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# Second Thoughts on the Crime of Aggression

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## Abstract

*The article is a critique of the proposal for the codification of the crime of aggression by the Special Working Group on the Crime of Aggression. It concentrates on four main points – the inherent indeterminacy of the definition of aggression, its uncertain application to recent cases concerning the use of force, the involvement of the Security Council in the exercise of jurisdiction, and, finally, the danger of concentrating issues of jus in bello and jus contra bellum in one single court or tribunal. The contribution concludes that the time is not ripe for a codification of the crime of aggression at a time at which the Court is still struggling to establish itself.*

## 1 The Crime of Aggression between Consensus and Contestation

When reading the recent documents on the definition of the ‘crime of aggression’ – which was postponed in the 1998 Rome conference<sup>1</sup> – one gets the impression that the inclusion of the crime of aggression in the Rome Statute on the occasion of the Review Conference in Kampala next year is a done deal which merely hinges on technicalities.<sup>2</sup> The Working Group on the Crime of Aggression has come up with a

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<sup>1</sup> Art.5(2)(1) of the Rome Statute of the International Criminal Court of 17 July 1998, 2187 UNTS 3, reads: ‘The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.’

<sup>2</sup> Report of the Special Working Group on the Crime of Aggression, International Criminal Court, Assembly of States Parties, 7th session (second resumption), New York, 9–13 Feb. 2009, 20 Feb. 2009, Doc ICC-ASP/7/SWGCA/2; Informal inter-sessional meeting on the Crime of Aggression, ICC Assembly of States Parties, 8th sess., Doc ICC-ASP/8/INF.2 (10 July 2009). See also Kress, ‘The Crime of Aggression before the First Review of the ICC Statute’, 20 *Leiden J Int’l L* (2007) 851, at 864; Barriga, ‘Against the

proposal<sup>3</sup> which may contain some brackets – in particular regarding the ‘triggering mechanism’ for the exercise of jurisdiction by the Court – but the decision in principle seems to be made. In such a situation, it appears that any further discussion would go ‘behind Rome’ or, even worse, ‘behind Nuremberg’.<sup>4</sup> Going back behind Rome, however, would imply a denial of the success story of the International Criminal Court. In other words, criticizing the foundational decision to include the crime of aggression in the jurisdiction of the International Criminal Court catapults the critics into the pre-1998 wilderness, at the fringe next to the sceptics of international criminal law, or even international law altogether. ‘Now or never’ appears to be the slogan of the day.

And yet there is something artificial in this consensus. When I presented the following conclusions – at first informally in a discussion statement from the floor at the Annual Meeting of the American Society of International Law, later at an international law conference in South Tyrol and at the annual meeting of the German Working Group on International Criminal Law in Lausanne this summer – the reaction of the audience was astonishingly positive. Remarks such as ‘I was against it from the beginning’ or ‘the crime of aggression could ruin the Court’, were made, if more in private than in public; and the sweeping enthusiasm of the ASIL meeting (‘trust the Court’, ‘talk to your government’, ‘the members of the working groups did all agree’) gave way to balanced and thoughtful arguments over the pros and cons of ICC jurisdiction.

It is in this spirit I offer the following criticism. Let me clarify from the outset that I do not intend to reopen the Nuremberg question whether the crime against peace is part of contemporary international law. As the House of Lords has recently stated in *Jones*, waging aggressive war is a crime under existing international law.<sup>5</sup> Numerous authoritative statements support this conclusion, from General Assembly and Security Council resolutions to statements of the International Law Commission and the Rome Statute itself, which leaves open the definition of the crime but not the criminality of aggression as such. But this does not necessarily imply that the International Criminal Court should be entrusted, at this particular juncture, with jurisdiction over the crime of aggression, and even less that the proposal of the Working Group should be regarded as *fait accompli*.

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Odds: The Results of the Special Working Group on the Crime of Aggression’, forthcoming in R. Bellelli (ed.), *International Criminal Justice* (2009); Scharf and Hadji, ‘Symposium: The International Criminal Court and the Crime of Aggression’, 41 *Case Western Reserve J Int’l L* (2009) 267; but see Ellis, ‘Jurisdictional and Trigger Mechanisms’, in *ibid.*, at 391; Anderson, ‘The Rise of International Criminal Law: Intended and Unintended Consequences’, 20 *EJIL* (2009) 331, at 354–355; Zimmermann, in O. Trifflerer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, 2008), Art. 5 para. 41.

