THE CRIME OF AGGRESSION
IN THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT:
POLITICAL CONSENSUS VS. DOGMATIC DISSENT

GISELLE HERRERA KHENEYZIR

Universidad de los Andes
Facultad de Derecho
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The crime of aggression in the Statute of the International Criminal Court: political consensus vs. dogmatic dissent

Giselle Herrera Khenezir

**Abstract**

On June 2010 the First Review Conference on the ICC Statute adopted by consensus the definition and conditions for the exercise of jurisdiction over the crime of aggression. Despite such historic agreement, the content and characteristics of the crime of aggression remain subject to great discussion among legal scholars. This article aims to explore the antecedents and preparatory works that culminated in the adoption of this new definition, to describe and analyze the key elements of the approved proposal, as well as to identify its possible shortcomings in order to sketch new arguments for its interpretation, application and/or reform.

**Keywords:** crime of aggression, act of aggression, use of force, individual criminal responsibility, state responsibility.

**Resumen**

En junio de 2010 la Primera Conferencia de Revisión del Estatuto de la Corte Penal Internacional adoptó por consenso la definición del crimen de agresión y el régimen jurisdiccional del mismo. A pesar de este acuerdo histórico, el contenido y las características del crimen siguen siendo objeto de discusión entre juristas internacionales. Este artículo busca explorar los antecedentes y trabajos preparatorios que culminaron en la adopción de esta nueva definición, describir y analizar los elementos clave de la enmienda adoptada, e identificar sus posibles falencias con el fin de esbozar propuestas para su interpretación, aplicación y/o reforma.

**Palabras clave:** crimen de agresión, acto de agresión, uso de la fuerza, responsabilidad penal individual, responsabilidad estatal.
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Introduction

The night of June 11, 2010, during the First Review Conference on the ICC Statute, agreement was finally reached over the definition and conditions for the exercise of jurisdiction over the crime of aggression. The decision, surprisingly adopted by consensus, amends the Rome Statute and ends a long-standing debate over the topic, but most importantly, gives birth to a completely unexplored field of international criminal law. Despite such historic consensus, as with all landmark codifications, the content and characteristics of the crime of aggression remain subject to great discussion among legal scholars.

This article aims to explore the antecedents and preparatory works that culminated in the adoption of this new definition, to describe and analyze the key elements of the approved proposal, as well as to identify its possible shortcomings in order to sketch new arguments for its interpretation, application and/or reform.

For such purpose, the following pages will first make a brief account of the major historic developments that preceded the abovementioned amendment, from the standpoints of both public international law and of international criminal law. Secondly, the discussion will shift towards the content of the approved codification, providing a general evaluation of its core components. An in-depth examination of the perpetrators’ qualifications, of the alternative acts of commission and applicable theories of criminal responsibility, and of the objective requirements of an act of aggression as the material element of the crime will guide this section. Subsequently, some brief remarks on the adequate interpretation and application of the Statute provisions on the crime of aggression will be made. Finally, the last section will highlight the most relevant conclusions to be drawn from this overall assessment.

I. DEFINING THE CRIME OF AGGRESSION

The prohibition of aggression as an international obligation binding upon States can be traced back to almost a century ago, though attempts to define the concept of aggression and, furthermore, to characterize it as an international crime are relatively more recent.

Reference is made to the Kellog-Briand Peace Pact in 1928 as the first international legal instrument establishing this rule, as article 1 of this treaty states that “The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another”.

However, a more comprehensive provision could already be found in the Covenant of the League of Nations, whose article 10 prescribed that “The Members of the League undertake to res-

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1 The amendments regulating the jurisdictional regime for the crime of aggression, contained in articles 15 bis and 15 ter of the Rome Statute, will not be addressed by the present article.


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

Article 16 of the Covenant further authorized the Members of the League to impose a series of sanctions against any State party that contravened this obligation. After the dissolution of the League of Nations, the best known provision to outlaw the use of force is the one contained in article 2(4) of the Charter of the United Nations, which enshrines as one of the guiding principles of the organization that “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”.

By then, however, the abovementioned rule was exclusively aimed at regulating the conduct of states, and a definition of what constituted an act of aggression was still lacking. In spite of this, the Charter itself entrusted the UN Security Council the task of determining “the existence of any threat to the peace, breach of the peace, or act of aggression”, rendering such a determination a political decision to be taken on a case by case basis.

It was not until the establishment of the International Military Tribunal (IMT) “for the just and prompt trial and punishment of the major war criminals of the European Axis” on the 8th of August 1945 that individual criminal liability for the commission of aggression was included in an international law instrument. According to the Charter of the IMT, crimes coming within the jurisdiction of the Tribunal comprised crimes against peace, war crimes and crimes against humanity; the first of which were defined as the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing” by persons acting in the interest of the European Axis countries.

In its judgment, the IMT convicted a total of 12 defendants of crimes against peace: 8 of them were found guilty under the counts of participating in a common plan or conspiracy to commit crimes against peace (count one) and of planning, preparing, initiating and waging aggression.

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4 Covenant of the League of Nations, Article 10. See also Covenant Articles 11, 12, 13 and 15 for a more detailed description of the settlement of international disputes arising between Members of the League.

5 The text of this article reads as follows: “Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.”

6 Charter of the United Nations, Article 2(4) [hereinafter UN Charter].

7 UN Charter, Article 39.

8 Charter of the International Military Tribunal, Article 6(a), annexed to the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 280 [hereinafter IMT Charter]. The last paragraph of this provision extended criminal responsibility to other agents in the following terms: “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”

9 IMT Charter, Article 6(1).
war (count two); while the criminal responsibility of the remaining 4 was established only in relation with the last of these counts. Among the many considerations regarding the nature, characteristics and forms of perpetration of crimes against peace, the Tribunal asserted that “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.” Concerning individual criminal responsibility for such acts, the IMT further affirmed that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

Approximately three months after the adoption of the IMT Charter, the Control Council for Germany adopted Law No. 10 for the prosecution of individuals other than the major war criminals of the European Axis who were already being tried by the Nuremberg Tribunal. Pursuant to this law, the United States established a number of military tribunals that conducted a total of twelve trials between 1946 and 1949, four of which dealt with crimes against peace. Similarly, the General Tribunal of the Military Government for the French Zone of Occupation in Germany, established by France in application of the above-mentioned Control Council Law, conducted a trial that involved charges of crimes against peace. The definition of such crimes contained in Control Council Law No. 10 differed slightly from its immediate predecessor in the IMT Charter. Namely, it considered that invasions of other countries – and not only wars of aggression or in violation of international treaties, agreements or assurances – amounted to crimes against peace. In addition, it broadened the scope of such acts by expressing that these included, but were not limited to, the ones listed in the definition of the IMT Charter.

As to “waging”, being a high official again seemed necessary but so did some significant participation. I cannot quite put my finger on it, and it fits awkwardly with criminal theory, but some kind of “guilty” mind was again required. A person just doing his job, even if it contributed to the war economy and to war-like activities, was not one of the criminals unless his contribution was very significant. It is all very rough and ready, both in the general explanations and in applying the Charter to the individuals’.Clark, Roger S., *Nuremberg and the Crime against Peace*, 6 Wash. U Global Stud. L. Rev. 549-550 (2007).

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11 For a detailed account of the IMT’s most relevant considerations in this respect see: United Nations, Preparatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, Historical review of developments relating to aggression, prepared by the Secretariat, UN Doc. PCNICC/2002/WGCA/L.1 (2002) [hereinafter Historical review of developments relating to aggression] 15-117. Roger Clark, on the other hand, draws some general propositions from the Nuremberg Judgment: “Regarding conspiracy, while it is not entirely distinct from the ‘waging’ theory, it was found mainly for those who were part of the ‘plan’ from early on, who attended the relevant meetings in the 1930s and who planned the takeover of Austria, Bohemia and Moravia, all the while harboring the concept of further aggressions to come. They were high officials, but being a high official was not, in itself, enough. Some input on policy was needed. Nor, although this is less clear, was mere knowledge enough. Some kind of purpose appears to have been necessary. The Judgment is frankly, totally unsatisfactory as a piece of criminal law on this front. From Poland onward, though, most of these people also became "wagers".

12 IMT Judgment, at 186.

13 Id. at 221.

14 Historical review of developments relating to aggression ¶¶ 186-120. The trials conducted by the United States’ Tribunals in relation with crimes against peace comprise the I.G. Farben case, the Krupp case, the High Command case, and the Ministries case. The trial conducted by the French Tribunal refers to the Roebeling case.

The case-law of the Military Tribunals developed the IMT’s previous jurisprudence over the matter. Considerations regarding the elements of knowledge, intent, high-level positions in the political, military or industrial fields, and a significant degree of participation in the acts that amount to crimes against peace as necessary requirements for the establishment of individual criminal responsibility are of particular relevance in this respect.

