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The Crime of Aggression before the First Review of the ICC Statute

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Abstract
A few years before the expected convening of the First Review Conference on the Statute of the International Criminal Court, the Special Working Group for the Crime of Aggression has made very significant progress in preparing the ground for enabling the Court to exercise its jurisdiction over what the Nuremberg Tribunal famously called the 'supreme international crime'. The complex structure of this absolute leadership crime has been fully explored, including its implications for the interplay between the definition of the crime and the general principles of international criminal law. At the same time, the crucial analytical distinctions between state and individual conduct as well as between the substantive elements of the crime and the possible procedural role of the UN Security Council appear to be generally accepted. In the light of the momentum achieved on the diplomatic level, the First Review Conference presents a distinct and historic window of opportunity to the world's political leadership to complete the Rome Statute and thereby prevent its prominent lacuna from becoming permanent and thus turning into a legitimacy gap. The final phase of the negotiations should be guided by two principles. First, the substantive definition of the state act of aggression should stay within the legitimate limits of international criminal justice by not exceeding undisputed general customary international law. Second, a possible procedural role for the Security Council must not have the practical effect of placing the permanent members of the Security Council beyond the reach of the law.

Key words
crime of aggression; First Review Conference on the Statute of the International Criminal Court; International Criminal Court; international criminal law; international law on the use of force; United Nations Security Council; veto power of the permanent members of the UN Security Council

> The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment.
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> Robert Jackson, Nuremberg[1]

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1. Opening speech of the Chief Prosecutor for the United States, reprinted in *Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* (2001), 45.

As early as 1997, in his article 'Obstacles in the Way of an International Criminal Court', John Dugard, the eminent international lawyer and practitioner, demonstrated his keen interest in and intimate knowledge of the establishment of the first permanent international criminal court in history. In this text[2] Dugard correctly predicted the lack of determination of states in 1998 to give the new court full jurisdiction over the crime of aggression. It is hoped that the following considerations of international criminal law and policy on the recent diplomatic work towards filling this most important lacuna of the Rome Statute will be of some interest to John Dugard, to whom they are offered in admiration.

1. The place of the crime of aggression within the emerging system of international criminal justice

Peace and security of the world is the paramount collective value that the International Criminal Court (Court, or ICC) is to protect,[3] as stated in the preamble to the ICC Statute (Statute).[4] The crime of aggression most directly undermines this value. Paradoxically, though, Article 5(2) of the Statute prevents the Court from exercising its jurisdiction over that crime. This judicial disability also constitutes a rather sad historic irony in the light of the fact that the Nuremberg Tribunal called the crime of waging a war of aggression the supreme international crime,[5] and Robert Jackson's powerful words, cited above, express the fundamental promise that, in the future, international criminal law against aggression will apply equally to all.

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2. (1997) 56 *Cambridge Law Journal* (1997), 329, at 335.
3. Focus on the protection of international peace and security is firmly entrenched in the tradition: cf. V. V. Pella, *La guerre-crime et les criminels de guerre* (1946), 15. For a more recent restatement of the same focus, see the title of the 1996 ILC Draft 'Code of Crimes against the Peace and Security of Mankind', UN Doc. A/51/10, 26 July 1996; for the historic background of that title, see R. O'Keefe, 'The ILC's Contribution to International Criminal Law, (2006) 49 *German Yearbook of International Law* 201, at 218. In his recent study, M. Schuster argues that 'it should be acknowledged that the world has changed in the last fifty years. Whereas state sovereignty was almost unlimited at the time of the Nuremberg judgment, and human rights concerns relegated to the sidelines, this situation has now fundamentally changed'. 'The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword', (2003) 14 *Criminal Law Forum* 1, at 14. This statement is correct in its reference to the grown importance of international human rights standards. But Schuster is wrong to imply that, as a result, the value of international peace and security has lost its significance. While the latter remains a core international value to be protected by a rule of international criminal law, the coming into existence of international human rights standards adds another dimension to this rule in that soldiers' rights to life and physical integrity enter into the picture.
4. Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998, and corrected by procès-verbaux on 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001, and 16 January 2002 (entry into force: 1 July 2002).
5. 'To initiate a war of aggression, therefore, is not only an international crime, it is the supreme crime', *Judgment of the International Military Tribunal (IMT) for the Trial of German Major War Criminals in Nuremberg 30 September and 1 October*, Miscellaneous No. 12 (1946), 13. The view of the IMT is no longer unchallenged, though. For example, M. Schuster, *supra* note 3, at 14, argues: 'Even if aggression was once the supreme crime, then its importance in a legal context has certainly faded by now, as the other Nuremberg crimes have risen to the undisputed status of customary international law.' There is certainly room for doubt as to whether the crime of aggression (still) is 'the supreme international crime'. This, however, is a question of secondary importance. What matters is that, contrary to Schuster's claim, the crime of aggression has not lost its importance as a result of international criminal law's evolution in other respects.

These reminders are offered in order to highlight from the outset why the crime of aggression must receive the greatest measure of attention at the upcoming First Review Conference.[6] In that respect, it would be mistaken to confuse the crime of aggression with crimes such as drug trafficking. It is acknowledged that Resolution E adopted by the Rome Conference[7] recommends that a Review Conference pursuant to Article 123 of the Statute consider the crimes of terrorism and drug crimes with a view to arriving at acceptable definitions and their inclusion in the list of crimes within the jurisdiction of the Court. That said, whether drug trafficking will and should ever rise to the level of a crime under general customary international law is questionable and remains to be seen.[8] By contrast, the crime of aggression has already risen to this level,[9] as was unanimously confirmed by the British law lords

