play in this regard.

[...] there has been a persistent undercurrent of opinion expressive of the view that there is no fixed limit to the possibilities of judicial settlement; that all conflicts in the sphere of international politics can be reduced to contests of a legal nature; that the only decisive test of justiciability of the dispute is the willingness of the disputants to submit the conflict to the arbitration of law.

H. Lauterpacht

1. INTRODUCTION

More than fifty years after the Nuremberg trial, the crime of aggression has found its place in the Statute of the International Criminal Court, concluded in Rome in the summer of 1998. Yet, it is included in a rather extraordinary way. Although the crime of aggression falls within the ambit of the Court’s jurisdiction over “the most serious crimes of concern to the international community as a whole,” no definition is provided and the Court may not exercise the jurisdiction it has been given until agreement on such a definition has been reached.2

---

* First Legal State Examination (Ruprecht-Karls-University, Heidelberg) 1998; LL.M. (School of Oriental and African Studies, London) 1999; Ph.D. student (University of Potsdam); currently Postgraduate Legal Trainee, Berlin.
1. The Function of Law in the International Community 164 (1933).
2. Article 5 of the Statute reads as follows: Crimes within the jurisdiction of the Court:
1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: The crime of genocide; Crimes against humanity; War Crimes; The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the
How could the “supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole”3 be included de iure, but not de facto? Generally speaking, in the debate about the crime of aggression all objections brought forward against an International Criminal Court (hereinafter ‘the Court’) are gathered.

First and foremost, there is the question of the status of the Security Council in respect of the crime of aggression.4 Inevitably and by virtue of the task conferred upon it by Chapter VII of the United Nations Charter, the Security Council is in a certain way necessarily involved in the mechanism that may ultimately lead to the prosecution of the crime of aggression. Yet no state is prepared to subject itself to a judicial body, whose credibility and independence have been doubted, given that the Security Council, a manifestly political body, might be in a position to influence the ultimate judgement on the criminal responsibility of its nationals. States are most unwilling to accept such a hegemony when criminal and individual responsibility are concerned.

Apart from that controversy, there is the question of jurisdiction ratione personae. The crime of aggression is inherently a state crime. Although the idea of initiating an armed conflict originates and develops in the mind of individuals, the aggressive act emanates as an act of the state, not of its intellectual initiators. However, it is not the state which is held responsible for the crime of aggression; instead, the line of responsibility is traced back from the state entity to the individual instigators.

Among other important subjects, these were the seemingly insurmountable hurdles faced by the signatory states during the Rome conference. Yet it remains the case that the debate on the crime of aggression represented the most difficult issue. Member states feared that the outcome of the whole process of establishing a permanent court would be jeopardised by the ongoing and unresolved discussion over a possible definition of the crime.5

In the light of this, must one draw the conclusion from the outcome of the Rome conference that there is no crime of aggression under customary

---

Or rather, will it be possible to establish its elements, only to have the international community prove unwilling to provide a definition, general enough to comprise the range of imaginable situations, but precise enough to meet the requirement of the principle of legality?

Maybe then, it was to the surprise of some states and to the welcome of others that at its seventh meeting in August 1999 the Preparatory Commission agreed to the setting up of a working group on the crime of aggression. It was directed to prepare proposals for a provision on aggression and its elements as well as for the conditions under which the Court could exercise jurisdiction with regard to that crime.

In 2001, the Preparatory Commission will hold two sessions. The first has been held in early spring, from 26 February to 9 March, the second will be held in autumn, from 24 September to 5 October. The time is ripe for the working group to engage in substantive discussion.

This article takes advantage of the efforts being made so far by the working group and attempts to offer a definition acceptable to states still convinced of insurmountable practical and legal obstacles of a definition. The first section will illustrate the historical development of the crime of aggression. After addressing the general objections against the notion, the article will analyse the two different approaches the crime is build upon: a definition in general terms versus an exhaustive enumeration of different acts. The third section will examine step by step the constitutive elements of the crime of aggression. Finally, the article will conclude with a draft definition that could possibly be adopted by the signatory states.

2. **HISTORICAL OVERVIEW**

In the 1900s, war was pursued as a valid practice of national policy, as “a continuation of diplomacy by other means.” The atrocities of World War I and, as a consequence, the foundation of the League of Nations effected a significant change. The Covenant of the League of Nations was established, based on a collective system for the maintenance of peace. By the terms of Article 10, the parties to the organisation agreed to respect and preserve the territorial integrity and existing political independence of each
member state against external aggression. Any war or threat of the same was declared a “matter of concern.”