The last trial worth mentioning in this brief account of the major steps leading to the criminalization of aggression is the one that took place before the International Military Tribunal for the Far East (IMTFE) established in Tokyo, Japan. Approved on the 19th of January 1946, the Charter that lay down the Tribunal’s jurisdiction included a definition of crimes against peace whose single difference with the one set forth by the Nuremberg Charter pointed to the irrelevance of a formal declaration of war in the determina-

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16 Judgment, 29, 30 July 1948, Trials of War Criminals before the Nuremberg Military Tribunals, United States Government Printing Office, 1952, vol. VIII, at 1113: “It is contended that the defendants must have known from events transpiring within the Reich that what they did in aid of rearmament was preparing for aggressive war. It is asserted that the magnitude of the rearmament effort was such as to convey that knowledge. Germany was rearming so rapidly and to such an extent that, when viewed in retrospect in the light of subsequent events, armament production might be said to impute knowledge that it was in excess of the requirements of defence. If we were trying military experts, and it was shown that they had knowledge of the extent of rearmament, such a conclusion might be justified. None of the defendants, however, were military experts. They were not military men at all. The field of their life work had been entirely within industry, and mostly within the narrower field of the chemical industry with its attendant sales branches. The evidence does not show that any of them knew the extent to which general rearmament had been planned, or how far it had progressed at any given time. There is likewise no proof of their knowledge as to the armament strength of neighbouring nations.”

17 Judgment, 27, 28 October 1948, Trials of War Criminals before the Nuremberg Military Tribunals, United States Government Printing Office, 1950, vol. XI, at 486: “As we have pointed out, war whether it be lawful or unlawful is the implementation of a national policy. If the policy under which it is initiated is criminal in its intent and purpose, it is so because the individuals at the policy-making level had a criminal intent and purpose in determining the policy. If war is the means by which the criminal objective is to be attained, then the waging of the war is but an implementation of the policy, and the criminality which attaches to the waging of an aggressive war should be confined to those who participate in it at the policy level.”

18 Judgment, 29, 30 July 1948, supra note 16, at 1126: “The defendants now before us were neither high public officials in the civil Government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. It is, of course, unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilt to which the corollary of mass punishment is the logical result for which there is no precedent in international law and no justification in human relations.”

19 Id., at 1125-1126: “In this case we are faced with the problem of determining the guilt or innocence with respect to the waging of aggressive war on the part of men of industry who were not makers of policy but who supported their Government during its period of rearmament and who continued to serve that Government in the waging of war, the initiation of which has been established as an act of aggression committed against a neighbouring nation (…). Of necessity, the great majority of the population of Germany supported the waging of war in some degree. They contributed to Germany’s power to resist, as well as to attack. Some reasonable standard must, therefore, be found by which to measure the degree of participation necessary to constitute a crime against peace in the waging of aggressive war. The IMT fixed that standard of participation high among those who lead their country into war.” In pages 1126 and 1127 the Tribunal continued to explain its reasoning in the following terms: “Strive as we may, we are unable to find, once we have passed below those who have led a country into a war of aggression, a rational mark dividing the guilty from the innocent. (…) the mark has already been set by that Honourable Tribunal in the trial of the international criminals. It was set below the planners and leaders, such as Goering, Hess, von Ribbentrop, Rosenberg, Keitel, Frick, Funk, Dönitz, Raeder, Jodi, Seyss-Inquart and von Neurath, who were found guilty of waging aggressive war, and above those whose participation was less and whose activity took the form of neither planning nor guiding the nation in its aggressive ambitions. To find the defendants guilty of waging aggressive war would require us to move the mark without finding a firm place in which to reset it. We leave the mark where we find it, well satisfied that individuals who plan and lead a nation into and in an aggressive war should be held guilty of crimes against peace, but not those who merely follow the leaders and whose participations, like those of Speer, were in aid of the war effort in the same way that other productive enterprises aid in the waging of war.”

20 For a detailed account of the American and French Tribunals’ most relevant considerations in this respect see: Historical review of developments relating to aggression” ¶¶ 128-266.
tion of whether a particular conduct qualified as such an offense\textsuperscript{21}. A total of 24 Japanese nationals – including Prime Minister Hideki Tojo for the attack on Pearl Harbor – were convicted of crimes against peace, yet the Tokyo Tribunal, like its predecessors, failed to provide a definition of aggression\textsuperscript{22}.

Perhaps the most salient feature of the IMTFE’s judgment is its application of the doctrines of inchoate conspiracy and joint criminal enterprise in order to justify its conviction of such a high number of individuals. Unlike the Nuremberg Tribunal, which set forth very stringent requirements for the establishment of individual criminal responsibility, its Tokyo equivalent has been viewed by many as over criminalizing aggression\textsuperscript{23}, most likely driven by the need to avoid the massive acquittal of those involved in overly complex and diffuse decision making-processes\textsuperscript{24}.

Following the conclusion of the IMT Trial, the United Nations General Assembly (GA) adopted Resolution 95(I), through which it affirmed the principles of international law recognized by both the Charter and judgment of the Nuremberg Tribunal\textsuperscript{25}, and directed the Committee on the codification of international law to consider the formulation of such principles “\textit{in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code}”\textsuperscript{26}. This same task, entrusted to the International Law Commission, was reiterated in stronger terms with the adoption of Resolution 177 (III) one year later\textsuperscript{27}.

A series of failed attempts to approve a general codification of criminal offenses that included a definition of aggression\textsuperscript{28}, on the one hand, or to agree upon the meaning of this term considered on its own\textsuperscript{29}, on the other, were partially overcome when, in 1974, the General Assembly reached agreement over the matter via Resolution 3314\textsuperscript{30}. Until then, however, the task of defining

\begin{itemize}
  \item \textsuperscript{21} Charter of the International Military Tribunal for the Far East, \textit{Trial of Japanese War Criminals: Documents}, p. 39, Department of State Publication No. 2613, United States Government Printing Office, 1946, Article 5. The text of this provision is reproduced below:

  \textit{“The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace.}

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

  (a) \textit{Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”}

  \item \textsuperscript{22} Glennon, supra note 2, at 74.


  \item \textsuperscript{24} Id., at 431.

  \item \textsuperscript{25} Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I) (1946) ¶ 1.

  \item \textsuperscript{26} Id., ¶ 2.

  \item \textsuperscript{27} Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, G.A. Res. 177(III) (1947) ¶¶ a-b.


  \item \textsuperscript{29} Question of Defining Aggression, G.A. Res. 599 (VI) (1952); Question of Defining Aggression, G.A. Res. 688(VII) (1952); Question of Defining Aggression, G.A. Res. 1181(XII) (1957).

  \item \textsuperscript{30} Definition of Aggression, G.A. Res. 3314(XXIX) (1975) [hereinafter Resolution 3314].
\end{itemize}
aggression had been consistently delegated or postponed\(^{31}\), not to mention that some of the main organs entrusted with this mandate even advocated against the possibility and desirability of providing a legal definition for such term\(^{32}\).

The adoption of Resolution 3314 by the UN General Assembly marked a major step in the path towards the criminalization of aggression, since it provided the framework for the future definition of this crime under the Rome Statute. Article 1 of the annex to the resolution 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 this Definition”. Article 2 declares that “the first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression”, yet empowers the Security Council to arrive at a different conclusion “in the light of other relevant circumstances, including the facts that the acts concerned or their consequences are not of sufficient gravity”. Article 3 contains a non-exhaustive list of examples that amount to acts of aggression\(^{33}\) and article


\(^{32}\) United Nations, International Law Commission, Second report of the Special Rapporteur on the Draft Code of Offences against the Peace and Security of Mankind, Mr. J. Spriopoulos (3rd session of the ILC (1951)), U.N. Doc. A/CM.4/44, in: Yearbook of the International Law Commission, 1951, vol. II. In paragraphs 165-170 of this Report the Special Rapporteur concludes, as to the possibility and desirability of a legal definition of aggression, that: “(...) the notion of aggression is a notion, per se, a primary notion, which, by its very essence, is not susceptible of definition. (...)”

166. A “legal” definition of aggression would be an artificial construction which, applied to concrete cases, could easily lead to conclusions which might be contrary to the “natural” notion of aggression, which is the test adopted by international law for the determination of aggression.

167. Firstly it is, both theoretically and physically, impossible to determine, a priori, which behaviour of a State may be considered as “aggression under international law”.

168. Secondly it is inadmissible to judge on the existence or non-existence of “aggression” on the basis of the concrete behaviour of a State only, without taking simultaneously into consideration the objective element of the concept of aggression: the “aggressive intention”.

(b) But even if the definition of aggression were theoretically possible, it would not be desirable, for practical reasons, to draw up such a definition.