<sup>3</sup> Report of the Special Working Group, *supra* note 2, at 11–13.

<sup>4</sup> See, e.g., Ferencz, ‘Ending Impunity for the Crime of Aggression’, 41 *Case Western Reserve J Int’l L* (2009) 281, at 290.

<sup>5</sup> *R v. Jones and others* [2006] UKHL 16, [2006] All ER 741, at paras 19 (Lord Bingham), 59 (Lord Hoffmann), 99 (Lord Mance).

Thus, this contribution is intended as an invitation to serious debate on the proposal, a debate which needs to include, in the opinion of the present writer, the political context – both with regard to the situation of the ICC itself and with regard to the state of general international law on the prohibition on the use of force in general. Only when the result of that discussion is that a regulation of the crime of aggression is positive for the development of international law as a whole, should the crime be included in the Rome Statute. In a world full of unintended consequences, such debate is indispensable when the very foundations of the international legal (un)order are at stake. The prohibition on the use of force and the establishment of the Charter system of collective security constitute the cornerstones of the international system after World War II, whereas international criminal law may be the signature legal advance after the fall of the Berlin wall. This debate should not be limited to the usual circles of international criminal lawyers, but needs to include the college of international lawyers and the international public at large.

## 2 A Critique of the Working Group Definition

The present critique will centre on the proposal on the Crime of Aggression by the Special Working Group of the Assembly of States Parties to the Rome Statute<sup>6</sup> in preparation for the 2010 Statute Review Conference in Kampala. First, we will look at the definition of the crime of aggression as proposed by the Working Group, which relies heavily on the 1974 General Assembly Definition of Aggression,<sup>7</sup> but adds qualifiers regarding the leadership character of the crime and the ‘manifest’ character of its violation. Secondly, we will deal with the repercussions of the definition of the crime of aggression on the prohibition on the use of force. Thirdly, we will discuss the trigger mechanism(s) of proposed Article 13*bis*, in particular with regard to the relationship between the Security Council and the Prosecutor of the ICC. Fourthly, we will deal with the relationship between *jus ad bellum*, on the one hand, and issues of *jus in bello* and crimes against humanity and genocide, on the other. Finally, we will further contextualize the jurisdiction for the crime of aggression with the situation of the Court. My conclusion is that, for all of these reasons, it may well be advisable to wait until a broader consensus emerges on the contours of the crime and the conditions for the exercise of jurisdiction over it.

### A *The Definition of the Crime of Aggression in Article 8bis*

Famously, the crime against peace in Nuremberg remained largely undefined. According to Article 6(a) of the Nuremberg Charter, crimes against peace encompassed ‘planning, preparation, initiation or waging of a war of aggression, or a war in violation of

<sup>6</sup> Report of the Special Working Group on the Crime of Aggression, *supra* note 2.

<sup>7</sup> Definition of Aggression, Res 3314 (XXIX), Annex, UN GAOR, 29th Sess., Supp. No. 31, at 142, UN Doc. A/9631 (1974).

international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing'.<sup>8</sup> Thus, with the notable exception of wars waged in violation of international agreements, the definition dealt with the modalities of the crime and the participation in it, but not with the crime itself. Accordingly, the Nuremberg judgment contains a lengthy discussion of whether aggression was punishable at all, but no definition of the crime, and neither the General Assembly nor the International Law Commission has filled that gap since.<sup>9</sup>

The first problem any definition of the crime of aggression faces is the relationship between criminal and 'ordinary' law. In other words, should every prohibited behaviour also constitute a crime punishable at an individual level? Or do we need to distinguish between international unlawfulness and individual criminal responsibility? In its Article 5(2), the GA Definition of Aggression determines that a 'war of aggression is a crime against international peace' and seems thus to distinguish between 'acts of aggression' and the 'crime of aggression'.<sup>10</sup> The Working Group has now adopted the view that this distinction limits the cases in which acts of aggressions are punishable. According to the definition contained in Article 8*bis*(1) of its proposal, "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'. Paragraph (2) reproduces more or less verbatim the 1974 General Assembly Definition of Aggression, combining the general definition of (acts of) aggression in Article 2 of the GA definition and a list of examples contained in Article 3. However, the proposal omits the opt-in and opt-out clauses of Articles 2 and 4 of the GA definition allowing the Security Council to exclude and include acts not falling under the general definition. Due to disagreements in the Working Group,<sup>11</sup> it remains open whether the list is meant to be exhaustive, however.