When in 1919 Kaiser Wilhelm II of Hohenzollern was publicly arraigned by the Treaty of Versailles it was the first time in history that an individual was officially charged with the instigation of a war. Still, he was accused of “a supreme offence against international morality and the sanctity of treaties.”9 A trial never took place as the Kaiser sought refuge in the Netherlands which refused to extradite him on the basis that, as head of state, he enjoyed immunity from prosecution for having committed a political act.

In 1945, the notion of ‘crime against peace’ was established by the International Military Conference, held in London as a consequence of the horrors of World War II. An ad hoc tribunal was installed in Nuremberg to try the major war criminals of the European Axis nations. The Nuremberg Charter identified a crime against peace as, inter alia, the “planning, preparation, initiation or waging of a war of aggression, or 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.”10 The exact content of that rather circular definition was left to the interpretation of the Tribunal on a case by case basis. An equivalent tribunal followed in 1946 in Tokyo to punish the Japanese instigators of the war.

The so-called Nuremberg Principles, the principles of international law recognised in the Charter of Nuremberg and in the Judgement of the Tribunal, were elaborated by the International Law Commission and affirmed by the United Nations General Assembly in 1946. As a follow-up process, the International Law Commission began to draft a Code of Offences against the Peace and Security of Mankind based upon those principles. Between 1954 and 1996 it presented three different drafts, none of which was finally adopted by the United Nations.11

Political rivalries between the major powers made consensus agreements almost impossible. It was constantly argued that without a clear definition of the crime of aggression, no criminal code would be complete and as long as there was no code, there was no need for a court to enforce it.12

Similar efforts to define aggression were undertaken within the General Assembly of the United Nations. In 1952, a Special Committee was established to consider a definition of aggression.13 It resumed its work

10. Art. 6(a) of the Nuremberg Charter, 82 UNTS 279–300 (1951).
13. UN Doc. A/RES/688 (VII), GAOR, Suppl. 20 (A/2361), para. 5(a), (b) (1952).
22 years later in the General Assembly Resolution 3314 (XXIX) of 14 December 1974 on the Definition of Aggression. Yet again, the debates in the Committee echo the contradictory positions that constantly failed to be harmonised.

At the request of the United Nations General Assembly, the International Law Commission submitted a draft statute for a permanent court in 1994. Its outcome laid the basis for the Preparatory Committee on the Establishment of an International Criminal Court, established in 1995. After more than two years of preparatory work, plenipotentiaries assembled in Rome in the summer of 1998 to conclude the statute of the permanent International Criminal Court. One of the crucial issues at the conference was the debate on the inclusion of the crime of aggression. A large number of members felt that it would be retrogressive not to include it in the core of the most serious international crimes. Indeed, the lack of movement was seen by some delegates as being capable of undermining the whole of the process that was being undertaken at Rome. Special concern was expressed relating to the dependence of the court on the prior determination by the Security Council of the occurrence of an act of aggression. Nevertheless, the majority finally pronounced itself in favour of inclusion of the crime of aggression within the jurisdiction of the Court.

Yet, no generally acceptable formula could be agreed upon until halfway through the conference. The danger arose that rupture over the problem would threaten the conference’s successful outcome. Therefore, when the Bureau of the Committee of the Whole submitted a proposal on 10 July 1998, Article 5 set a deadline for formulating a generally acceptable provision for the crime of aggression to be submitted by the end of 13 July. If no such definition could be presented, the Bureau proposed adjourning this issue to a review conference.

Eventually, the so-called ‘Final Package’ was presented to the delegations in the early hours of the last conference day. In relation to the crime of aggression, it proposed the above quoted formulation. The possibilities left were to accept the Statute or reject it entirely.

On a superficial examination, one might draw the conclusion that the outcome of the conference echoes the prevalent political unwillingness to address the scope of the crime of aggression. On the other hand, it might

have been a wise decision not to overburden the conference with this undisputedly difficult question, in view of the fact that during the last 50 years, efforts within the United Nations constantly failed to harmonise the contradictory positions taken in respect of this crime.

The Preparatory Commission appointed a Co-ordinator, Mr Tuvako Manongi of Tanzania, to conduct the work. So far, he has produced the compilation of different proposals in regard to a definition as well as the collection of a list of possible issues relating to the crime of aggression. In comparison to the previous somewhat barren 50 years, the efforts of the Working Group to date are relatively fruitful. It is moving steadily forward, focussing on crucial points.

The time frame to establish a definition of the crime of aggression is set up by the Statute itself: seven years after its entry into force, a review conference shall convene with a view to consider any amendment to the Statute. According to Article 123(3), Article 121 establishes the procedure that must be followed. Amendments to Article 5 that fail to be adopted by consensus require a two-thirds majority of state parties. One year after the deposit of their instruments of ratification, they will become binding on those state parties which have accepted the amendment.