169. In complicated cases—and it is only in such cases that a definition of aggression would have any practical value at all—the difficulties of determining the aggressor would be so great that the existence of a definition of aggression would appear a rather unimportant, in some cases even a disturbing, factor. Thus, for instance, in the case of an armed conflict between States or among a group of States, preceded by a period of misunderstandings, political tension, general armament, mobilization, etc., the fact that there is a definition of aggression enumerating acts to be considered as test of aggression, would scarcely have any practical importance.”
5(1) bans the invocation of political, economic, military or other considerations as a justification for aggression. Continuous reference to the Security Council in its task of determining the existence of acts of aggression indicates that Resolution 3314 was not intended to serve the purpose of defining aggression in its double dimension of an internationally wrongful act and an international crime. Even when article 5(2) expressly provides that “a war of aggression is a crime against international peace” and that “aggression gives rise to international responsibility”, nowhere in the text of the resolution is it possible to find any explicit or implicit reference to the individual criminal responsibility that an act of aggression entails. On the contrary, the resolution consistently reminds States of their obligation to refrain from all acts of aggression and other uses of force that contravene the UN Charter.

Despite this relative progress, which could have given rise to the immediate advancement of international law on the matter, the criminalization of aggression experienced no significant developments during the decades following the adoption of Resolution 3314. Quite the contrary, the most relevant discussions over the topic were dealt with from a State-oriented perspective. It had been widely accepted by then that military intervention inside the territory of another State was in breach of international law, and subsequent judicial decisions recognized the customary character of the prohibition of the use of force and reiterated the unlawfulness of military intervention. Likewise, a number of Security Council Resolutions condemned the perpetration of aggressive acts.

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Resolution 3314, ¶ 4; Annex to Resolution 3314, Preamble, Articles 2 and 4.

Solera, Oscar, *The Definition of the Crime of Aggression: Lessons Not Learned*, 42 Case W. Res. J. Int’l L. 804-806 (2009-2010). In these pages the author recalls that the definition of aggression contained in Resolution 3314 “was for the exclusive use of the Security Council and was conceived to provide guidance to the Council when it had to deal with situations amounting to a breach of international peace and security or acts of aggression”. In his view, “the actual value of the consensus reached to adopt Resolution 3314 should not be overestimated” given that “the resolution’s purpose, and therefore its nature, is clearly political, not legal”.

It must be noted that the phrasing of this article indicates that what constitutes a crime against peace is a “war of aggression” and not precisely an “act of aggression”. It cannot be inferred from this terminology that a single act of aggression in itself amounts to a crime against peace. By defining aggression in article 1 and referring to a war of aggression as a crime against peace in article 5, the annex to Resolution 3314 seems to suggest that there is a difference between these two concepts and that only the latter — for which no definition is provided — qualifies as an international offense.

37 Resolution 3314, ¶ 3; Annex to Resolution 3314, Preamble.


39 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, GA. Res. 2131(XX) (1965) ¶1; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA. Res. 2625(XXV) (1970); Resolution on Non-Interference in the Internal Affairs of States, GA. Res. 31/91 (1976) ¶1; Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, GA. Res. 36/103 (1981) ¶1.


However, neither of the Ad Hoc Tribunals established by the Security Council to prosecute those responsible of serious violations of human rights and international humanitarian law committed in the territories of Rwanda and the Former Yugoslavia included the crime of aggression or crimes against peace within their jurisdiction ratione materiae.

In its last effort to criminalize aggression as part of a Code of Crimes against the Peace and Security of Mankind, the International Law Commission suggested that “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”. Nonetheless, it did not refer to the definition of aggression contained in Resolution 3314 and failed to provide a definition of its own in order to aid in the determination of whether a crime of aggression had existed or not.

It was not until the adoption of the Rome Statute of the International Criminal Court that the issue of defining aggression as an international crime was again revisited. Article 5(1) of the Statute limited the jurisdiction of the Court to “the most serious crimes of concern to the international community as a whole”, including, among others, the crime of aggression. However, article 5(2) postponed the exercise of the Court’s jurisdiction over the crime until “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”. It also added that “Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations”.

The task of preparing proposals for a provision on aggression that included the definition and Elements of the Crime of aggression, as well as the establishment of the conditions under which the Court was to exercise its jurisdiction over the crime, was first entrusted to the Preparatory Commission for the International Criminal Court. The most significant outcome of the work of the Preparatory Commission in this respect is contained in the 2002 Discussion Paper proposed by the Coordinator of the Working

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43 The International Criminal Tribunal for Rwanda (ICTR) was established pursuant to Security Council Resolution 955 of 8 November 1994 (S/RES/955 (1994)).

44 The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established pursuant to Security Council Resolution 827 of 25 May 1993 (S/RES/827 (1993)).

45 Articles 2, 3, and 4 of the Statute of the ICTR, as annexed to Security Council Resolution 955, limited the material competence of the Tribunal to the crimes of genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II. In the same vein, articles 2, 3, 4 and 5 of the Statute of the ICTY limited this Tribunal’s subject-matter jurisdiction to grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. The Statute of the ICTY is contained in: United Nations, Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, Annex. This report was later approved by Security Council Resolution 827.


48 Articles 121 and 123 refer to the Amendments to the Statute and to the Review of the Statute, respectively.

Group on the Crime of Aggression (WGCA)\textsuperscript{50}, which had been created by the Commission in its third session. To the extent that it summarizes the main positions in the debate over the definition, elements of crimes and jurisdictional conditions for the crime of aggression, reference will be made to the relevant considerations contained in the 2002 Discussion Paper along the text of this article.

After the entry into force of the ICC Statute, the completion of the abovementioned task was transferred to the Assembly of States Parties (ASP) to the Statute. Certain proposals suggested for consideration by the ASP emphasized that the forms of aggression were so “variable” and “unpredictable” that universal agreement over a particular definition of the crime would be nearly impossible to reach. They consequently recommended that in determining whether an individual has committed the crime of aggression, the ICC applied a series of sources of international law that included, among others, the relevant provisions of the UN Charter, the IMT Charter and Judgment, and the definitions of aggression adopted by the UN General Assembly in Resolution 3314 and by the International Law Commission in 1996\textsuperscript{51}.

It was, however, through the establishment of the Special Working Group on the Crime of Aggression (SWGCA) that the ASP actually undertook its mission. In February 2009 the SWGCA presented a discussion paper that included a draft resolution that was intended to serve as the basis for the final text which would be forwarded to the ASP for consideration during the 2010 Review Conference on the ICC Statute to be held in Kampala, Uganda\textsuperscript{52}.

The final paper containing a proposed draft outcome for the Review Conference was submitted by the Chair of the SWGCA on the 25\textsuperscript{th} of May 2010\textsuperscript{53}. The final amendments to the ICC Statute concerning the crime of aggression were approved by consensus through the adoption of Resolution RC/Res.6 on 11 June 2010, the text of which, in relevant part\textsuperscript{54}, will be reproduced below:

\begin{quote}
\textbf{A. Annex I}

\textbf{Amendments to the Rome Statute of the International Criminal Court on the crime of aggression}

1. Article 5, paragraph 2, of the Statute is deleted.

2. The following text is inserted after article 8 of the Statute:

\begin{itemize}
\item 1
\item 2
\end{itemize}

\end{quote}


\textsuperscript{52} International Criminal Court, Assembly of States Parties, Discussion paper on the crime of aggression proposed by the Chairman (revision January 2009), Doc. ICC-ASP/7/SWGCA/INF.1.


\textsuperscript{54} The text of the amendments which has been reproduced in this article refers exclusively to the definition of aggression. The amendments to other Statute articles and to the Elements of Crimes, as well as the Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, contained in Annexes I, II and III of Resolution RC/Res.6, will also be dealt with in the present article.
The crime of aggression in the Statute of the International Criminal Court: political consensus vs. dogmatic dissent

Article 8 bis
Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means 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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Having concluded this brief historic appraisal of the major steps in the process of defining the crime of aggression, it is this new codification which will be analyzed in the following pages.

II. AGGRESSION UNDER SCRUTINY

The definition contained in article 8 bis of the ICC Statute is comprised of a number of elements that merit individual examination. At the outset, it must be noticed that a distinction is made between the “crime of aggression” and an “act of aggression”, the latter being an essential component in the characterization of the for-
mer. In order for an act of aggression to qualify as a crime of aggression it must further satisfy a threshold requirement: that, by its “character, gravity and scale”, it constitutes a “manifest” violation of the UN Charter. Finally, the definition contained in paragraph 2 of article 8 bis of the Statute lists several other conditions determining the existence of an act of aggression.

Another relevant aspect of the abovementioned codification is the limited group of perpetrators that can commit this crime, since the category of punishable offenders is restricted to individuals “in a position effectively to exercise control over or to direct the political or military action of a State”. Lastly, attention must be paid to the set of verbs employed by the definition to convey the actions that give rise to individual criminal responsibility for aggression, namely, the “planning, preparation, initiation or execution” of an act of aggression.

For a clearer exposition and a more careful analysis of the previous matters, the present section will divide the study of the criminalization of aggression in the ICC Statute into the following three questions: firstly, who can commit the crime of aggression; secondly, how can the crime be committed; and thirdly, what acts can meet the criteria of criminal aggression.