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6. Pursuant to Art. 123(1) Statute, the Secretary-General of the United Nations shall convene a Review Conference seven years after the entry into force of the Statute. Ambassador Rolf Fife of Norway, who acts as the focal point on the review of the Statute, has repeatedly suggested that the words 'shall convene' could be taken to mean 'shall send out the invitation letters'. The author understands that this suggestion is based on the understanding that the wording of the paragraph leaves some room for interpretation for states parties. While this is not readily apparent to this author as a matter of literal interpretation, the terms in question may have to be read in context with the rules concerning the right formally to submit proposals for amendments, which arises after seven years in accordance with Art. 121 Statute. Combined with the need for states to have sufficient time to make an informed assessment of proposals, there may be other practical considerations as referred to by the focal point in his discussion paper ICC-ASP/5/INF2 submitted to the Fifth Session of the ASP in November 2006. At the time of writing, it is likely that the first Review Conference will take place in the first half of 2010.
7. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. I, Final Documents, Annex I, 72.
8. On the non-inclusion of a number of so called 'treaty crimes' or 'transnational crimes', A. Zimmermann states: 'The main reason was that not all of the conventions providing the basis for such 'treaty crimes' have found sufficient international acceptance and thus could not be considered as reflecting customary international law.' 'Article 5', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), 98. On drug trafficking, in particular, the same author notes, ibid., 99: 'However, most delegations took the position that such acts, notwithstanding their criminal nature under domestic criminal law, were not of the same nature as those now listed in article 5'.
9. The ILC confirmed this legal status of the crime of aggression by including it in its 1996 Draft Code, *supra* note 3. In her recent textbook treatise on the subject, E. Wilmshurst states: 'Aggression is widely regarded as a crime under customary international law '. 'Aggression', in R. Cryer, H. Friman, D. Robinson, and E. Wilmshurst (eds.), *An Introduction to International Criminal Law and Procedure* (2007), 262. This view is correct. See e.g. K. Ambos, 'Strafrecht und Krieg: strafbare Beteiligung der Bundesregierung am Irak-Krieg?', in J. Arnold et al. (eds.) *Menschengerechtes Strafrecht: Festschrift für Albin Eser zum 70. Geburtstag* (2005), 674; M. C. Bassiouni and B. B. Ferencz, *International Criminal Law: Crimes*, 2nd edn, in M. C. Bassiouni (ed.), *International Criminal Law* (1999), 313; I. Brownlie, *Principles of Public International Law* (2003), 561; A. Cassese, *International Criminal Law* (2003), 113; Y. Dinstein, *War, Aggression and Self-Defence* (2001), 113; M. Dumée, 'Le crime d'agression', in H. Ascensio, E. Decaux, and A. Pellet (eds.), *Droit International Pénal* (2000), 251; G. Gaja, 'The Long Journey towards Repressing Aggression', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. 1, 430; E. Greppi, 'The Evolution of Individual Criminal Responsibility under international law', 835 *International Review of the Red Cross* 531; R. L. Griffiths, 'International Law, the Crime of Aggression and the *Ius ad Bellum*', (2002) 2 *International Criminal Law Review* 301, at 308; M. Hummrich, *Der völkerrechtliche Straftatbestand der Aggression* (2001), 90; C. Kreß, 'Strafrecht und Angriffskrieg im Licht "des Falles Irak"' (2003) 115 *Zeitschrift für die gesamte Strafrechtswissenschaft* 294, at 295; T. Meron, 'Defining Aggression for the International Criminal Court', (2001) 1 *Suffolk Transnational Law Review* 1, at 6; I. K. Müller-Schieke, 'Defining the Crime of Aggression under the Statute of the International Criminal Court', (2001) 14 LJIL 409, at 414; D. D. Nsereko, 'Defining the Crime of Aggression: An Important Agenda Item for the Assembly of States Parties to the Rome Statute of the International Criminal Court', (2003) *Acta Juridica* 265, at 266; L. Sadat and S. R. Carden, 'The New International Criminal Court: An Uneasy Revolution', 88 *Georgetown Law Journal* 381, at 437 (n. 341); M. Aziz Shukri, 'Will Aggressors Ever Be Tried before the ICC?', in M. Politi and G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (2004), 33 at 35; O. Triffterer, 'Establishment of the Court', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), 40; G. Werle, *Principles of International Criminal Law* (2005), 393;

in a recent judgment.[10] This basic fact explains why the crime of aggression, unlike the crime of drug trafficking, is already a so-called 'core crime' within the Court's jurisdiction.[11] It also explains why Article 5(2) in conjunction with Article 5(1)(d) of the Statute calls upon states parties to work towards defining this crime for the purpose of activating the Court's jurisdiction.[12] States are not, therefore, being invited to traverse new legal ground, even though adding to the Statute a definition for the crime of aggression may technically require the Statute to be amended.[13] The Statute merely calls for its own completion by finishing the job that was most regrettably left unfinished in Rome – the job of fully transposing the accumulated body of customary international criminal law into the form of a treaty text.

2. Recent developments in the negotiations

The Special Working Group for the Crime of Aggression (Group)[14] has gone a very long way towards preparing the groundwork for this transposition. Scholars, criminal law scholars in particular, tend to be somewhat suspicious about leaving crimes to be defined by diplomats. There is understandably the fear that diplomats may not be entirely sensitive to the peculiarities and technical subtleties of the criminal law. In my view, however, the members of the Special Working Group are not deserving of this suspicion. To the contrary, their intensive, thorough, and

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G. Westdickenberg and O. Fixson, 'Das Verbrechen der Aggression im Römischen Statut des Internationalen Strafgerichtshofes', in J. Abr. Frowein et al. (eds.), *Verhandeln für den Frieden: Liber Amicorum Tono Eitel* (2003), 500; E. Wilmshurst, 'Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?', in Politi and Nesi, *The International Criminal Court and the Crime of Aggression*, *supra*, at 95. For a different view see Schuster, *supra* note 3, at 13. The correct majority position of the customary status of the crime of aggression can best be explained on the basis of 'modern positivism' (see B. Simma and A. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts', (1999) 93 AJIL 302, at 306) that accounts for much of the recent development of international criminal law (for an analysis of the international criminalization of war crimes committed in non-international armed conflicts, see C. Kress, 'War Crimes Committed in Non-international Armed Conflicts and the Emerging System of International Criminal Justice', (2000) 30 *Israel Yearbook on Human Rights* 103, at 104).