3. General Objections Against the Crime of Aggression

Two main objections are brought forward against the existence of the crime of aggression. Firstly, that there is no crime of aggression under customary international law. Secondly, it is said that in fact there is no need for the crime of aggression under customary international law as an offender of the crime will most likely be guilty of one of the Court’s other three core crimes.20

As to the second assumption, it clearly disregards the value of a criminal prosecution of aggression itself. Criminalisation in that respect corresponds to the constant efforts of the international community to condemn recourse to the use of force as a means to solve international disputes.21 Furthermore, if the crime of aggression can be initially prevented this will in return have a positive impact on the other core crimes.

The criticism as regards the first point is certainly obsolete. The judges in Nuremberg already noted that the tribunal “is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.”22 Either the trial enforced existing


22. Nuremberg Judgment, supra note 3, at 216.
customary international law or represented the first act whereby the international community inaugurated a new custom. As Mr Justice Jackson, the American Chief Prosecutor, stated in his opening speech, “every custom has its origin in some single act and every agreement has to be initiated by the action of some State.”

4. THE ELEMENTS OF THE CRIME OF AGGRESSION

4.1. The crucial issue: a definition in general terms versus an enumerative approach

Since the first efforts to define the crime of aggression, two generally distinct approaches face each other: the definition of the crime in general terms provided for in the Charter of Nuremberg, and the enumerative approach taken by the General Assembly in Resolution 3314. Even today, within the Working Group on the Crime of Aggression, the question of the approach is clearly the core issue with regard to a definition.

Nevertheless, in an overall assessment and having weighed the respective advantages as well as disadvantages of both approaches, a general definition should be favoured. Certainly, the fact that the other crimes under the Court’s jurisdiction take an enumerative approach militates, not least for reasons of conformity, in favour of the same approach in regard to the crime of aggression. Moreover, there are voices raising the opinion that to verify a list of different acts that represent the crime in their essence might facilitate consensus.

However, cogent arguments rule out an enumerative definition in general, and especially the suggestion that General Assembly Resolution 3314 can act as a directive for a wording. A definition of the crime should reflect the very core of customary international law, something the Resolution 3314 is not able to fulfil. Firstly, its drafting history unequivocally reveals that it was a mirror of its time. Elaborated during the 1960s and 1970s, its content was dominated by the political struggles of the Cold War. This had a determining impact on the wording of the consensus definition. It undeniably echoed divergent political positions and conflicting concerns of states. Although the consensus was approved by some

23. The Trial of German Major War Criminals, Opening Speeches of the Chief Prosecutors 40 (1946).
24. UN Doc. A/RES/3314/XXIX (1974). For the text of this resolution, see Annex to this article.
25. Suggestions made orally by Italy on 13 March 2000 with regard to a structure for discussion on the crime of aggression, PCNICC/2000/WGCA/DP.3, at para. 5(a).
authors,27 the majority took a critical position.28 It was even asserted that there had been an “agreement on phrases with no agreement as to their meaning.”29

In addition, it has to be taken into account that it was precisely the open nature of the definition that allowed its ultimate adoption. Its purpose was to serve as a guideline for the Security Council, a political body, not as a definition in the sphere of criminal law.

Moreover, a definition will have to fulfil the requirement of a substantive principle of criminal law, namely the principle of nullum crimen sine lege.30 An enumeration could never take into account all possible ways in which the crime could occur and would therefore prove to be too vague and lack the necessary rigour and precision. Interestingly, this was precisely the argument raised by the majority of the International Law Commission in 1991, when an earlier definition of the crime of aggression within the Draft Code of Crimes against the Peace and Security of Mankind was simply replaced by the complete text of the 1974 Definition.31

As rightly elaborated by Colombia at the Preparatory Commission’s Fourth Session in March 2000, an enumerative approach may limit the protection of a country’s territorial integrity, sovereignty, and independence if the state is subjected to attacks not covered in the list.32

Notwithstanding the advantage of a short and general definition that is precise enough to respect the principle of nullum crimen but flexible enough to leave the classification of a certain case to the discretion of the Court, the Statute itself grants the possibility to make a reference in clear-cut cases to Resolution 3314. Even though in the first place, according to Article 21, the Court shall apply the Statute, in the second place, and where appropriate, it can refer to “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.” Another option would be to set up a general definition that is complete in itself followed by some illustrative examples, summarising the crystal-clear cases of the crime. In that respect Article 3(a) to (d) of the General Assembly Resolution of 1974 would certainly provide for a valuable input.

