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Defining the Crime of Aggression: Cutting the Gordian Knot?

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Mémoire présenté à la Faculté des études supérieures
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Defining the Crime of Aggression: Cutting the Gordian Knot?
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Résumé

Le crime d’agression se veut être un des quatre crimes internationaux sous la juridiction de la CPI. Lorsque les délégués à la Conférence de Rome n’eurent point atteint de consensus sur une définition du crime, celui-ci resta, depuis, indéfini en droit. En conséquence, la CPI n’aura juridiction pour entendre des causes portant sur le crime d’agression qu’une fois la définition sera adoptée par l’Assemblée des États Parties au plus tôt en 2009.

Ce mémoire traite trois problématiques liées au crime d’agression : la question de la responsabilité pénale individuelle, le rôle du Conseil de sécurité de l’ONU, et les paramètres du crime en tant que tel. La responsabilité pénale individuelle est analysée, inter alia, du point de vue du principe des sources du droit international. Quant à l’éventuelle implication du Conseil de sécurité dans le champ de compétence de la CPI sur le crime d’agression, l’auteure soutient tel que suit: Si le Conseil de sécurité se voit accordé un pouvoir plus large que celui dont il est présentement doté en vertu des articles 13(b) et 16 du Statut de Rome, chaque membre permanent aura un veto sur toute situation d’agression qui serait autrement portée devant la Cour. Ceci aura pour conséquence de politiser la CPI en ce qui a trait au crime et rendra hypothétique toute définition éventuelle. Si la définition est bien conçue et rédigée, on fait valoir, qu’il n’est point nécessaire de limiter davantage la compétence de la CPI. Les paramètres de la définition du crime proposés par l’auteure sont établis selon les conclusions d’une analyse des notions composantes de l’agression. L’essentiel du concept se veut un recours illégal et non-nécessaire qui constitue une rupture à la paix. À moins qu’il ne soit exercé en « légitime défence » ou en vertu d’un mandat du Chapitre VII, le recours à la force constitue prima facie une agression et s’il est suffisamment grave, il s’agira d’un crime d’agression. Ce mémoire termine avec un projet de définition du crime d’agression en vue d’avancer le discours vers un consensus sur ces problématiques majeures. Non seulement est-il possible d’arriver à un consensus sur la définition, croit l’auteure, mais nous sommes plus que jamais à l’aube d’y parvenir.

MOTS-CLÉS:
Abstract

The crime of aggression is one of the four international crimes under the jurisdiction of the ICC. When delegates at the Rome Conference were unable to agree on the content of a definition, the crime was left undefined. As a result, the ICC can only begin prosecuting individuals for the crime of aggression once a definition is adopted by the Assembly of States Parties in 2009, at the earliest.

This thesis examines three issues associated with the crime of aggression: the question of individual criminal responsibility, the role of the UN Security Council and the general scope of the definition of the crime of aggression itself. Individual criminal liability is reviewed, inter alia, from the perspective of international sources doctrine. Regarding the role of the Security Council in relation to the crime of aggression, the author concludes: if the Security Council is vested with more powers than it already has under Articles 13(b) and 16 of the Rome Statute, each permanent member will have a veto over any situation of aggression that might otherwise be brought before the Court. This would result in a complete politicization of the ICC and render moot any future definition of the crime of aggression. If a definition for the crime of aggression is properly conceived and constructed, it is argued, there is no need to further limit the Court’s exercise of jurisdiction. The author proposes general parameters for the scope of the definition based on conclusions reached in the analysis of the conceptual components of aggression. At its essence, the act of aggression is the unnecessary, unlawful use of force which constitutes a breach of the peace. Unless employed in “self-defence” or under a Chapter VII mandate, the use of force constitutes prima facie an act of aggression, and if it is sufficiently grave, a crime of aggression. This thesis concludes with a working definition of the crime of aggression to promote dialogue and ultimately a consensus on these core issues. Not only is a definition is within reach, the author believes, we are closer to it than we ever have been before.

KEY WORDS:

## OUTLINE

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To the memory of Katia Boustany
I would like to thank Dean Anne-Marie Boisvert for her enthusiastic support, encouragement, her most insightful comments and generous supervision of this thesis.

I would also like to give posthumous thanks to Katia Boustany, the first supervisor of this thesis, whose presence was felt until it was completed. Her contribution to international law was as great as her love and passion for it, unconditional. She still had so much more to give, and she is sorely missed. May she be at peace knowing her rich legacy. You may say she’s a dreamer, but she’s not the only one...
In the sphere of municipal law we do not usually object to defining murder or manslaughter for the reason that a definition may on occasions prove insufficient or unjust. We put our trust in the skill of the draftsman and the wisdom of the Courts. It is therefore to be hoped that international lawyers will devote their attention less to piling up objections based on somewhat ingeniously devised possibilities showing the difficulties of a definition than to assisting progress by helping to frame a definition of aggression so as to provide, as far as the nature of that task permits, for unforeseen contingencies, including the unavoidable residuum of discretion for the adjudicating agency.

— Hersch Lauterpacht (International Law: Collected Papers, 442)
INTRODUCTION

It used to be that war was regarded as a legitimate way of resolving international disputes: a *necessity*. By the turn of the twentieth century however conflicts were no longer only being fought in the battlefield between soldiers; they moved into our cities and our homes. International conventions were signed marking the realization that rules were needed to protect civilians from the scourge of war. At the end of World War I countries began officially renouncing war as a way of conducting international affairs and the movement took on momentum. The announcement of the creation of the League of Nations at the Paris Peace Conference had as its main purpose the prevention of war. For the first time in modern history states espoused *non-aggression* as a policy and signed treaties outlawing war.

Then World War II happened, and when it ended the international community responded with two solutions: one legal and the other political. A growing sense of urgency to see that justice was rendered resulted in the creation of two International Military Tribunals at Nuremberg and Tokyo ("IMTs"). For the first time in modern history, individuals were prosecuted for crimes against peace, war crimes and crimes against humanity. To this day however the prosecution of individuals for crimes against peace (i.e. aggression) remains shrouded in controversy as there is no crime unless there is a law in force to that effect. When the war ended, "crimes against peace" were not "on the books" so the Allied Powers decided to create a law making *aggressive war a crime*, and applied it to the defendants at the Nuremberg and Tokyo IMTs *ex post facto*.

The political response to the Second World War sparked the creation of the United Nations in accordance with the Charter of the United Nations ("UN Charter"). In general, the UN Charter prohibits the threat or use of force among member states, and vests the UN Security Council and the General Assembly with the duty to
maintain and restore international peace and security.\(^1\) The sole exception to the
general prohibition on the use of force by individual member states is self-defence.\(^2\)
The UN Security Council however is empowered to authorize collective use of
force for the purposes of maintaining or restoring international peace and security.\(^3\)
This system of collective security has had its failings. The UN Security Council,
for example, has been unable to handle situations of international crises in an
effective or consistent manner, largely as a result of the political imbalance created
by the five permanent veto-carrying members on the Council ("P-5"). This state of
affairs has led to the virtual paralysis that has prevented the Council from carrying
out its duty especially if the threat or breach of peace is perpetrated by a P-5
member or one of its allies.

The crime of aggression is the *Achilles' heel* of international criminal law. For
decades, individual states and international organizations have grappled with draft
definitions, by and large, without much success. The lack of a clear definition and
the absence of a recognized forum in which to prosecute the crime have rendered
the crime of aggression unenforceable on a consistent and effective basis. The
reason usually proffered for the absence of a coherent definition is that the matter of
reaching a consensus is laden with political issues. No doubt, this has made the task
of reaching a definition suitable to a large number of states extremely difficult.

\(^1\) Articles 2(4) and 24, UN Charter in regard to the Security Council, and Articles 11 and 12 in
relation to the General Assembly.
\(^2\) Article 51, UN Charter.
\(^3\) Articles 39 and 42 of Chapter VII, UN Charter. While the UN General Assembly is not vested
with these specific powers, it may nonetheless make recommendations on collective action under a
"Uniting for peace" resolution should the Council be unable to reach agreement on an urgent matter
(UNGA resolution 377(V) Uniting for Peace, adopted 3 November 1950 at the 302nd plenary
meeting.). Article 11 of the Charter evidences the non-exclusive nature of the Security Council’s
*primary responsibility*. It empowers the General Assembly with the complementary duty to consider,
discuss and make recommendations on any questions that relate to the maintenance of international
peace and security. Only when the same question or matter has been submitted to the Security
Council for its consideration is the General Assembly precluded from exercising this responsibility.
Article 10 additionally provides that the General Assembly may discuss and make recommendations
regarding any matters within the scope of the Charter and regarding the powers and functions of any
may discuss any questions or any matters within the scope of the present Charter or relating to the
powers and functions of any organs provided for in the present Charter, and, except as provided in
Article 12, may make recommendations to the Members of the United Nations or to the Security
Council or to both on any such questions or matters.” Article 10, United Nations Charter.
Aggression has been referred to as a “Gordian Knot” whose only solution is to be severed from the statute from whence it came. A central theme of this paper is that the concept of aggression is something that can be defined by applying existing principles of international law. By way of preliminary comment, even if the allegory of the Gordian Knot is tenable, which arguably it is not, the analogy between it and the crime of aggression is a false one. The knot is said to be impossible to undo, and so too is aggression said to be “impossible to define”. The only solution to undoing the knot is to take a sword and slice right through it. Similarly, the analogy holds, the only way to address aggression is to cut it out of the Rome Statute. A knot is an intertwining of a rope with itself or another to fasten it together. A knot can always be undone, albeit with varying degrees of difficulty. Similarly, though aggression is arguably a more complex concept it is not impossible to define as it is notion with which we are not only intuitively familiar, but one that we understand. Defining it should be no more difficult than defining assault.

Since the Second World War there have been parallel efforts to codify the crime of aggression and to define the act of aggression. In connection with the latter, the 1974 Consensus Definition of Aggression which was touted as a major development is problematic. It conflates major issues relating to international law, it was not arrived at by consensus, and most importantly, it does not define aggression. For

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5 “Assault” is defined in the Criminal Code of Canada as: “265. (1) A person commits an assault when (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly; (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs. (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault. (3) For the purposes of this section, no consent (…)”.
7 One example of how Res. 3314 conflates the issues is the fact that it calls the act of aggression “an international crime” even though aggression was not. On the absence of consensus, see Nicholas Nyiri, The United Nations" Search for a Definition of Aggression, (New York: Peter Lang Publishing
these reasons, it does not figure prominently in any particular discussion in this paper.

In July 1998 the International Criminal Court ("ICC") came into existence and the crime of aggression was included among the international crimes under its jurisdiction. No consensus however had been reached on its definition and it therefore remains undefined to this day. The goal of this paper is to clarify some of the issues surrounding and advance the debate on the definition of the crime of aggression.

And so, we find ourselves at this critical juncture. Either we can repeat our mistakes of the past and go on contaminating aggression with politics, or we can entrench it in the judicial arena where it has recently been placed, albeit on tenterhooks. The future of the crime of aggression as a law with any practical force at all, is uncertain, as it remains to be decided whether each permanent ("P-5") member of the Security Council will have a veto on all potential matters of aggression. Upon defining the crime of aggression, would-be perpetrators should be on notice once and for all that they will be held accountable for their decisions and actions. But this is not likely to happen unless the ICC exercises the same jurisdiction over this crime as it has over the other three international crimes. Anything short of a clear definition that the ICC alone can use in the exercise of its unfettered jurisdiction over the crime of aggression, will seriously compromise the Court’s integrity. As Hersh Lauterpacht says, let us put our trust in the skill of the

draftsman and the wisdom of the Courts.⁸ Let us not bend to the dubious arguments of the most powerful states who are more interested in retaining control over their own unilateral use of force than in the international collective good.

Just as “assault” constitutes a tort / delict and a potential crime, understanding the essence of aggression requires us to conceive of it as both an internationally wrongful act (tort / delict), and possibly an international crime. Only upon doing this will we acquire a firm grasp of the concept. Aggression is an unlawful use of force that is unnecessary and that constitutes a breach of the peace. Like assault, the concept of aggression encompasses an incredibly broad range of unlawful uses of force. And again, as with the case of assault, this is not to say that individuals will or should be prosecuted for the crime aggression every time an act of aggression occurs. The de minimus rule and practical reality prevent this from happening.

This paper seeks to address the core issues relating to the crime of aggression. The first is a preliminary and general concern regarding current discourse on either removing aggression from the Rome Statute or eliminating any possibility that it might be prosecuted without the highly political interference of the UN Security Council. I begin therefore with a critique under Chapter 1 of the analogy drawn between the crime of aggression and the Gordian Knot. This discussion will address and refute the claims made against the philosophical premises for criminalizing aggression. Chapter 2 examines the broader issue of individual criminal responsibility for the crime of aggression. This is undertaken from the perspective of international developments that led to its codification and from

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⁸ See pre-introduction quote. “Attempts to define aggression have been described as impractical; as leading to absurd or unjust situations; as being a ‘trap for the innocent and a sign-post for the guilty’; as rendering it difficult to apply the intention of the law to complicated facts; as necessarily leaving possible criminal acts outside the purview of the definition; and as savouring of the Continental passion for definition and logic in contradistinction to the English tendency to elasticity. (…) The objections to a definition of aggression are in the long run calculated to make more difficult the establishment of an effective system of international obligations in the domain of observing and securing the observance of pacific settlement.” Hersch Lauterpacht, Sir Elihu Lauterpacht ed. *International Law: Being the Collected Papers of Hersch Lauterpacht*, Volume 5: Disputes, War and Neutrality (Cambridge, Cambridge University Press, 2004) at 442.
sources doctrine, generally. Here, we will review the complex manner in which international criminal law has evolved, as well as the more specific issue of how the concept of state aggression is adaptable to individual penal characterization.

Chapter 3 addresses my gravest concern: excessive Security Council powers over the ICC, and specifically in relation to the latter’s exercise of jurisdiction over the crime of aggression. It provides an analysis of the role, if any, the UN Security Council should play in regard to the crime of aggression. I argue that the Council already has the power to intervene in the Court’s docket, in discharging its duty to maintain international peace and security, with a referral power under Article 13(b) or a deferral power under Article 16 of the Rome Statute. Any additional powers granted to the Council regarding matters of aggression will usurp the jurisdiction of the ICC and tarnish its integrity.

The following chapter analyses the definitional parameters of the crime of aggression beginning with the major component notions involved in the concept: unlawful use of force; self-defence; anticipatory self-defence; Chapter VII use of force or Security Council use of force mandates; humanitarian intervention or the responsibility to protect; possible defences and rationae personae considerations. Conclusions drawn from these discussions will inform the content of the proposed working definition. The crime of aggression, it will be seen, lends itself to a composite provision formula made up of a series of subDefinitions.

Finally, Chapter 5 opens with a critical review of the draft proposed definitions currently on the negotiating table and proposes a new working definition for the crime of aggression. In the process of reaching a consensus on the definition, it is understood that certain policy decisions will have to be made in establishing the scope of discretion that will be left to the Court in its determination of whether an individual is guilty of the crime of aggression. It is hoped, however, that the tendency will be to lean towards allowing the Court sufficient leeway so that it may make enlightened decisions based on the facts of each given case.
Chapter 1 Why Criminalize Aggression?

Why criminalize aggression? What reasons underlie its inclusion in the Rome Statute? While much has been written about the political and definitional aspects of aggression, relatively little has been said about the premises underlying its criminalization. Matthias Schuster is among the few who have made some ostensibly convincing arguments against criminalizing aggression. In his article, "The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword", Schuster suggests the recent debate on the crime of aggression has focused more on a definition than it has on the premises on which aggression was included in the Rome Statute in the first place. Three of the premises he explores provide a useful framework for this opening discussion: the precedent argument; the supreme international crime, and the deterrent value.

1.1 The Precedent Argument

The first premise for including the crime of aggression in the Rome Statute relates to the so-called precedent argument taken from an article by von Hebel and Robinson.

With respect to the inclusion of the crime of aggression, one of the most compelling reasons advanced in favour of its inclusion was that to exclude it would be a retrogressive step, given that the Nuremberg and Tokyo Tribunals had held persons criminally responsible for this crime more than 50 years ago.

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9 Schuster, supra note 4. The title of this thesis was inspired by Schuster’s article as well as the work of numerous other writers who have argued with less force against defining (the crime of) aggression. It is the view of the writer that the definition of the crime of aggression is not a Gordian knot; and if it is viewed as a complicated matter by some, this is not to say that it can not or should not be defined.
10 Ibid. at 9.
11 Ibid. Personal accountability does not figure among the premises examined by Schuster. We can only speculate that he is less critical of this premise than he is of those mentioned above.
13 Ibid.
This premise breaks down into two component issues. The first relates to the appropriateness of using the Nuremberg and Tokyo judgments to justify the claim that aggression is an international crime. The second pertains to whether events since WWII support the contention that the international community has consistently recognized aggression as an international crime.

The "Precedent" Argument

According to Schuster "[w]hile the Nuremberg and Tokyo proceedings were certainly groundbreaking in many aspects (sic), it should not be overlooked that the most contested provision of their respective charters was the one dealing with the crimes against peace."14 He quotes an aide mémoire in which the United Kingdom argued that aggression was, in fact, not a crime but should be punished anyway.15 Until the drafting of the London Charter aggression, or crimes against peace, was not a recognized international crime. At the July 1945 International Conference on Military Trials representatives from the U.S., Great Britain, France and Russia met to prepare the statute that would serve as the source for the indictments against the Germans.16 On 19 July 1945 the United States and France tabled for discussion their respective proposals for the definition of the crime of aggression. The minutes of the conference illustrate the divergent views held by the representatives of the U.S. and the French delegations, Justice Jackson and Professor Gros, respectively.17

14 Schuster, supra note 4 at 10.
15 The author's quote of the aide-mémoire reads as follows: "Reference has been made above to Hitler's conduct leading up to the war as one of the crimes on which the Allies would rely. There should be included in this the unprovoked attacks which, since the original declaration of war, he has made on various countries. These are not war crimes in the ordinary sense, nor is it at all clear that they properly be described as crimes under international law." Ibid. at 11.
17 Gros: "We do not consider as a criminal violation the launching of a war of aggression. If we declare war a criminal act of individuals, we are going farther than the actual law. (...) We do not want criticism in later years of punishing something that was not actually criminal, such as launching a war of aggression. (...) We think it will turn out that nobody can say that launching a war of aggression is an international crime - you are actually inventing the sanction." Jackson: "(...) This language is not suggested as perfect, but I think the idea of defining "aggressor" is very important and that we shall have to face it at some point in this prosecution. We either have to define it now, in which case it will end argument at the trial, or define it at the trial, in which case it will be the
France did not recognize crimes against peace as an international crime for which individuals could be punished, whereas the U.S. was of the view that it had to be.\(^\text{18}\)

Schuster notes that the Nuremberg Tribunal tried its best to “dispel any doubt as to the criminality of aggression”.\(^\text{19}\) He claims that while it did not succeed in defining aggression, the Tribunal still managed to conclude that aggression had been committed by the defendants against twelve different states.\(^\text{20}\) Article 6(a) of the Nuremberg Charter, however, had defined the offence of crimes against peace as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances; or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing.”\(^\text{21}\)

Schuster then cites Rifaat as warning that a cautionary approach should be taken if Nuremberg and Tokyo are to be regarded as precedents: “It is very serious to accept such a precedent which only applies as an instrument of the victors after a successful end of a war, even if [their adversaries] were the aggressors.”\(^\text{22}\) Placed in its proper context, Rifaat's quote explains how the judicial option of the military tribunals marked a clear departure from the way aggression was handled in the past by the international community. He is also suggesting that there will be no real benefit to using Nuremberg and Tokyo as precedents unless future developments

\(^{18}\) Ibid.