First, and widely uncontroversially, this definition confirms that the crime of aggression is a leadership crime, thus not applying to ordinary soldiers. Secondly, and for our purposes more importantly, the definition also endorses the view according to which

<sup>8</sup> London Agreement of 8 Aug. 1945, Annex, 39 *AJIL* (1945) Suppl. 258.

<sup>9</sup> See Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, GA Res 95 (I), 11 Dec. 1946; Nürnberg Principles, ILC Final Draft Articles and Commentary, 2 *Yrbk Int'l Law Commission* (1950) 374, Principle 6, paras 113, 117 (emphasizing character as leadership crime, but not defining it). Art. 16 of the Draft Code of Crimes Against the Peace and Security of Mankind of 1996 also fails to define aggression. The commentary speaks only of a 'sufficiently serious violation of the prohibition' on the use of force: see Report of the Commission on the work of its 48th session, *Yrbk Int'l Law Commission* (1996) II 2, at 42–43, at para. 50, Commentary to Art. 16, para. 5; ILC Final Draft Statute, *Yrbk Int'l Law Commission* (1994) II 2, at 39, para. 91; Commentary to Art. 20, at para. 7.

<sup>10</sup> For its drafting history see T. Bruha, *Die Definition der Aggression* (1980), at 211–216 (emphasizing the divergence of views of the drafters); B.B. Ferencz, *Defining International Aggression. The Search for World Peace. A Documentary History and Analysis* (1975), ii, at 43–45, with further references (criticizing the differentiation between 'act' and 'war' or aggression).

<sup>11</sup> Barriga, *supra* note 2, at sect. 3 B 2.

only certain acts of aggression also give rise to the crime of aggression, namely to the extent that the act 'by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.

The meaning of 'manifest' remains unclear, however. The term was chosen after several alternatives, such as 'serious' or 'flagrant', were discarded, but seems to have little meaning of its own.<sup>12</sup> According to Article 46(2) of the Vienna Convention on the Law of Treaties, a violation of domestic law can be invoked as manifest 'if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith'.<sup>13</sup> This corresponds to the lexical meaning of 'manifest' as, in the words of the *Oxford English Dictionary*, 'clearly revealed to the eye, mind, or judgement; open to view or comprehension; obvious',<sup>14</sup> but amounts to an extremely restrictive standard. What, after all, is obvious for one is completely obscure to the other, in particular in international law. According to at least one member of this year's ASIL panel, 'manifest' relates to the evidence of a violation. But that would amount to a confusion between evidence and substance of a crime.

The explanatory and more colourful terms 'character, gravity and scale' rather suggest that certain acts of aggression are greater than others and therefore subject to prosecution. The drafting history would point to the inclusion of a threshold for prosecution 'to exclude some borderline cases'.<sup>15</sup> Nevertheless, it remains unclear what precisely renders an act of aggression a crime. 'Gravity' and 'scale' may point to the extent of an armed attack, and thus exclude mere border incursions of the type frequent in anti-terrorist warfare beyond borders.<sup>16</sup> 'Character', of course, is so indeterminate that it is almost meaningless. It is entirely in the eye of the beholder – or, rather, the Court – to determine which use of armed force is of a 'character' that warrants treatment as an individual crime.

Apparently, when drafting the amendment, the members of the Working Group intended to render the application of the crime of aggression more precise and to distinguish a crime from an ordinary violation of the prohibition on the use of force. Looking at the wording alone, it is difficult to call the result a success – not to speak of the problematic 'character' of the list of examples as contained in Article 3 of the Definition of Aggression which seems, if looked at from a 'criminal law angle', to confuse modes of participation, as in letters (f) and (g)), with direct perpetration (letters (a) to (e)), but was never meant to be applied as a criminal statute.