29. Stone, id., at 243.
30. I.e., no punishment without existing and clear provision.
32. Commentary by Colombia, supra note 26, at para. 1.
4.2. The actus reus

4.2.1. Acts of aggression versus war of aggression

Historically, aggression dealt with breaches of the *ius ad bellum* and therefore addressed the question of legality of war. Accordingly, it was in the terms of ‘war’ that Nuremberg perceived the charges of the crime of aggression. Article 6 of the Nuremberg Charter defined the then still named crime against peace as the "planning, preparation, initiation or waging of a war of aggression, or 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.”

Yet, with the establishment of the Charter of the United Nations the ban on aggression as such found its place in international law. According to Article 2(4) of the Charter

> [a]ll 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.

Again distinct from the criminal context of Nuremberg, the 1974 General Assembly definition condemned acts of aggression in general and, moreover, enlarged the scope of illegitimate acts to several forms of indirect aggression.

Nevertheless, even this definition drew a distinction between the consequences of a war of aggression and mere acts of aggression. According to Article 5(2) of Resolution 3314 a war of aggression was said to constitute a crime against international peace and thus entailed international *criminal* responsibility. On the contrary, acts of aggression solely gave rise to international responsibility of the state.

Once more, the judgement at Nuremberg provides for a valuable input. The case of the defendant Kaltenbrunner, leader of the SS in Austria and State Secretary for Security after the Anschluß, is very instructive in that regard. Although he had been involved in the seizure of power in Austria, the Tribunal found him not guilty, as there was no evidence of his involvement in plans to wage aggressive war on any other front. The Court held that the Anschluß, “although it was an aggressive act, is not charged as an aggressive war, and the evidence against Kaltenbrunner […] does not show his direct participation in any plan to wage such a war.”

However, even those who participated in the preparation for war, did not inevitably commit a criminal offence. A. Speer, Hitler’s architect, and H. Schacht, President of the Reichsbank until January 1939, had been

---

33. 82 UNTS 279–300 (1951). Emphasis added.
34. The ‘accession’ of Austria to the Third Reich.
35. Nuremberg Judgement, supra note 3, at 284.
indicted for both conspiracy and aggressive war. They had been involved in the rearmament of Germany, which had formed a part of Germany’s preparation for war. Nevertheless, the Tribunal asserted that “rearmament of itself is not criminal under the Charter”\(^{36}\) and therefore acquitted them of the crime against peace.

To define the actions which constitute the crime of aggression is the crux of the matter. The signatory states should be aware that effective prosecution can only be guaranteed if the scope of the crime is firmly established in customary international law.\(^{37}\) The scope has to be traced back to the narrowest compromise possible. Such a compromise can be reached by restricting the crime to the prosecution of wars of aggression. Direct and indirect acts of aggression have to be left to the field of political condemnation. As far as the international criminal law level is concerned, there is, as yet, no room for prosecution of those acts.

This view corresponds to numerous international agreements in the area: the Nuremberg Charter, the Allied Control Council Law No. 10 and the General Assembly Resolution 3314, to name but a few. Furthermore, under some national law systems only a war of aggression constitutes a punishable crime.\(^{38}\) In addition, by reducing the \textit{actus reus} content to a war of aggression, a definition would meet the requirement of Article 5 of the Rome Statute that the jurisdiction of the Court shall be limited to the “most serious crimes of concern to the international community as a whole.” Thus read, it corresponds to the threshold set by the other crimes under the Court’s jurisdiction.

\subsection*{4.2.2. The meaning of ‘war of aggression’}

Nevertheless and despite what is said above, the notion of ‘aggressive war’ has to be explained. Here, the Statute of the International Criminal Court in its Article 5(2) calls for consistency of the crime with the relevant provisions of the Charter of the United Nations. The Charter itself sets up a scale of illegitimate forms of force. Whereas Article 2(4) condemns recourse to the threat or use of force in international relations, Article 39 refers to a threat to the peace, breach of the peace, and an act of aggression as a precondition for deciding upon collective measures against the investigating states. Finally, Article 51, providing for the right of individual or collective self-defence, sets the highest threshold: self-defence is allowed against an \textit{armed attack} occurring against a member state. And that is indeed the meaning of a war of aggression: one state launching a military attack on the territorial integrity or political independence of another state without any justification of self-defence or as part of col-

\begin{itemize}
\item \textit{Id.}, at 300.
\item Proposal submitted by Germany, PCNICC/2000/WGCA/DP.4, para. 5 (2000).
\item \textit{E.g.}, Sec. 80 of the German Criminal Code. \textit{See also} the suggestions made by Italy, \textit{supra} note 25, at para. 5(e).
\end{itemize}
lective measures under the Charter. Equally, to lift the content ratione materiae to the threshold of an illegitimate armed attack would correspond to the idea that only massive violations of the use of force should entail individual criminal responsibility.