10. *R. v. Jones et al.*, [2006] UKHL 16, paras. 12, 19 (Lord Bingham); paras. 44, 59 (Lord Hoffmann); para. 96 (Lord Rodger); para. 97 (Lord Carswell); para. 99 (Lord Mance).
11. With respect to the crime of aggression, it is therefore a little bit misleading to speak of the inclusion of a 'new' crime as Rolf Fife does in 'Criminalizing Individual Acts of Aggression by States', in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden. Essays in Honour of Asbjorn Eide* (2003), 73; for a comprehensive account of the history of the debate on the crime of aggression see O. Solera, *Defining the Crime of Aggression* (2007).
12. Accordingly, Resolution F adopted by the Rome Conference is formulated in mandatory terms: 'The [Preparatory] Commission shall prepare proposals for a provision on aggression . . .' (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. I, Final Documents, Annex I), 72.
13. For a summary of the debate within the Special Working Group on how to 'adopt a provision in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction', see ICC-ASP/3/25, 344 and ICC-ASP/4/32, 359 ff.; for an illuminating scholarly analysis see R. S. Clark, 'Aggression and the International Criminal Court', paper presented at the Gui Yang Workshop on the International Criminal Court: The Concerned Issues of China, 18–19 March 2006 (http://camlaw.rutgers.edu/site/faculty/pdf/clark.pdf); see also N. Strapatsas, 'Analysis of the Amendment Rules Applicable to the Inclusion of the "Crime of Aggression" in the ICC Statute', paper submitted to the Special Working Group by N. Strapatsas on behalf of the Committee for Effective International Criminal Law.
14. The Special Working Group was established by Resolution ICC-ASP/1/Res.1 adopted by consensus at the 3rd Plenary Meeting on 9 September 2002, ICC-ASP/1/3, 328.

sincere work over the past years has resulted in the crime of aggression receiving more careful scrutiny than any other crime in the Statute. Consequently, in the century-long process of reflecting about the crime of aggression,[15] the special structure of this crime has never been more fully explored and understood than now.[16] The Group's work on three main 'baskets' of problems supports this appraisal.[17]

2.1. The crime of aggression – defining the individual conduct

A very solid consensus exists on the absolute leadership nature of the crime of aggression as established by the Nuremberg and Tokyo tribunals. By 'absolute', it is meant that the leadership requirement applies to all forms of participation in the crime, however those forms are conceptualized. The Group Co-ordinator's recent Discussion Paper restates the Nuremberg *acquis* as follows: 'being in a position effectively to exercise control over or to direct the political or military action of a State'.[18] The only remaining question is whether this formula is broad enough to capture fully the case law of Nuremberg and Tokyo, in particular, as regards those persons who are in a position effectively to *shape* the policy of the state concerned without forming part of the formal government circles.[19] Perhaps this problem can be solved by clearly stating in the *travaux préparatoires* the drafters' intent behind the above cited language to adopt *comprehensively* the *Nuremberg* and *Tokyo* precedent.

The most recent debate in the Group has been about the possible interplay between the definition of the crime and the general principles of criminal law that are stated in Part 3 of the Statute. The clear and dominant view is to deviate as little as possible from the solutions contained in Part 3. To the surprise of this commentator, this view has been maintained even in respect of the modes of individual participation that are listed in Article 25(3)(a)–(d) of the Statute.[20] Consequently a lot of thought has gone into the formulation of what has by now come to be called the 'differentiated approach'[21] – that is, the legal recognition of all different forms of individual participation in the crime of aggression. The key question is how best to

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15. For a monumental study of the aggression debate from 1920 to 1975, see B. B. Ferencz, *Defining International Aggression – The Search for World Peace: A Documentary History and Analysis*, 2 vols. (1975). For a useful and more recent account, see United Nations (ed.), *Historical Review of Developments Relating to Aggression* (2003).
16. As early as 2002, R. S. Clark welcomed the existence of a 'now substantial focus on the "technical", "criminal law" aspects of the endeavour'; 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', (2002) 15 LJIL 859, at 886. R. S. Clark has been participating for a very long time in the negotiations on the crime of aggression and has made many significant contributions to them.
17. These three 'baskets' are clearly distinguished in the 2007 Report of the Special Working Group on the Crime of Aggression, ICC-ASP/5/35 (2007 SWG Report), 9 ff., under the following headings: (1) 'The crime of aggression – defining the individual's conduct'; (2) 'The act of aggression – defining the conduct of the State'; and (3) 'Conditions for the exercise of jurisdiction'.
18. ICC-ASP/5/SWGCA/2, 16 January 2007.
19. See 2007 SWG Report, *supra* note 17, at 10 (para. 13). For a most stimulating scholarly critique in the same direction, see K. J. Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression', (2007) 18 EJIL (forthcoming); see also N. Strapatsas, 'Is Article 25 (3) of the ICC Statute Compatible with the "Crime of Aggression?"', (2007) 19 *Florida Journal of International Law* (forthcoming).
20. See 2007 SWG Report, *supra* note 17, at 9, para. 6.
21. This commentator has tried to set out in detail the distinction between the 'monistic approach' (as suggested in the Co-ordinator's 2002 'Discussion Paper', ICC-ASP/2/10, 234 [sub. I.1 and I.3]), and the 'differentiated approach' in his paper, Sub-coordinator, 'Discussion Paper 1: The Crime of Aggression and Article 25, paragraph 3, of the Statute', ICC-ASP/4/32, 376 ff.