A. The question of overqualified aggressors: is this desirable?

It has already been pointed out that only a small category of individuals gathering certain characteristics will be considered by the Statute to be potentially liable for the crime of aggression. The drafting of article 8 bis, paragraph 1 of the Statute refers to “persons in a position effectively to exercise control over or to direct the political or military action of a State”. When read in conjunction with the definition of an act of aggression contained in paragraph 2, according to which the latter requires the use of armed force by a State, the abovementioned article allows no other interpretation.

The first conclusion to be drawn here is that the perpetration of a crime of aggression entails not only the individual criminal responsibility of its authors, but also the responsibility of a State for an internationally wrongful act. At least from a theoretical perspective and to the extent that it requires the commission of an act of aggression, the existence of this crime presumes as well the existence of an act or omission that constitutes a breach of an international obligation of a State and that can be attributed to it under international law. In this particular case, it will be the prohibition of the use of force enshrined in article 2(4) of the UN Charter.

Furthermore, the fact that aggression is the only crime in the ICC Statute whose sphere of possible perpetrators is so exclusive, raises a number of questions of crucial importance to the inter-


57 In defining an “act of aggression”, paragraph 2 of article 8 bis of the ICC Statute requires it to be inconsistent with the UN Charter.
national criminal law system as a whole. Unlike war crimes, crimes against humanity, and genocide, the crime of aggression cannot be committed by individuals that remain outside the political or military elite of a State. This means that, despite the increasing threat they represent to international peace and security, national and transnational terrorist organizations are not in a position to commit this crime.

Apparently an undisputed matter in the negotiations within the SWGCA, the exclusion of non-state actors from the list of potential aggressors is all but uncontroversial among legal scholars. In an era in which other chief international offenses, such as crimes against humanity and war crimes, have evolved to incorporate acts committed by groups and organizations other than the legal entities of States, and in which it is generally accepted that some of the key provisions of International Humanitarian Law bind States and insurgents alike, the link between aggression and statehood must be reassessed.

In the same vein, this position has been advanced by some authors that refer to an emerging rule of customary international law allowing for states to use force in response to society-induced terrorist attacks, a view which broadens the concept of “armed attack” to include acts of violence by non-state actors and, by necessary implication, extends the applicability of the inherent right to self-defense contained in article 51 of the UN Charter.

Conversely, it has traditionally been argued that the justification for this overly selective categorization of aggressors stems from the diverging legal values that the crime of aggression and the other Statute crimes seek to protect. Thus, to the extent that the latter are aimed at the protection of the individual, whereas the main objective of the criminalization of aggression is to safeguard States from the unlawful use of force by other States against their sovereignty, territorial integrity or political independence, it seems prima facie logical to narrow down the circle of perpetrators to the top political and military

59 S/RES/1373 (2001) (Terrorism). In this resolution, the UN Security Council strongly condemned the terrorist attacks that took place in New York, Washington D.C., and Pennsylvania on 11 September 2001, reaffirmed that terrorism represented a threat to international peace and security, and called for States to take a number of actions aimed at preventing and punishing the commission, participation in or financing of terrorist acts by persons or entities. For an analysis of the change in legal responses to international terrorism see: Marja Lehto, Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts (2010), xxxii-xxxvii.
60 Kreß & von Holtzendorff, supra note 38, at 1190.
61 Id., at 1190.
64 Lindsay Moir, The Law of Internal Armed Conflict (2002), at 52.
66 Kreß, Claus, Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts, Journal of Conflict & Security Law, Vol. 15 No. 2, 270 (2010). In this article, the author asserts that, from the standpoint of legal consistency, it might well be argued that customary international law on the crime of aggression should include transnational armed violence by non-state actors, as the latter reasonably amounts to an armed attack within the meaning of article 51 of the UN Charter.
leaders of a State. If we additionally take into consideration that the definition of aggression adopted by the Statute makes explicit reference to a violation of the UN Charter, and that only States can be parties to the Charter under international law, the aforementioned conclusion gains further support.

However, at this stage of the debate it might be useful to recall that the definition of aggression contained in Resolution 3314 was not intended to serve as a basis for the future codification of an international crime. Hence, normative consistency will not be jeopardized by extending the group of possible perpetrators to non-state actors as long as both of these notions – “crime” of aggression and “act” of aggression – are equally re-examined. Quite the contrary, to demand special credentials from aggressors remains highly problematic, as the lack of coherence between the most recent developments of ius ad bellum and ius in bellum, on the one hand, and the newly adopted codification of aggression, on the other, must not be left unnoticed.

Back to the double responsibility standard implied in the definition of the crime, it is necessary to make a distinction between the requirements for the activation of the international responsibility of the State and of the individual responsibility of the perpetrator. The basic rule regulating attribution of conduct to a State expresses that the conduct of its organs shall be considered acts of the State under international law. In interpreting this norm, the International Law Commission has explained that the reference to State organs is not limited to the highest-ranking officials, since the acts of subordinates can also engage the international responsibility of the State as long as these are performed in their official capacity. When compared to this model, the standard adopted by article 8 bis of the Statute for the attribution of individual criminal responsibility proves much more stringent. Thus, it appears that a crime of aggression can only be committed if an internationally wrongful act of aggression has occurred, but not every

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67 Heinsch, supra note 58, at 722.
68 Solera, supra note 35, at 804-806.
internationally wrongful act of aggression by a State will amount to a crime of aggression under the Statute.

Even when the last part of this conclusion seems uncontroversial, its first component deserves a more detailed analysis, since there are a number of borderline cases in which, despite the absence of a link of attribution between an individual’s conduct and the internationally wrongful act of aggression of a State, the lack of criminal punishment of the individual involved appears, at the least, counterintuitive.

Perhaps the best example of the above would be the case of an industrialist whose actions, originating outside of the State machinery, nonetheless exert a significant influence over decisions taken at the highest level of its political or military structure. It has already been contended that these individuals should be held criminally responsible for such acts, and proposals to adopt a more flexible standard of attribution can also be found in the context of the discussions that preceded the amendments approved at Kampala. In particular, it has been asserted that this newly adopted codification is actually a deviation from the Nuremberg, Tokyo, and Military Tribunals’ legacy, since these courts applied the “shape or influence” formula rather than the “control or direct” requirement as a basis for the establishment of individual responsibility for crimes against peace.

Regardless of the adoption of the effective control or of the overall control test in the determination of whether an individual qualifies as an aggressor under the Statute, suffice it to say that it is nearly impossible for an individual that remains outside of the State machinery or that, being part of it, is not at the highest level of command, to “control or direct” the political or military action of a State.

The crime of aggression in the Statute of the International Criminal Court: political consensus vs. dogmatic dissent

74 For a complete study of the interpretation and application of the leadership requirement of the crime of aggression by the IMT, the Military Tribunals established pursuant to Control Council Law No. 10 and the IMTFE, see: Heller, Kevin Jon, Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression, 18 EJIL 477-497 (2007).

76 Heller, supra note 73, at 479-488. In particular, the formulation of the “shape or influence” rule is highlighted by the author in his assessment of the High Command case. At p. 486, the author recalls the following excerpt from the abovementioned case: “It is not a person’s rank or status, but his power to shape or influence the policy of his State, which is the relevant issue for determining his criminality under the charge of crimes against peace.”

77 Nicaragua, ¶¶ 109-115.
79 The reader should be aware of the difference between the application of an effective control test in the interpretation of this leadership clause, and the use of the word “effectively” in the phrasing of such a clause. While the former refers to the degree of control over the political or military action of a State required for attribution of criminal responsibility, the latter describes the adequacy or capability of the perpetrator’s position to exercise such control or direction – regardless of its qualification – over the said action of a State. It must be clarified as well that the tests adopted by the ICJ and the ICTY in the Nicaragua and Tadić cases, respectively, were applied under factual and juridical circumstances that differ substantially from the ones discussed in this article, as such tests referred to the realm of State responsibility (Nicaragua), on the one hand, or to the classification of an armed conflict (Tadić), on the other. Hence, they have only been invoked for illustrative purposes, and not necessarily as a result of a previous judgment from the author on their applicability to the case at hand.

80 This conclusion finds support in the appraisal of the trials of industrialist defendants in Nuremberg. For an example of such an appraisal, see: Danner, Allison Marston, The Nuremberg Industrialist Prosecutions and Aggressive War, 46 Va. J. Int’l L. 669-671 (2006). In these pages, the author correctly explains that the defendant’s ability to influence
Another interesting scenario might deal with the situation of a high-ranking military organ placed at the disposal of an international organization, such as in the case of a peacekeeping operation charged with the mandate of overseeing the border between two countries. In these contexts, the interplay between individuals, States and International Organizations may yield a series of different results. Let us, for the sake of argument, analyze the following example: the Mission’s Force Commander, who happens to be the same General Commander of one of the Troop Contributing States’ Military Forces, orders the use of force against the territorial integrity of one of the receiving States, in excess or contravention of the Organization’s instructions, or in a manner that is otherwise inconsistent with the Mission’s mandate, acting in his official capacity as an organ placed at the disposal of the Organization, but guided by the desire to advance a strategic interest of his State of nationality.