4.3. The offender of the crime of aggression

4.3.1. Individual criminal responsibility

Even though aggression emanates as an act of state, it is in fact carried out by its agents. There is no need for any further reasoning in this day and age to the effect that an individual can be held responsible for having committed such an act. As the Tribunal in Nuremberg put it: “Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

Yet, not every individual from the ordinary combatant fighting on the battlefield, to the head of state giving the final order to launch an attack on another state, can reasonably be prosecuted. On the other hand, the responsibility cannot only be restricted to the head of state either. The Tribunal in Nuremberg rightly stated that “Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men.” Also, the Tribunal only called for the responsibility of the top twenty-two ranking persons in the circle around Hitler. But even among them, those who had not participated in the important conferences at which Hitler had presented his ideas and developed his plans of aggressive action in creating new Lebensraum were singled out. They had not held a position enabling them to influence the state policy directed towards aggressive war.

Similarly, in one of the Subsequent Proceedings at Nuremberg, the High Command case, the American Military Tribunal asserted that anybody who has the “actual power to shape and influence the policy of their nation” and who “prepare[s] for, or lead[es] their country into […] an aggressive war” is liable to punishment. Likewise, it stated in the I.G. Farben Trial: “Those persons in the political, military, and industrial fields, for example, who were responsible for the formulation and execution of policies may be held liable for waging wars of aggression […]”

Article 27 of the Statute sets up a definition of the offender whereby it

40. Id., at 223. Equally, the Court in the High Command case (United States of America v. von Leeb and Others), 15 Annual Digest and Reports of Public International Law Cases 380 (1948).
41. High Command case, id., at 381, 382.
42. I.G. Farben Trial (United States of America v. Krauch and Others), 15 Annual Digest and Reports of Public International Law Cases 669 (1948). Emphasis added.
[...] shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute [...].

The scope of this article would have to be restricted in relation to the crime of aggression. Due to the special nature of the crime low ranking officials or soldiers who are not in the position of formulating or executing state policies and are rather receiving and carrying out orders would not fall within the circle of possible offenders. Such a restriction would have to be expressly set up within the definition of the crime itself.

4.3.2. Aggression as a state crime

Turning to the determining feature of the crime of aggression, it essentially represents a state crime. Thus, the crime of aggression can only be committed in the context of an international armed conflict. Customary international law has certainly not developed to the extent of perceiving aggressive conduct of non-state entities as a punishable offence. The opinio iuris has moved forward concerning other international crimes, enlarging the application of, for example, crimes against humanity to internal armed conflicts. Whereas the Statutes of the International Criminal Tribunal for the former Yugoslavia and the Tribunal for Rwanda substantially contributed to this development, they equally demonstrate that the scope of the crime of aggression could not follow that path. Both Statutes did not include any reference to the crime as a punishable offence.

The consequences are twofold: firstly, an attack of the government of a state on an ethnic group within that state, such as Yugoslavia’s attack on Kosovo in spring 1999, does not, as yet, constitute a crime of aggression punishable under public international law. Secondly, initiators of a non-state entity launching a military attack on the legitimately elected government of that same state also cannot be held responsible for the crime of aggression. Unquestionably, it would be welcomed to provide justice for those being attacked by their own state as this equally constitutes a crime as heinous as an attack on another state. However, today’s standing of public international law suggests no opinio iuris nor consuetudo in that regard.

4.4. The mens rea

In respect of the mens rea, reference can be made to Article 30 of the Statute which requires, unless otherwise provided, that the material

elements are committed with “intent or knowledge.” This firmly established rule under both national and international criminal law finds confirmation in the Nuremberg jurisprudence. There, the Court held that only those statesmen, military leaders, diplomats, and business men made themselves liable by co-operating with Hitler in knowledge of his aims. Therefore, it justified the acquittal of the defendant *Bormann* for participation in a common plan or conspiracy because it was not evidenced that he had knowledge of Hitler’s plans of aggressive war nor could such a knowledge have been “conclusively inferred” from his position.

4.5. **Conditions under which the Court shall exercise jurisdiction:**

the inter-play between the Court and the Security Council

4.5.1. **Characteristics of the Security Council and the International Criminal Court**

With the foundation of the United Nations, the international community established an authoritative system of collective security. Primary responsibility for the maintenance of international peace and security was conferred upon the Security Council. It is a political body whose principal concern is not justice, but the preservation of factual international peace through collective action, based on a decision engaging multiple interests.