describe the (principal) perpetrator's *commission* of the crime within the meaning of Article 25(3)(a) of the Statute. At a formal Group meeting in January 2007, the Group Co-ordinator presented a Discussion Paper in which he translated the differentiated approach into the following language: 'that person (leads) (directs) (organizes and/or directs) (engages in) the planning, preparation, initiation or execution of an act of aggression/armed attack'.[22] As it proved difficult to agree on the best conduct verb, the suggestion was made during the same meeting to use the Nuremberg and Tokyo language to describe the commission of the crime and to say, 'For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution of an act of aggression'. This idea attracted so much support that consensus is within reach. The same would seem to apply to the need to repeat the leadership clause in Article 25(3) of the Statute, which is essential to preserve the *absolute* leadership nature of the crime while, at the same time, adhering to the differentiated approach.[23]

2.2. The act of aggression – defining the conduct of the state

The Group has also made significant progress on the definition of the state act of aggression.[24] Most importantly, there is now general agreement not to confuse the *substantive* definition of the state act with the *procedural* issue of a possible role for the Security Council in the early stages of the proceedings.[25] This distinction is not only required under sound principles of criminal law, but it is also envisaged by the wording of Article 5(2) of the Statute, which separates *crimes* within the Court's jurisdiction from the *conditions* under which the Court shall exercise jurisdiction. Unlike the 2002 Discussion Paper submitted by the former Co-ordinator,[26] the new Co-ordinator's Discussion Paper[27] reflects this distinction.

It also seems clear after the latest debate in New York that an overwhelming majority of delegations want the definition of the state act to be based on the Annex to General Assembly Resolution 3314 (XXIX) of 14 December 1974 (Annex).[28] This again constitutes a major clarification of the overall picture, even though one may certainly entertain doubts as to whether all of the acts listed in Article 3 of the Annex reflect customary international *criminal* law.[29] Perhaps it can be argued that

22. ICC-ASP/5/SWGCA/2, 16 January 2007, Sub I. Variant (a) 1.
23. For an excellent basis for consensus, see the 'Revised proposal' as set out in Annex II of the 2007 Princeton Intersessional Report, Informal intersessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 11 to 14 June (2007 Princeton Report).
24. In its commentary on Article 16 of the 1996 Draft (*supra* note 3), the ILC has emphasized that '[i]ndividual responsibility for such a crime [the crime of aggression] is intrinsically and inextricably linked to the commission of aggression by a State'. At no point in the debate since then has there been an appreciable degree of support to extend the definition to *non*-state acts of aggression. This is in line with existing customary international law: see E. Wilmshurst, *supra* note 9, at 272; for a question *de lege ferenda*, see C. Stahn, 'International Law at a Crossroads? The impact of September 11', (2002) 62 *Zeitschrift für öffentliches Recht und Völkerrecht* 183, at 250.
25. For a pertinent critique of the earlier confusion, see D. D. Nsereko, *supra* note 9, at 278.
26. Co-ordinator's 2002 'Discussion Paper', ICC-ASP/2/10, 234 (sub. I.2).
27. ICC-ASP/5/SWGCA/2, 16 January 2007.
28. GAOR, 20th Session, Supplement 31, 142 ff. See the 2007 SWG Report, *supra* note 17, at 9, para. 14.
29. This commentator has set out some arguments in support of those doubts in C. Kress, 'The German Chief Federal Prosecutor's Decision Not to Investigate the Alleged Crime of Preparing Aggression against Iraq',

the '3314 approach' could crystallize into custom through a broad consensus among states taking part in the negotiations.

In the course of the Group's upcoming meetings, the '3314 approach' must be spelled out in detail and with precision. At the 2007 Princeton Intersessional, the Co-ordinator introduced a non-paper to this effect[30] which was widely welcomed as an important step in the right direction. In that respect, it bears emphasizing that the Annex cannot be referred to in its entirety. The reason for this is simple: the General Assembly text has been written as a guide for a *political* organ, the Security Council of the United Nations, in order to assist *that* organ in its application of Article 39 of the UN Charter.[31] If states parties wish to use the Annex as a guide to drafting a *criminal law text* to be applied by a *judicial* body, modifications are required. It would therefore be a dangerous oversimplification to argue on the basis of Article 8 of the Annex to Resolution 3314 that the Annex must be incorporated wholesale into a criminal-law text. If this is done, there is a real risk that the legal definition of aggression will conflict with fundamental principles of criminal law. This caveat applies especially to Articles 2, 3, and 4 of the Annex. Making Article 2[32] part of the definition of the state act of aggression would pose a serious problem in respect of Article 67(1)(i) of the Statute, which protects the accused from any reversal of the burden of proof or any onus of rebuttal. It would also undo the necessary distinction between substance and procedure by making the existence of an act of aggression dependent on the *ex post facto* decision of the Security Council. This word of caution also applies to parts of the *chapeau* of Article 3.[33] Finally, the incorporation of Article 4[34] would not only raise a serious question pertaining to the legality principle, but it would again entail confusion between substance and procedure, which must be avoided. To avoid all of those problems, the pertinent language of Articles 1 and 3 of the Annex should be transposed verbatim to define the state conduct instead of a sweeping reference to the Annex as a whole.

Compared with the above questions of principle, the controversy as to whether the list of acts of aggression, as transposed from Article 3 of the Annex, should be an exhaustive or a non-exhaustive one[35] is of secondary importance. After all, the

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(2004) 2 *Journal of International Criminal Justice* 245, at 249; for a similar scepticism, see Wilmshurst, *supra* note 9, at 272; on the doubts expressed within the ILC during its work on the Draft Statute for an International Criminal Court, see N. Strapatsas, 'Rethinking General Assembly Resolution 3314 (1974) as a Basis for the Definition of Aggression under the Rome Statute of the ICC', in O. Olusanya (ed.), *Rethinking International Criminal Law: The Substantive Part* (2007), 156. Strapatsas himself calls upon the Special Working Group to rely upon 'the substantive definitional provisions of the 1974 Resolution' (ibid., at 190).