The basic rule in this case would call for the attribution of conduct to the International Organization if the latter exercised effective control over such conduct. In the case of the UN, the Organization generally assumes that it exercises prima facie control over members of national contingents in a peacekeeping force. Additionally, if the Organization retains operational command and control over the abovementioned conduct, judicial decisions over the matter have generally considered that they lack jurisdiction to determine the lawfulness or unlawfulness of such actions, since they cannot be generally attributed to the State, but rather to the International Organization at whose disposal the State organ was placed. Therefore, it might be worth asking if attribution of conduct to the Organization rules out attribution of conduct to the State and, consequently, the possibility of prosecuting the Force Commander in question for the execution of an act of aggression under article 8bis of the Rome Statute. If such conduct cannot technically be considered an act of aggression insofar as it does not constitute the use of force by a State against another State, would the ICC lack jurisdiction over it?

Lastly, a policy argument could be made to question the overall exclusion of conduct not attributable to the State from the scope of criminal punishment. If it has been consistently acknowledged that the outlawing of aggression is a peremptory norm of international law that gives rise to obligations erga omnes, and if both the Statute of the International Criminal Court and the Articles on State Responsibility of the International Law Commission expressly provide

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82 Id., Commentary to Article 5, at 111.


85 Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, 1970 ICJ ¶ 34.
that individual criminal responsibility and the responsibility of States are independent spheres of international law, why should the existence of a crime of aggression be contingent upon the existence of an internationally wrongful act of a State? Even if we accede to this double responsibility standard, why should we set the criminality threshold so high above the customary rules of attribution of conduct to a State? Just to mention an example, why should the ultra vires acts of a medium or low-ranking state organ or of a person exercising elements of governmental authority be left outside the reach of the international criminal law regime?

**B. Reconciling the acts of commission and theories of responsibility in the crime of aggression**

As was previously stated in the introduction to this section, the debate will now shift to the question of how the crime of aggression can be perpetrated. In this context, three specific issues will be considered: 1) the criminalization of inchoate aggression, 2) the possibility of incurring criminal responsibility for the crime of aggression by means of an omission, and 3) the applicability of the various modes of criminal liability contained in the ICC Statute to the crime of aggression.

As regards the first of these points, it is convenient to recall that the newly adopted codification of aggression admits four different acts of commission, which have been gathered under the “planning, preparation, initiation or execution” formula in article 8 bis. It thus seems that any of these actions considered on its own may give rise to individual criminal responsibility for the crime of aggression. However, when read in conjunction with the corresponding amendment to article 25 of the Statute adopted at Kampala, this conclusion is deprived of all normative support.

The aforementioned provision on individual criminal responsibility covers both the actual perpetrators and all other accomplices in the commission of the crimes under the jurisdiction of the International Criminal Court. Despite the great number of difficulties that surrounded the negotiation of article 25, parties to the Statute were finally able to agree on a single provision governing the conduct of those who commit, order, aid, abet or otherwise contribute to the commission or attempted commission of any of the crimes contained therein.

With respect to aggression, though, the inapplicability of article 25, paragraph 3 had been

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86 ICC Statute, Article 25(4): “No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” Article 58 of the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts expresses a parallel rule in the following terms: “These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.” On the differences between these two branches of international law see: Robert Cryer, Hakan Friman, Darryl Robinson & Elizabeth Wilmhurst, *An Introduction to International Criminal Law and Procedure* (2nd ed., 2010), 15-16.

87 State Responsibility, Commentary to Article 7, at 103.


90 Article 25, paragraph 3 of the Statute reads as follows: “3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
suggested since the negotiations within the Pre-
paratory Commission for the International Cri-
minal Court. Not surprisingly, such a view was
equally upheld at Kampala and came to light as
paragraph 3 bis, inserted after article 25, pa-
ragraph 3, of the Statute in the following terms:

3 bis. In respect of the crime of aggression, the
provisions of this article shall apply only to per-
sons in a position effectively to exercise control
over or to direct the political or military action
of a State.

Likewise, the Amendments to the Elements of
Crimes contained in Annex II to Resolution RC/
Res.6 specifically provide that

3. The act of aggression – the use of armed
force by a State against the sovereignty, terri-
torial integrity or political independence of ano-
ther State, or in any other manner inconsistent
with the Charter of the United Nations – was
committed.

In conclusion, this means that an aggressor’s
liability for punishment ultimately depends on
whether an act of aggression is actually con-
summated.

Nonetheless, to espouse such an interpretation
leads to a series of undesirable consequences
that risk legal consistency within the Statute.
To begin with, if the planning or preparation of
an act of aggression are already criminalized
under article 8 bis of the Statute, it seems un-
reasonable, or at least unnecessary, to restrict
the applicability of article 25, paragraph 3, to
the group of qualified aggressors under article
8 bis. “Planning” has been understood as the
action of “devising, agreeing upon with others,
preparing and arranging for the commission of a
crime” and has been further interpreted by
the case-law of international criminal tribunals
as requiring that “one or several persons con-
template designing the commission of a crime at
both the preparatory and execution phases.” In
such circumstances, why should we need to
narrow the application of a specific provision
that punishes those who attempt to commit a

(b) Orders, solicits or induces the commission of such a crime which in fact
occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids,
abetts or otherwise assists in its commission or its attempted commis-
sion, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commis-
sion of such a crime by a group of persons acting with a common pur-
pose. Such contribution shall be intentional and shall either:
   (i) Be made with the aim of furthering the
       criminal activity or criminal purpose of the
       group, where such activity or purpose in-
       volves the commission of a crime within
       the jurisdiction of the Court; or
   (ii) Be made in the knowledge of the intention
        of the group to commit the crime;

(c) In respect of the crime of genocide, directly and publicly incites others
to commit genocide;

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


92 Murphy, Sean D., Aggression, Legitimacy and the International Crimi-
nal Court, 20 EJIL 1150 (2009), footnote 18.

93 Report of the International Commission of Inquiry on Darfur to the
United Nations Secretary General, Pursuant to Security Council Re-
solution 1564 of 18 September 2004 (2005), in: United Nations, Se-
curity Council, Letter dated 31 January 2005 from the Secretary-Ge-
neral addressed to the President of the Security Council, U.N. Doc.
S/2005/60, ¶ 551.

94 Prosecutor v. Blaškić, IT-95-14-T, ICTY Trial Chamber, Judgment
(2000) ¶ 279; Prosecutor v. Akayesu, ICTR-96-4-T, ICTR Trial Cham-
crime “by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions”\(^95\). Do the drafters of the Statute presume that there can be an attempt to plan or prepare a crime? Or does this limitation deal exclusively with the acts of execution? If that were the case, what would make it different from the acts of initiation already contained in article 8 bis?

On the other hand, and even if we disregard such ambiguities, the question still remains whether the content of paragraph 3 of the Elements of the Crime rules out any possible cases of aggression on the grounds of planning or preparing the commission of such an offense. To the extent that this element conditions liability for punishment to the completion of an act of aggression\(^96\), it seems that only the execution, or perhaps the initiation, of such an act could engage an individual’s criminal responsibility. If we take this interpretation one step further, we will be forced to conclude that for an individual who plans or prepares an act of aggression to be liable for punishment, he or she must be the same person who completes the commission of the act, or otherwise the act must have been completed by another person whose conduct is attributable to the State in question. Illegal threats to use force – in themselves prohibited under article 2(4) of the UN Charter – or attempted acts of aggression will not give rise to criminal responsibility for all those who materially engage in such conduct\(^97\). Similarly, if an individual who is not in a position to exercise control over or direct the political or military action of a State happens to commence the execution of the illegal act of aggression, the high-ranking political or military official who planned, prepared or otherwise ordered that conduct will not be criminally responsible under article 25 (3) (b) or 25 (3) (f) of the Statute, since the latter provisions are confined to attempted crimes – not to attempted acts\(^98\) –, and it has been sufficiently established that the crime of aggression can only be committed by a limited group of qualified perpetrators.

In sum, the amendments to the Statute and to the Elements of Crimes regarding the crime of aggression are far from clear when it comes to identifying whether preliminary acts of aggression are covered by the Court’s material jurisdiction\(^99\). Quite the contrary, indeterminacy seems to prevail.

As regards criminal responsibility for aggression by means of an omission, the question must be examined from the perspectives of both state responsibility and international criminal law.

It has already been explained that an internationally wrongful act of a State may consist of actions or omissions\(^100\), since the failure to take

\(^95\) ICC Statute, Article 25(3)(f).

\(^96\) Kreß & von Holtzendorff, supra note 38, at 1200.


\(^98\) See supra note 90 for the text of article 25(3) of the Statute.

\(^99\) Murphy, supra note 92, at 1150.