Chapter VII of the UN Charter defines the Security Council’s central role in the maintenance of international peace and security. By virtue of Article 39, it is empowered to

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

Its decision to take action involves aspects of a political, moral, economic, and military nature, and lastly of *realpolitik*. In addition, the decision-making process is influenced by the composition and voting procedure of the Council. There might be good reasons for the Security Council to simply act under Chapter VII in general without identifying a state as an aggressor. In search for a solution, the Security Council might want to, or even have to negotiate. To label a state an ‘aggressor’ means to internationally and expressly condemn its behaviour. Such a statement might undermine or contradict the Security Council’s role in offering its good offices. Furthermore, either domestic strategic interests or relations with

---

45. *Id.*, at 329.
both neighbouring states and allies might convince the members of the Security Council to refrain from utilising the notion of aggression in its resolutions.47

Conversely, a court approaches a situation from a strictly legal point of view. Its operations are necessarily based on the principles of independence and impartiality. If its judges have the reputation of being biased, the credibility and integrity of the court as such would be placed in doubt. Basic principles such as equality before the law and the presumption of innocence have to be respected and guaranteed by a court, those principles being of even greater relevance bearing in mind the heinous crimes the members of the bench have to judge in the context of international criminal law.

Both an international criminal court and the Security Council undertake to effect restorative measures for the maintenance of international peace and security. Nevertheless, there is an important difference between the approach of the two bodies: the latter applies measures of collective security to reach ‘factual’ international peace, the former ‘legally’ establishes international peace by judicial instruments. Certainly, it would be fatal if the court would have to rely on the rare situation of consensus of its signatory states in order to start investigations. A criminal court has to be completely independent of strategic interests of member states.

4.5.2. How to embed the Statute of the International Criminal Court within the framework of the Charter of the United Nations

How are the Statute of the International Criminal Court and the Charter of the United Nations related to each other in general and especially in respect of the crime of aggression? Paragraph 7 of the Preamble of the Statute reaffirms “the purposes and principles of the Charter of the United Nations […].” More specifically in this context, Article 5(2) of the Statute stipulates that the definition of the crime of aggression “shall be consistent with the relevant provisions of the Charter of the United Nations.”

It is Article 39 of the Charter that determines the role and authority of the Security Council in this regard. It is the competent organ to decide on the occurrence of a threat to the peace, breach of the peace or an act of aggression committed by a state. Furthermore, Article 103 postulates the prevalence of the Charter “in the event of a conflict between the obligations of the members of the United Nations under the Charter and their obligations under any other international agreement.” Thus, the Charter virtually reads as an international constitution that all other international agreements have to be compared to. Indeed, the Charter cannot be altered by any criminal statute.

47. Id., at 186.
4.5.3. The exercise of jurisdiction of the International Criminal Court in relation to the crime of aggression

In the discussion paper concerning the preliminary list of possible issues relating to the crime of aggression, the co-ordinator poses three questions in respect of the conditions under which the Court should exercise its jurisdiction. According to those questions, the relationship between the Court and the Security Council is to be elaborated.

(1) What role should be played by the Security Council in relation to the jurisdiction of the International Criminal Court over the crime of aggression?

As stated above, the crime of aggression constitutes the “paradigmatic crime of State” for which an individual can be held responsible. Thus, there seems to be an irresolvable situation: On the one hand, the court exercises jurisdiction over individuals on the crime of aggression. In order to fulfil its task with due diligence it has an irrefutable need for independence. On the other hand, the crime of aggression presupposes the occurrence of an armed attack by a state. It is the Security Council which has the exclusive responsibility for establishing the existence of an act of aggression. Thus, a political body takes its role within the framework of the court.

It has to be accepted that the bridge between responsibility of the state for an act of aggression and the individual responsibility of its organs crosses the Security Council. Yet, accepting realities does not mean that the crime of aggression is a dead letter as a legal concept. The challenges lie in the harmonisation of the two organs.

The question to be asked is not whether the Security Council should play at all a role within the work of the Court but rather what the exact form its role should take. First of all, the trigger mechanism has to recognise the primary responsibility of the Security Council to establish an act of aggression in accordance with the relevant provisions of the Charter. In view of the unusual nature of the crime a prior consideration of a situation by the Council – of its own volition or upon referral by the Court – is a necessary prerequisite of the exercise of the Court’s jurisdiction. It is in no way objectionable.