\(^{19}\) Schuster, supra note 4 at 11.

\(^{20}\) The author cites Julius Stone, Aggression and World Order, 28 (1958). Ibid.

\(^{21}\) Nuremberg Charter 1946. “In this text aggression was considered as a subcategory of crimes against peace, which were all subjected to the same regime. Thus, the precise definition of aggression in relation to other crimes against peace was immaterial.” Giorgio Gaja, “The Long Journey towards Repressing Aggression” in Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., The Rome Statute of the International Criminal Court: A Commentary, (New York: Oxford University Press, 2002) Volume 1, 427 at 428 [Cassese, The Rome Statute].

\(^{22}\) The author cites A.M. Rifaat, supra note 7 at 179. Schuster’s quote is partial and inaccurate: “A cautionary approach is also supported by Rifaat who warns that ‘it is very serious to accept such a precedent which only applies as an instrument of the victors after a successful end of a war, even if [their adversaries] were the aggressors’”. Schuster, supra note 4 at 12.
see to it that *all aggressors*, be they the victors or the vanquished, are subject to prosecution.

[I]t is a very serious procedure if it is to be considered a precedent. If the post-war trials and principles in connection with crimes against peace are to be considered a precedent, *without further development to make it function in regard to all future aggressors irrespective of their positions – victors or vanquished* – the outcome, which we now witness, will be completely contrary to what was hoped.\(^{23}\)

Since Nuremberg and Tokyo, there has been one major development in this regard: the creation of the ICC having the jurisdiction over both victors and vanquished.\(^{24}\) Calling the reference to the Nuremberg and Tokyo decisions a “precedent argument” is also somewhat misleading.\(^{25}\) On its face it assumes, or invites the reader to assume, that a precedent is *required* for a crime to be formally recognized as such. It is not clear that this is so. Aggression needs a definition before it can be prosecuted\(^ {26}\) however it does not necessarily require a precedent before it is officially recognized as an international crime.\(^ {27}\) While the Rome Statute affirms the ICC’s jurisdiction over genocide, crimes against humanity and war crimes, there was still no agreement on how the crime of aggression should be defined.\(^ {28}\) There did not appear to be any suggestion, however, that the crime of aggression required a precedent.

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\(^{23}\) In light of such a rule of conduct, which does not apply unless there is a vanquished party, it is to be expected that “the Nuremberg Trial will be claimed by victorious nations of the future as a welcome political precedent for the trial and punishment of their adversaries.” A.M. Rifaat, *ibid.*

\(^{24}\) Unfortunately, the ICTY and the ICTR do not exercise the same kind of “blind justice”. Though the ICTY Statute does not limit the tribunal’s jurisdiction to specific nationalities, the Prosecutor’s Office will not prosecute individuals involved with the 1999 NATO bombing campaigns, for example, despite the existence of ample evidence suggesting that war crimes were committed at that time. Additionally, the Prosecutor’s Office at the ICTR made it clear that it would not be prosecuting anyone associated with the FPR. See Michael Mandel, *How America Gets Away with Murder, Illegal Wars, Collateral Damage and Crimes Against Humanity*, (London: Pluto Press, 2004) generally.

\(^{25}\) Von Hebel and Robinson, *supra* note 12. Note the authors do not use the word “precedent” in their text.

\(^{26}\) Article 5(2), Rome Statute and the principle of legality require that the crime of aggression be clearly defined so that it can be prosecuted.

\(^{27}\) See Chapter 2 below.

The solution that emerged was to specifically recognize the crime of aggression within the Court’s jurisdiction (Article 5) but with the proviso that the Court may not exercise jurisdiction over this crime until a definition and preconditions are adopted by a review conference (Article 5(2)). At the same time, the Preparatory Commission has been given a mandate to begin discussions with a view to developing a definition. Thus, for the time being, the ICC has what might be called a ‘dormant’ jurisdiction over the crime of aggression. 29

Excluding Aggression “Retrogressive”

The second part of the “precedent” premise suggests that it would be retrogressive to exclude aggression from the ICC’s jurisdiction. In Schuster’s view, this is questionable given that,

- There is no international treaty dealing with aggression for which individual liability attaches (as is the case with the other core crimes);

- The statutes the Yugoslavia or Rwanda tribunals do not contain a provision concerning aggression even though armed force was used in both conflicts; and,

- Very few countries have provided for the prosecution of aggression in their domestic legislation. 30

That there is no international treaty providing for individual liability prior to the Rome Statute, in Schuster’s opinion, demonstrates a lack of willingness on the part of the international community to recognize aggression as an international crime. However, crimes against humanity never had an international convention calling for

29 Ibid. at 78. See also Philippe Kirsch and John T. Holmes, “The Rome Conference on an International Criminal Court: The Negotiating Process” (1999) Am. J. Int’l L. 2 at 10: “Most of the provisions [in the Rome Statute] reflected options in the bureau’s previous proposal. In a few areas, the bureau developed solutions of its own to bridge gaps and accommodate concerns in such a way as to broaden support for the court. This approach explains, for example, the reference to the crime of aggression despite the absence of agreement over its definition.” Ibid.

30 Schuster, supra note 4 at 12-13. The author gives the example of Germany having included aggression in its domestic legislation but does not specify whether the law is civil or penal in nature.
individual responsibility either. Von Hebel and Robinson report that during the
period leading up to the Rome Statute, there were two general categories over
which the ICC might have jurisdiction: "core crimes" and "treaty crimes"; the crime
of aggression always figured among the core crimes.

Schuster's second argument is based on the fact that neither of the two ad hoc
tribunals contained a provision for aggression. At the time these tribunals were
created, however, it was widely held that the main purpose of establishing the
tribunals was to address crimes against humanity and genocide. Moreover, if the
lack of jurisprudential value of Nuremberg and Tokyo on crimes against peace
turned on the fact that they constituted *ex post facto* law, then *what's sauce for the
goose is sauce for the gander*. The Yugoslavia and Rwanda tribunals would have
been subject to the same criticism as that levied against the IMTs. In any event, the
United States did not want the ICTY to exercise jurisdiction over this offence as it
might hamper eventual military interventions similar to its 1989 invasion of
Panama.

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31 "Genocide and crimes against humanity, with their special elements of criminality, encompass the
most atrocious of acts - those, respectively, committed with the intent to destroy specific ethnic,
religious, racial, or national groups; or carried out in a systematic or mass manner based on the
victims' political or other identification. Genocide remains the clearer of the two offences in terms
of the specificity and certainty of its definition under the Genocide Convention, but it addresses a
narrower set of crimes. Crimes against humanity covers (sic) a broader range of acts, *though its
evolution through customary law leaves certain of its elements and constituent acts the subject of
some debate (even the inclusion of a definition in the Rome Statute).*" Steven R. Ratner & Jason S.
Abrams, *Accountability for Human Rights Atrocities in International Law*, 2nd ed. (New York,

32 "The International Law Commission (ILC) Draft Statute recognized two categories of crimes over
which the Court might exercise jurisdiction. The first category consisted of the crimes of genocide,
aggression, serious violations of the laws and customs applicable in armed conflict, and crimes
against humanity. The second category consisted of a list of crimes established under relevant treaty
regimes and included grave breaches of the 1949 Geneva Conventions and the 1977 Additional
Protocol I thereto, apartheid, torture, and certain acts of terrorism and illicit traffic in narcotic drugs.
In later discussions, the two categories of crimes came to be known respectively as the 'core crimes'
and the 'treaty crimes'. Von Hebel and Robinson, *supra* note 12 at 80.

33 "The Security Council resolutions that established the two ad hoc International Criminal Tribunals
did not include aggression among the crimes for which the Tribunals have jurisdiction. This is not
very significant, because the primary reason for creating the two Tribunals was the need to repress
crimes against humanity and war crimes." Gaja, *supra* note 21 at 430.

34 Mandel, *supra* note 24 at 177.
Third, Schuster maintains that because the international crime of aggression is only found in the domestic legislation of a handful of states this, too, indicates a lack of international will to repress the crime. This would presume that domestic legislation is necessary to recognize the crime of aggression. Typically however states enact laws to mirror treaty provisions after the ratification process, that is, after they sign on to a convention.

Developments regarding aggression since WWII appear to both support and dismiss the argument that it would be retrogressive to exclude the crime of aggression. In 1946 and 1950 the General Assembly endorsed the IMT principles that declared aggression the “gravest of all crimes against peace and security throughout the world” and four years later the International Law Commission listed it among the crimes contained in the Draft Code of Offences against the Peace and Security of Mankind. According to Ratner and Abrams, it was governmental attitudes that more clearly expressed a hesitation to prosecute individuals. The authors suggest that four factors explain the apparent confusion over crimes against peace: the debate over the precedent value of Nuremberg and Tokyo; the “elusiveness” of an agreement on a definition specific enough for aggression, to try individuals; the question as to the level of involvement of the individual (rationae personae); and how “ill-equipped” the courts are to conduct the necessary factual inquiries to make a determination of aggression.

While some cases of aggression are as clear as the Nazi invasions in Western Europe or Iraq’s invasion of Kuwait, other incidents demand more careful

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35 Schuster, supra note 4 at 12-13.
36 GA Res. 380(V), UN GAOR, 5th Sess., UN Doc A/1775, at 13 (1950).
37 1954 ILC Report at 151 (Art. 2(1)).
38 Ratner and Abrams, supra note 31 at 125-6.
39 Curiously, although their text was published in 2001 the authors use the term aggression sparingly preferring instead to use “crimes against peace”.
40 Ratner and Abrams, supra note 31 at 125-6.
41 In relation to the Nazi invasions of Western Europe, Justice Jackson was quoted as saying, “I really think that this trial, if it should get into an argument over the political and economic causes of this war, could do infinite harm, both in Europe, which I don’t know well, and in America, which I know fairly well. If we should have a prolonged controversy over whether Germany invaded Norway a few jumps ahead of a British invasion of Norway, or whether France in declaring war was the real aggressor, this trial can do infinite harm for those countries with the people of the United
scrutiny. The shortcomings in the handling of the question of aggression by the International Court of Justice in the Nicaragua case (which did not even concern implication of criminal conduct) cast some doubt upon the ability of tribunals to handle crimes against peace responsibly, although the Yugoslavia Tribunal has nonetheless handled similarly difficult issues in the context of command responsibility. The result is that states have been reluctant to place legal constraints of a criminal form on their use of force, so that jus ad bellum has remained far more immune to criminalization than jus in bello.

Even if the foregoing reasons, with the possible exception of the fourth, explained the current state of affairs with respect to the crime of aggression, this hardly demonstrates a “general unwillingness of states” to place constraints of a criminal form on their use of force. At best, it might explain why the permanent members of the Security Council are so inclined.

1.2 The Supreme International Crime

In 1947 the International Military Tribunal at Nuremberg held,

War is essentially an evil thing. [...] To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

As much as it may resonate with some readers, this excerpt is still obiter dictum, and referring to aggression as the “supreme international crime” does not make it

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States. And the same is true of our Russian relationships. The Germans will certainly accuse all three of our European Allies of adopting policies which forced them to war. The reason I Say that is that captured documents which we have always made that claim—that Germany would be forced into war. They admit they were planning war, but the captured documents of the Foreign Office that I have examined all come down to the claim, “We have no way out; we must fight; we are encircled; we are being strangled to death.” in London Conference Minutes, supra note 17. Emphasis added.

The authors do not explain what they mean by “shortcomings” nor do they offer examples.

Supra note 31 at 125-126. Emphasis added.

“Judgment of the International Military Tribunal for the Trial of Major German War Criminals” (1947) 41 Am. J. Int’l L. 172 at 221 [the “Nuremberg Judgment”].
so. The exercise Schuster embarks on to prove that “waging war” is not the supreme international crime, therefore, is pointless. Still, he makes the claim that aggression is not the worst crime of all, and this, based on two principle arguments. First, he asserts that it is futile to inquire into whether war is waged in an aggressive or defensive manner because parties will inevitably provide self-serving justifications. And second, any real consequences or “atrocities” are only committed after the decision to use armed force. Thus, Schuster maintains that it is not aggressive war that is the cause of all evil, rather, it is the crimes that accompany it. The atrocity or *mala in se* is the damage that is inflicted and suffered during the course of the armed conflict, and the fact that the armed conflict began in the first place is apparently irrelevant. Curiously, Schuster bases his argument on the following quote by Justice Jackson and not on the actual excerpt from the Nuremberg Judgment.

Any resort to war – to any kind of war – is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal.

To the extent that Jackson is claiming on the one hand, that every resort to armed force is criminal and, on the other, that the resort to armed force for defensive purposes is not criminal, Schuster’s criticism of inconsistency is valid. Even so, it

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45 This is akin to suggesting that there is no need for criminal law at all, as defendants will always come up with excuses or justifications for their actions.

46 “This demonstrates that it is not necessarily aggressive war that is the cause of all ‘evil’ and that is the *mala in se* but rather, as Professor Sadat Wexler has pointed out, ‘the crimes committed against life and property that accompany it – there will always be war crimes and crimes against humanity where there is aggression.’” Schuster, supra note 4 at 13-14. It is uncertain whether Schuster would similarly argue that the “worst thing” about murder is that the victim ends up dead, and not the fact another person killed the victim. In any event, it would seem to Schuster, the criminal system should not concern itself with the murderer’s motive.

47 Schuster, supra note 4 at 13-14.

48 It is not clear why Schuster proceeds on this basis; perhaps it is to avoid directly criticizing the Tribunal.

49 Schuster, supra note 4 at 13-14.
is only valid insofar as the armed force is used before a state is attacked. He asserts that Jackson conceded, “a war that is waged in defence (whatever the definition of a defensive war might be) would exculpate those who ordered it: ‘An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality.’ The words “wage” and “resort” are problematic. Unless accompanied by a temporal qualifier (e.g. “before” or “after” an armed attack) it is unclear what they mean. As neither person is very clear, the two can easily be talking about two entirely separate contexts for the use of force. At best, each person’s choice of words is equally ambiguous. Given that the issue of self-defence is central to any discussion on the use of force, or the crime of aggression, critical discourse requires that we specify whether we are talking about use of force before or after an armed attack.

Regardless of what Jackson intended, Schuster assumes that he meant any use of armed force (i.e. before or after an armed attack): “if the emphasis is placed on the idea of war as the source of all evil, then it surely should not matter whether it is waged in an aggressive or a defensive manner.” When we refer back to the Nuremberg Judgment, it did not say that “war” or “armed conflict” was inherently criminal; it said that the “initiation of a war of aggression was the supreme international crime.” Nevertheless, Schuster’s remark invites further comment on the important issue of vocabulary in aggression discourse. “War” as a term is more confusing than the “resort to war” or the “waging of war” as it not attributable to any particular party; it neutrally describes the state of armed conflict. This is only helpful if in the course of a discussion we are trying to discern whether we are

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50 We do not know whether by “resort to armed force for defensive purposes” Jackson was referring to the a) resort to military force in anticipation of an armed attack, or b) taking up of arms following an armed attack.
52 The importance of this distinction will become clearer in Chapter 4 below.
53 Schuster, supra, note 4 at 13.
54 The exact wording: “To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime (…).” Supra, note 44.
55 By way of analogy, if we were trying to define “murder”, “knife plunged into belly” describes a gruesome event but hardly contributes to a definition. Similarly, “war” describes on-going hostilities but fails to describe the essence of “aggression”.

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referring to the period prior to or following the initiation of hostilities. In the final analysis, however self-contradictory the quote by Jackson, if at all, it is peripheral to the *obiter* statement made by the IMT.

Schuster then claims that it is pointless to inquire into the reasons why a war was waged and points to the example of Vietnam.\(^56\) Because both the United States and Vietnam alleged they were acting in self-defence,\(^57\) according to him, it serves little purpose to inquire into the reasons why a state goes to war; the grounds for using military force against another state are simply, irrelevant.

The very suggestion that what *counts* is limited to what takes place during an armed conflict is no doubt meant to steer our attention away from the task at hand: identifying cases of and defining aggression. On the contrary, the circumstances surrounding, and the motivation for using force are the crux of the question of aggression in that they go to the very heart of the matter.\(^58\) To conflate "aggressive" and "defensive" war, or "use of force", denies the mutual exclusivity of the two notions and renders any pretext to use force, meaningless.

The failure to distinguish aggression from defensive action essentially places them on the same continuum. With appropriate definitions of "use of force" and "self-defence" (and a fair understanding of their nature and criteria), a distinction can be drawn between aggressive and defensive action. It is not necessary to describe a particular use of force as falling "somewhere" on the continuum. With objective criteria, sound judgment and common sense, the law will apply and a particular use of force will be characterized as either "aggression" or self-defence. Whether Schuster sincerely believes that there is nothing undesirable about starting a war (for any reason), or he is resigned to the "reality of war" – or *realpolitik*, his analysis suggests that international law has no role to play in the decision to use


\(^{57}\) In the case of the United States, it argued that it engaged in *collective* self-defence, while Vietnam was acting in individual self-defence.

\(^{58}\) See discussion on general scope of the crime of aggression in Chapter 4 below.
force on behalf of or against another state.\textsuperscript{59} Thus, he is denying that prohibition on the use of armed force is \textit{jus cogens}.\textsuperscript{60}

Schuster concludes his critique with the suggestion that if aggression was ever the supreme crime, then its importance in a legal context has certainly faded by now with the other Nuremberg crimes having risen to the “undisputed status of customary international law.”\textsuperscript{61} Such a claim, however, is not supported by the work of the International Law Commission\textsuperscript{62} and the academics who have debated the subject for the last half century.\textsuperscript{63}

1.3 Deterrence

Although the concept of deterrence is key in matters of international relations and national security, for the following discussion on the deterrent effect of international criminal law its meaning is limited to the definition provided by Schuster, namely, the “ability of a legal system to discourage or prevent certain

\textsuperscript{59} Schuster actually refers to \textit{realpolitik} in his section on “deterrent value” premise for including aggression in the Rome Statute.

\textsuperscript{60} See Chapter 2 below.

\textsuperscript{61} Schuster, \textit{supra} note 4 at 13. It should be recalled that genocide, itself, was not an international crime for which individuals could be held criminally responsible until it was included in the ICTY Statute.


\textsuperscript{63} “The crime of war is the cause and the parent of war crimes and of misery on a vast scale. It is the greatest menace to civilization and to the survival of mankind. We would have failed in our duty if we had not done our share in putting it beyond doubt that aggressive war is a crime under international law.” Lauterpacht, \textit{supra} note 8 at 83.
conduct through threats of punishment or other expression of disapproval." In the on-going effort to criminalize aggression, is it justified to assume that the crime will actually have a deterrent effect? In the context of aggression, Schuster reminds us, the threat of effective legal sanctions would be aimed at the decision-makers. He believes that the fact that it is decision-makers who would ultimately be held responsible renders the entire process all the more complicated. And because it will be "exceedingly difficult" to identify those responsible for aggression, there may be little or no deterrent effect.