\(^100\) See supra note 56.
Command responsibility has its origins in war crimes cases decided after World War II\textsuperscript{103}, and it encompasses direct responsibility for ordering unlawful acts as well as imputed criminal responsibility for a commander’s failure to act in response to his or her subordinates’ unlawful conduct\textsuperscript{104}. The latter notion of command responsibility has been extensively developed by the jurisprudence of international criminal tribunals\textsuperscript{105}. However, the text of article 28 of the Statute is very clear in limiting its scope of application to the criminal responsibility of military commanders and other superiors for crimes within the jurisdiction of the Court committed by forces or subordinates under their effective command, authority and control, provided the existence of certain requirements\textsuperscript{106}. Given that

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\textsuperscript{101} Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, 1949 ICJ [hereinafter Corfu Channel]. In pages 18-23 of its judgment, the International Court of Justice expressed the general obligation incumbent upon a State “not to allow knowingly its territory to be used for acts contrary to the rights of other States”, and admitted that the responsibility of a State for an omission may be established on the basis of inferences of fact and circumstantial evidence. Likewise, in the

\textsuperscript{102} Saland, supra note 89, at 212-213.

\textsuperscript{103} John R.W.D. Jones & Steven Powles, International Criminal Practice: the International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the International Criminal Court, the Special Court for Sierra Leone, the East Timor Special Panel for Serious Crimes, war crimes prosecutions in Kosovo (3rd ed., 2003), 424. For an analysis of this mode of liability and an account of its application in the case law of international tribunals see pages 424-443.

\textsuperscript{104} M. Cherif Bassiouni & Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia (1996), 345. The authors’ comments to the concept of Command Responsibility under article 7(3) of the ICTY Statute can be read in pages 344-374.


\textsuperscript{106} Article 28 of the Statute reads as follows: “In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
the crime of aggression cannot be committed by middle or low-ranking officials who are not in a position to exercise control over or direct the political or military action of a State, a superior’s failure to prevent, investigate or punish an act of aggression perpetrated by one of his or her subordinates will fall short of criminal punishment under article 28.

In light of the abovementioned considerations, we must conclude that in the case of aggression, the Statute leaves no room for criminal accountability as a result of conduct consisting of omissions.

Besides command responsibility, other forms of liability generally recognized in international criminal law include co-perpetration and aiding and abetting\(^{107}\). Equally important among them is the criminal responsibility in which an individual incurs through participation in a Joint Criminal Enterprise. This last mode of liability has been consistently applied by the International Criminal Tribunal for the Former Yugoslavia as a form of co-perpetration\(^{108}\), yet it has been rejected by subsequent decisions of the International Criminal Court\(^{109}\). In spite of this, the debate over the applicability of the theory of Joint Criminal Enterprise as a residual mode of liability under article 25 (3) (d) of the ICC Statute has not been abandoned\(^{110}\).

Before proceeding with the definition of the various forms of criminal responsibility under international law and in order to provide a clearer exposition of all relevant concepts, the distinction must first be made between individuals who engage in the commission of a crime as perpetrators and those who participate as accomplices. The responsibility of perpetrators is regulated under article 25 (3) (a) of the Statute, according to which an individual may commit a crime by himself, jointly with another person, or through another person\(^{111}\). In the first of these situations, we will be in the presence of a single direct perpetrator, whereas in the second and

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\(^{108}\) Though the concept of Joint Criminal Enterprise has been resorted to in subsequent cases, it is generally acknowledged that the Tribunal’s landmark decision over the matter is Prosecutor v. Tadić, supra note 78, at ¶¶ 185-228.


\(^{111}\) The Prosecutor v. Thomas Lubanga Dyilo, supra note 109, at ¶ 320; The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, supra note 109, at ¶ 488.
third hypotheses we find co-perpetration and indirect perpetration, respectively. As opposed to these modes of responsibility, paragraphs (b) through (d) of article 25 (3) of the Statute deal with other forms of accessorial liability.  

In its case-law, the International Criminal Court has stated that the concept of co-perpetration stems from “the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner”. Under this notion, all of the participants share control over the offense, since each one of them is in a position to “frustrate the commission of the crime by not carrying out his or her task”. Among its objective requirements, the Court has mentioned “the existence of an agreement or common plan between two or more persons”. Such agreement need not be explicit, but it must include an element of criminality. Additionally, this mode of liability requires that each of the co-perpetrators makes a coordinated essential contribution that results in the realization of the objective elements of the crime. Lastly, each of the co-perpetrators must fulfill the required mens rea of the crime in question.

The concept of indirect perpetration, on the other hand, refers to the commission of a crime through another person, regardless of whether that other person is criminally responsible. In an effort to provide a solid theoretical construction of this form of criminal responsibility, the Court’s jurisprudence has enumerated its objective requirements: a) the existence of an organized and hierarchical apparatus of power, 2) the perpetrator’s control over the organization, and 3) the execution of the crimes secured by almost automatic compliance with the perpetrator’s orders. Furthermore, it has been asserted that “the underlying rationale of this mode of criminal responsibility is that the perpetrator behind the perpetrator is responsible because he controls the will of the direct perpetrator”. In light of this, the Court has also stated that “through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which allows the Court to assess the blameworthiness of ‘senior leaders’ adequately.”

Conversely, criminal responsibility for aiding and abetting is a form of accessory liability in which a person “carries out acts specifically directed through another person, regardless of whether that other person is criminally responsible. In an effort to provide a solid theoretical construction of this form of criminal responsibility, the Court’s jurisprudence has enumerated its objective requirements: a) the existence of an organized and hierarchical apparatus of power, 2) the perpetrator’s control over the organization, and 3) the execution of the crimes secured by almost automatic compliance with the perpetrator’s orders. Furthermore, it has been asserted that “the underlying rationale of this mode of criminal responsibility is that the perpetrator behind the perpetrator is responsible because he controls the will of the direct perpetrator”. In light of this, the Court has also stated that “through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which allows the Court to assess the blameworthiness of ‘senior leaders’ adequately.”

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to assist, encourage or lend moral support to
the perpetration of a certain specific crime (...),
and this support has a substantial effect upon
the perpetration of the crime”121. In this parti-
cular case, “the requisite mental element is
knowledge that the acts performed by the aider
and abettor assist the commission of a specific
crime by the principal”122. The actus reus of ai-
ding and abetting may be perpetrated through
an omission, and there is no need to prove the
existence of a causal link between the conduct
of the aider and abettor, on the one hand, and
the act of the principal, on the other123.

Concerning the crime of aggression and as a
result of the amendment adopted through the
insertion of paragraph 3 bis under article 25 of
the Statute, it seems that the only applicable
theories of responsibility to the case at hand
would be those that stem from the content of
article 25 (3) (a), namely, individual perpetra-
tion of the crime, co-perpetration, indirect perpetra-
tion, and indirect co-perpetration. Whenever
qualified aggressors commit the crime through
another person in the context of an organized
apparatus of power, they will be criminally res-
ponsible as indirect perpetrators or co-perpetra-
tors. Nonetheless, if an unqualified aggressor
carries out an essential task for the realization
of the objective elements of the crime, and per-
forms this task in coordination with other agents

121 Prosecutor v. Tadić, supra note 78, at ¶ 229.

122 Id., at ¶ 229. For an in-depth analysis of the actus reus and mens
rea requirements of aiding and abetting, as well as a historic account
of the legal antecedents of this mode of liability, see: Prosecutor v.
Furundžija, IT-95-17/1-T, ICTY Trial Chamber, Judgment (1998) ¶¶
190-249.


that do exercise control over or direct the poli-
tical or military action of a State, he or she will
not be liable for punishment as a co-perpetrator.
Similarly, if this same individual renders assis-
tance that has a substantial effect on the perpe-
tration of the crime, his or her acts will fall short
of criminal responsibility as those of a person
who aids and abets in the commission of the
offense. In general, and since paragraph 3 bis
categorically restricts the application of the va-
rious modes of liability under article 25 of the
Statute to the limited group of qualified aggres-
sors, the amendments on the crime of aggres-
sion basically exclude the conduct of all other
possible accomplices from the realm of criminal
punishment. When compared to cases of ac-
cessorial liability for other Statute crimes, this
consequence appears both counterintuitive and
undesirable.

C. Criminal aggression and non-criminal
aggression: where to draw the line?

Last but not least, we will now deal with the
threshold requirement that an act of aggression
must comply with in order to qualify as a crime
under the Statute: that, by its character, gravity
and scale, it constitutes a manifest violation of
the Charter of the United Nations.

A thorough examination of the previous quali-
fiers requires that they be read in conjunction
with the relevant amendments to the Elements
of Crimes, as well as with the Understandings
regarding the amendments to the Rome Statute
of the International Criminal Court on the crime
of aggression. To begin with, the introduction to
the Elements of the Crime states that the term
“manifest” is an objective qualification, and that there is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the UN Charter, or as to the “manifest” nature of such a violation124. The Elements of the Crime, however, do require that the perpetrator be aware of the factual circumstances that established that the use of armed force was inconsistent with the Charter, as well as of the factual circumstances determining the manifest character of such a violation125. Finally, the abovementioned Understandings demand that the gravity of the acts concerned and their consequences, along with all other relevant circumstances of each particular case, be considered in the determination of whether an act of aggression has been committed126. Likewise, such Understandings provide that the three components of character, gravity and scale will be sufficient to justify that a particular act of aggression amounts to a manifest violation of the UN Charter, but that no one component considered on its own can be significant enough to satisfy this standard127.