30. Annex IV to the Princeton 2007 Report, *supra* note 23.
31. See in particular para. 4 of Resolution 3314; E. Wilmshurst concurring, *supra* note 9, at 272.
32. The provision reads as follows: 'The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity'.
33. The provision reads: 'Any of the following acts, regardless of a declaration of war, shall, *subject to and in accordance with provisions of Article 2*, qualify as an act of aggression' (emphasis added).
34. The provision reads as follows: 'The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter'.
35. 2007 Princeton Report, *supra* note 23.

generic definition as transposed from Article 1 of the Annex, which must be fulfilled in any event, satisfies per se the (reasonably construed) demands of legal certainty.[36]

The 2007 New York and Princeton debate on the definition of the state act of aggression also resulted in a substantial amount of support for limiting this crime to the use of armed force 'which, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations'.[37] The wording of this qualifier bears a noteworthy resemblance to the language used by the International Court of Justice (ICJ) in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*.[38] It is not far-fetched to assume that the ICJ had the crime of aggression in mind when using this language, although it stopped short of calling a spade a spade.[39]

The widespread insistence on a qualification of those acts of aggression that fall within the scope of the international *criminalization* reflects the reality of present-day *jus contra bellum*. One essential albeit regrettable aspect of this reality is the existence of a grey area in the international legal framework. Reasonable international lawyers may legitimately disagree in their assessment of the *lex lata* for this crime, depending *inter alia* on how recent international practice is seen and weighed.[40] A reference to (genuine) forcible humanitarian intervention[41] and the ongoing debate about the 'responsibility to protect'[42] should suffice to highlight the burning problem. The view of those very many delegations that wish to have the Court stay away from this grey zone[43] should not be misunderstood as an expression of *un*principled *realism*.

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36. For a useful word of caution against overstretching the principle of *nullum crimen sine lege certa*, see Lord Hoffmann in *R. v. Jones et al.*, *supra* note 10, para. 59: '[I]f the core elements of the crime are certain enough to have secured convictions at Nuremberg, or to enable everyone to agree that it was committed by the Iraqi invasion of Kuwait, then it is in my opinion sufficiently defined to be a crime, whether in international or domestic law'.
37. Co-ordinator's 2007 Discussion Paper, *supra* note 18 (sub. I.1). See also the 2007 SWG Report, *supra* note 17, at 9, para. 16; numerous efforts have been made to further specify the qualifier through a formulation of a 'specific collective intent' (for the position of this commentator, see *supra* note 29, at 258) to pinpoint the criminal *noyeau dur*; while those efforts should be pursued further by scholars (see the recent suggestion by Solera, *supra* note 11, at 419 et seq.), it will probably prove overly ambitious to agree on a specific wording as part of the definition; for precisely this reason, it would seem to overstretch the requirements flowing from the legality principle (cf. *supra* note 36) to demand the inclusion of such a wording into the definition instead of using the qualifier mentioned in the above text.
38. See para. 165 of the Judgment of 19 December 2005, in which the Court speaks of a military intervention 'of such magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter'. Similarly, the commentary on Article 16 of the 1996 ILC Draft Code (*supra* note 3) stated that '[t]he action of a State entails individual responsibility for a crime of aggression only if the conduct of the State is a sufficiently serious violation of the prohibition contained in Article 2, paragraph 4, of the Charter of the United Nations'; *Report of the ILC on the work of its forty-eighth session, 6 May to 26 July 1996*, A/51/10, 14, at 84 ff.
39. For a critique of this failure, see para. 2 of the Separate Opinion of Judge Simma.
40. For a succinct and fair presentation of this grey area, see Wilmshurst, *supra* note 9, at 268.
41. The literature on the topic is abundant; for just two important studies arriving at opposite conclusions, see S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2001); and C. Greenwood, 'Humanitarian Intervention: The Case of Kosovo', (2000) 10 *Finnish Yearbook of International Law* 141.
42. For a recent summary of the debate, see M. Fröhlich, 'Responsibility to Protect – Zur Herausbildung einer neuen Norm der Friedenssicherung', in J. Varwick and A. Zimmermann (eds.), *Die Reform der Vereinten Nationen – Bilanz und Perspektiven* (2006), 167; C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm', (2007) 101 AJIL 99.
43. At the same time, the qualification excludes *minor* uses of armed force from the international criminalization; this is, of course, without prejudice to the question of *state responsibility* where the use of force is illegal.

Quite to the contrary, adding the aforementioned qualification fully accords with the goal of the Statute's drafters to confine the Court's jurisdiction to atrocious behaviour that indisputably violates general customary international law. This intent has found a particularly clear expression in the introduction to the Elements of the Crimes against Humanity, which reads,

> Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail international criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.[44]

This statement carries with it quite considerable wisdom, and the underlying principle must apply to the crime of aggression *mutatis mutandis*. The principle is also a good one as a matter of legal policy. In his recent thought-provoking article on the crime of aggression, Rolf Fife cautioned against developing the international law on the use of force through the back door of international *criminal* law.[45] A very substantial part of the Group shares this fundamental concern and is realistic enough to recognize that *international criminal law is also ill-equipped to decide major controversies about the content of existing legal rules*. If states parties could eventually agree on the inclusion of the qualification in the definition, Rolf Fife's two central demands in law and policy would be met: the crime of aggression would 'rest on rock-solid foundations' and the 'discussion of crimes against the peace [would] not lead to a continuation of politics in a legal forum'.[46]

2.3. Conditions for the exercise of jurisdiction with respect to the crime of aggression

The third basket of problems arises from a possible role for the Security Council, which is, as has already been noted, a procedural question. The different positions are too well known to require any restatement.[47] While it is not difficult to find a solution for this problem in terms of drafting, it is obvious from a policy perspective that the Security Council issue remains the 'question of questions' on the crime of aggression. Everyone who participated in the negotiations in Rome will recognize a certain parallel between this and the jurisdiction issue that was finally settled by way of a majority vote in the form of Article 12 of the Statute.[48] In the light of this, it would be a little naive to expect the emergence of a consensus on this issue at any time before the very end of the negotiations. This is worth stating because it reveals