In a work published fifty years ago, Julius Stone observed how "extremely difficult" it was to ascertain exactly which individuals among the most powerful in a country, were the decision-makers. Presumably, the argument goes, if it is difficult to identify the perpetrators, then this will diminish the deterrent effect, if any, crimes would have on them. Put differently, the harder it is to catch would-be perpetrators, the more inclined they are to engage in the undesirable behaviour. This raises an interesting question: should we criminalize certain behaviour when it is not likely to have a deterrent effect (or have little effect) on would-be perpetrators? Or, should the level of anticipated deterrence not be a factor at all? This assumes, of course, that we can measure the success rate of future prosecutions and the consequential deterrent value. It may also be putting the cart before the horse; by criminalizing behaviour we mean to send the message that certain behaviour is not acceptable and will be punished.

To the extent that any deterrent effect is diminished in inverse proportion to the level of difficulty identifying perpetrators, Schuster's argument stands to reason. Depending on the government structure and hierarchy, it may not be evident who wields the ultimate decision-making power. However, states do generally have a

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65 Schuster, ibid. at 14.
66 Ibid. at 15.
67 Ibid.
68 Ibid. Schuster is citing Stone, supra note 20.
limited number of individuals who fit the description of “decision-makers” and so the prospects of successfully identifying the individuals responsible for aggression remain reasonably high. Implicit in this argument is that difficulty in identifying the perpetrator is a feature unique to the crime of aggression. Crimes against humanity and genocide however are also perpetrated by decision-makers, so the same logic would apply to them.69

Schuster argues that because aggression has traditionally expressed itself in state actions, the international criminal law targeting aggressors “will have to overcome the [possibility that such leaders are acting under powerful pressures, and promises issuing from the state community], something that is very unlikely.”70 He suggests that under the weight of such pressure, political and military leaders are not likely to be very influenced by the prospect of violating international law.71 This raises two more important issues: state responsibility for aggression (civil or penal), and the relevance of domestic political pressure in prosecuting the crime of aggression.72 In connection with the latter, if a decision-maker can demonstrate that he or she used force under such pressure, it is unclear whether this would constitute a defence (a justification or an excuse).73

Schuster then suggests that the supposed deterrent value74 could actually have the opposite effect, leading decision-makers to intensify their efforts “to ensure victory in war” and that no international tribunal would have the actual power to prosecute

69 Experience prosecuting the crimes of genocide and crimes against humanity at the ad hoc tribunals for the Former Yugoslavia and Rwanda would be instructive in this regard.
70 Schuster, supra note 4 at 15 quoting J. Stone, “We certainly cannot confidently assume that at the crisis of decision the deterrent pressure of an international criminal law would usually prevail in this struggle”.
71 Ibid. “It is therefore difficult to even conceive the scenario that Professor Sadat Wexler envisages, where at least in democratic States, a general or Chief of Staff may, in a particular case, feel that a certain military action violates international law and raise objections before rather than after the fact.”
74 The author may have meant to say that criminalizing aggression “could actually have …”
them. However, if military efforts are intensified, as Schuster anticipates they might, surely the extent of overkill would strengthen the prosecution’s case and possibly factor into sentencing. As victors are not shielded from possible prosecution, a neutral ICC should be free to measure the degree to which the accused intensified efforts to ensure a “slam dunk” victory. Schuster cautions that we bear in mind what is possible when “lofty goals of international justice clash with the cynical exigencies of realpolitik” and asks how behaviour can be deterred, if it cannot be defined. Criminal law does not purport to deter behaviour that has not yet been criminalized, or that has not yet been defined. Suggesting therefore that we cannot deter behaviour which has not yet been defined, is to state the obvious. What is less obvious is that aggression cannot be defined.

In the final analysis, Schuster’s examination of the premises underlying the inclusion of aggression in the Rome Statute raises a number of issues, some of which are more important to its definition than others. In short, he maintains that because defining aggression is prohibitively complex, all efforts to this end should be abandoned. What Schuster abandons in fact, is the challenge at the heart of defining aggression or the crime of aggression: identifying its characteristic feature.

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75 Schuster, supra note 4 at 16. The author concedes that this might be a “far-fetched calculation, but one should keep in mind what is possibly when the lofty goals of international justice clash with the cynical exigencies of realpolitik.” The underlying assumption here is that the victor of an armed conflict will always go un-prosecuted. Perhaps this was the case with Nuremberg and Tokyo, but the ICC promises to make a firm departure from this tradition. In this connection, see ICC news release 12 August 2004 reporting that both sides in the DRC conflict (DRC and Uganda) are being accused of atrocities. It nevertheless behooves the ICC and the network of governmental and non-governmental organizations supporting it to impart a clear message that the Court is a neutral body that will prosecute any individuals involved in matters that fall within its ratione materiae jurisdiction.

76 Ibid. Schuster, supra note 4 at 16. This rings of a veiled warning.

77 Ibid. The author refers to Allegra Carroll Carpenter, “The International Criminal Court and the Crime of Aggression” (1995) 64 Nordic J. Int’l L. 223 at 227 who writes, “[i]n analyzing the 1993 draft of the Court, David Krieger postulates that the purpose of establishing a tribunal is “not so much to punish the guilty as to provide a clear warning to would-be violators of international law that their crimes will not be tolerated.” With regard to the crime of aggression this noble intention is not likely to bear fruit. First, aggression results from the accumulation of forces originating in the minds of individuals but ultimately come to life as the act of a sovereign. The individuals carrying out the forces of aggression may themselves not be aware that their actions are criminal. Entirely aside form concerns about the judicial postulate this phenomenon may violate, it is a dynamic that prevents deterrence from taking place. In short it is difficult to deter what cannot be defined.”
What makes aggression "aggression" and self-defence "not aggression"? What are its essential and sufficient conditions or characteristics? These are the questions this paper hopes to answer.78

The precedent value of Nuremberg and Tokyo will be reviewed in the next chapter as we examine the legality rule, *nullum crimen sine lege*, and its application to the crime of aggression. Issues such as whether perpetrators are likely to commit other core crimes, and the relative "importance" of aggression, will not be examined further. Aggression may be, but it does not need to be, the supreme international crime. And the deterrent effect of the crime of aggression will be what it will be, if and when the time comes.

Finally, the other issues raised in Schuster's analysis are questions that are not unique to the crime of aggression; crimes against humanity and genocide are just as much "state-involving" or "leadership" crimes as is aggression. The questions that relate to this aspect of the nature of the crime therefore apply to the two other core crimes: for example, the difficulty to identify perpetrators; whether there are clear and flagrant examples of the crime; and whether "public pressure" can constitute a defence.

Although few, if any, of Schuster's criticisms of the premises for including aggression in the Rome Statute withstand scrutiny, they emphasize the importance of carefully framing our discourse using the proper vocabulary to avoid conflating the issues.

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78 See Chapter 4 below.
Chapter 2: Individual Criminal Liability

Sources doctrine serves a number of purposes. It is the tool used to i) explain who is authorized to make law; ii) determine when binding norms emerge; iii) confirm those who are bound to comply with the rules; and, iv) explain how rules of international law (soft law or hard law) acquire their legally-binding force. When it is defined, the crime of aggression will become a treaty-based rule of international law that is legally-binding on the nationals of those states and other entities over which the International Criminal Court has jurisdiction. Or will it?

While acknowledging that treaties, custom and general principles are the accepted sources of international law, Anthony Arend challenges tradition arguing that two criteria be used to determine whether a putative norm is genuine international law: "authority" and "control". A rule of international law, he posits, is authoritative when it is perceived to be legitimate or has opinio juris. It is controlling when states actually comply. Even treaty law, Arend argues, is subject to these criteria.

It seems reasonable to argue, for example, that states have in practice effectively withdrawn their consent from a particular provision of a treaty, and hence, that it is not 'law,' if: 1) the provision is not believed by them to be authoritative, and 2) there is very little compliance with the provision, even though the treaty may remain technically 'in force'. Similarly, if a putative general principle is not perceived to be authoritative and is not controlling, it would be impossible to declare that it is truly a 'general principle of law recognized by the civilized nations. In short, whatever the traditional source of a particular rule of law in question may be, the validity of the rule will be determined by reference to its authority and control.
Diverging from the traditional conception of international law sources doctrine, this theory is based on legal positivism. Quoting Brierly, Arend writes: “the doctrine of positivism ... teaches that international law is the sum of the rules by which states have consented to be bound, and that nothing can be law to which they have not consented.” Accordingly, unless a norm restricting state behaviour comes with a high level of authority, it is not a norm of international law and states can act as they choose. For the use of force to be prohibited, therefore, there would need to be an authoritative and controlling proscription against it.

The major problem with this reasoning is in its underlying premise: that the law is that there is no law unless it is authoritative and controlling. Arend’s claim is itself cloaked in normative language and purports to be a norm though it has no source at law. This purported norm of Arend’s falls short itself of the criteria it espouses, namely, that it be authoritative and controlling. A second weakness with his position lies in the suggestion that because states are free to unsign treaties at will, they can unsign any international legal obligation that no longer suits their fancy—including jus cogens norms such as the prohibition on the use of force. This is false.

Although the legitimacy of a particular rule must never be taken for granted, it is believed that a school of thought that posits the two criteria outlined by Arend not only reflects the view of a shrinking minority, but is a danger and a menace to peace in the international community if left unscrutinized. It makes more sense to suggest that a norm must be legitimate (i.e. and not necessarily controlling) as established by the notion of opinion juris. Undoubtedly, the

\[83\] Ibid. at 10.
\[84\] Ibid.
\[85\] Ibid.
\[86\] Ibid.
\[87\] There are several problems with the criterion of “controlling”, not the least of which is trying to measure the incidence of compliance with a particular norm.
business of law-making and in particular international law-making must
conform to a minimum standard of legitimacy. New rules of international law
do not just happen.

The direct, prophetic announcement of norms is a dangerous activity. Who
counts as a true prophet? Which norms are valid? It is natural that this
phrase should be accompanied by a concern to control the process and to
preserve the purity of the wells form which the norms flow. 88

Lowe’s concern to “control the process” and “preserve the purity” of the law-
making system emphasizes the importance of validating norms, particularly in the
international context. 89 A rule’s legitimacy is all that needs to be established for an
international norm to constitute international law. Although states are traditionally
regarded as the entities responsible for the wrongful act of aggression, over the past
century the concept of aggression has been enlarged to accommodate the
characterization of aggression as a crime giving rise to individual criminal liability.
The process of validating the crime of aggression therefore does not require us to
shift or transfer the concept of liability from one entity to the other (i.e. from state
to individual); international law at once both outlaws aggression as it pertains to
state or non-state actors, and criminalizes it in relation to its individual perpetrators.

Traditional sources doctrine should confirm the legitimacy of the crime of
aggression once it is defined, based on the fact that it is codified in the Rome
Statute. Nevertheless, in anticipation of challenges to its legitimacy, and to bolster
its legal-binding force, this chapter examines its legitimacy of the crime of

88 Vaughan Lowe, at 223.
89 See M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law (The Hague:
outstanding questions regarding the legitimacy of holding individuals responsible for crimes against
humanity, and in his preface, recounts his experience as legal expert in the Canadian case of R. vs.
Finta, Canada’s first prosecution of “crimes against humanity” under a 1987 statute incorporating
this international crime into Canadian criminal law. Although his explanation of the crime was
accepted by the court but in the process of preparing for the case, he was left with more questions
than he had to begin with ("the case for the legal validity and viability of 'crimes against humanity'
needed to be made, Nuremberg and Tokyo notwithstanding").
aggression under three rubrics: the evolution of international criminal law;
historical developments; and legal premises.

2.1 International Criminal Law

The process leading up to the creation of a legal system is made up of a series of phases.

First, questions as to 'proper' courses of international conduct have arisen in the day-to-day dealings of States, and solutions to the questions have been consciously adopted, with the consciousness or intention that the solutions should carry, as it were, a normative charge. Further, the solutions have been recorded. (…) At a later stage the solution is detached from the problem and recorded separately – the rule is stated without the facts of the precedents. And then a third stage is reached in which the solutions are brought into order and coherence, and the relations between the rules clarified and systematized. Finally, and crucially, there is the stage at which the ordered solutions are recognized as constituting a legal system. That is to say, it is recognized that the system of ordered solutions — the system of rules — is capable of generating solutions to questions of kinds that have not previously arisen. The norms have a force that reaches beyond the scope of the problems that gave rise to them. At this stage, there is an active, self-generating system of norms, not simply a copybook of precedents. There is, in Maine's words, 'a complete, coherent, symmetrical body of … law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances.'

Current international criminal law straddles Lowe's third and fourth stage of development. Specifically, solutions are still being brought into order and coherence, and relations between the rules are being clarified and systematized. Some rules are gradually being recognized by the international community as applicable to questions that have not previously arisen. The rule holding individuals responsible for the crime of aggression, for example, is in the process of...

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91 Ibid.
being developed, and its *opinio juris* (authority or legitimacy) being established. In this light, we might question the fairness of Arend’s somewhat premature challenge to the legitimacy the *jus cogens* norm prohibiting the use of force. Before the norm has had a chance to evolve and develop into an established international legal rule, it is already being denied its very existence.

Until the middle of the nineteenth century international criminal laws were virtually non-existent but for piracy and slave-trading which were limited in scope and rarely enforced. Ancient customary laws of war provided for individual criminal responsibility for only narrowly defined breaches of medieval law, such as use of the crossbow, poisoning of wells, or wanton attacks on the civilian population. The evolutionary process through which international crimes have evolved over the course of time is characterized by unevenness and lack of systematization.

[International criminal law norms have originated in diverse sources, and developed unsystematically over time. The content and mode of implementation of each norm reflect the immediate historical context of the period in which the norm emerged and the way in which legal recognition came about. International criminal law norms are neither uniform nor consistent in application and often vary greatly as regards source of law, form and legal status.]

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93 Ibid.

94 “International crimes have evolved over the course of time and have been embodied in a number of multilateral conventions. Between 1815 and 1996, 322 multilateral instruments have been developed. These instruments fall within twenty-five categories of international crimes.” Bassiouni, *supra* note 89 at 253.

95 Sunga, *supra* note 92 at 2-3. See also Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Abuses* (Dordrecht: Martinus Nijhoff Publishers, 1992) at 163-4 where the author writes, “As the general rule stipulating individual responsibility for serious human rights violations has not yet emerged in international law, it is possible only to extrapolate what its source and legal validity are likely to be. Thus far, implementation of norms in international law stipulating individual responsibility for serious human rights violations has been very sparse, perhaps because these norms taken together are complex and chaotic; they developed unsystematically over a long period of time and originated in many legal sources. [...] The content, legal status and effect of the norms reflect, and are to a certain extent, constrained by, the particular circumstances and times in which the prescriptive content emerged and legal recognition was evinced.”
Just because it is called “international criminal law” does not mean that domestic criminal law principles automatically or equally apply in the international setting. In the case of the latter there is, theoretically, no hierarchical structure involving subordination - no legislature that makes states its subjects.

The parallel drawn by part of the doctrine between the treatment to be applied to serious violations by States and the treatment applied by domestic law to breaches by individuals clashes however with the sharply different structure of the two systems. In fact, criminal law, inspired by the principles of hierarchy and subordination, can hardly be used as a basis for international law, which is governed by the principle of sovereign equality among its members.  

Leanza explains how the evolution of international practice on individual responsibility for international crimes has always been accompanied by the development of different theories aimed at establishing a special form of state responsibility for the commission of international crimes. Such theories range from the characterization of the so-called criminal (or “rogue”) state, to the recognition of international criminal responsibility for legal persons, among which states would also be included. He adds that the initial efforts made by the United Nations to establish an International Criminal Court possibly failed, in part, due to the fact that “the issue of repression of individual crimes and the issue of international responsibility of States were often the object of useless as well as dangerous confusions.”

If international criminal law is characterized by a lack of systematization, then the same can probably be said for other specialized areas of public international law.

97 Ibid.
98 Ibid.
99 Ibid.
The fact that the legal system from whence the crime of aggression evolved is not strictly organized should not dilute, nor detract from its legitimacy.

2.2 Historical Developments regarding the Crime of Aggression

The idea of punishing individuals for aggression is not new. The first documented prosecution for initiating an unjust war is reported to have occurred in Naples in 1268 when Conradin von Hohenstafen was executed for that reason. Most authors would contend the “idea that the waging of aggressive war, or ‘crimes against peace’, or something resembling it, might be prosecuted” originated with the British in 1918. At that time, the objective was to try Kaiser Wilhelm and other leading Germans and to punish those responsible for the war or for atrocious violations of the laws of war.

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100 The notion of holding individuals responsible for aggression evolved from the antiquated concepts of just and unjust war. See J.B. Scott, The Spanish Conception of International Law and Sanctions, (Washington, D.C.: Carnegie Endowment, 1934) at 88-89: “Modern conscience condemns in principle the use of force for the settlement of any controversy, even if the State resorting to war can prove that a wrong has been committed against it. This line of though is strengthened by the fact that in the days of old, wars were justified for the redress of wrong, because there did not exist in the international community an authority vested with power to decide controversies between States. ‘The only justification for war, in the opinion of enlightened theologians, from St. Augustine down, was that between equal states there was not and could not be in the then state of affairs, a court of the superior. We of today have solved the difficulty by creating a court of the superior, the superior in this instance being none other than the international community and to this supreme tribunal all States of the world may appeal for a redress of their legal wrongs.’”

101 Bassiouni, supra note 89 at 517. The author includes the following footnote: “Reported by Remiguisz Bierzanek, War Crimes: History and Definition, in 1 Bassiouni and Nanda Treatise at 559-60 (1973). The original source is likely to be Emmerich de Vattel, Le Droit des Gens, bk. III (1887).” At 514 the author writes, “The prosecutions for certain international crimes, as described in this Chapter, are important precedents. In all of these, the principle of individual criminal responsibility has been reaffirmed in much the same terms as it is with respect to criminal responsibility in every national criminal justice system – the difference being that the source of applicable law is international as opposed to national law.”


103 Ibid. The Kaiser had sought refuge in the Netherlands, a neutral country after World War I, and there was a “growing feeling that war itself was a crime against humanity…” The author cites David Lloyd George, The Truth About the Peace Treaties, Vol. I, London: Victor Gollancz, 1938, pp. 93-114.
The 1919 Report of the Commission on the Responsibilities of the Authors of War and Enforcement of Penalties for Violations of the Laws and Customs of War established an elaborate scheme of international crimes and international liability and is often touted as the greatest development in the area of individual responsibility in international criminal law. While the report stipulated that it was desirable for the future that penal sanctions follow such "grave outrages against the elementary principles of international law," it recommended that the crime of waging war not be prosecuted. In spite of this, the Treaty of Versailles called for the public arraignment of Wilhelm II of Hohenzollern. The German population protested the inclusion of this article and, surprisingly, the Allies readily conceded that the indictment did not have "a juridical character as regards its substance, but only in its form". This state of affairs led to Germany trying its own alleged war criminals and the ultimate conviction of six, of the original eight hundred and ninety-five people listed, for war crimes.