<sup>12</sup> See Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, 8–11 June 2006, in Assembly of States Parties, 5th session 2006, Doc ICC-ASP/5/SWGCA/INF.1 (5 Sept. 2006), at paras 18, 20. The reasons for the preference for the word 'manifest' over the 2002 term 'flagrant' are not explained. According to Barriga, *supra* note 2, at sect. 3 A 3, 'flagrant' was considered too high a barrier.

<sup>13</sup> 1155 UNTS 331. For the drafting history, in which states expressed great reluctance towards accepting any grounds of invalidity, see I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, 1984), at 171.

<sup>14</sup> Entry 'manifest, adj. and adv.', A.1.a., *Oxford English Dictionary Online* (June 2009), available at: <http://dictionary.oed.com> (visited 5 Aug. 2009).

<sup>15</sup> Informal inter-sessional meeting 2006, *supra* note 12, at para. 19.

<sup>16</sup> See Tams, 'The Use of Force Against Terrorists', 20 *EJIL* (2009) 359, at 378–381.

## B The Definition and Controversial Uses of Force

That leads us to the context of the past 10 years since the drafting of the Rome Statute. After Kosovo, Afghanistan, Iraq, and recently Georgia, the task of drafting a definition of aggression has become more and more problematic. Criminal law starts from the premise that it penalizes only acts which are outlawed according to a broad consensus in society, both as to their illegal nature and to individual criminal accountability. However, if anything, the prohibition on the use of force has become less consensual in the past 10 years.

One of the main problems regarding the prohibition on the use of force is the question of humanitarian intervention. Obviously, this is not the place to discuss the issue in depth. While it appears that states using force continue to appeal to a more or less circumscribed right to humanitarian intervention, as in the cases of Kosovo<sup>17</sup> and South Ossetia,<sup>18</sup> recent attempts to ‘legalize’ humanitarian intervention seem to have failed: while attempting a codification of sorts of the concept of the ‘responsibility to protect’, the UN Summit of 2005 clearly reserved the reaction to the non-observance of the responsibility of states to protect their populations from war crimes, crimes against humanity, ethnic cleansing, and genocide, to the United Nations, in particular the Security Council.<sup>19</sup> Nevertheless, some writers have proposed the creation of an explicit or implicit exception for unilateral uses of force.<sup>20</sup>

The ‘manifestness’ of the use of force, however, seems not affected by the humanitarian motive – if one does not interpret benevolent intent as indicating the non-criminal ‘character’ of the use of force. But do the drafters really wish to allow any well-intentioned use of force? In the view of Claus Kress, who was a member of the Working Group, only a ‘war of conquest and a hegemonial war’ constitute historical precedents for a war of aggression,<sup>21</sup> and this insight constituted the basis for the

<sup>17</sup> However, in front of the ICJ, only Belgium dared to make such an argument: see *Legality of Use of Force (Yugoslavia v. Belgium)*, Verbatim Record, ICJ Doc. CR 99/15, 10 May 1999 (Me Ergec), at 15–18, available at: [www.icj-cij.org](http://www.icj-cij.org) (visited 5 Aug. 2009); but cf. the positions of other states: A. Cassese, ‘A Follow-Up: Forcible Humanitarian Countermeasures and *Opinio Necessitatis*’, 10 *EJIL* (1999) 791, with further references; see also, in particular, the Belgian (!) statement before the General Assembly that Kosovo did not constitute a precedent for unilateral intervention: *ibid.*, at 798 n. 32.

<sup>18</sup> On the Russian justification for its attack against Georgia see Nußberger, ‘The War between Russia and Georgia – Consequences and Unresolved Questions’, 1 *Göttingen J Int'l L* (2009) 341, at 345; on the justification under international law cf. Luchterhandt, ‘Völkerrechtliche Aspekte des Georgien-Krieges’, 46 *Archiv des Völkerrechts* (2008) 435, at 465–472 on the one hand, and Kranz, ‘Der Kampf um den Frieden und sein besonderer Facilitator. Anmerkungen zur Georgienkrise’, 46 *Archiv des Völkerrechts* (2008) 481, at 489–494, on the other (with English summaries at 479 and 501, respectively).