Aggression is, without a doubt, the most controversial crime in the Rome Statute. Despite the apparently longstanding consensus over its criminal character under customary international law, its inclusion in the group of crimes within the jurisdiction of the International Criminal Court met with strong opposition from a number of States and, in particular, from Security Council permanent members128.

Great part of the discussions within the SWGCA revolved around the description of the material elements and mental requirements of the crime, and how specific or generic these should be129. As regards its material elements, the proposals for a provision on the crime of aggression elaborated within the Preparatory Commission for the ICC included a number of definitional options according to which the act of criminal aggression should either amount to a war of aggression or have the object or result of establishing the military occupation of, or annexing, the territory or part of the territory of another State130. It thus seems that the drafting history of article 8 bis of the Statute endorsed a mainstream opinion that not all acts of aggression should be subject to criminal punishment.

Notwithstanding its widespread acceptance, the espousal of such a view did not exempt States at Kampala from their duty to adopt a clear-cut definition of aggression as a crime. Not surprisingly, the lack of clarity of which the actual formula suffers has been the subject of extensive criticism. Just to cite an example, the term “mani-

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124 International Criminal Court, Review Conference of the Rome Statute, Resolution RC/Res.6 (The crime of aggression) [hereinafter Resolution RC/Res.6], Annex II: Amendments to the Elements of Crimes, Article 8 bis, Introduction, ¶¶ 2-4.

125 Resolution RC/Res.6, Annex II: Amendments to the Elements of Crimes, Article 8 bis, Elements, ¶¶ 4, 6.

126 Resolution RC/Res.6, Annex III: Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, ¶ 6.

127 Resolution RC/Res.6, Annex III: Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, ¶ 7.

128 Benjamin N. Schiff, Building the International Criminal Court (2008), 186.

129 Id., at 188.

fest” has been considered to have little meaning of its own, especially if we rely on its dictionary definition, according to which it expresses the quality of being obvious or clearly revealed to the eye, mind or judgment\textsuperscript{131}. Even when the general rule of interpretation set forth in article 31 of the Vienna Convention on the Law of Treaties admits recourse to the ordinary meaning of treaty terms and, consequently, to regular dictionary definitions\textsuperscript{132}; in this particular case, in which the last decades have witnessed how consensus over legal and illegal uses of force in international law has been the exception rather than the rule\textsuperscript{133}, the lexical meaning of the word “manifest” offers little or no guidance in the determination of whether a crime of aggression has taken place\textsuperscript{134}. Far from being an objective qualification, the term “manifest” seems to adopt an increasingly subjective approach.

This latter conclusion originates from the legal uncertainty surrounding a series of borderline cases concerning the use of force, and is best exemplified in two particular situations: (i) the “war on terror” and (ii) humanitarian interventions. On the first of these issues, diverging views have been expressed to support\textsuperscript{135} or contest\textsuperscript{136} that terrorist attacks may amount to armed attacks within the meaning of article 51 of the UN Charter and, as such, trigger States’ inherent right to use force in self-defense. Though it has been traditionally required that the exercise of this right be linked to an armed attack that is attributable to another State under international law\textsuperscript{137}, such an interpretation has also been rebutted by highly qualified publicists\textsuperscript{138}. Similarly, one can find a myriad of arguments both in favor of and against humanitarian intervention\textsuperscript{139}. While it has been generally deemed that international law as it stands does not – yet – recognize a right for States to unilaterally intervene in another State whenever grave human rights violations are taking place in the territory of the latter and the State is unwilling or unable to address the situation\textsuperscript{140}, contrary opinions can also be found in international legal literature\textsuperscript{141}. In particular, proposals for an emerging

\textsuperscript{131} Paulus, Andreas, Second Thoughts on the Crime of Aggression, 20 EJIL 1121 (2009). In this case, the author relies on the definition of the word “manifest” contained in the Oxford English Dictionary. He also notes that such definition corresponds to the content of article 46(2) of the Vienna Convention on the Law of Treaties, which states that “a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith”.

\textsuperscript{132} Avena and other Mexican Nationals (Mexico v. United States of America) 2004 ICJ ¶ 84.

\textsuperscript{133} Paulus, supra note 131, at 1122-1124. On the disagreements regarding the scope of self-defense as an exception to the prohibition of the use of force, see: Christine Gray, International Law and the Use of Force (3rd ed., 2008), 114-166.

\textsuperscript{134} Murphy, supra note 92, at 1150-1151.

\textsuperscript{135} Tarcisio Gazzini, The Changing Rules on the Use of Force in International Law (2005), 183.

\textsuperscript{136} Mary Ellen O’Connell, International Law and the Use of Force: Cases and Materials (2005), 277.

\textsuperscript{137} Nicaragua, ¶ 195; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ [hereinafter Construction of a Wall] ¶¶ 139, 142.


\textsuperscript{140} Id., at 9-19, 55; Cassese, Antonio, Ex injuria ius oritur: Are we moving towards international legitimisation of forcible humanitarian countermeasures in the world community? 10 EJIL 25 (1999); Ian Brownlie, Public International Law (7th ed., 2008), 744; Thomas Franck, Recourse to Force: Threats and Armed Attacks (2002), 136.

\textsuperscript{141} Christopher Greenwood, Humanitarian Intervention: The Case of Kosovo, in: Essays on War in International Law (2006), 593, 616-625;
rule of a customary character precluding the unlawfulness of humanitarian intervention draw upon the so-called ex-post facto authorizations of the use of force, as in the cases of Liberia and Kosovo, whereby the Security Council recognized the moral and political legitimacy of the interventions once they had taken place.

In addition to the aforesaid debates, other classical questions associated to the prohibition of the use of force challenge the apparent simplicity that has been attached to the determination of whether an act of aggression constitutes a manifest violation of the UN Charter. The requirement that the use of force in self-defense be directed against the responsible party of an armed attack, that such a response be necessary and proportional, and even the recognition that the use of force taken for purposes other than defense might be lawful under certain circumstances, may all hinder the judgment on the manifest character of a violation of the Charter.

The dictionary definitions of the words “character”, “gravity” and “scale”, on the other hand, render such terms practically meaningless. For example, the Merriam-Webster Dictionary defines the word “character” as “main or essential nature especially as strongly marked and serving to distinguish”; the word “gravity” as “importance, significance; seriousness”; and the word “scale” as “a distinctive relative size, extent or degree”. Indeed, such broad descriptions represent an undeniable threat to the purported legal certainty of the ICC Statute. If we additionally take into account that all three of them are necessary for a particular act of aggression to be considered criminal, it seems very unlikely for the Court to arrive at a uniform application of these qualifiers in its future case-law.

Moreover, important problems of coherence arising from the disconnect between the definition of the crime of aggression under article 8 bis of the Rome Statute and the provisions of articles 2(4) and 51 of the Charter of the United Nations run counter to any remaining hopes of harmonizing international law on this subject. Different types of coercive acts will be subjected to dissimilar legal treatments that will surely frustrate the effective application of the newly defined crime of aggression. Accordingly, it might be useful to consider the legal consequences of a number of hypothetical cases, such as 1) a use

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144 Nicaragua, ¶¶ 176, 194; Nuclear Weapons, ¶¶ 31-33; Oil Platforms, ¶¶ 73-77.

145 Corfu Channel, at 29-35.

146 Paulus, supra note 131, at 1121; Murphy, supra note 92, at 1150-1151.


150 Murphy, supra note 92, at 1152.
of armed force which does not rise to the level of an armed attack; 2) a use of armed force which does not rise to the level of an armed attack but, by its character, gravity and scale, is a manifest violation of the UN Charter; 3) a use of armed force which constitutes an armed attack but, by its character, gravity and scale, is not a manifest violation of the UN Charter; and 4) a use of armed force which constitutes an armed attack and, by its character, gravity and scale, is a manifest violation of the UN Charter. Inasmuch as these issues remain unsolved, the Kampala amendments on the crime of aggression will have been more detrimental than beneficial to the advancement of public international law.

Lastly, before we proceed to the following section, two final remarks must be made with respect to the threshold clause in the definition of aggression. The first of them deals with the mental requirements of the crime, while the second observation concentrates on the exercise of overlapping jurisdictions over one same conduct.

It has already been stated that the introduction to the Elements of the Crime of aggression provide that the perpetrator need not make a legal evaluation as to whether the use of armed force was inconsistent with the UN Charter, or as to the manifest nature of such a violation, but that he or she must have nonetheless been aware of the factual circumstances establishing that such use of armed force was manifestly inconsistent with the Charter. In regulating the required mens rea of crimes within the jurisdiction of the Court, article 30 of the Rome Statute expresses that liability for punishment depends on whether the material elements of the crime were committed with intent and knowledge. Intent is defined as the will of a person to engage in criminal conduct or to cause a criminal consequence, or, in the absence of will, as awareness that such consequence will occur in the ordinary course of events. Similarly, knowledge is defined as the awareness that a circumstance exists or a consequence will occur in the ordinary course of events. If this is so, it might be worth asking how someone can possibly intend the use of force against the sovereignty, territorial integrity or political independence of another State in manifest contravention of the UN Charter, or otherwise be aware of the above, without making a legal evaluation of his or her conduct. After all, isn’t a manifest violation of the Charter an essential component of the crime of aggression? And isn’t the Charter a legal instrument?