During the Second World War the London International Assembly was established under the aegis of the League of Nations. The Assembly created a commission to

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104 Bassiouni, *supra* note 89 at 520.
106 "The premeditation of a war of aggression dissimulated under a peaceful pretence, then suddenly declared under false pretexts, is conduct which the public conscience reproves and which history will condemn, but by reason of purely optional character of the Institutions at The Hague for the maintenance of peace (International Commission of Inquiry, Mediation and Arbitration) a war of aggression may not be considered as an act directly contrary to positive law, or one which can successfully brought before a tribunal such as the Commission is authorized to consider under its Terms of Reference... We therefore do not advise that the acts which provoked the war should be charted against their authors and made the subject of proceedings before a tribunal", United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London: His Majesty's Stationery Office, 1948 p. 237 ["History of UN War Crimes"] as cited by Schabas, *supra* 102 at 20.
108 Schabas, *supra* note 102 at 21. The Treaty essentially "declared" the individual responsibility of the Kaiser. The Allies consented to let Germany prosecute the alleged war criminals, "a concession that the Allies would subsequently regret". Within the framework of the Commission on Responsibility, the Allies submitted a list of 895 names of alleged war criminals. For political reasons, and largely because Germany was reluctant to hand over accused war criminals, the list shrunk to forty-five. In the end, a mere twelve individuals were tried before the Supreme Court of Germany sitting in Leipzig, half of whom were acquitted. Bassiouni, *supra* note 89 at 520-1.
study the question of “war crimes”. This commission eventually agreed to a broad definition of war crimes that included aggression.\(^\text{110}\) In 1943 the United Nations War Crimes Commission came into existence, taking over the work of the Assembly commission for the upcoming prosecutions.\(^\text{111}\) **The most important issue at that time was whether aggressive war amounted to a criminal act.**\(^\text{112}\) Since 1942, a Czechoslovakian barrister by the name of Bohuslav Ecer had been arguing that the “paramount crime” of the Axis powers was the “launching and waging of the war”.\(^\text{113}\) In 1944 the UN War Crimes Commission’s Legal Committee favoured Ecer’s opinion, however, there were opponents to the idea. A sub-committee created for the purpose of looking into the question issued two reports: one supporting criminalization and the other, a minority position, rejecting the idea. By the time the London Conference took place, no decision had been reached.\(^\text{114}\) Ecer continued to maintain that the law on the waging of aggressive war had been “transformed” since World War I, mainly as a result of the Kellogg-Briand Pact, and that it was correct to state that “[a]ggressive warfare, in itself, even if waged without ‘atrocities’ and in full compliance with the conventions of The Hague and Geneva, is a crime.”\(^\text{115}\)

Aggressive war is a crime, and by its character an international crime, because it aims against peace and international order. The total aggressive war started by Germany and her allies in 1939 is additionally an international crime in its territorial extent and the number of victims of the aggression.

Not only the aggressor States as such, but also their rulers and military leaders are personally responsible in the eyes of the law for the gigantic

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\(^{110}\) Schabas, *supra* note 102 at 22.

\(^{111}\) *Ibid.* The author reports that this Commission even drafted the statute of a future international criminal court. *History of the UN War Crimes, supra* note 106 at 107-118.

\(^{112}\) *Ibid.*

\(^{113}\) *Ibid.*


chain of crimes which compose this war and which are punishable under the
criminal laws of the countries affected.

The penalty according to all these laws is death.\textsuperscript{116}

It was this view that prevailed at the London Conference making "Crimes Against
Peace" the most important charge in the indictments against the defendants. Article
6 of the Charter of the International Military Tribunal at Nuremberg defined Crimes
against Peace as follows:

(a) Crimes against peace: namely, planning preparation, initiation or waging of
a war of aggression, or a war in violation of international treaties,
agreements or assurances, or participation in a common plan or conspiracy
for the accomplishment of any of the foregoing.\textsuperscript{117}

In 1945, the IMTs for Nuremberg and Tokyo handed down decisions holding
several individuals criminally liable for crimes against peace, crimes against
humanity and war crimes. According to Dupuy,

[Even before the existence of United Nations law and prior to incorporation
of the principle stated in Article 2(4) of the Charter into customary law, the
Tokyo Tribunal had already handed down numerous condemnations for
plotting against peace between 1 January 1928 and 2 September 1945.\textsuperscript{118}

The two International Military Tribunals also handed down a number of
condemnations for crimes against peace \textit{stricto sensu.}\textsuperscript{119} Prior to Nuremberg and

\begin{thebibliography}{99}
\item Schabas, \textit{supra} note 96 at 23-4.
\item Charter of the International Military Tribunal.
\item Pierre-Marie Dupuy, "International Criminal Responsibility of the Individual and International
\item Dupuy's text is ambiguous and may lead one to think that condemnations were handed down
between 1928 and 1945. Rather, it was indeed the \textit{conspiracies} that occurred between 1928 and
1945. Dupuy references R. Maison, "La Responsabilité individuelle pour crime d'État en droit
international public", thèse Université Paris 2, janvier 2000, 69 \textit{et seq.} The Maison text reads: "Le
Tribunal de Tokyo, en prononçant de nombreuses condamnations pour complot, a reconnu
l'existence d'un projet politique spécifique, conduit sur une période s'étendant entre le 1er janvier
1928 et le 2 septembre 1945, et dont le but était d'assurer la domination navale, politique et
\end{thebibliography}
Tokyo, the classical rules of international responsibility of states essentially ignored the role of the individual who acted on the state’s behalf.\(^{120}\) The Nuremberg Tribunal handily reversed this trend by trying individuals accused of three categories of international crimes, including crimes against peace (i.e. aggression). In one fell swoop, the Tribunal rejected the classical rules.

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.\(^{121}\)

In December 1946 the UN General Assembly affirmed “the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal” and directed a Committee created for the codification of international law to treat as a matter of primary importance plans for the formulation of offences against the peace and security of mankind or an International Criminal Code of the “principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.”\(^{122}\)

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\(^{120}\) The classic example is the case of The Netherlands refusing to surrender Kaiser Wilhelm following World War I. The Netherlands replied to the victorious powers at the time, “L’offense suprême contre la morale internationale et l’autorité des traits … ne figurant pas dans les nomenclatures des infractions pénales insérées dans les lois de Hollande ou les traits par elle conclus.” (1920) 8 Revue de droit international 40, cited in William A. Schabas, supra note 102.

\(^{121}\) The Nuremberg Judgment, supra note 44.

\(^{122}\) UNGA resolution 95(1) 11 December 1946. The ILC submitted the Nuremberg Principles to the General Assembly in 1950, however, pursuant to resolution 488 (V) the Assembly decided to neither adopt nor reject ILC Nuremberg Principles. Principle VI (a) Crimes against peace: (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i). Note this is the same wording as Article 6(a) of the IMT Charter but for the roman numerals.
The following year, the Assembly requested the International Law Commission to formulate the Nuremberg Principles and to prepare a Draft Code of Offences against the Peace and Security of Mankind.\textsuperscript{123} The original version of the Draft Code of Offences published by the ILC in 1951 attempted to establish “a distinction between crimes which could only be committed by the authorities of a state and crimes which could be committed by an individual.”\textsuperscript{124}

Article 1 of the final version of the Code of Offences established the connection between international crimes for which the authorities of a state would be responsible, and individual accountability.

Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished.\textsuperscript{125}

In 1957 the General Assembly requested that the ILC defer its work on the Draft Code of Offences until a definition for the crime of aggression was reached.\textsuperscript{126} This was an interesting development for the following reason: while the ILC Draft Code provided for individual criminal liability, the work undertaken concurrently by a Special Committee on the Question of Defining Aggression related to state responsibility. It took four consecutive Special Committees two decades to prepare the draft the General Assembly adopted under resolution 3314, or what came to be

\textsuperscript{123} UNGA resolution 177(II) 21 November 1947.

\textsuperscript{124} Jorgensen, \textit{supra} note 72 at 144-145. The ILC commentaries state that by their very nature, “these crimes can only be committed by the authorities of a state however individual penal responsibility may result through the application of crime (1) that deals with conspiracy, incitement, attempt, and complicity.” \textit{Ibid}. The only exception is crime (3) “The incursion into the territory of a state by armed bands coming from the territory of another state and acting for a political purpose.” The ILC commentaries specify that any member of the band would be responsible. “This difference of treatment is justified because, in the case of state action, it would go beyond any logic to consider a mere soldier as criminally responsible for an action which has been decided and directed by the authorities of a state while in the case of armed bands the participation in them will result from the free decision of the individual members of the band.” Text of Draft Code of Offences against the Peace and Security of Mankind, (1951) Yrbk ILC, vol. II.

\textsuperscript{125} Draft Code of Offences, \textit{ibid}.

\textsuperscript{126} UNGA resolution 1186 (XII).
known as the 1974 *Consensus Definition*.\(^{127}\) The 1996 revised Draft Code of Crimes against the Peace and Security of Mankind scales down aggression to one sentence.\(^{128}\) Article 16 entitled, “Crimes against the peace and security of Mankind” reads:

An individual who, as leader, or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.\(^{129}\)

Finally, in 1998 the Rome Statute creating the International Criminal Court was adopted. While it includes the crime of aggression, the Court will only have jurisdiction over the crime when a definition has been agreed upon by the Assembly of States Parties.

### 2.3 Legal Premises

In addition to the fact that the crime of aggression is still in its “formative” stage of development as an international legal norm, and a lengthy list of key historical

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\(^{127}\) The four committees were: First Special Committee on the Question of Defining Aggression (1953-54); the Second Special Committee (1956-57); the Third Special Committee (1959-1967) and the Fourth Special Committee (1968-1974). For details on work undertaken by all four Special Committees see Ahmed M. Rifaat, *supra* note 7 at 231-262. The definition of aggression, *supra* note 6, would serve as a guideline for the Security Council in its determinations of acts of aggression. Paragraph 4 of Resolution 3314 reads: “*Calls the attention* of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition, as guidance in determining, in accordance with the Charter, the existence of an act of aggression.” See Benjamin Ferencz, “Nations seemed to have forgotten, or chose to overlook, the fact that the 1946 General Assembly mandate was to draft a definition, not merely to serve as a guide to the Council, but as the most important provision of a new criminal code that would legally bind everyone and serve the cause of world peace.” Benjamin Ferencz, “Deterring Aggression by Law – A Compromise Proposal” January 11, 2001 on web site visited 9 September 2004, http://www.benferencz.org/defined.htm.

\(^{128}\) Draft Code of Crimes against the Peace and Security of Mankind, 1996, *Yearbook of the International Law Commission, 1996*, vol. II(2). Under Part I, Article 1 “Scope and application of the present Code” provides that “Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law” at para. 2.

\(^{129}\) *Ibid.*
developments in the criminalization of aggression, three legal premises support the legitimacy of the crime of aggression: compliance with the principle of *nullum crimen sine lege*; the *jus cogens* nature of the norm prohibiting the use of force underlying the crime of aggression; and, the rising status of the individual under international law.

*Nullum Crimen Sine Lege*

Now codified international criminal law, the rule of legality or *nullum crimen sine lege* provides that a person cannot be tried for an act that was not a crime at the time it occurred. Its sister rule, *nulla poena sine lege*, proscribes any form of punishment unless the act was criminal at the time it was committed.

The crime of aggression has been incorporated into the Rome Statute and will be prosecuted when it is defined. In virtue of the principle of legality, this law will only apply to acts that take place following its entry into force. Thus, the crime of aggression will be in compliance with the rule of legality, not shrouded in the same controversy over *ex post facto* that followed the Nuremberg and Tokyo judgments. The questions raised by these decisions provide an ideal opportunity to examine the applicability of the rule of legality to the crime of aggression, and to judge whether the judgments constitute a precedent for the crime of aggression.

Supporters of the “Nuremberg precedent” postulate that this maxim did not apply to crimes against peace, or that it applied but was not infringed. Two experts at loggerheads over whether Nuremberg constituted a precedent provide varying accounts of what the Tribunal held in respect of the rule of legality. George Finch, then-editor-in-chief of the American Journal of International Law, reports

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130 Article 22, Rome Statute.
that the Tribunal denied that the maxim had any application to the case. Finch, who believed the decision violated the rule of legality, quotes directly from the Nuremberg Judgment:

“Occupying the positions they did in the Government of Germany, the defendants, or at least some of them, must have known of the treaties signed by Germany outlawing recourse to war for the settlement of international disputes. They must have known that they were acting in defiance of international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case then, it would appear that the maxim has no application to the present facts.”

In contrast, Quincy Wright does not see the judgment as having violated the principle of legality: the Tribunal maintained that the rule of international law resting upon “general principles of justice” was affirmed by several then-recent international declarations that aggressive war is an international crime. The rule, which was formally accepted by all the states concerned under the 1928 Pact of Paris condemning recourse to war to resolve international controversies, was the renunciation of war as an instrument of national policy, and made the “resort to a war of aggression not merely illegal but criminal.” The Tribunal therefore, according to Wright, “considered that the well-known legal maxim nullum crimen sine lege had been duly observed in the case.”

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132 Finch, ibid. at 33. The first part of this excerpt (not quoted by Finch) reads: “In the first place, it is to be observed that the maxim nullum crimen sine lege is not a limitation on sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.” Nuremberg Judgment, supra note 44 at 49. Asserting that it is “unlawful” to punish when no crime is committed is not the same as asserting it is “unjust”. Possibly in reference to the Tribunal’s reliance on a non sequitur, Finch notes that the Tribunal did not cite any references to law, international conventions, court decisions or customs which showed that individuals had theretofore been criminally punishable in an international judicial forum for crimes against peace such as those charged.

133 Wright, supra note 131 at 54 (p. 220 of judgment).

134 Ibid.

135 Ibid. Emphasis added. Wright’s conclusion is fallacious; any rule under the Pact of Paris of 1928 applied to states and did not provide for the individual criminal responsibility.
Lador-Lederer, another proponent of the “Nuremberg precedent” who claims the maxim does not apply to international criminal matters, draws a sharp distinction between domestic and international criminal law. The former, he argues, is hierarchical in nature as between the state and subject while international law is a level playing field where equal sovereign states are both law-maker and subject. Lador-Lederer fashions some attractive arguments for the non-application of the maxim. He maintains that “[w]hatever the belief in the paramountcy of treaty law or customary law, the knowledge that penal law is not a contract with the offender is one of the first lessons that a law student hears.” He believes there are misconceptions of the role that nullum crimen sine lege might play in international affairs. “Casuistry in international law is a consequence” of these misconceptions, and there has been a “dangerous oversimplification” in the analysis of the rule.

Lador-Lederer’s first argument is that there is “normative content” in the inaction of the competent domestic legislator (i.e. the legislator must have had good reason for not criminalizing the behaviour), but the same cannot be said for any such lacuna in international law. The presumption that the legislator has considered, a priori, all possible human behaviour – present and future – however, is easily rebutted. His second argument is based on a quote from an old American Supreme Court decision which held that to be “open to objection, ex post facto law is only such as has made criminal something ‘which was innocent when done’.” He points out the legal “trick” in this syllogism:

137 Ibid. Much can be said about the “equality” of sovereign states in international law and international relations.
138 Lador-Lederer, supra note 136 at 125.
140 Lador-Lederer, ibid.
141 The absence of relevant legislation may be due to the delay involved in the law “catching up” to technology. For example, driving under the influence was once unimaginable behaviour; and even when it was practiced, Canada waited more than forty years to criminalize it. Another reason for legislative inaction is the paternalist influence on law-making both at the domestic and international law levels.
142 Calder v. Bull, 3 Dall 386, 390 (1798).
[T]he telescoping into one sentence of legal concepts belonging to two distinct legal philosophies: “legal” as a matter of Positive Law and “innocent” as a matter of Natural Law. (...) if an act was not innocent in Natural Law, and punishment is inflicted after a definite offence was committed, the offender shall not be allowed to plead that, because of the non-retroactivity of such offence, there was innocence on his part, or impunity is due to him. In a conflict between a clear postulate in Natural Law and Positive Law, the political agent may not enjoy impunity.\textsuperscript{143}

To side-step any positivist issues the Court expanded the notion of “innocent” to include the moral as well as the legal concept. \textit{A pari}, the Nuremberg tribunal equated the violation of an international treaty with a moral wrong (and then equated the moral wrong with an international crime).\textsuperscript{144} Nuremberg used the open concept of immorality to transform a violation of an international norm into an international crime. Natural Law, which is neither articulated nor evidenced in ways like customary law is, for example, and Positive Law are thereby placed into the same category of “international law”. Thus, both legal philosophies are accorded legally-binding status as “sources” of international law, which they are not.\textsuperscript{145} As such, they would be on an equal footing and applicable concurrently. And so, the leap of faith the Nuremberg Tribunal took between the positivist and naturalist realm - becomes a mere hop. Accepting that two distinct philosophies can apply in relation to a single matter in a single decision (although recognizing Natural Law is highly unorthodox in methodology”) permits a “reasonable correspondence between emerging new crimes and the body of traditional law.”\textsuperscript{146}

\textsuperscript{143} Lador-Lederer, \textit{supra} note 136 at 124-5
\textsuperscript{144} “\textit{Nullum crimen sine lege} principle was thus regarded at Nuremberg as a moral maxim destined to yield to superior exigencies whenever it would have been contrary to justice not to hold persons accountable for appalling atrocities. The fact that the (...) principle, in its strict positivist scope, had yet to be proclaimed at the international level is perhaps unsurprising, for at that stage the \textit{corpus} of international criminal law was still rudimentary and indeed rather embryonic.” Susan Lamb, “\textit{Nullum Crimen, Nulla Poena Sine Lege} in International Criminal Law” in Cassese, The Rome Statute, Volume I, 733 at 736-7.
\textsuperscript{145} While we can point to norms in the positive law realm, natural law norms may bear a closer similarity to principles of \textit{jus cogens}.
\textsuperscript{146} Lador-Lederer, \textit{supra} note 136 at 125.
Politicians and jurists believed that a second failure to vindicate the law, such as that which followed World War I, would be seen as an inability to develop and strengthen international law for the future. The controversy that followed the Nuremberg judgment is evidence that the concept of individual responsibility for wars of aggression did not quite “take” as it violated the rule of legality.

The majority of authors maintain that Nuremberg infringed the rule of legality. In addition, the jurisdiction of the Tribunal was limited both as to rationae personae and rationae materiae. These reasons make the Nuremberg and Tokyo judgments weak precedents in relation to the crime of aggression, if they can even be considered as such. The crime of aggression under the Rome Statute will not infringe the rules of *nullum crimen sine lege* and *nulla poena sine lege*. Nor, is it necessary for this crime to have a precedent.

**Ius Cogens**

The second legal basis in support of the legitimacy of the crime of aggression is the *ius cogens* nature of its underlying norm: the prohibition on the use of force. A source, if you will, of the crime of aggression, the Charter prohibition on the use of force emerged first through customary and then became conventional international law. This norm of general application to states under international law, by

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147 Finch, *supra* note 131 at 20. “To maintain retroactively that these invasions were international criminal acts involving personal responsibility is to suggest that the United States officially compounded international crime with international criminals. The United States continued to recognize the Government of Germany as legitimate, to receive its diplomatic representatives at Washington, and to accredit American diplomatic representatives to Berlin.” *Ibid.* at 28.