<sup>19</sup> 2005 World Summit Outcome, UN Doc A/RES/60/1 (2005), at para. 139; see also SC Res. 1674 (2006), at para. 4; SC Res 1706 (2006), at preambular para. 2; implementing the responsibility to protect see SG report, 12 Jan. 2009, A/63/677 (2009), at paras 9–10.

<sup>20</sup> Leclerc-Gagné and Byers, ‘A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention’, 41 *Case Western Reserve J Int'l L* (2009) 379.

<sup>21</sup> Kress, ‘Strafrecht und Angriffskrieg im Licht des “Falles Irak”’, 115 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2003) 294, at 302–303. But see Ambos, ‘Strafrecht und Krieg: strafbare Beteiligung der Bundesregierung am Irak-Krieg?’, in J. Arnold, B. Burkhardt, and W. Gropp (eds), *Menschengerechtes Strafrecht, Festschrift für Albin Eser* (2005), at 671, 676, 681–682.

German proposal to limit criminality to military occupation or annexation.<sup>22</sup> But does conquest exclude humanitarian motives? How does a court of law weigh political motives anyway? How can one prevent abuse?

As to the controversial cases of the past 10 years, was the 'NATO war' against Yugoslavia justified to protect the Kosovars, but not Russia's move to protect the South Ossetians from Georgia (provided this was indeed its purpose)? Was the attack on Iraq in 2003 justified or de-criminalized by humanitarian side effects? Or by the mere purpose of removing WMDs? Kress is indeed on record as suggesting that the coalition war against Saddam Hussein does not constitute a 'manifest' violation.<sup>23</sup> The elements of 'scale' and 'gravity' should in both cases be met, however. Others may maintain that Iraq was manifest because the initial use of force was evident and humanitarian motives were imputed after the fact. Kress might respond that at least one of the current judges of the ICJ, Christopher Greenwood, opined at the time – and holds even today – that the war was legal by reason of SC Resolution 678.<sup>24</sup> But cannot any lawyer of some quality find reasons why almost anything is legal or illegal under prevailing circumstances? Think of George W. Bush's lawyers and torture.<sup>25</sup> Or Serbia's lawyers and genocide.<sup>26</sup> The draft Elements of Crime would also suggest something else, emphasizing the objective character of the determination of a 'manifest' violation and the irrelevance of the legal evaluation by the perpetrator.<sup>27</sup> Nevertheless, the disagreement shows the indeterminacy of the definition.

As to the use of force against transnational terrorist groups, Afghanistan is a case in point. While there seems now to be an – albeit precarious – agreement that the initial use of force against the Taliban regime was justified by the inclusion of the right to self-defence in the preambular paragraphs of the relevant SC Resolutions<sup>28</sup> – this discussion has solved hardly anything with regard to the general rule. In addition, by using

<sup>22</sup> See Compilation of proposals on the crime of Aggression, Preparatory Commission for the ICC, 2 Aug. 1999, Doc PCNICC/1999/INF/2 (1999), at 20. See also Kaul, 'Definitional Options for the Way Forward', in M. Politi and G. Nesi (eds), *The International Criminal Court and the Crime of Aggression* (2004), at 97–108. For an overview of the debates see Zimmermann, *supra* note 2, Art. 5(20) ff.

<sup>23</sup> Kress, *supra* note 21, at 331 (in German) (since a respectable view exists which holds that the war was legal, the Iraq war does not constitute a war of aggression).

<sup>24</sup> See Greenwood, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn, 2008), at para. 101; Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq', 4 *San Diego Int'l LJ* (2003) 7, at 34–35.

<sup>25</sup> See, e.g., Bybee, 'Standards of Conduct for Interrogation', in K.J. Greenberg and J.L. Dratel (eds), *The Torture Papers. The Road to Abu Ghraib* (2005), at 172; Yoo, 'Letter to Alberto R. Gonzales of Aug. 1, 2002', in *ibid.*, at 218–222.

<sup>26</sup> Cf. the arguments made by Serbia in the *Use of Force* cases, Provisional Measures [1999] ICJ Rep. 136, at paras 34–35 (Belgium case), and in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 Feb. 2007, at para. 278, and Public Hearings, CR 2006/18-20 14–15 June 2006 (Me de Roux), available at: [www.icj-cij.org](http://www.icj-cij.org) (visited 6 Aug. 2009).