In the same way, it has to be accepted that the Court is barred from the

50. Discussion paper proposed by the Co-ordinator on the consolidated text of proposals on the crime of aggression, PCNICC/1999/WGCA/RT.1, at 6 (1999).
initiation or continuation of investigations if the Council calls for a halt. As set out in Article 16 of the Statute,

> [n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the court to that effect; that request may be renewed by the Council under the same conditions.

(2) What action, if any, could be taken in the event that the Security Council fails or otherwise declines to determine that an act of aggression has occurred?

Having reviewed the practice of the Security Council, it would be illusory to believe that the Court might serve as a catalyst for a clear pronouncement by the Council on the concept of aggression. Although unambiguous cases of aggression have occurred, the Council has persistently refrained from using the term ‘aggression’ in its resolutions.

Two examples illustrate that approach by the Security Council. The first example referred to herein is that which developed from an incident on 25 June 1950 when the North Korean armed forces invaded South Korean territory without prior warning. The Security Council noted with grave concern the armed attack and condemned the action as a breach of the peace. Subsequently, it called upon the member states to provide assistance to the Republic of Korea in order to restore international peace and security in that area and recommended a few days later that the United States should co-ordinate the responding states, under a centralised command structure. These resolutions were adopted in absence of the Soviet Union which had pursued an ‘empty chair’ policy between January and July 1950. Upon return, the Soviet Union made use of its veto right, thus blocking the Council’s work. The General Assembly acted immediately and passed the “Uniting for Peace” Resolution of 3 November 1950 in which the factual competence to make recommendations, in case of Security Council paralysis, was transferred to the Assembly. On 1 February 1951 it passed a resolution condemning the People’s Republic of China for having itself engaged in aggression in Korea. By international efforts, armistice negotiations were commenced in June 1951 and ultimately, an armistice agreement was signed in 1953.

Another incident where the Security Council was called upon to counteract aggression by one of its member states was in August 1990 when Iraq, accusing Kuwait of driving down the oil prices by exceeding OPEC production quotas and stealing oil from the Rumaila oil field at

---

52. UN Doc. S/RES/1501 (1950).
56. UN Doc. A/RES/498 (V) (1951).
the Iraqi-Kuwaiti frontier, crossed the border into the Sheikdom of Kuwait and occupied the territory. In its resolution, the Security Council determined that the invasion was a breach of international peace and security, condemned the Iraqi invasion, and demanded the immediate and unconditional withdrawal of its forces. Initially, the draft spoke of an act of aggression on behalf of Iraq. Under the pressure of the Soviet Union the wording had to be changed.57

In subsequent resolutions, the Security Council affirmed the inherent right of individual and collective self-defence to counteract the “armed attack by Iraq against Kuwait”58 and declared the annexation as null and void.59 Since all these measures did not have any consequence on the position of Iraq and since negotiations did not lead to any meaningful result, the Security Council finally authorised the use of “all necessary means” to restore international peace and security in the area.60 Under United Nations’ command, air attacks were started on 17 January 1991 against Iraqi positions in Kuwait and military installations in Iraq itself. On 1 March 1991, Kuwait was liberated.

Notwithstanding the refusal to employ the notion of ‘act of aggression’ in its resolutions, the Security Council’s response to the disturbance of international peace and security was always effective, bearing in mind that, as events showed, an armistice agreement was signed between North and South Korea, and that Kuwait was liberated from dictatorship by Iraq.

However, the attitude taken by the Council inevitably has implications on the trigger mechanism of the Court’s jurisdiction. Whether the Council avoids the wording of ‘act of aggression’ but decides instead to pass a resolution whereby it identifies a state of having committed a “breach of the peace” or whether it utterly declines to pronounce itself at all on a conflict situation, the prosecutor must be granted the right to commence investigations on its own initiative. The responsibility of the Council is certainly primary, but it cannot create an overall barrier to every other international body performing its duty in that field.61 This assumption has been equally supported by the International Court of Justice in its Advisory Opinion on the Case of Certain Expenses of the United Nations where it stated, although in relation to Article 24 of the Charter, that the responsibility of the Security Council in the matter was primary, however it was not exclusive.62 Similarly, in the Case Concerning Military and

57. C. Greenwood, New World Order or Old? The Invasion of Kuwait and the Rule of Law, 55 Modern LR 159 (1992).
61. See also the proposal submitted by Greece and Portugal, PCNICC/2000/WGCA/DP.5, at 3 (2000).
The International Court of Justice did not consider itself precluded from deciding whether certain facts constituted the use of force prohibited by the Charter of the United Nations and customary international law.