148 “The principle of legality and its corollaries originated in municipal law; its movement from being a principle primarily of national law to being one clearly and firmly entrenched in international law was a product of World War II and its aftermath. The crux of the controversy surrounding *nullum crimen* in relation to international criminal law is the vagueness of the definition of international crimes. The lack of systematic definition of international criminal law at Nuremberg ensured that it fell to the Tribunals themselves to articulate many of the elements of the crimes. Consequently, the Nuremberg trials were frequently criticized as *ex post facto* applications of alien law to acts which had not been explicitly outlawed at the time they were carried out.” Lamb, *supra* note 144 at 735.
extension, applies to individuals in their capacity as agents or representatives of the
state. A state cannot use force unless an individual so decides as a matter of policy.

The UN Charter and the Declaration of Principles of International Law Concerning
Friendly Relations and Co-operation among States\(^{149}\) impose a positive law duty of
the highest legal order on states to refrain from using armed force against another
state. Most authors recognize *jus cogens* as rules of customary law having
universal application:

Les auteurs relevant ainsi le manqué de critères permettent de cerner la
notion de *jus cogens* et de là son indétermination. *La majorité d’entre eux
considèrent toutefois que le *jus cogens* se compose de règles coutumières à
portée universelle comme celles interdisant le recours à la guerre, celles
relatives à la protection des droits de la personne et celles relevant du droit
humanitaire.\(^{150}\)

A 1966 International Law Commission report states that the law of the Charter
concerning the prohibition of the use of force in itself constitutes a conspicuous
example of a rule in international law having the character of *jus cogens*.\(^{151}\) This
report is referred to by the International Court of Justice in its decision in the case
of *Nicaragua*.\(^{152}\)

A further confirmation of the validity as customary international law of the
principle of the prohibition of the use of force expressed in Article 2,
paragraph 4, of the Charter of the United Nations may be found in the fact
that it is frequently referred to in statements by State representatives as being
not only a principle of customary international law but also a fundamental or
cardinal principle of law. The International Law Commission, in the course

\(^{149}\) UNGA resolution 2625, 24 October 1970 “Declaration on Principles of International Law,
Friendly Relations and Cooperation Among States in Accordance with the Charter of the United
Nations”.

\(^{150}\) Claude Emanuelli, *Droit international public* (Montréal, Editions Wilson & Lafleur, 1999). The
Dispositivum and jus cogens in International Law*, (1966) 60 A.J.I.L., 55, 59 et seq. Emphasis
added.

\(^{151}\) Paragraph (1) of the Commentary of the International Law Commission to Article 50 of its draft

\(^{152}\) *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of
America), Merits*, I.C.J. Reports 1986 (“Nicargua”).
of its work on the codification of the law of treaties, expressed the view that “the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens”.153

The concept of jus cogens has been codified under Article 53 of the Vienna Convention on Treaties:

Treaties conflicting with a peremptory norm of general international law (jus cogens) - A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm or general international law having the same character.154

The International Law Commission considered specifying, by way of example, some of the most obvious and best settled rules of jus cogens in order to indicate the general nature and scope of the rules contained in the article.155 The first two such examples of prohibited treaties were: (a) a treaty contemplating the unlawful use of force contrary to the principles of the Charter; and (b) a treaty contemplating the performance of any other act criminal in international law.156 These examples are important in two respects. First, the ILC’s use of the word “other” in example (b) implies that the unlawful use of force referred to in paragraph (a) constitutes a

153 Nicaragua at para. 190. Both Nicaragua and the United States had officially recognized that the principle prohibiting the use of force embodied in the Charter had “come to be recognized as jus cogens”. The United States was particularly emphatic as it averred that it was “material to quote the views of scholars that this principle is a ‘universal norm’, a ‘universal international law’, a ‘universally recognized principle of international law’, and a ‘principle of jus cogens’. The fact that the United States and Nicaragua were accusing one another of violating this norm perhaps might explain why both states easily agreed on the issue.

154 Article 54, The Vienna Convention.

155 ILC Commentary, supra note 151 at 247-248.

156 Ibid.
“criminal act”. Second, the examples support the theory that all international crimes fall within the *jus cogens* category.\textsuperscript{157}

Since World War II international law recognizes a limited number of peremptory norms that have the character of "supreme law".\textsuperscript{158} Precisely which norms are peremptory is not universally agreed, however, it is accepted that Article 2(4) of the Charter outlawing the use of force has also become customary law binding on non-parties and has the character of *jus cogens*.\textsuperscript{159}

The concept of *jus cogens* did not enter the law by convention, and has therefore been described as “customary law.” It is also assumed that this particular customary law is not open to exception for any “persistent objector”: thus South Africa’s objection to including apartheid as a violation of customary law and of *jus cogens* has been generally disregarded.\textsuperscript{160}

That the persistent objector has no escape from the *jus cogens* norm renders essential that the peremptory norm be based on an authentic systemic consensus.\textsuperscript{161} The concept of *jus cogens* has been compared to the development of a *systemic constitutional law* of fundamental values identified and adopted by the international system.\textsuperscript{162} If the norm from which the crime of aggression was derived has the character of *jus cogens* then the assertion that its own nature is peremptory is tenable. Consequently, there is no escape from the prohibition on the use of force or the crime of aggression for a “persistent objector” such as Arend. If there can be no persistent objector, then arguably neither rule is subject to erosion by excessively broad interpretations of the concept of self-defence.\textsuperscript{163}

\textsuperscript{157} Query whether the inverse is true: i.e. that all norms of *jus cogens* are, or will one day be, international crimes.


\textsuperscript{159} *Ibid.* at 39.

\textsuperscript{160} *Ibid.*

\textsuperscript{161} *Ibid.*

\textsuperscript{162} *Ibid.*

\textsuperscript{163} See discussion on self-defence in Chapter 4 below.
Status of the Individual

In 1992 the United Nations Centre for Human Rights published a report entitled, "Status of the Individual and Contemporary International Law: Promotion, Protection and Restoration of Human Rights at National, Regional and International Levels" which considered the rising importance of the natural person as a subject of international law. 164

The present stage of international law should be considered as a transitional period towards a new legal order in which the individual will be called upon to play a more important role as a subject of international rights and responsibilities.

In particular, it is upon respect for the human person and his dignity that the new developments and tendencies converge in order that the individual may be recognized as a subject of rights, responsibilities and duties in international human rights law. 165

The report reviews the most notable developments in international law in relation to aggression, 166 and in particular references the 1954 Draft Code of Offences against Peace and Security of Mankind that targeted individuals. 167

The principal innovation by the draft Code is that individuals shall be punished. Although the draft Code is still under consideration by the ILC, it could be stated that individuals acting as organs of the State, according to existing international law, should be considered subjects of international duties. 168

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166 Examples include the IMT at Nuremberg, Article 2(4) of the Charter, and the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States, supra note 149. Status of Individual Report, supra note 164 at paras. 398-409.
167 Ibid.
168 Ibid. Emphasis added.
Although this amounted to a fairly strong suggestion that individuals acting on behalf of a state should be considered as subjects of international law, the question remained whether individuals acting on behalf of an organized “political” group or collectivity, and not a state *per se*, may also qualify as subjects of international law.\(^{169}\) The report reviews the four main theories that developed until 1992 on the status of the individual under international law:

1) The natural person has no legal personality, this attribute being reserved for States;
2) The natural person is the object, not the subject, of international law;
3) The legal personality of states is a fiction and only natural persons can be the “real” subjects of international law;\(^{170}\) and,
4) States are the “normal” or traditional subjects however the there can be legally valid rules concerning individuals.\(^{171}\)

The very development of international criminal law refutes the first two theories. Of those that remain, we can safely conclude that individuals acting as agents of states are subject to legally-binding international law rules, and in particular, those under international criminal law. When an international law rule imposes a duty on a state, it necessarily regulates the conduct of individuals, in their capacity as organs or agents, who are in a position to violate the rule be it an illegal act or a crime.\(^{172}\)

The idea that the individuals are subjects of international law was formed on the basis of developments in international criminal law.\(^{173}\) Accordingly, not only are

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169 See discussion on *rationae personae* in Chapter 4 below where the argument is made that the crime of aggression should apply to leaders of state and non-state entities.
170 "According to this theory concerning corporate personality, the State is unreal, because as a corporate entity, a moral person, it cannot have a will of its own, that is to say a will other than that of the individuals which comprise it." (G. Scelle, *Précis du droit des gens*, vol. 1) "Subsequently, the corporate personality of the State is a mere fiction, and fictions are by logical necessity inadequate instruments for scientific analysis." The doctrine of state personality is a fiction for two reasons: (a) the State, like any other corporation, is composed of human beings, and (b) its ultimate purpose is the welfare of these human beings." Status of Individual Report, *supra* note 164 at paras. 511-518
171 Status of Individual Report, *ibid.* at paras. 519-525.
173 “The individual was liable for some limited offences only under classical international law, for example, piracy. Under contemporary international law the individual is responsible for international crimes and may be tried and punished under an international procedure. On the basis of the theory of international crimes, the idea was developed that the individuals are subjects of international law.” *Ibid.* at para. 544.
individuals the subjects of international rights, but those acting as an organ of State are subjects of international duties.174

[T]he individual is the beneficiary of international law and in certain cases bears the liabilities and disabilities which it imposes; the growing and ever changing needs and the interdependence of communities and the real interest of modern society require, in most cases, the existence of various subjects of international law; and the individual, at the present time, should at least be considered on a parallel with the State as a subject of international law.175

By targeting individuals, international humanitarian law and international criminal law have contributed to the expansion of the application of international law.176 Individuals accused of international crimes are being called to account for their actions as organs of the state or in their personal capacity if there is no domestic legal system in place. There are two main categories of international crimes: those that require the direct involvement of a state apparatus or a collective organization, and those that (while perhaps related to actions of the state) are imputable to the individual, alone.

One may certainly rank in [the former] category the crime of aggression. The same will be true of most cases of crimes against humanity and genocide. There is by contrast another category of crimes which, while involving direct relations with actions of the State, are liable autonomously to be imputed to an individual. These are war crimes. (…) The conjunction of individual responsibility and State responsibility is thus manifest in connection with aggression.177

If state apparatus is required for genocide and the other crimes, there should be a reference to the state (or a collective organization) in the text defining such a crime.

174 Ibid. at para. 409.
175 Ibid. at paras. 57-8. Emphasis added.
176 “Although international criminal law shares some of the goals and methods of international human rights and humanitarian law, there is far from a perfect congruence of the first with the other two. (…) But to the extent that those two bodies of law address accountability of the individual for their violation, they overlap with international criminal law.” Ratner and Abrams, supra note 31 at 12.
177 Dupuy, supra note 118 at 1088.
The Rome Statute does make such a reference to the State in its definition of crimes against humanity. The systematic removal of immunity for accused persons, however, demonstrates the autonomy of the individual, and his or her responsibility vis-à-vis that of the state (or non-state entity).

Here, the gravity of the act takes precedence over the person’s legal position. It entails a declassification of the act, which ceases being associated with the public function covered by the ordinary system of immunities from jurisdiction and enforcement.

The view that individuals are held responsible for state crimes because that is the only effective way to impute liability to a state belies a pre-1945 classical conception that there are no legal persons in international law other than the state. Such a reflection, influenced by classical legal positivist ideology, seems increasingly out of step with the actual evolution of law. It is more commonly held that individuals, therefore, are playing an increasing role in the international system both as beneficiaries of rights and subjects of international duties.

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178 "2. For the purpose of paragraph 1: (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” Article 7, Crimes Against Humanity, Rome Statute. Emphasis added.

179 Dupuy, supra note 118 at 1093.

180 Ibid.

181 Ibid. at 1091.

Aggression remained controversial up until the end of the conference that led to the signing of the Rome Statute.\textsuperscript{183} There was the question of whether to include aggression at all, and the diverging views on both the role of the Security Council and the definition of the crime.\textsuperscript{184} While the two latter issues proved the biggest obstacles, in the end the crime of aggression was included in the Rome Statute by way of a compromise: aggression was included but left undefined. The debate over the possible jurisdictional overlap between the ICC and the SC survived the signing of the Rome Statute in the form of Article 5(2), with some states claim the Security Council has a monopoly in relation to \textit{all matters aggression} while others believe that the Court's exercise of jurisdiction over the crime of aggression should remain as "unfettered" as it is for the other three international crimes.\textsuperscript{185}

\begin{quote}
The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.\textsuperscript{186}
\end{quote}

Article 5(2) contains three requirements: the definition of the crime of aggression must comply with Articles 121 and 123 of the Rome Statute; it must set out the conditions under which the Court shall exercise jurisdiction, finally, it must be consistent with the relevant provisions of the UN Charter. An analysis of Articles 121 and 123 is beyond the scope of this paper. The two remaining requirements, for their part, are generally understood as meaning that conditions need to be established to ensure that the definition does not infringe the UN Charter. But are conditions even necessary?

\textsuperscript{183} Von Hebel and Robinson, \textit{supra} note 12 at 81-82.
\textsuperscript{184} \textit{Ibid.}
\textsuperscript{185} \textit{Ibid.}
\textsuperscript{186} Article 5(2), Rome Statute.
If Article 5(2) was included to essentially keep the crime of aggression in the Rome Statute, this was a small price to pay for those who oppose excessive Security Council powers. Why? Article 5(2) provides that the Court’s jurisdiction over the crime of aggression shall be “consistent with the relevant provisions” of the UN Charter. As this is stating nothing more than the obvious, it is a truism.\textsuperscript{187} Although he suggests that this requirement is redundant and superfluous, Condorelli maintains that it is nevertheless significant.\textsuperscript{188}

\textit{Elle témoigne, en effet, de la reconnaissance générale qu’il y a bien un problème très délicat qu’il faudra régler à l’avenir sans apporter des entorses à la Charte. L’art. 5 met ainsi indirectement en exergue le nœud fondamental à trancher par les négociations futures : celui de savoir comment se raccordent les compétences de la Cour en matière de crime individuel d’agression à celles du Conseil de sécurité relatives à l’agression aux termes de la Charte, c’est-à-dire dans les relations interétatiques.}\textsuperscript{189}

The \textit{nœud fondamental} is the configuration or notion of a workable relationship between the ICC and the SC in relation to the crime of aggression. The carefully constructed phrase, “shall be consistent with the relevant provisions of the Charter of the United Nations” of Article 5(2) of the Rome Statute is indeed understood as a reference to the role the Council “may or should play in relation to the crime of aggression.”\textsuperscript{190}

Conceivably, special conditions may be required if there is a potential for jurisdictional conflict. This however remains to be proven in regard to the roles the Security Council and the ICC play in relation to aggression. One would think that any potential jurisdictional overlap has been addressed by Articles 13(b) and 16 of

\textsuperscript{187} A rule of international law cannot contradict the UN Charter. “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Article 103, UN Charter.

\textsuperscript{188} Luigi Condorelli, “Conclusions Générales” in ICCCA, supra note 96, 151 at 153.

\textsuperscript{189} Ibid.

\textsuperscript{190} Von Hebel and Robinson, supra note 12 at 85. Another author goes so far as to suggest that 5(2) calls for a provision “on the relationship of the Security Council with the Criminal Court.” Saeid Mirzaee Yengejeh, “Reflections on the Role of the Security Council in Determining an Act of Aggression” ICCCA, supra note 96, 125 at 126.
the Rome Statute. Article 13(b) provides that the Security Council can refer a matter that would not otherwise fall under the jurisdiction of the Court to the ICC. Article 16 states that the Council can suspend or defer proceedings at the ICC for a renewable period of one year. The latter, requires the support of all five permanent members of the Security Council for a resolution requesting the suspension or deferral of a matter before the Court. As they stand, these rules ensure that no single permanent member of the Council has absolute authority over what matters of aggression go before the Court.

The suggestion that the Council requires additional powers (over the Court) in dealing with aggression - in particular, the proposal that a Security Council “determination” of aggression is necessary – reduces the role of the ICC to that of a bureaucrat. If a Council “determination” that “an act of aggression occurred” becomes a condition precedent for ICC jurisdiction, each permanent member will effectively be in a position to veto each and every potential investigation or prosecution of the crime of aggression. This, would result in a most flagrant politicization of the court. It would also mean that a definition for the crime of aggression is, at the very worst, unnecessary and at the very best, unimportant. For these reasons, and for the sake of consistency with regard to the other three international crimes, the Court’s exercise of jurisdiction over the crime of aggression should not be subject to conditions that involve the determinations or otherwise by political bodies.

It is interesting to observe that pre-conditions for the ICC exercise of jurisdiction over the crime of aggression, for some, are not only a future requirement but a reality.

[T]he Statute stipulates in Article 5(2) that a future provision adopted by States Parties defining the crime of aggression ‘shall be consistent with the relevant provisions of the Charter of the United Nations’. By requiring the future ICC definition of aggression to defer to the primary responsibility of the Security Council for the maintenance of international peace, Article 5(2)
clearly deprives the ICC of a primary jurisdiction to review a Council decision that an act of aggression has occurred.\textsuperscript{191}

This is a misreading of the provision. Not quite depriving the ICC of primary jurisdiction over the crime of aggression or deferring responsibility to the SC, Article 5(2) states that the definition will need to be consistent with the UN Charter. What is more, Robinson opines that it is theoretically possible for a definition to be adopted without the establishment of further conditions for the Court to exercise its jurisdiction.\textsuperscript{192} It must not only be theoretically possible; it must become a reality.

If it can be demonstrated that a) the crime of aggression is not “unique”, and b) the Court’s exercise of jurisdiction will not enter into direct conflict with the authority

\textsuperscript{191} Dan Sarooshi, “The Peace and Justice Paradox: The International Criminal Court and the UN Security Council” in Dominic McGoldrick, Peter Rowe and Eric Donnelly, eds. The Permanent International Criminal Court (Portland: Hart Publishing, 2004) 95 at 110. “At about the middle of the Rome Conference, it became clear that support for the inclusion was increasing despite the knowledge that no agreement could be reached at the conference either on its definition or on the role of the Security Council. The permanent members indicated that they could agree on the inclusion (...) only if the proper role of the Security Council in accordance with the Charter were recognized. (...) [That] these issues must be consistent with the Charter of the United Nations (...) is intended to take account of the concerns of the permanent members of the Security Council that the statute not be used to amend the Charter by infringing on the competence of the Council to determine acts of aggression.” See also M. Arsanjani: “The mandatory language of Article 39 of the Charter seems to indicate that a primary role must be given to the Council to determine the existence of aggression on the part of a State as a pre-condition to the institution of criminal proceedings against individuals by the Court.” M. Arsanjani, “The Rome Statute of the International Criminal Court” (1999) 93 AJIL 22 at 29-30 quoting Lionel Yee. Yee, however, writes in a footnote: “It could be argued that the word “consistency” used in Article 5(2) of the Rome Statute simply means ensuring that the Court does not make a finding which contradicts a determination, if any, made by the Council on the existence or non-existence of an act of aggression by a State”. Lionel Yee, “The International Criminal Court and the Security Council: Articles 13(b) and 16” in Lee, ed. supra note 12, 143 at 145.