<sup>27</sup> See Introduction and draft elements 4 and 6, in Informal inter-sessional meeting on the Crime of Aggression, ICC Assembly of States Parties, 8th sess., Doc ICC-ASP/8/INF.2 (10 July 2009), at 12.

<sup>28</sup> Even the ICJ, which views the use of force under any circumstance with great suspicion, seems to be sympathetic to that view: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep. 136, at 194, para. 134.

the definitions contained in the 1974 GA definition of aggression, the Working Group has failed to endorse an extension of the notion of aggression to the voluntary support for terrorist groups in launching attacks against other states (Article 3(g)), contrary to such support for states (Article 3(f)).<sup>29</sup> Thus, Resolution 3314 appears singularly unhelpful in solving these difficult issues.

In conclusion, it will be almost impossible for the Court to apply the Working Group definition to the ‘hard cases’ of international life. Certainly, the definition would allow the Court not to prosecute any of these cases, thus limiting ‘manifest’ violations to the most egregious cases, such as Saddam Hussein’s attack against Kuwait in 1990. But this would almost certainly leave the definition a dead letter. What happens to the remaining ‘ordinary’ violations of the prohibition on the use of force? Are they less meaningful because they are not criminalized? The true impact of the definition as adopted by the Working Group may well lie in the derogation from the existing comprehensive prohibition on the use of force rather than in its clarification.

Of course, not all violations of international humanitarian law are crimes, and international humanitarian law is nonetheless binding. But when one sees how some state representatives handled the *Nuclear Weapons* opinion of the ICJ<sup>30</sup> or the ICTY Prosecutor report on the Kosovo war<sup>31</sup> as justification for what states were doing anyway, the confidence that non-criminal violations of the *jus ad bellum* would still maintain the opprobrium of illegality after they were sorted out from criminalization is very modest. Those who support the lawfulness of humanitarian intervention may approve that result.<sup>32</sup> But they should beware that, in the absence of prosecution by the Court, states can easily view such abstention as an unjustified bill of clean health. Thus, in the end, criminalization may lead to the unintended consequence of rendering the use of force easier rather than sanctioning it more effectively.

### C *The Crime of Aggression and the Security Council*

This gets us to the next point, namely the involvement of the Security Council. While the Court’s designation of an act of aggression is, according to Article 15*bis*(5) of the draft, independent of outside organs, the Prosecutor must ascertain whether the Security Council has made a determination to the effect that the state concerned has committed an aggression in order to proceed with an investigation pursuant to paragraph (2).

<sup>29</sup> See Ferencz, *supra* note 10, ii, at 39–40, with further references. Cf. the 2005 African Union Non-Aggression and Common Defence Pact cited by Tams, *supra* note 16, at 381 n. 152 which includes the support of terrorism in its definition of aggression.

<sup>30</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226. On the self-congratulatory reaction see, e.g., Neubauer, ‘Remarks’ [1997] ASIL Proceedings 11; Matheson, in *ibid.*, at 14.

<sup>31</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, available at: [www.icty.org/sid/10052](http://www.icty.org/sid/10052) (visited 5 Aug. 2009).

<sup>32</sup> On the possible consequences of the codification of the crime of aggression see Murphy, ‘Criminalizing Humanitarian Intervention’, 41 *Case Western Reserve J Int’l L* (2009) 341, showing that a failure to prosecute humanitarian interventions may eventually lead to their legalization.



There is, however, no agreement between the permanent members of the Council and other states on whether organs other than the Security Council could, under the Charter, substitute for a lack of SC determination. The Working Group leaves the question open, adding four options: either the lack of SC designation renders prosecution impossible, or the ICC Pre-Trial Chamber can act on its own, or the GA or the ICJ, or both, may substitute for an SC determination.