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44. Elements of Crime, ICC-ASP/1/3, 116.
45. 'The Court needs to be well integrated in the existing system of peace and security of the international community. This system is certainly imperfect, and legitimate reasons speak in favour of its strengthening. However, it seems a dangerous illusion to believe that it could be revised through international criminal law'. R. Fife, *supra* note 11, at 73.
46. *Supra* note 11, at 73.
47. See the list of options contained in the Co-ordinator's 2007 Discussion Paper, *supra* note 18 (sub. I. 5).
48. For a detailed account of the negotiations leading to the final vote on the ICC's jurisdiction regime, see H. P. Kaul and C. Kress, 'Jurisdiction and Cooperation in the Rome Statute on the International Criminal Court: Principles and Compromises', (1999) 2 *Yearbook on International Humanitarian Law*, 143.

how seriously mistaken it would be to say that the crime of aggression should be placed on the First Review Conference's agenda *only if* agreement on this last issue is reached *before* that conference begins. In fact, the contrary is true: if one is serious about reaching agreement on the crime of aggression, one will provide the Review Conference with the procedural framework and necessary time to make the final choice. On this point, it is encouraging to note recent signals indicating that the First Review Conference will receive this support.

It is pointless and inappropriate to enter into the field of speculations about what will ultimately be decided in respect of the Security Council's role. What the solution must *not* look like, however, can be stated: *any* rule that would subject international judicial proceedings for an alleged crime of aggression to the veto power of each of the permanent members of the Security Council must be rejected as fundamentally flawed both in international law and international legal policy.[49] Of course, this is not to ignore the fact that the International Law Commission (ILC) suggested precisely such a solution in Article 23(2) of its 1994 Draft Statute for an International Criminal Court.[50] But it should not be forgotten that the ILC also suggested, in Article 22 of its Draft Statute, a general jurisdiction scheme for the ICC that was modelled very much along the lines of the jurisdictional regime of the ICJ which was rightly rejected by states at the Rome Conference[51] and had, already in 1997, been aptly criticized by John Dugard as 'unduly deferential to State sovereignty'.[52] Similarly, Article 23(2) of the ILC Draft is, to borrow Dugard's words, unduly deferential to the veto power of the five permanent members of the Security Council.[53]

To start with the applicable law, it is now – and not least as a result of the extensive discussion within the Group – a well-known fact that there is *no legal requirement* to vest the Security Council with a power to authorize international investigations into an alleged crime of aggression.[54] In particular, no such power flows from Article 39

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49. This applies, e.g., to option 2 in the Co-ordinator's 2007 Discussion Paper, *supra* note 18 (sub. I.5).
50. Reprinted in M. C. Bassiouni (ed.), *The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute* (2005), 130.
51. Reprinted in ibid., 106.
52. 'Obstacles in the Way of an International Criminal Court', (1997) 56 *Cambridge Law Journal* 329, at 336; R. O'Keefe, *supra* note 3, at 251, explains the very reluctant approach on the court's jurisdiction contained in the 1994 Draft by the fact that the decisive shift of 'the tectonic plates of international opinion' allowing for improvements only occurred subsequently.
53. In fact, Article 23(2) of the Draft provoked criticism already from within the ILC: 'There was also the consideration that article 23 would introduce into the statute a substantial inequality between State members of the Security Council and those that were not members, and, as well, between the permanent members of the Security Council and other States. It was not likely to encourage the widest possible adherence of States to the statute'; *Report of the International Law Commission on the work of its forty-sixth session, 2 May to 22 July 1994*, A/49/10, 43, at 87 ff.
54. For the latest thorough and convincing study, see C. McDougall, 'When Law and Reality Clash – the Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression', (2007) 7 *International Criminal Law Review*, 277, at 279 ff.; as early as 2001, Hummrich, *supra* note 9, at 222, arrived at the same result on the basis of a similarly detailed analysis; for another rather comprehensive recent analysis supporting the same view, see M. Stein, 'The Security Council, The International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?', (2005) 16 *Indiana International and Comparative Law Review* 5. For a further selection of concurring views, see Cassese, *supra* note 9, at 117; L. Condorelli, 'Conclusions Générales', in Politi and Nesi, *supra* note 9, at 159; P. Escarameia, 'The ICC and the

of the UN Charter (Charter). As the United Kingdom's long-standing negotiator on matters of international criminal justice, Elizabeth Wilmshurst, correctly points out, 'It is clear that the Council does not have *exclusive* responsibility with regard to threats to international peace and security. Its responsibility is exclusive only for the purpose of its powers under Chapter VII which include deciding upon economic sanctions and other responses to breaches of the peace'.[55] It is equally unconvincing to derive the Security Council power in question from Article 5(2) of the Statute.[56] While it is true that the United Kingdom has interpreted the latter provision in this way,[57] it is equally true that this interpretation does not reflect a *shared* understanding.[58] This leads to Carrie McDougall's succinct summary of the legal analysis: 'As Article 5(2) of the Rome Statute is inconclusive, any legal restriction on the ability of other entities to make such a determination would have to be found in the UN Charter. An analysis of the Charter finds no such restriction'.[59] As for Elizabeth Wilmshurst's overall appraisal, she states, 'The *legal* reasons for the proposal that the Security Council should make a prior determination . . . are weak'.[60] Going one step further, one might very well ask whether the Security Council acts at all legally if it allows its permanent members to sit in judgement in criminal proceedings that may be of immediate concern to themselves. Erika de Wet makes a powerful case that the Security Council must satisfy the requirements of 'independence, impartiality and even-handedness' where it acts in relation to criminal proceedings.[61]