\textsuperscript{192} “It is theoretically possible for there to be agreement that no preconditions are needed. However, as a practical matter, I don’t think there is any realistic prospect that such an approach would be adopted. Aggression is a distinct crime that would require the Court to examine public international law issues (use of force, self-defence, anticipatory self-defence, humanitarian intervention, etc.) which have at least some difference from classic individual criminal responsibility questions. Too many states are concerned about possible politicization and, I suppose, the power that would be granted to the Court if there were no preconditions. The predominant view, on all sides, is that some precondition is useful to depoliticize the issue. So these political questions would go first to a body more equipped to handle the policy/political questions of aggression. Then the ICC focuses on the criminal responsibility aspects, which it is well equipped to do.” Darryl Robinson, Email message sent to the writer dated 4 January 2005 (permission received to include the text in this thesis).
of the Council to take decisions in respect of an act of aggression, then no
conditions beyond those already required by Articles 13(b) and 16 are necessary to
further circumscribe the Court's jurisdiction over the crime of aggression.

Notwithstanding any new conditions that may be established to further usurp the
Court's jurisdiction over the crime of aggression, it will remain vulnerable to the
challenge that aggression is a "political matter". A challenge on this basis however
stands little chance of success. In The Prosecutor v. Tadic, the ICTY Appeals
Chamber held that international tribunals, duly constituted with clear jurisdictional
parameters, are not subject to jurisdictional challenges on the basis of a purported
political question argument.¹⁹³

The doctrines of "political questions" and "non-justiciable disputes" are
remnants of the reservations of "sovereignty", "national honour", etc. in very
old arbitration treaties. They have receded from the horizon of contemporary
international law, except for the occasional invocation of the "political
question" argument before the International Court of Justice in advisory
proceedings and, very rarely, in contentious proceedings as well.

The Court has consistently rejected this argument as a bar to examining a
case. It considered it unfounded in law. As long as the case before it or the
request for an advisory opinion turns on a legal question capable of a legal
answer, the Court considers that it is duty-bound to take jurisdiction over it,
regardless of the political background or the other political facets of the
issue. On this question, the International Court of Justice declared in its
advisory opinion on Certain Expenses of the United Nations:

"[I]t has been argued that the question put to the Court is intertwined with
political questions, and that for this reason the Court should refuse to give an
opinion. It is true that most interpretations of the Charter of the United
Nations will have political significance, great or small. In the nature of
things it could not be otherwise. The Court, however, cannot attribute a
political character to a request which invites it to undertake an essentially
judicial task, namely, the interpretation of a treaty provision." (Certain
Opinion of 20 July).

¹⁹³ Le Procureur c/ Dusco Tadic, Alias "Dule" 2 octobre 1995 (La Chambre d'Appel) – Arrêt relatif à l'appréciation de la défense concernant l'exception préjudiciable d'incompétence.
This dictum applies almost literally to the present case.\textsuperscript{194}

Is it hoped that conditions will \textit{buffer} potential collisions between the two spheres of competence? Is there any realistic possibility of a collision at all? Is the ICC afraid of the Council, or vice versa? Complementarity or the notion of concomitant jurisdictions, \textit{without the rigid procedural mechanics special conditions would entail}, is not an impossible or unimaginable prospect.

The first section of this chapter will review the Security Council’s jurisdiction in regard to acts of aggression. Section 2 will demonstrate how the jurisdictions of the SC and the ICC are complementary and do not give rise to conflict in relation to matters of aggression. The section that follows will examine the analogous relationship between the SC and the International Court of Justice. Finally, the fourth section will compare aggression to the other international crimes and establish how it shares characteristics of genocide and crimes against humanity.

Throughout this chapter it should become apparent how current discourse on the issue of the role of the Security Council often confuses rather than clarifies the issues. To conclude, we will review the statutory relationship as established by the Rome Statute and demonstrate how it is unnecessary to establish additional conditions for the Court to exercise its jurisdiction over the crime of aggression.

\textsuperscript{194} \textit{Ibid.} at para. 24. See also 1993 Bosnia v. FRY and Serbia application for provisional measures at ICJ at para. 33 “whereas however in any event, as the Court has observed in a previous case, while there is in the Charter, a provision for a clear demarcation of functions between the General Assembly and the Security Council, in respect of any dispute or situation, that the former should not make any recommendation with regard to that dispute or situation unless the Security Council so requires, there is no similar provision anywhere in the Charter with respect to the Security Council and the Court. The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.” (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 434-435, para. 95).
3.1 Security Council Jurisdiction over Acts of Aggression

The UN Charter establishes the role of the Security Council in relation to acts of aggression. Article 24 of the Charter confers upon the Security Council the responsibility to ensure, maintain and restore international peace and security.

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. (...)\(^\text{195}\)

Article 39 under Chapter VII, for its part, vests the Security Council with the authority to determine the “the existence of any threat to the peace, breach of the peace, or act of aggression (...) [and] make recommendations, or decide what measures shall be taken (...) to maintain or restore international peace and security.”\(^\text{196}\) Articles 40 through 42 further empower the Council to call upon the parties concerned to comply with the provisional measures it deems necessary.\(^\text{197}\) If measures not involving the use of force prove inadequate, the Security Council may then take such action involving the use of force as is necessary to re-establish the peace.\(^\text{198}\)

Article 11 of the Charter evidences the non-exclusive nature of the Security Council’s primary responsibility and empowers the General Assembly with the complementary duty to consider, discuss and make recommendations on any questions that relate to the maintenance of international peace and security. Only when the same question or matter has been submitted to the Security Council for its

\(^{195}\) Article 24(1), UN Charter. Emphasis added.

\(^{196}\) Article 11, UN Charter.

\(^{197}\) "(...) Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned." Article 40, UN Charter.

\(^{198}\) Article 42, UN Charter.
consideration is the General Assembly precluded from exercising this responsibility.\footnote{Article II (2), UN Charter.} Article 10 additionally provides that the General Assembly may discuss and make recommendations regarding any matters within the scope of the Charter and regarding the powers and functions of any organs provided for in the Charter.\footnote{"The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters." Article 10, UN Charter.}

Thus the Charter vests the Council with the primary responsibility to maintain international peace and security. Since the creation of the United Nations, however, the Security Council has only determined that aggression occurred in but a handful of cases. Cassese explains,

\begin{quote}
The mechanism set up in San Francisco could have worked if the cold war had not broken out at once and the world had not split into two blocks. It is easy to imagine the effects of this rift on the 'system of collective security'. The armed forces of the United Nations were never created; the West, which had the majority in the General Assembly tried to deflect to the General Assembly the powers that had been attributed to the Security Council (blocked by the Soviet veto); the tension grew and the whole collective mechanism broke down.\footnote{Antonio Cassese, \emph{Violence and Law in the Modern Age}, (Cambridge: Polity Press, 1986) at 33.}
\end{quote}

For nearly a quarter of a century the Council was effectively unable to carry out its responsibilities. This situation changed after the Cuban Missile Crisis. The early 1970s ushered in a series of Security Council resolutions that condemned acts of aggression.\footnote{"Historical Review of Developments Relating to Aggression", UN Doc. PCNICTC/2002/WGCA/L.1 and "Historical Review of Developments Relating to Aggression (Addendum)", UN Doc. PCNICTC/2002/WGCA/L.1/Add.1 at 115 et seq.} In particular, it dealt with matters involving Southern Rhodesia, South Africa, Benin, Israel and Iraq.\footnote{\emph{Ibid.}} Aggressions in these regions took the form of armed attacks, air raids, invasions and illegal occupations and assassinations,
among others. In 1985 and 1988, for example, the Security Council vigorously condemned the “act of armed aggression” Israel perpetrated against Tunisian territory “in flagrant violation of the Charter of the United Nations, international law and norms of conduct”.

For the last half century the Council has, in general, demonstrated a reluctance to characterize the illegal use of force as an act of aggression. Moreover, to take action under Chapter VII of the UN Charter it is not necessary for an “act of aggression” to occur; it is sufficient that there be a threat to the peace or a breach of the peace. (There being no tangible benefit to using the “A” word, the Council is unlikely to risk stigmatizing a state and if it can achieve the same purpose by downgrading a situation to a threat to international peace and security.) There is nothing to indicate that the Council will be more willing to “determine” that an act of aggression occurred after the crime of aggression is defined.

3.2 The Inevitable Link of Complementary Jurisdictions

The Rome Statute establishes a privileged relationship of jurisdictional complementarity between the U.N. Security Council and the International Criminal Court. Articles 13(b) and 16 of the Statute provide the Council with explicit

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206 The establishment of a relationship between the ICC and the U.N. is provided for under Article 2 of the Rome Statute: “The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.” Article 2, Rome Statute. Articles 13(b) and 16 of the Rome Statute further accord a special status to the Security Council.
authority to refer to the Court a situation that would otherwise not fall under the latter’s jurisdiction, and to defer or suspend the investigation or prosecution of a matter for a renewable period of twelve months. These provisions spell out the virtually seamless integration of the Security Council in the Court’s jurisdiction and the latter’s role in the traditionally political system of international collective security.

The link between the Security Council and the ICC can be characterized as a “divider” or a “connector”. The relationship is a connector when the respective jurisdictions of these two entities are regarded as complementary rather than conflicting. In our discussions below, we will examine the link as a divider to determine to what extent, if any, such a characterization encourages and advances reasoned discussion on the issue of aggression. The view that \textit{prima facie} the link is a divider leads to claims such as: the Charter vests the Security Council with the primary responsibility of determining aggression. The Charter however makes no such provision. It does stipulate that the Council must first determine that a threat to the peace, breach of the peace or an act of aggression has occurred if it is going to take measures to establish or maintain international peace and security. This authority to so “determine” or characterize a given situation operates as a \textit{condition precedent} to measures taken pursuant to Articles 41 or 42 of the Charter. Thus the essence of this authority is neither quasi-judicial nor its goal to lay blame on a particular party to a conflict. It \textit{enables} the Council to take the next step and decide on the action necessary to discharge its duty.

\textsuperscript{207} Article 13(b) “The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (...) (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; (...)” Article 16: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” Articles 13(b) and 16, Rome Statute.

\textsuperscript{208} “Warning about the risks of politicizing the ICC has been a powerful argument in the debates of the Preparatory Commission – but also an intriguing one.” See Marja Lehto, “The ICC and the Security Council: About the Argument of Politicization”, ICCCA, \textit{supra} note 96, 145.

\textsuperscript{209} See \textit{supra} note 191 and text.

\textsuperscript{210} The provision under Article 39 is mandatory in nature.
Condorelli anticipates little, if any, jurisdictional overlap between the ICC and the Security Council. The competencies of each entity pertain to related but distinct objects, “de sorte que de véritables conflits entre les résultats de leur exercice respectif sont très improbables et, à la limite, d’une gravité bien réduite, vu l’étendue fort circonscrite de l’effet de la chose jugée qui se rattacheraient en tout état de cause à une condamnation ou à un acquittement prononcés par la C.P.I.” If establishing conditions under 5(2) renders the Court’s jurisdiction conditional on a prior Council determination of aggression, then the court will be a politicized institution in that its authority will depend on purely political determinations.

The proposed precondition requiring a Security Council determination of an act of aggression before the Court exercises jurisdiction is controversial in that it encourages the very outcome that it purports to prevent: the politicisation of the ICC. Still, some authors seem resigned to the eventuality that the Council will exercise ultimate control over the Court in this respect. This section begins to address the very serious threat to the Court’s independence with a review of the implications of the Article 39 Determination theory. We will then examine what current discourse ironically refers to as arguments of politicization which Article 39 Determination theory advocates actually posit in support of their position.

3.2.1 Article 39 Determination Theory

Of the various mainstream formulae advanced to address concerns about the Court’s jurisdiction over the crime of aggression, the most drastic calls for the

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211 Condorelli, supra note 188 at 161.
212 Ibid.
213 “How the provision on the preconditions to the jurisdiction of the Court will be formulated, will depend on the political choices of the future Review Conference. The Conference may, if it so wishes, opt for an express exclusion and decide that a prior determination of the Security Council of an act of aggression is always a prerequisite for the Court to deal with a complaint related to a crime of aggression.” Marja Lehto, supra note 208 at 148-9.
214 It is suggested that “Article 39 Determination theory” is a more accurate and telling way of describing the underlying premise of the position that holds that the Court’s jurisdiction over the crime of aggression is conditional upon a Security Council determination that “aggression” has occurred.
deferral of any potential matter of aggression to the Security Council so that it may make a “determination” as to whether aggression has actually occurred. Advocates of this proposal argue that it represents the easiest way to avoid the situation of “contradictory findings” by the two entities. They further maintain that a Council determination is necessary as Article 39 of the Charter vests the Council with a power to determine that an act of aggression has taken place, or has not taken place. This contention is problematic for the reasons discussed above. In addition, the implication is that an act of aggression will be “recognized” if and only if the Council so determines.

The Security Council is authorized to determine that a threat to the peace or an act of aggression occurred as a condition precedent to adopting measures under Chapter VII. This is an operational, not a judicial authority, that is not even exclusive to the Council; the General Assembly has a complementary duty to restore and maintain international peace and security and can also adopt resolutions relating to matters of aggression. Nevertheless, the Article 39 Determination theory, which underpins the proposal that all matters relating to aggression be deferred to the Security Council, is based on the fear of contradictory findings and the claim that the Council is the sole entity able to decide when aggression has occurred.

Leaving every potential case involving the crime of aggression to the discretion of the Security Council would be a logistical and procedural nightmare. First, it is entirely possible that a situation would not even undergo a review by the Council as it may not be deemed of sufficient political importance to one of the permanent members. In that case, would the ICC be expected to insist that the Council issue a resolution on the matter? If not, would that be where it ended even if there was sufficient evidence to warrant an investigation by the Prosecutor’s Office? What if the Council did determine that an act of aggression occurred, and referred the matter to the ICC pursuant to Article 13(b), would the Court then be bound to

accept the *actus reus* as a given? Would it then only need to try an individual for his or her *mens rea*? If the Council exercised the exclusive power to *determine* that an act of aggression occurred, and if in the course of carrying out his own investigation the ICC prosecutor determined that there was insufficient evidence to warrant a charge of aggression, *then* there would be a serious problem of so-called contradictory findings. If the Council *determined* that an act of aggression occurred could it subsequently justify deferring or suspending proceedings under Article 16? And if the Council downgrades an act of aggression to a “threat to” or “breach of” the peace to avoid stigmatizing a state, should this be taken to mean that “no act of aggression occurred, period? If one of the stated objectives of the proposed deferral of situations of aggression to the Security Council is to avoid “conflicting findings”, then it fails in this regard.

The discourse framing the Article 39 determination theory pits Security Council “findings” against Court findings as though the two were on a judicial par and scenarios of *litispendens* or *res judicata* were conceivable.216 However, as stated above, the purpose of an Article 39 determination of aggression is to trigger measures under Chapter VI or VII and is not subjected to rigorous judicial analysis as, say, the crime of aggression would be. And so, conflating the *act* of aggression with the *crime* of aggression removes the “degree of gravity” that arguably serves a distinguishing role between the two. By definition, the Council’s characterization of an event is naturally political and the process leading up to a determination is fundamentally different from that which results in a criminal indictment. The ICC determination of a crime of aggression also takes place within a highly formal adversarial framework. A major problem with the theory is that a Council

216 “[O]ne must notice a significant development in the practice and policy of the Security Council over the past ten or twelve years. The role of the Security Council has become increasingly central in the enforcement of international legal norms. The Council has not only, increasingly, taken into account legal considerations but has also made legal determinations, sometimes of a type “that is in the heart of what is normally seen as judicial activity. (...) Determinations of international law are now part and parcel on decision-making on collective measures”. So much so that it has become customary to speak of the quasi-judicial role of the Security Council. The expansion to the legal realm has been coupled with a change in the Council’s agenda, a growing sensitivity for issues like international crimes, protection of civilians, and international humanitarian law.” Marjo Lehto, *supra* note 208 at 147.
determination of aggression will create expectations to the effect that the
individuals who are responsible will automatically be found guilty. Individuals
tried under such circumstances are hardly likely to avoid conviction.

Gaja considers the possibility of “conflicting findings on aggression – a positive
determination by the Court and a negative one by the Council, or vice versa”.

Although he recognizes the desirability of avoiding conflict, he sees the attraction
of not tying the Court to a previous assessment by the Security Council.

Otherwise, “[a]ny of the permanent members of the Council would (...) be entitled
to prevent the ICC from taking criminal proceedings on aggression. Moreover, the
Security Council, in case of a positive finding, would impinge on the Court’s
judicial function, since an aggression necessarily implies that at least some of the
leaders of the aggressor State are criminally responsible.”

And, were the Council
determination of an act of aggression to remain “notionally separate” from the
Court’s questions relating to the crime of aggression (i.e. we accept that the “act of
aggression” is not determinative of a crime of aggression), then there would be no
point to the Council making a prior determination at all.

According to the theory, if the Council makes an Article 39 determination then the
Court can exercise jurisdiction over the crime. At that point, if the Court fails to
find a legal nexus between the aggression and the act of the individuals alleged to
be involved, it will undoubtedly call into question the Council’s determination and
thus create a conflict between the ICC and the Security Council.

For there to be a
conflict, however, Gomaa is assuming two things: that the accused is the only

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217 Gaja, supra note 21 at 432.
218 Ibid.
219 “It could not be argued that under the Charter the Security Council has been given an exclusive
power to take a decision on the existence of aggression, nor that a finding by the Security Council
would have to be binding also for a treaty body entrusted with the repression of individual crimes.
Any such binding effect is not required under Article 103 of the U.N. Charter or under Article 5(2)
of the ICC Statute, but is only one of the ways in which a link between the Security Council and the
ICC could be established.” Giorgio Gaja, “The Respective Roles of the ICC and the Security
Council in Determining the Existence of an Aggression” in ICCCA, supra note 96, 121 at 123:
220 Mohammed M. Gomaa, “The Definition of the Crime of Aggression and the ICC Jurisdiction
over that Crime” in ICCCA, supra note 96, 55 at 75.
possible individual responsible for the act, and that an Article 39 determination is the equivalent of a “crime of aggression” determination. Based on the assumption that the Council is the only entity capable of determining that an act of aggression has occurred he asks,

How could it be expected in the case of aggression that individual responsibility be established first without a prior determination of the wrongdoing on the part of the State? Whence, what is needed for the purposes of criminal prosecution of an individual is the attribution to that individual of the wrongful acts resulting in or leading to the aggression. This inevitable link between the international responsibility of the State for aggression and individual criminal responsibility requires a determination on the commission of aggression, rationae materiae. Only after a State has been declared as an aggressor (pursuant to the Charter of the United Nations and the definition of aggression annexed to General Assembly resolution 3314), may an individual – for the purposes of individual criminal responsibility, and more particularly the Statute of the ICC – be tried on the basis of that legal nexus.221

Gomaa’s reasoning is on solid footing until he suggests that the connection between state and individual responsibility “requires a determination on the commission of aggression”. The sentence that follows is flawed in that it is narrow in scope and precludes the possibility that an individual can be tried on the basis of a second legal nexus: that between the Court’s finding that aggression occurred (based on the definition of the crime of aggression) and the individual’s actions or involvement. To his credit, Gomaa recognizes the weightlessness of the Court’s authority.