The first option which requires a previous SC designation of state action as aggression may allow for an – easy – consensus, but may have disastrous consequences: since such designation is unlikely to be forthcoming – the SC has hardly used its power under Chapter VII to do so yet, even without criminal repercussions<sup>33</sup> – the crime of aggression would more often than not remain a dead letter. This would entail a (further) devaluation of the prohibition on the use of force, and thus be detrimental to the cause of fighting aggression. Worse: the Security Council may become even more reluctant to designate aggressions as such under Chapter VII. ICC jurisdiction could thus hamper the Security Council in the exercise of its primary responsibility to maintain international peace and security.

In addition, do we really want to make prosecution of one of the gravest crimes dependent on a political body in which the great powers have veto power to shield themselves and their allies entirely from prosecution?<sup>34</sup> As the brief history of the ICC has shown, the Security Council will not refrain from using its prerogatives under Chapter VII and Article 103 of the Charter to claim precedence over the ICC, as has already happened when it shielded UN forces from the jurisdiction of the Court.<sup>35</sup> Thus, while it makes a huge difference whether one applies a ‘green light’ or a ‘red light’ procedure with regard to SC involvement – in other words, whether the SC has to approve any investigation, under the threat of the veto, or whether the SC needs actively to oppose an existing investigation under Article 16 of the Statute and Chapter VII of the Charter – to prevent the SC from further meddling in the affairs of the Court and endangering its independence may well prove impossible. In other words, the politicization of the Court may get even worse.

If a determination by another organ could be substituted for that of the SC, it remains doubtful whether the General Assembly, and even less so the International Court of Justice, would like to play the role of an auxiliary or subsidiary body of the ICC Prosecutor for the determination of a situation of aggression. As the *Lockerbie* case has shown, the ICJ is extremely reluctant to overrule the Council.<sup>36</sup> However, creating

<sup>33</sup> The only cases in which the Security Council has condemned ‘acts of aggression’ were not adopted under Chapter VII: see Res. 455 (1979), at para. 1, Res. 573 (1985), at para. 1, and Res. 577 (1985), at para. 2.

<sup>34</sup> For an argument in this regard see Meron, ‘Defining Aggression for the International Criminal Court’, 25 *Suffolk Transnat’l L Rev* (2001) 1, at 13–14 (arguing in favour of mandatory SC designation); but see Kress, *supra* note 2, at 859–863.

<sup>35</sup> See SC Res 1593 (2005), at para. 6, and SC Res 1422 (2002); see also Stahn, ‘The Ambiguities of Security Council Resolution 1422 (2002)’, 14 *EJIL* (2003) 85.

<sup>36</sup> See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Provisional Measures, Order of 14 Apr. 1992, [1992] ICJ Rep 3, at 15, paras 39–42.

with regard to a case of arguable aggression a constitutional crisis at the UN between Council, Assembly, and Court would further weaken the maintenance of peace and security by the United Nations.

Many international criminal lawyers may agree that the best solution would consist in the complete freedom of the Court to prosecute aggression. But this option may endanger the vital support of the P5 for ICC investigations in the first place, and further alienate the United States, in particular.<sup>37</sup> Before paying this heavy price, one should ask oneself whether a mere theoretical possibility of ICC prosecutions is worth it.

### D *Jus ad bellum and jus in bello before one Court*

The next point is institutional, too, and goes against the apparent consensus in Rome on having a single court for violations of both *jus ad bellum* (aggression) and *jus in bello* (war crimes, but also crimes against humanity and genocide applying regardless of responsibility for the armed conflict itself).<sup>38</sup> The very point of the separation of the two is that all fighting sides must, under any circumstance, independently of *jus ad bellum*, implement the *jus in bello*. Each violation will be prosecuted, if it amounts to a crime. It is no accident that the intellectual ‘father’ of the crime of aggression and the Nuremberg trials, William Chandler, wanted to do away with this distinction altogether,<sup>39</sup> thus demonstrating that the crime of aggression is not easy to combine with the prosecution of violations of *jus in bello*.

If the leadership of one party has already been singled out by the Court as the culprit in an armed conflict, what incentive does it have for upholding the *jus in bello*? Any deterrent effect for the conduct of hostilities through international criminal law, if any, may be lost. But the experience of the Nuremberg Trials was precisely that, while aggression is certainly a dangerous crime almost necessarily engendering many others, violations of the *jus in bello*, and genocide, and crimes against humanity may be even worse, because they negate the civilized behaviour which is due at any time to any human being, irrespective of war and peace. We should think twice before we reduce the pressure on all parties to the conflict to follow the *jus in bello*.