In the interest of justice it seems perfectly understandable to exempt the Prosecution from the burden of proving that the perpetrator made a sophisticated assessment of the legality of his conduct before carrying it out, but this does not mean that the aggressor need not possess any

152 Article 30 of the Statute reads as follows: “1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.”

151 Id., at 1152-1154.
intuition, albeit precarious, of the conformity of his conduct with the applicable law on the use of force, especially if we consider that it is the actions of the highest-ranking State officials that constitute the object of the Statute provisions on the crime of aggression. To espouse this last view would surely increase an aggressor’s chances of escaping criminal punishment on the grounds of a mistake of fact or of law\footnote{Article 31 of the Statute reads as follows: “1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime. 2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.”}. The question of overlapping jurisdictions over one same act of aggression, on the other hand, is a natural consequence arising from the double responsibility standard embedded in the definition of the crime. Insofar as the Court’s findings with respect to an individual’s criminal responsibility for aggression are closely intertwined with a determination of the responsibility of a State for that same act, it might be useful to consider whether the existence of parallel judicial proceedings or of a final judgment over the last of these matters will have an effect – and if so, of what kind – over the Court’s verdict. Even when the amendments to the Statute on the crime of aggression specifically provide that “a determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s own findings under this Statute”\footnote{ICC Statute, Articles 15 bis (9) and 15 ter (4).}, the context in which this caveat is inserted suggests that it was aimed at regulating the relation between the ICC and the UN Security Council. Bearing in mind that a judicial body can make legal considerations that touch upon subjects pertaining to the functional sphere of a diverse political organ\footnote{Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 ICJ ¶ 32; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, 1998 ICJ ¶44.}, the difficulties that may arise from the interplay between these two in the determination of the existence of an act of aggression may be easily solved\footnote{Before the crime of aggression was defined at Kampala in 2010, the opinion had already been expressed that participation of political bodies such as the UN Security Council in the determination of the ICC’s exercise of jurisdiction over the crime would be highly problematic, as judicial independence could be at stake. This view is upheld, among others, by: Trahan, Jennifer, Defining “Aggression”: Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum, 24 Loy. L.A. Int’l & Comp. L. Rev. 440-441, 460-463 (2002).}. However, when a single conduct happens to activate the jurisdictions of two international courts, we might be dealing with a more complex scenario. This concurrence of legal competences may take a number of different forms, as in the case of previously existing proceedings over an illegal use of force by a State before the International Court of Justice, of a final judgment rendered by the latter on this same question, or of an advisory opinion on the legality of the use of force under a particular set of circumstances that were later reproduced in the situation currently under investigation by the Office of the Prosecutor, just to cite a few examples. In the case of a final judgment by the ICJ, would the declaration of the international responsibility of a State for an unlawful use of force constitute clear-cut evidence on which the Prosecution could rely be-
fore the ICC to advance its submissions on the perpetrator’s criminal responsibility? Would the ICC be bound by this decision? If, on the contrary, this hypothetical judgment declared the lawfulness of such use of force, would this finding constitute sufficient grounds to exclude the ICC’s exercise of jurisdiction over the alleged criminal conduct? Finally, in the absence of any parallel judicial proceedings, would the ruling on the internationally wrongful act of a State fall within the International Criminal Court’s inherent jurisdiction?¹⁵⁷

III. FINAL REMARKS ON THE INTERPRETATION AND APPLICATION OF THE CRIME OF AGGRESSION

Along the text of this article a series of interpretive difficulties arising from the terminology of the various amendments to the Rome Statute on the crime of aggression have been explained. These intricacies, however, must be read in conjunction with all other norms and principles which might be of relevance to the hermeneutics of the Statute.

To begin with, the Understandings regarding the amendments to the Rome Statute on the crime of aggression require that a determination whether an act of aggression has been committed be in accordance with the UN Charter¹⁵⁸. Secondly, article 21 of the Rome Statute sets forth the various sources of law that the Court shall apply in the decision of the cases submitted to it, and the order in which it is allowed to do so. Reference is made to the Statute, Elements of Crimes and Rules of Procedure and Evidence as the leading sources of law to which recourse may be had. Only where appropriate, and as secondary sources, may other relevant treaties, principles and rules of international law come into play¹⁵⁹.

Unlike the broader list adopted by article 38 of the Statute of the ICJ, judicial decisions of other courts and tribunals, as well as the opinions of highly qualified publicists as subsidiary means for the determination of rules of law are excluded from the Statute of the International Criminal Court. Thirdly, and perhaps most importantly, article 22 (2) of the Rome Statute endorses the general principle pursuant to which “the

¹⁵⁷ The recognition of a Court’s competence to adjudicate on its own jurisdiction as a general rule of international law (principle of kompetenz-kompetenz) can be found in the case law of the International Court of Justice. See: Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, 1954 ICJ at 60; Nottebohm (Liechtenstein v. Guatemala), Preliminary Objections, 1953 ICJ at 119-120.

¹⁵⁸ Resolution RC/Res.6, supra note 124, Annex III: Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, ¶ 6

¹⁵⁹ Article 21 of the Statute states: "1. The Court shall apply:
(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."
definition of a crime shall be strictly construed and shall not be extended by analogy”, and “in case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted”. Finally, inasmuch as they reflect customary international law on treaty interpretation\(^{160}\), reliance upon the provisions of articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties should also be admitted.

The problem which now arises is that the application of one or other source of law or interpretive criteria, or even a combination of them, may lead to very different results. Accordance with the UN Charter in the determination of whether an act of aggression has been committed, for example, is very difficult to achieve if we recall the existence of dissimilar legal concepts, such as “act of aggression” and “armed attack”, in the texts of the Rome Statute and the UN Charter. Similarly, the abovementioned guidelines will be scarcely useful to elucidate whether the list of acts contained in article 8 bis (2) of the Statute is non-exhaustive. In application of article 31 of the Vienna Convention on the Law of Treaties, the ordinary meaning of the terms adopted by article 8 bis (2) when it states that any of the acts listed therein shall qualify as acts of aggression “in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974” suggests accordance with Resolution 3314 in its entirety, as no exception is made with respect to any of its contents. If this is so, article 4 of the said Resolution, which states that “the acts enumerated above are non-exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter”, would need to be observed by the ICC in its decisions. This last passage, however, seems contrary to the prohibition of extending the definition of a crime by analogy set forth in article 22 (2) of the Statute.

It thus appears that many of the most controversial questions surrounding the crime of aggression will not be easily resolved by mere recourse to the interpretive criteria which have been cited in the present section. Consequently, it remains to be seen how the Court will unravel these matters in its case-law.

### Conclusion

It has been traditionally asserted that attempts to define the crime of aggression remained within the confines of existing customary international law\(^{161}\), expressed both through the Nuremberg and Tokyo precedents on crimes against peace and the general prohibition of the use of force. Thus, the task of delineating the essential components of the offense was never meant to start from scratch, and has not been deemed to have done so\(^{162}\). However, the extent to which certain normative antecedents on which the actual definition rests actually codified customary international law on the matter has been contested\(^{163}\).

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160 Kasikili/Sedudu Island (Botswana/Namibia), 1999 ICJ ¶ 18.

161 Kreß & von Holtzendorff, supra note 38, at 1188.


In spite of the above, and of the initial delay in defining the crime in 1998, the amendments adopted at Kampala have been praised by many as reflecting States’ firm conviction to punish what has been considered to be the “supreme international crime”. Nonetheless, the mere conclusion of an agreement over a controversial matter should not be extolled unless an evaluation of the convenience and correctness of its content has been previously made.

Throughout the last few pages I have attempted to explain how the choice of the various elements of the approved codification was not the most appropriate. To a great extent, this is a result of the drafters’ apparently unconditional reliance upon customary international law on the use of force. However, it should be recalled that the outlawing of aggression has been traditionally conceived from the standpoint of the relations between States, and not as a general prohibition binding upon individuals. As such, a thorough reassessment of, and perhaps a slight departure from, the abovementioned body of law should have taken place if an adequate formula on individual criminal responsibility was being pursued.

As they stand, article 8 bis and all other relevant amendments on the crime of aggression convey both ambiguity and uncertainty. Unfortunately, it will be very hard for the Court to solve all normative inconsistencies and fill all legal gaps via interpretation. Quite the contrary, the actual definition of the crime fosters arbitrary and highly politicized adjudication. Hence, if coherence and determinacy are legal values to be safeguarded by parties to the Rome Statute, reform is required. In the meanwhile, and as regards the crime of aggression, political consensus cannot be genuinely celebrated in the light of dogmatic dissent.

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