On the other hand if the Council failed – for whatever reasons – to make a determination that there existed an act of aggression, the ICC would not be able to exercise its jurisdiction with respect to aggression if the Council were to be the only body allowed to make such determinations. (...)222

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221 Ibid. at 65. Emphasis added.
222 Ibid.
Gomaa can see the far-reaching implications of the Article 39 determination theory especially if the Council refrains from making the determination: "The Council’s inability to react to cases of aggression most of the time is not fictitious. From the day of its inception up to 1990, and despite all the atrocities and acts of sheer aggression that the world has witnessed, the Council had only in one single instance declared that there was a case of aggression. That was the Korean case, …" 223

Still, to some, deferring to the Security Council on matters of aggression simplifies the situation. 224 Politi suggests that this essentially means that it is pointless for the Court to define the crime of aggression because ultimately aggression would simply be what the Security Council deems it to be. 225 Like Gomaa, Politi wonders what should be done in the event that the Council not make an Article 39 determination.

We know that this situation could be very frequent. History shows that the Council is very reluctant to say that an aggression took place. The use or threat of veto by the permanent members increases the likelihood of no decision being made by the Council. (…) But let me say that, despite all the odds, there is now a widespread conviction among delegates of the need to find a way out that would allow the Court to repress one of the most serious crimes of concern to the international community." 226

Garvey is of the view that the Council should never make a determination of an act of aggression as it conflicts with its pacification function and may be incompatible with the U.N.’s efforts to achieve international peace and security. 227 Labelling a State an aggressor indicates the assertion of a condemnatory and punitive posture

223 Ibid. at 75-76. In fact, though authors often suggest that the Council has only addressed aggression on “one” or “two” occasions, the Security Council has in fact addressed acts of aggression in a number of situations: Southern Rhodesia, South Africa, Benin, Israel (curiously, the heading of this situation in the PCNICC document is entitled “Tunisia” – not “Israel”), and Iraq. See Historial Review Document, supra note 202 at paras 382 et seq.

224 Mauro Politi, “The Debate within the Preparatory Commission for the International Criminal Court” in ICCCA, supra note 96, 43 at 49-50.

225 “There seems to be an agreement today at least on the point that there cannot be individual responsibility for the crime of aggression unless the State concerned has international responsibility for aggression.” Ibid.

226 Ibid. at 50-51.

by the Security Council.228 More importantly, it places the subject State (i.e. the “aggressor”) “outside the institutional process otherwise provided by the United Nations for negotiation of disputes”. As demonstrated by the Arab-Israeli situation, among others, crisis resolution usually requires a concentrated effort to avoid normative judgment.229 Garvey describes the political dynamics involved in a Council determination of an act of aggression.

The preconditions for judicial neutrality in the application of a legal standard simply are not present. Judicial neutrality has no bearing on the posture of the members of the Security Council in a crisis situation. The debate is infused with propaganda and the expression of self-interested points of view, not judicial deliberation. The final disposition cannot be independent of the very parties rendering it. The prime desideratum is neither justice nor legality, but mutual interest centered in the possibility of collective action for pacification.230

The Article 39 determination interferes with the political, policing and pacification function of the Security Council by adding to its purposes the role of adjudicator.231 The function of words such as ‘aggression’ in the context of collective security arrangements is critical.232 ‘Aggression’, just like ‘breach of the peace’ or ‘threat to the peace’, reflects in its application a situation that may result in peace-enforcing action under the Charter.233 In a world where no international body has jurisdiction over a non-consenting State, the determination of “aggression” must be the creature of political decision.234 In a world where there is an international body with jurisdiction over a non-consenting State (i.e. the International Criminal Court), the crime of aggression can be brought squarely within the judicial arena.235

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228 If so condemned, the “aggressor” may intensify its aggression on the theory that, having been condemned, its most prudent course of action is to improve its bargaining position. “This tends to amplify the alleged aggressor’s need for vindication and to increase national resolve, resulting in the disparagement and dismissal of the United Nations as an instrument of settlement.” Ibid. at 184.
229 Ibid.
230 Ibid. at 192. Emphasis added.
231 Ibid.
232 Ibid.
233 Ibid.
234 Ibid. at 195-6.
235 Ibid.
The Security Council’s tendency to understate a situation (i.e. “downgrade”) suggests it has difficulty reaching the required majority for adopting a resolution.²³⁶ Accordingly, the Article 39 determination theory is likely to deprive any future crime of aggression of almost all its meaning.²³⁷

Moreover, one cannot assume that when the Security Council uses its powers under Chapter VII on a basis which is alternative to aggression, the Council necessarily takes a negative view on the existence of aggression. The Security Council’s powers are not in any way affected; downgrading in the text of a resolution a situation of aggression to a breach of the peace or even to a threat to the peace may be due only to considerations of political expediency. Thus one cannot assume that the absence of a finding by the Security Council that aggression occurred necessarily implies that in its view there is no aggression and that therefore a conflict would arise with a positive finding by the ICC that an individual has committed a crime of aggression.²³⁸

The Coordinator of the Working Group on the Crime of Aggression reports that the exclusivity of the Security Council to determine an act of aggression was contested by those who stressed the fact that the Charter assigned competence in the area of international peace and security to several organs.²³⁹ The Council’s exclusivity lay in the capacity of taking “action” through the imposition of sanctions, be they of an armed or non-armed character.²⁴⁰ Delegates in the Working Group argued that the Security Council had no role at all in this individual criminal responsibility and the conditions for the exercise of this jurisdiction lay solely in the ICC.²⁴¹ It was emphasized that practice over the years had shown that Council decisions on aggression was, at best, sporadic and as the Council resisted making such determinations.²⁴² The failure of this UN organ to fulfill its responsibility cannot render ICC jurisdiction over the crime of aggression “inoperative and nonexistent”.²⁴³

²³⁶ Gaja, supra note 21 at 434.
²³⁷ Ibid.
²³⁸ Ibid.
²⁴⁰ Ibid.
²⁴¹ Ibid.
²⁴² Ibid.
²⁴³ Ibid.
3.2.2 The “Politicization” Arguments

There are at least two ways to imagine the politicization of the ICC, substantively and procedurally. The first form of politicization relates to a confusion of the ICC and SC mandates leading some to believe that the ICC is making so-called political decisions when all it is doing is exercising its jurisdiction over the crime of aggression. The second form involves the contamination of ICC jurisdictional integrity when the Council inappropriately interferes with the Court’s exercise of jurisdiction, deciding, for example, what potential crimes of aggression will undergo initial investigation. The first scenario is borne out of a confused notion of the different entities’ mandates; in the second case, selective justice is rendered.

At one extreme of the first politicization argument is Meron who believes that asking the ICC to decide on matters relating to the crime of aggression is the equivalent of contaminating the ICC with “tainted subject matter”.

To ask the Court in the absence of a determination by the Security Council to decide that an act of aggression has taken place (...) would endanger (...) its judicial role and image. (...) Imagine the immense difficulties that the ICC, as a court of law, would face in dealing even with relatively simple acts of aggression. (...) is it equipped to consider such matters as historical claims to territory, maritime boundaries, legitimate self-defence under Article 51 or legitimate reprisals? (...) And is the competence of the Court, in any event, not limited to jurisdiction over natural persons? (...) we must not turn the ICC into a political forum discussing the legality of use of force by States.

244 Lehto, supra note 208 at 146.
245 Ibid. Statement by the Representative of the United States, Professor Theodore Meron, at the ICC Preparatory Commission, Working Group on the Crime of Aggression, 6 December 2000, as cited by Lehto, ibid. Ratner and Abrams share this general distrust of international tribunals in relation to “crimes against peace”: “[A]uthoritative determinations of crimes against peace in many cases encompass complex factual inquiries for which courts may well prove less than fully equipped. [...] The shortcomings in the handling of the question of aggression by the International Court of Justice in the Nicaragua case (which did not even concern implication of criminal conduct) cast some doubt upon the ability of tribunals to handle crimes against peace responsibly”. Ratner and Abrams, supra note 31 at 125-6.
The very suggestion that the legality of the use of force is the domain of politicians, and not jurists, flies in the face of the rule of law. To contend that the Court’s image and role would be “endangered” if it fulfills its judicial function and prosecutes aggressors, is tantamount to fear mongering.

At the essence of the politicization argument is a concern about a confusion of mandates. Lehto acknowledges the concern to safeguard the judicial role and integrity of the Court as well as that to avoid an encroachment by the Court on the responsibilities of the Security Council.

Determining that an act of aggression has taken place is said to lie outside the scope of the judicial function. At the same time, there are many who see that the politicization argument would only apply to the ICC, and not to the International Court of Justice – a useful distinction that leaves room for innovative mechanisms to allow the ICC to use its particular jurisdiction also in the absence of a Security Council determination.

On a substantive level, it has yet to be demonstrated how, at one end, an investigation, and at the other end, a finding of guilt for the crime of aggression, encroaches upon the responsibilities of the Council. At all times the Council is free to make any determination under Article 39 it sees fit in view of adopting Chapter VII measures. An ICC investigation into a matter of alleged aggression or its prosecution of an individual, do not prevent the Council from performing its duties under the Charter, i.e. restoring and maintaining international peace and security. The two separate functions can exist simultaneously without interference.

If the Council determined that a particular case of genocide constituted a “threat to the peace”, one might argue that the ICC’s investigation or prosecution into the matter could encroach on the Council’s responsibilities in that case. In fact, all

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246 On more than one occasion the ICJ has quite ably demonstrated that this is not the case. Supra note 194 and accompanying text.
247 Lehto, supra note 208 at 146.
248 Ibid.
249 Ibid.
indictments that would issued by the Court would arguably result from situations that – at the very least – constituted a threat to international peace and security. Carrying this line of reasoning to its logical conclusion, *reductio ad absurdum*, every matter the Court investigates or prosecutes encroaches upon the Council’s responsibility to maintain international peace and security.

Much has been said about the “guarantee” that the ICC will remain a non-political entity. ICC President Kirsch was reported to have said that “the work of his tribunal will prove skeptics wrong”.250 “We have laid a strong legal foundation,” he said, “[t]his is a guarantee of a purely judicial body. Some states do not draw that conclusion, so our job is to demonstrate in practice that indeed we are what we say we are.”251 Appearing purely judicial is as important as being purely judicial. How states choose to apply 5(2) will, no doubt, reflect their priority: judicial integrity or political control.

Deferring to the Council on matters related to aggression will only complicate matters, not simplify them. Moreover, it will negatively impact on the Court’s integrity. The only reason left that remains in support of the Article 39 determination theory is to provide the Council with a monopoly over all matters aggression. This purely political purpose however will make the ICC, the Council’s puppet in relation to the crime of aggression.

Les intérêts de haute politique qui alimentent les différentes thèses en présence sont trop connus (...). [I]l n’est d’ailleurs pas vraiment utile d’exprimer des positions militantes, inévitablement à caractère politique, en faveur de l’une ou de l’autre. Il convient par contre de se pencher sur l’argument juridique fondamental dont on prétend qu’il fonderait la primauté du Conseil sur la Cour, pour en vérifier la consistance. Reconstruisons donc, d’abord, ce que je n’hésite pas à appeler le pseudo-raisonnement proposé par les partisans de la primauté, puis déconstruisons-le (voire démystifications-le) en mettant en évidence ce qui en fausse chaque passage.252

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251 Ibid.

252 Condorelli, *supra* note 188 at 159-160.
Condorelli maintains that the theory is based on two premises.\textsuperscript{253} First, an individual cannot be found guilty for the crime of aggression unless there is an "aggressor state" and second, according to the Charter, a state cannot be an aggressor state unless the Security Council has determined that it is one in virtue of its exclusive power under Article 39.\textsuperscript{254} His deconstruction of this argument is made easy because both premises are wrong.\textsuperscript{255} In regard to the first, we can easily imagine cases where the acts of individuals would not or could not be attributable to a state.\textsuperscript{256} The second premise, for its part, is equally unsound as it is based on a very rough and partial reading of the Charter.\textsuperscript{257} It is absolutely not true that the Charter gives the Council a monopoly over the determination of aggression. What is true is that the Council is the only body that can adopt Chapter VII collective security measures – provided that it has determined the existence of either: a threat to the peace, a breach of the peace or an act of aggression. No monopoly. What is more, and so long as the Council has not adopted Chapter VII measures, the Charter expressly provides that the inherent right to individual and collective self-defence permits all states to assess whether they are the victims of aggression. Most importantly,

\begin{quotation}
Il convient d'insister sur un point : il n'est absolument pas vrai que les futures dispositions sur le crime d'agression, pour être compatibles avec la Charte, devront sauvegarder un prétendu monopole du Conseil de sécurité en matière de constatation de l'agression. La Charte ne prévoit ni n'exige rien de pareil. Certes, la Charte n'interdit pas non plus qu'une subordination de la C.P.I. au Conseil soit créée à l'avenir; une telle solution pourrait donc bien être choisie à l'issue des négociations, si les membres permanents du Conseil de sécurité parvenaient à convaincre un nombre suffisant de délégations que leurs intérêts personnels correspondent à l'intérêt général. Mais il faut d'avance mettre au clair qu'une telle solution serait déterminée, alors, par
\end{quotation}

\textsuperscript{253} Ibid.
\textsuperscript{254} Ibid.
\textsuperscript{255} Ibid.
\textsuperscript{256} Ibid.
\textsuperscript{257} Ibid.
3.3 SC & ICJ: A Case Study

Jurisdictional overlap has been studied in another context: the relationship between the Security Council and the International Court of Justice. In this section we examine this relationship to see how it applies to the current question of the role of the Council in relation to the crime of aggression. The interplay between the Council and the ICJ on politico-legal matters raises interesting questions as to the limits, if any, on Security Council functions and impact on the integrity of the Court. These questions, in turn, will inform our analysis of the eventual role of the Council in regard to the crime of aggression. This discussion begins with a review and analysis of the Lockerbie case with a close reading of the dissenting opinion of Justice Bedjaoui. This will be followed by a review of the highlights from a 1993 conference on the legality of UN resolutions and the relationship between the Council and the ICJ and how they bode for the ICC-SC relationship. We will conclude with a review of the existing statutory framework governing the relationship between the ICC and the Security Council, and how it impacts the conditions under which the ICC can exercise its jurisdiction over the crime of aggression, if at all.

3.3.1 Lockerbie

The decision in *Lockerbie*, and in particular the Bedjaoui dissenting opinion, presents us with a fascinating analysis of the jurisdictional overlap that sometimes

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258 Ibid. at 162. Emphasis added.
happens between Security Council and the International Court of Justice. In this case, each entity was seized of distinct but related disputes.

On 3 March 1992 Lybia brought an application for provisional measures (injunction) against the United Kingdom and the United States to enjoin them from taking any measures to force the extradition of two of its citizens. More than a month prior, the UK and the US had petitioned the Security Council to issue a resolution against Lybia so that it would surrender two of its nationals the US and UK accused of being involved in an aircraft bombing over Lockerbie, Scotland. Lybia wanted to conduct its own trial and believed it had this right under the Montreal Convention and customary international law. Accordingly, Lybia brought an application before the ICJ seeking both a confirmation of this right, and an injunction against the UK and the US. While the Court was seized of the international legal dispute of establishing the rights of Lybia, and the respective obligations of the UK and the US regarding the extradition of two individuals, the Security Council was addressing the broader matter of labelling Lybia a terrorist state.

The parties pleaded their case before the ICJ in March 1992. On 31 March 1992, three days after arguments closed, the Council issued a second resolution on this matter (this time under Chapter VII) forcing Lybia to hand over the two suspects. The timing of this resolution is crucial. While the Court was considering the legality of an injunction, the Council took a decision that essentially rendered any judicial decision on the matter, moot. To use Bedjaoui’s words, the resolution annihilated the rights of Lybia. On 14 April 1992 the International Court of Justice refused the application for provisional measures as requested by Lybia. Essentially, it decided not to decide the matter as a consequence of a Security Council Chapter VII resolution issued after hearings were closed.

262 Lockerbie, supra note 259 at 14-15.
In support of this decision not to apply international law, the Court took judicial notice of a Security Council resolution passed after the case was heard. The contention that the indication of provisional measures would have impeded the UK's new-found right (to demand extradition) shows a clear bias for the Respondents, unfounded on any norm or principle of international law, and arguably the result of political interference.263

Justice Bedjaoui took issue with the Court’s majority decision.264 He began his dissenting opinion by introducing the complexity of the case as it relates to the “concomitant exercise of concurrent but not exclusive powers”. This case, he explained, presents the Court not only with “the grave question of the possible influence of the decisions of a principal organ on the consideration of the same question by another principal organ, but also more fundamentally, with the question of the possible inconsistency between the decisions of the two organs and of how to deal with so delicate a situation.”265

The dissent’s analysis is premised on the existence of two distinct but related disputes.266 The first is the precise legal dispute Lybia brought before the Court. The second is the dispute of a political nature which the UK and the US brought before the UN Security Council. Though it required judicial assessment, the latter dispute was resolved in a strictly political forum.267 A judicial solution would have set higher procedural standards, requiring, inter alia, the production of evidence, adversary proceedings and respect for due process of law.268 Bedjaoui recognized that Lybia was “fully within its rights in bringing before the Court, with a view to

263 “Considérant en outre qu’une indication des mesures demandées par la Libye serait de nature à porter atteinte aux droits que la résolution 748 (1992) du Conseil de sécurité semble prima facie avoir conférés au Royaume-Uni”. Ibid.
264 “This rejection [of the provisional measures requested by Lybia] does not appear to stem from the actual merits of the case and the intrinsic value of the Application, but rather from the considerations and decisions external to the case, which could pose the problem of the integrity of the legal function” Ibid. at 16. Emphasis added.
265 Ibid. at 33. Emphasis added.
266 Ibid. at 33-4.
267 This dispute involved the possibility of Lybia being found “responsible”, a demand for compensation, and the imposition of an obligation on Lybia to renounce terrorism.
268 Lockerbie, supra note 259 at 34.
judicial settlement, the dispute concerning extradition” just as the UK and the US could bring their dispute before the Security Council. The “respective missions of the Security Council and the Court are thus on two distinct planes, have different objects and require specific methods of settlement consistent with their own respective powers.” This particular situation involving two distinct procedures before two principal organs of the United Nations having parallel competences is not, according to Bedjaoui, an unusual one. 269

But the difficulty in the present case lies in the fact that the Security Council not only has decided to take a number of political measures against Lybia, but has also demanded from it the extradition of its two nationals. It is this specific demand of the Council that creates an overlap with respect to the substance of the legal dispute with which the Court must deal, in a legal manner, on the basis of the 1971 Montreal Convention and international law in general. The risk thus arose of the extradition question receiving two contradictory solutions, one legal, the other political, and of an inconsistency between the decision of the Court and that of the Security Council. 270

Such an inconsistency between the decisions of two United Nations organs would be a matter of serious concern. For it is as a rule not the Court’s role to exercise appellate jurisdiction in respect of decisions taken by the Security Council in the fulfillment of its fundamental mission of maintaining international peace and security, no more than it is the role of the Security Council to take the place of the Court, thereby impairing the integrity of its international judicial function. 271

A pari, the same may be said of the interplay between the Council and the ICC. It is not the role of the ICC to exercise appellate jurisdiction in respect of decisions taken by the Council in the fulfillment of its mission to maintain international peace

269 Ibid.
270 Ibid. at 34-5. Underlining added. Therefore, the Council’s demand for extradition created the overlap of subject-matter. Until the Council made this demand, there was no potential for conflict. We might apply this observation to the situation where the Council determines that an act of aggression has occurred (a determination of state responsibility). In this event, unless the Council makes a determination on the criminal liability of an individual, there will be no potential for conflict.
271 “For the facts of this case give the Court the power to indicate provisional measures to preserve the possible right of the Applicant to refuse the extradition of two of its nationals, whereas the Security Council has just taken a decision that is mandatory under Chapter VII of the Charter calling for the extradition of these two individuals.” Ibid. at 35. Emphasis added.
and security, no more than it is the role of the Council to take the place of the ICC, thereby impairing the integrity of its international judicial function.