The system of the United Nations is not actually built on the concept of an état de droit and no concept of strict separation of powers exists as prevails under national democratic systems. There is no institutional hierarchy between the Security Council and the International Court of Justice, as these two bodies serve distinct functions. As mentioned earlier, the former employs political considerations and the latter acts according to strictly legal rules. Nevertheless, they are functionally parallel in the sense that they pursue the same objective, namely compliance with the principles and purposes of the United Nations.

This also applies in respect to the International Criminal Tribunal for the former Yugoslavia. It must therefore equally have force with respect to the International Criminal Court. Indeed even more so, as a judgement by the International Criminal Court can have a positive effect on the actions of the Security Council, not least because it may confirm the legality of a collective measure taken under Chapter VII of the Charter. That there is in fact scope for such a decision is illustrated by the application of the former Republic of Yugoslavia filed to the International Court of Justice in early summer 1999. The applicant accused NATO states who participated in the bombing of Yugoslavia of having committed, inter alia, a breach of the obligation to refrain from the use of force in international relations.

If the sole basis for the exercise of the Court's jurisdiction in this regard is dependent on a decision of the Security Council then there is a serious risk that the Council will in fact dominate the Court in this matter. The Criminal Court’s trigger mechanism would become purely dependent on non-legal considerations. Not only the independence of the judiciary and the principle of legality and justice, but also the principle of equality before the law would be substantially negated. Inevitably, the five permanent member states would not only have the potential to shield their own
nationals from prosecution. They would also be in a position to veto a Security Council decision against another state in a case where their national interests were involved. This would amount to the unacceptable result of a quasi immunity status of the five permanent powers.

In the absence of a clear statement the Council has to enable transfer to the Court for evaluation. If for any important reason it later decides to intervene, it still enjoys the power under Article 16 to bring the investigations to a temporary standstill.

(3) What are the legal effects on the functions of the Court arising from a determination by the Security Council that an act of aggression was committed by a state?

Ultimately, the trigger mechanism might have consequences on the status of the person accused. Although the Security Council may only refer a ‘matter’ to the Court, i.e., an abstract situation, and not a ‘case,’ meaning concrete allegations against specific individuals, the question of the legal weight of such a determination becomes crucial. To what extent would the Court be bound by the Council’s determination? Would the accused be deprived of the possibility of challenging the decision of the latter? For the accused, a fundamental right, the presumption of innocence, is at stake.

What at first sight looks like a subordination of the Court to the Council proves to be no contradiction when examined more closely. Taking the situation that the Council passes a resolution condemning a state for having committed an act of aggression, the Court could still exempt an individual person from the verdict of guilt on the basis that he in particular did not belong to the group of possible instigators, or because he lacked intent to launch an armed attack on another state. Equally, it could reach the conclusion that although an act of aggression might have occurred it did not constitute a war of aggression and therefore close the ongoing investigations.

5. Conclusion

The Statute of the International Criminal Court constitutes a historic milestone in the development of international criminal law. As regards the crime of aggression, there is a clear chance of establishing a successful


definition, but only if the signatory states are willing to restrict the crime to its very essence.

The evidence that has been referred to above indicates that under customary international law, there is and has been for 50 years an *opinio iuris* as well as state practice concerning the criminalisation of the war of aggression. The valuable efforts already achieved by the Working Group should be continued with the same vigour. A clear and precise definition of the crime in respect of its constitutive elements as well as the conditions for the exercise of the jurisdiction are of utmost importance. A stringent definition has the potential to strengthen the belief of the international community in the court’s impartiality, independence, and effective functioning.

A definition of the crime of aggression could read as follows:

1. For the purpose of the present Statute, the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or directing the political or military action of a state: (a) planning; (b) preparing; (c) initiating; or (d) carrying out an armed attack of that state directed against the territorial integrity or political independence of another state in violation of the Charter of the United Nations.

2. The Court shall exercise its jurisdiction with regard to the crime of aggression subject to a consideration by the Security Council in accordance with Article 39 of the Charter, whether an act of aggression has been committed by the state concerned.

3. When a complaint regarding the crime of aggression has been submitted to the prosecutor, the Court shall first request the Security Council to make a determination with regard to the alleged aggression by the state concerned. If the Security Council does not pass such a resolution within six months of the request, the Court shall proceed with the case in question.

4. The decision of the Security Council shall not be interpreted as in any way impairing the Court in the exercise of its jurisdiction with regard to the crime of aggression.

**ANNEX**

**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.
Explanatory note: In this Definition the term “State”:
(a) Is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;
(b) Includes the concept of a “group of States” where appropriate.

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 armed 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 or 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 recognised 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 of Principles on 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.