Security Council on Aggression: Overlapping Competencies?', ibid., at 139; Gaja, *supra* note 9, at 433; G. Gaja, 'The Respective Roles of the ICC and the Security Council in Determining the Existence of Aggression', in Politi and Nesi, *supra* note 9, at 121; C. Kress, 'Versailles, Nuremberg, The Hague: Germany and International Criminal Law', (2005) 40 *The International Lawyer* 15, at 38; M. E. Kurth, *Das Verhältnis des Internationalen Strafgerichtshofes zum UN Sicherheitsrat* (2006), 216; M. Lehto, 'The ICC and the Security Council: About the Argument of Politicization', in Politi and Nesi, *supra* note 9, at 148; Müller-Schieke, *supra* note 9, at 425; Nsereko, *supra* note 9, at 285; A. Paulus, 'Peace through Justice? The Future of the Crime of Aggression in a Time of Crisis', (2004) 50 *Wayne Law Review* 1, at 21; L. J. Springrose, 'Aggression as a Core Crime in the Rome Statute Establishing an International Criminal Court', (1999) 5 *St. Louis-Warsaw Transatlantic Law Journal* 167; S. M. Yengejeh, 'Reflections on the Role of the Security Council in Determining an Act of Aggression', in Politi and Nesi, *supra* note 9, at 125. For a rather weak effort to argue the opposite case *on the basis of the United Nations Charter*, see Schuster, *supra* note 3, at 35 ff. For the same view, but almost without reasoning, see B. B. Ferencz, 'Enabling the International Criminal Court to Punish Aggression', (2006) 6 *Washington University Global Studies Law Review* 1, at 13.

55. *Supra* note 7, at 277. As early as 1984, the ICJ clarified the limited scope of Article 39 of the United Nations Charter and stated: 'The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs perform their separate but complementary functions with respect to the same events' – *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, (1984) ICJ Rep. 392, at para. 95; for an extensive and illuminating analysis of this decision, see C. McDougall, *supra* note 52. The logic set out in 'Nicaragua 1984' as cited above applies *a fortiori* to the Security Council and the ICC, as the latter is an international legal person independent from the United Nations. For a mistaken position ignoring this basic fact, see Schuster, *supra* note 3, at 37.
56. Such view has been endorsed, however, by Zimmermann, *supra* note 8, at 106.
57. A/CONF.183/13 [Vol.II], 124: 'Sir Franklin Berman (United Kingdom of Great Britain and Northern Ireland) said that the United Kingdom interpreted the reference to aggression in article 5 and, in particular, the last sentence of paragraph 2 of that article, which mentioned the Charter of United Nations (sic), as a reference to the requirement of prior determination by the Security Council that an act of aggression had occurred.'; for a restatement of this view, see F. Berman, 'The Relationship between the International Criminal Court and the Security Council', in H. A. M. von Hebel, J. G. Lammers, and J. J. Schukkina (eds.), *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (1999), 178.
58. For a more detailed analysis, see Hummrich, *supra* note 9, at 231.
59. *Supra* note 52, at 307.
60. *Supra* note 7, at 278.
61. *The Chapter VII Powers of the United Nations Security Council* (2004), 348.

But the claim to subject the ICC to the veto power of the permanent members of the Security Council does not only lack a basis in law. More fundamentally, it must be rejected as a matter of international legal policy because it *runs counter to the minimum requirements of legitimacy* in international criminal justice. There are arguments to the contrary, though. For example, it has been said that only a prior Security Council determination of aggression, or, at least, the Council's green light signalled in some other form, will save the Court from (the perception of) politicization. This argument is based on the fact that the crime of aggression requires a state act of aggression and is therefore intimately linked to state policy. While it is true that the involvement of a state (leadership) constitutes a (contextual) *element of the crime* only in the case of aggression, it is hard to deny that such involvement is *typical* for all crimes under international law. And was it not the very purpose of international criminal law in general to draw a red line as from where the political connotation of atrocious behaviour can no longer conceal the need for legal sanction? If this is the essence of international criminal law, it would be odd, to say the least, to shy away from the consequences when it comes to the '*supreme* international crime' only if that comes along under the guise of '*high* politics'. And what precisely will be the alleged adverse consequences if, in the future, the ICC applies a definition of aggression that rests on 'rock solid customary grounds' without prior authorization of the Security Council? It is likely, indeed, that the state concerned and perhaps some friends will criticize the Court for alleged political bias. However, experience tells that such an unfounded attack will be launched almost as a matter of course when international criminal proceedings are initiated. It is not only unduly timid to subject the Court to the prior decision of a political organ in anticipation of such a course of events. Rather, it is also bad policy, because it would make the Court structurally vulnerable to the critique that it lacks independence and would thus exacerbate exactly the problem that was purported to be cured. It follows that the international community must stand firm and defend its judicial embodiment against abusive attacks wherever they occur, instead of providing that embodiment with a shield that does more harm than good.

A similar argument is that the Court needs the political backing of the Security Council in aggression proceedings. Of course, one can only wholeheartedly agree that aggression proceedings before the ICC, as with all other proceedings, may benefit from the precious support of the Security Council. This procedural support may, perhaps ideally, include a referral under Article 13(b) of the Statute. However, it will not help the Court if each permanent member of the Security Council is empowered to prevent the Court from exercising its jurisdiction over the crime of aggression.[62] Such a power would instead adversely affect the Court's legitimacy, as it would fly in the face of the absolutely essential aspiration of the law applying equally to all. Robert Jackson could not avoid developing a strong feeling for this basic truth when he made his famous promise in Nuremberg, cited at the outset of this article. It is hoped that the political leadership in France, the United Kingdom, Russia, and the United States will recall that this noble promise to ensure equality

62. It is precisely the wisdom of the compromise underlying Article 16 of the Statute that no such veto power is granted.

before the law is essentially theirs, as it forms an integral and precious part of their Nuremberg and Tokyo legacy. H. T. King, former Nuremberg war crimes prosecutor, has not forgotten that legacy, as is clear from this impressive appeal:

> Nuremberg is sometimes viewed as a legend in today's world, but its legacy is with the people of the world. We must honor the actuality of Nuremberg while respecting its symbolism so that the Nuremberg principles, which are indeed far-reaching, become the universal rule of law in the world.[63]