## 3 Towards A Future for the Crime of Aggression?

Thus, either the resulting definition will be narrowly tailored to the most extreme and, as a whole, consensual cases of armed aggression for territorial gain, and will include

<sup>37</sup> See US Policy Toward the International Criminal Court: Furthering Positive Engagement, Report of an Independent Task Force Convened by the American Society of International Law, Mar. 2009, available at: [www.asil.org/files/ASIL-08-DiscPaper2.pdf](http://www.asil.org/files/ASIL-08-DiscPaper2.pdf)

<sup>38</sup> In a similar vein see Anderson, ‘The Rise of International Criminal Law: Intended and Unintended Consequences’, 20 *EJIL* (2009) 331, at 354.

<sup>39</sup> See the letter reprinted in Bush, ‘The “Supreme Crime” and its Origins: The Lost Legislative History of the Crime of Aggressive War’, 102 *Columbia L Rev* (2002) 2324, at 2402, and the analysis contained therein.

stringent requirements of political consensus regarding the characterization of the situation in question in the Security Council and beyond. Or it will be broad enough to cover the whole spectrum of aggression in contemporary international relations.

In the first case, the crime will rarely, if ever, be prosecuted, thus giving states an undeserved clean bill of health. In that alternative, a comprehensive prohibition on the use of force may well go down the drain. In the second – much less likely – scenario, the International Criminal Court, equipped with broad powers to prosecute aggression, will be at the centre of political controversy, jeopardizing its position of neutrality between the parties to a conflict and endangering the consensus on the prohibition of war crimes, crimes against humanity, and genocide in all cases and on all sides. In both cases, claims of hypocrisy will abound. Worse, the twin considerations of peace and justice may not come out unharmed. The world may thus become a worse rather than a better place. Tampering with the very core of the international legal order without the benefit of a comprehensive cost/benefit analysis borders on the reckless. More research is needed before we can confidently go down that road.<sup>40</sup> Good intentions alone are not enough.

Of course, such dire predictions do not need to be realized. One may well hope that the threat of criminal sanctions may deter one or the other leader before launching an attack. But in the current climate, in which the main ‘customer’ of the Court, Africa, appears less and less inclined to follow the Court,<sup>41</sup> and in a period when the Court is grappling with problems partly of its own making, partly being the inevitable result of its remoteness from the scenes of the crimes under its jurisdiction, it needs to keep the ranks closed, so to speak, and not to divide its supporters even further. Taking up aggression may be a step too far at this point. The questions of the procedure applicable to the definition of aggression – whether under Article 121(4) or (5) – and the necessity of the perpetrator’s consent to the exercise of jurisdiction are also not yet consensually resolved.<sup>42</sup>

The inclusion of the crime of aggression in the jurisdiction of the Court at this time costs too much, dividing the supporters of the Court, de-emphasizing the prohibitions of the current law, mingling *jus ad bellum* and *jus in bello* issues, and gives too little, a merely theoretical possibility of an activist Security Council combined with a Court being able to act swiftly to deter acts of aggression. As long as the disagreement within the international community on *jus ad bellum* issues persists, the time may not yet be ripe for giving the International Criminal Court jurisdiction over the crime of aggression.

<sup>40</sup> For an example of such research, see Murphy in this issue.

<sup>41</sup> See Akande, ‘Is the Rift between Africa and the ICC Deepening? Heads of States Decide Not to Cooperate with ICC on the Bashir Case’, available at: [www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/](http://www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/) (last visited 4 Aug. 2009).

<sup>42</sup> Report of the Working Group, *supra* note 2, at paras 6–11, 35–36; Informal inter-sessional meeting 2009, *supra* note 2, at paras 32–43. For a more extensive treatment see the other contributions to this Symposium.

This conclusion does not imply disrespect for the achievements of the Working Group. Their blueprint testifies to impressive historical progress and will remain the basis for any eventual codification. For the time being, however, Article 5(2) of the Rome Statute, namely that aggression is a crime of international law but that prosecution by the ICC needs to await a more detailed definition, reflects the current state of the prohibition on the use of force between universal condemnation and continual violation.