The example of Germany demonstrates that a government may be courageous enough to reconsider its own position based on sound principles. In 1980, (West) Germany spoke in favour of having the Security Council determine the existence of an act of aggression before starting international criminal proceedings.[64] At the 2007 New York meeting of the Assembly of States Parties, however, the German delegation stated the following:

> We have been following the debate on this issue very carefully throughout the years. We came to the conclusion that, under international law, the exercise of the ICC's jurisdiction should not be dependent on the authorization by any other body, such as the Security Council. Therefore, like many delegations who spoke before us, we are in favour of Option 1 in paragraph 5 of your paper.[65]

What can be done by the Group about the vexing jurisdiction issue before the political leadership around the world is given the opportunity to make its choices? First, it can hopefully eliminate jurisdiction proposals pertaining to the General Assembly and the ICJ because, as was said by one delegation in New York, these options have exhausted their potential as avenues for compromise. As Benjamin B. Ferencz, the prosecutor in the *Einsatzgruppen* case, convincingly argues in a recent essay, 'The General Assembly is not a judicial body and may be even more politically oriented than the Security Council. There is not much advantage in jumping from the frying pan into the fire'.[66] And regarding a possible referral of the matter to the ICJ, the same author astutely remarks that

> [R]eferrals from the ICC to the . . . ICJ . . . add costly and undesirable time-consuming procedures. Victims cry out, and not without cause, that justice delayed is justice denied. The ICC is a self-contained entity governed by a treaty signed by over a hundred nations. It should not be made dependent upon other organizations outside its control.[67]

Second, and in any event, the Group must work with a view to bringing the key options in line with the different trigger mechanisms under the Statute. The Co-ordinator did precisely this when he introduced, at the 2007 Princeton Intersessional, his non-paper on the exercise of jurisdiction, and has thereby move the discussion another step forward.[68]

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63. At the American Bar Association's Commemoration of the 60th Anniversary of the Nuremberg Trials, November 11, 2005, Georgetown School of Law, Washington, DC, (2006) 40 *The International Lawyer* 5.
64. A/C.6/35/Sr. 12, 7 October 1980, 7 ff.
65. The text of the statement is on file with the commentator.
66. *Supra* note 52, at 12; for a similar and equally convincing view, see McDougall, *supra* note 54, at 324.
67. *Supra* note 54, at 13; for a more extensive and equally powerful argument to the same effect, see McDougall, *supra* note 54, at 324 ff.
68. Annex III to the Princeton 2007 Report.

3. Concluding remarks

When the Rome Conference started in June 1998, the number of brackets that were to be eliminated was frightening. If we compare this state of play before the Rome Conference with the advanced stage of the negotiations within the Group, then there is ample reason to be optimistic. As has been rightly observed by Christian Wenaweser, the distinguished Co-ordinator of the Group's deliberations, the negotiations on the crime of aggression currently possess a momentum and have reached the point where political leaders must decide whether or not they wish to take advantage of the large and distinct window of opportunity that has been created. Few who have studied the century-long effort to come to terms with the 'supreme international crime' will doubt that political leaders have before them a historic opportunity. As Benjamin B. Ferencz so wisely stated,

> The most important achievement of the Nuremberg trials, after over 40 million people had died in World War Two, was the confirmation that war-making was no longer a national right but had become, and henceforth would be condemned, as an international crime. That great historical step forward toward a more rational and human world order under law must not be allowed to perish.[69]

The Coalition for the ICC (Coalition) and other members of civil society should signal to government leaders that it would be more than sad to let this historic opportunity pass. The Coalition must already be commended for its support of the Group's ongoing negotiations by involving a number of highly competent legal experts in the process. One is, however, surprised by the conspicuous silence of human rights organizations such as Amnesty International and Human Rights Watch. Even from a narrow perspective of human rights protection, one would expect such organizations to be concerned about the right to life of soldiers and civilians exposed to death in conflicts arising from criminal wars of aggression.

In my humble view, there are two principles that should guide the final phase of negotiations. First, the substantive definition of the state act of aggression should stay within the legitimate limits of international criminal justice by not exceeding undisputable general customary international law. Second, a special procedural regime that includes a carefully articulated role for the Security Council may well be devised. Such a regime must not, however, defy fundamental principles of international criminal justice and must not, in particular, have the practical effect of placing the permanent members of the Security Council (and their friends and partners in trade) beyond the reach of the law. Adherence to these two principles will require a spirit of compromise from almost all sides. Real compromise is different from the pretended compromise that Carrie McDougall envisions, which calls for a spirit of

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69. *Supra* note 54, at 15; for a similar view see Solera, *supra* note 11, at 506; for a drastic view to the contrary, see Schuster, *supra* note 3, at 51, who advocates the deletion of the crime of aggression from the ICC list of crimes; for the same view see J. N. Boehring, 'Aggression, International Law and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute', (2005) 43 *Columbia Journal of Transnational Law*, 557, at 610 ff.; for a less radical, though sceptical, position, see T. Stein, 'Aggression als Verbrechen im Statut des Internationalen Strafgerichtshofs – "A Bridge too Far"?', in H. Müller-Dietz et al. (eds.), *Festschrift für Heike Jung* (2007), 935, at 944.

compromise from only one side, that is, from the vast majority opposing a grant of exclusive power to the Security Council. McDougall's suggestion 'that the ability of the P5 to exercise their veto is a necessary component of any *compromise* solution that is to be successful'[70] amounts to much the same as saying that the five permanent members of the Security Council need *not* compromise. It is deplorable to note that McDougall, following a legal and legal policy analysis of outstanding quality, decides to bow to the alleged demands of realpolitik. Instead, this commentator firmly believes that international criminal justice must not sacrifice its legitimacy on the altar of realpolitik. Let us hope that the political leadership will soon be inspirited with a genuine will to compromise, and will assume its responsibility to close, ideally by consensus, the Statute's most prominent lacuna – before it becomes permanent and thereby turns into a legitimacy gap.

70. *Supra* note 54, at 331 (emphasis added).