In his dissenting opinion, Bedjaoui indicated that the Council could have requested an advisory opinion of the Court although the Charter does not compel it to do so.\(^\text{272}\) Nevertheless, Article 36, paragraph 3 of the Charter imposes a “certain duty” on the Council to direct parties with legal disputes to the International Court of Justice.

In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.\(^\text{273}\)

Bedjaoui questioned of the legitimacy of the Security Council resolutions in Lockerbie at a time when the legal validity of UN resolutions on the Charter or other international law generally was already the subject of academic scrutiny.\(^\text{274}\) The bombing took place three years before the resolutions were issued, yet Council deemed the extradition an “urgent” matter? The eloquent distinction between the specific legal dispute of the extradition matter and the wider political dispute brought before the Council, enables Bedjaoui to conclude that,

\([G]iven its functions and powers, the Court has no alternative but to refrain from entertaining any aspect whatever of the political solutions arrived at by the Security Council. The Court’s attitude in this respect continues to be defensible so long as no aspect of these political solutions adopted by the Council sets aside, rules out or renders impossible the juridical solution expected of the Court.\(^\text{275}\)\)

\(^{272}\) *Ibid.* at 42.

\(^{273}\) Article 36(3), UN Charter.

\(^{274}\) “How can the Court, which is not seized of the wider dispute, dispute the fact that the Security Council is responsible for qualifying international situations and that it can place itself within the purview of Chapter VII of the Charter, even if no small number of people may find it disconcerting that the horrific Lockerbie bombing should be seen today as an urgent threat to international peace when it took place over three years ago?” Lockerbie, supra note 259 at 43.

\(^{275}\) “It is clear that, in this case, it is the judicial function itself which would be impaired. Indeed, this is what is happening here in the area where these two disputes overlap, where the solution arrived at by the Council to the question of extradition of two individuals deprives a solution found by the
In other words, the Court fully respects and accordingly will not question the “political solutions” that are the subject-matter of the Council. However, it will refrain from such comment so long as no aspect of these solutions interferes with a judicial solution expected of the Court. If the same were true in the reverse, because the general political matter was already before the Council, should the Court have refused to hear the application brought by Lybia? If so, this would render the notion of an international court rather empty.

The question of the validity of the Council’s resolutions raises two problems “at once, serious and complex.” The first relates to whether the United Nations Security Council should respect the United Nations Charter, and respect general international law. Article 24(2) of the Charter “expressly states that ‘in discharging its duties, the Security Council shall act in accordance with the Purposes and Principles of the United Nations’.” The question then arises “whether one organ can act in a way which renders the role of the other impossible.” This applies as much to the Security Council as it does to the Court inasmuch as it is true that the Charter lays down that each of the United Nations organs shall carry out its task fully. The second problem is more complicated. Clearly, the Council must act in accordance with the ‘principles of justice’ just as it

Court of all meaning. (...) Such a situation, in which, on the basis of the inherent validity of the case, the Court should have indicated provisional measures solely in order to protect a right that the Security Council annihilates by its resolution 748 (1992) when the case is sub judice, is not satisfactory for the judicial function. It is even less so when one of the two Respondents, the United States of America, (...) had stated [in writing and during the hearings] that “in order to avoid any conflict with the Security Council the Court should decline the request to indicate provisional measures in this case” (...) Such invitations clearly made to the Court to refrain from exercising its judicial function independently are puzzling. In the past, the Security Council awaited the Court’s decision (...) Also today, in the Security Council, a number of member States, whether or not they voted for resolutions 731 (1992) or 748 (1992), have expressed their deep conviction that it is necessary to allow the Court to perform its task and, in fact, they are expecting the Court to lay down international legality.” Ibid. at 44. Emphasis in original.

276 Ibid. at 45.
277 Ibid.
278 “In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.” Article 24(2) UN Charter.
279 Lockerbie, supra note 259 at 45.
280 Ibid.
should draw inspiration from other principles of a political or other nature.\textsuperscript{281} However, is not the essential point of concern the fact that the Council is bound to respect "the principles of international law", an expression that holds a more precise meaning for international lawyers?\textsuperscript{282}

Applying the reasoning in the Bedjaoui dissent in \textit{Lockerbie} to the prosecution of the crime of aggression raises interesting questions. Assuming the delegates have decided that no special conditions were necessary for the ICC to exercise its jurisdiction over the crime, let us imagine the case where a matter involving an alleged aggression has been brought before the Court. Let us also imagine that the Security Council has been considering the matter for a number of weeks pursuant to its duty to maintain international peace and security. Each body has its own jurisdiction: the Council addresses subject matter that may threaten the peace and has the authority to take decisions to restore or maintain the peace under Chapter VII; the ICC has the jurisdiction to investigate and prosecute an individual for the alleged crime of aggression.

If the Security Council is sufficiently interested in a matter that it determines an act of aggression has taken place and adopts the necessary emergency measures to deal with the situation under Chapter VII, and the matter stops there, there is no overlap with the ICC jurisdiction over the crime of aggression. If, however, for political or maintenance of peace reasons the Council deemed a criminal investigation or prosecution undesirable then, as we saw in \textit{Lockerbie}, the Council would then intervene. To this end the Council would request a suspension or deferral pursuant to Article 16 of the Rome Statute. In this scenario, the only way there could be \textit{contradictory findings} is if the ICC found an individual innocent of a particular crime of aggression. Such a decision may, or may not be related to the fact that an aggression occurred. In this sense, we can see how the using the term "contradictory findings" can be misleading. What a decision of the Court does is

\textsuperscript{281} Ibid. at 45-6.
\textsuperscript{282} Ibid.
notionally independent of a decision reached by the Council on a possible aggression. If the Court finds that no aggression occurred, after a Council resolution to this effect, it may or may not relate to any “findings” by the Council. Indeed, the process of the Council’s consideration of a particular matter will be very different from that of the ICC. If the Council determines that an aggression occurred, then the independence of the Court requires that it exercise its own discretion based on all the facts available. And if the Court subsequently finds that an individual has not committed the crime of aggression, this does not mean that its decision contradicts the SC resolution. The two decisions will not be “contradictory” for two reasons: each entity will have a different set of facts before it and the processes by which each will reach a decision will be fundamentally different.

The existing collective security system that permits the Council to refer and defer matters of aggression works, and there is no need for additional conditions. Under the current rules, proceedings will only come to an effective halt if all permanent members on the Council are not in disagreement. The general rule is let the Court take care of its own business, and exceptionally, when all P-5\textsuperscript{283} members determine proceedings are in agreement they will invoke Article 16. A contrario, if the Article 39 determination theory prevails because national interests of P-5 members dominate, the general rule becomes: unless all P-5 members agree to, or do not veto, a resolution stating that an aggression occurred, the ICC will not exercise jurisdiction over the crime of aggression. Under the latter formula, if a P-5 member or one of its friends is involved in the aggression, the matter will not go before the ICC. Under existing rules, if a P-5 member is involved in an aggression then, theoretically, the Court may proceed with an investigation provided, inter alia, rationae personae jurisdiction is established and the state of which the accused is a national is either unable or unwilling to prosecute the individual for the crime of

\textsuperscript{283} “P-5” means the five permanent members of the Security Council: China, Russian, United States, Great Britain, and France.
aggression.\textsuperscript{284} Under this system, although the P-5 member has less control over the net outcome, the chances are greater that cases of flagrant aggression will be brought to the ICC. If the fortunate five are vested with yet more power over the Court, because it will be they who ultimately decide who gets punished and who does not, then it is futile to go through the process of reaching a consensus on the definition of the crime of aggression.

3.3.2 Joint Conference Panel Discussion on the Legality of UN Resolutions

In 1993, a panel discussion co-sponsored by the American Society of International Law and the Nederlandse Verinniging Voor Internationaal Recht entitled “UN Checks and Balances: The Roles of the ICJ and the Security Council” highlighted several important features of the relationship between the two entities.\textsuperscript{285} Discussions ranged from the legality of certain UN resolutions to whether the ICJ can function as a “review body” for Council decisions, and vice versa. The group discussion on the \textit{Lockerbie} case was particularly interesting, yet there was not a single reference to the Bedjaoui dissenting opinion.\textsuperscript{286}

Oscar Schacter opened the discussion citing complaints that the Security Council pays no attention to international law, and that many UN members believe the Council is in breach of a central Charter requirement, i.e. that Council members are supposed to act \textit{on behalf of} UN members.\textsuperscript{287} Instead, it is widely held that Council members are seen as doing whatever they believe is in their own countries'.

\textsuperscript{284} Articles 12 and 13, Rome Statute.
\textsuperscript{286} See subsection 3.3.1 above, generally.
\textsuperscript{287} Schacter points to the \textit{Iraq-Kuwait Boundary}, and the \textit{Lockerbie Extradition} cases. Joint Conference, \textit{supra} note 285 at 280.
interests. To a large extent the discussion focused on “competing jurisdictional spheres” and the fact that this is nothing new. The “simultaneous seizing of the Court and the Security Council of related but distinct aspects of the same dispute has played a role in a number of cases with which both organs have had to deal” including Hostages (Tehran), Nicaragua and Lockerbie. Arguably, the crime of aggression is such a situation, where the matters before the ICC and the Council are “related but distinct”.

Gill suggested that the relationship between the ICJ and the Council is one of equals: that is, each body has exclusive jurisdiction as to its own jurisdiction, and the authority to determine the scope of its own competence. The fact that a matter is before both the Court and the Council does not bar one entity from exercising its jurisdiction. He added, however, that the Council is not “precluded from or limited in taking any action which it determines to be necessary for the maintenance or restoration of international peace and security under Chapter VII of the UN Charter.” On its face, this last statement more or less backtracks from the original comment that the two entities are equals. Moreover, it is not certain whether Gill would favour a Security Council request to suspend or defer proceedings before the ICJ. He might suggest that the Council should be free to make such a request, provided this was necessary to maintain international peace and security. This calls into question, however, whether the two entities are indeed operating from a level playing field? Gill is unable to imagine how the Council can “set itself up as a sort of review board for the Court.”

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288 Ibid. at 284. Emphasis added.
289 This is on the basis of both the UN Charter and the Court’s Statute. “Consequently, neither the Court nor the Council has the authority to determine that the decisions or actions of the other are ultra vires or “unconstitutional”. Both organs are under a duty in the exercise of their respective functions to respect the authority, integrity and competence of the other and can in no way serve as a court of appeal or supervisory body with regard to the actions or decisions of the other organ.” Ibid.
290 Ibid. at 285.
291 This is an interesting point for our analysis in that the relationship between the ICJ and the Council can be distinguished from that between the Council and the ICC. In the case of the latter, the Council can request a deferral pursuant to Article 16 of the Rome Statute. The ICC could not “refuse” a request pursuant to Article 16 of the Rome Statute.
292 Joint Conference, supra note 285 at 291.
It is not to say that the Council is not interested in international law, but I do not think it could get into that depth of technicality. If, for instance, in a border delimitation case, the Court decided in favour of party A versus party B, and party B did not get off the territory which the Court said belonged to party A, and there was an attempt to enforce it, I think the question of whether the Council would act would depend on the political aspects whether there is support enough to take action under Chapter VI or perhaps even Chapter VII because Article 94 does not say one or the other.293

This remark recognizes the appropriate role of an international court to decide matters such as border disputes.294 It is hard to imagine, however, how the politically-charged Security Council is in a better position to make such weighty determinations, in particular, when it is acting in emergency situations under Chapter VII.

The Council has primary responsibility for the maintenance of international peace and security, and while the ICJ is not precluded from dealing with a dispute which falls within its jurisdiction by the fact that the Security Council is seized of the matter (or a related matter), Gill maintains that it may not take any action which would hinder or impede the Council in the exercise of its authority under Chapter VII of the UN Charter.295 This is a direct throwback to Lockerbie and, although Gill does not specifically refer to this decision, his remarks are telling.

Consequently, the Court has no power to indicate provisional measures which could frustrate the Council from taking enforcement action on the basis of a determination by the latter organ that a threat to the peace existed or a breach of the peace or act of aggression had occurred, even if such action had a bearing upon, or was directly related to the rights of a state which was the subject matter of a dispute before the Court. This would not, however, preclude the Court from taking interim measures directed towards

293 Ibid. Article 94 of the UN Charter reads: "94(1) Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a part. (2) If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

294 Some authors argue the contrary suggesting that the ICC is "ill-equipped" or simply not possess the "ability" required to handle such technical matters. See Ratner and Abrams, supra note 40 and accompanying text.

295 Joint Conference, supra note 285 at 285.
preventing an aggravation of the dispute or determining the respective rights of the parties to a dispute – provided that this in no way frustrated or impeded the Council in the exercise of its functions and responsibilities.\textsuperscript{296}

By stating that the Court cannot frustrate the Council from “doing its job” Gill is suggesting that the Council benefits from a position of “authority” over the Court, at least in terms of collective security matters.\textsuperscript{297} This is not to say that the Security Council’s authority is unlimited.\textsuperscript{298}

The Council is bound in the exercise of its authority by the purposes and principles of the UN, by pre-emptive norms (sic) of international law including, especially but not exclusively, respect for humanitarian and human rights norms and by what the members of the Security Council and the Organization as a whole are prepared to accept in political and policy terms.\textsuperscript{299}

These remarks are pertinent to our analysis regarding the crime of aggression. “Concurrent jurisdiction” seems to be at the heart of the “contradictory findings” analysis. Let us examine the two jurisdictions. First, the “act of aggression” under Article 39 exists alongside two other vague concepts: “threat to the peace” and the “breach of the peace”. All three relate to international collective security, and constitute triggers for the Security Council to exercise its authority under Chapter VII. Aggression, therefore, is not \textit{sui generis} or a \textit{cas d’espèce}. All three terms were left undefined by the framers of the UN Charter. The second jurisdiction is that of the crime of aggression under the ICC. This subject-matter involves a crime, not the “act” found under Article 39. There is concurrent jurisdiction between the Council and the Court insofar as the Court will be examining a particular event, or series of events, to determine whether it merits a charge of the crime of aggression. The Court is not looking to hold a state or organized collectivity liable for the aggression, nor can the Council convict individuals for the crime of aggression.

\textsuperscript{296} Ibid. Gill is referring to the official decision in Lockerbie, and not the dissenting opinion by Justice Bedjaoui – who asserts that the Court will not interfere with a “solution” of the Council or any of its aspects. Emphasis added.

\textsuperscript{297} On its face, this seems to support the official holding in Lockerbie.

\textsuperscript{298} Joint Conference, \textit{supra} note 285 at 286

\textsuperscript{299} Ibid. “Pre-emptive” should read “peremptory”. See Bedjaoui dissent, generally.
Acknowledging the perception that the Council in *Lockerbie* “overruled” the Court by obliging Libya to surrender its two nationals, or interfered with the Court’s prerogatives and judicial function, Gill does not agree that this is what happened.\(^{300}\)

He rejects this view on the basis that had the Court decided that Libya was not obliged to turn over the suspects, “this would in no way have precluded the Council from taking the measures that it did in Resolution 748 on the basis of its assessment that Libya’s actions and policies constituted a threat to international peace”.\(^{301}\)

But Libya was seeking recourse by applying for provisional measures in the form of injunctive relief—not an advisory opinion, and the Court’s decision is not normally subject to a Council “overruling”. While one might easily suggest that, in theory, the Council can do as it pleases, one may encounter some difficulty to make this assertion in the face of a *legally-binding* ICJ decision *ordering* the US and the UK not to petition the Security Council for a resolution forcing Libya to hand over the suspects. Perhaps not all P-5 members would have been supportive of such a move.

Duursma, questioned whether *Lockerbie* constituted “good case law” and noted the desirability of reviewing Security Council resolutions.\(^{302}\)

Judge Oda said that the right not to extradite a national is not only a right under the Montreal Convention but also a rule of customary international law. Thus, the Security Council Resolution could have been contested on that point. However, the Court was very hesitant in examining the legality. I wonder whether this is a good development of the Court’s case law.\(^{303}\)

Ginther suggests that the Council has no “sovereign powers” and must therefore legitimize the use of its powers: “[i]n the case of aggression, it is obvious, e.g. the invasion of South Korea by North Korea. (…)”\(^{304}\) He wonders whether the decision

\(^{300}\) Joint Conference, *supra* note 285 at 286.

\(^{301}\) *Ibid.* In other words, regardless of what the Court had to decide, the Council would still have been free to “overrule” the Court with a Chapter VII resolution demanding the extradition of the two Libyan nationals.

\(^{302}\) Joint Conference, *supra* note 285 at 293.

\(^{303}\) *Ibid.*

\(^{304}\) *Ibid.* at 297.
in *Lockerbie* belied the even bigger issue of individual criminal responsibility, as it was rendered the same year the ICTY was established.\(^{305}\)

Whatever the constraints the Council believes actually exist on its authority, "[i]n extreme cases, the Court may have to be the last resort defender of the system’s legitimacy if the UN is to continue to enjoy adherence of its members".\(^{306}\) Schrijver is aware of the criticism of how the Council functions, particularly in relation to issues such as “double standards” and the lack of legitimacy referred to above.\(^{307}\) The Council, being a highly political organ, is bound to get its hands dirty yet, he cautions, judicial review of Security Council decisions is more appealing than feasible.\(^{308}\)

With regard to the matter of aggression, it is unlikely one entity will have occasion to “review” a decision of the other. Article 16 specifically avoids this type of situation. Any further constraints on the Court will translate into greater power for each individual veto-holding member of the Security Council. The Council does not and cannot decide the legal merits the crime of aggression. Should the Council come to believe that an eventual finding of guilt of an individual is likely to lead to a de-stabilization of international peace and security, then it may under existing rules defer or suspend proceedings. If Article 16 doesn’t go far enough for some P-5 members, then perhaps it is a good thing that some have yet to sign onto, or ratify, the Rome Statute.\(^{309}\) A window of opportunity has presented itself to craft a proper definition that does not include any additional conditions for the Court’s exercise of jurisdiction of the crime of aggression.

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\(^{305}\) *Ibid.* “It could be seen as support for the introduction of individual responsibility in international law. What in effect the Court’s decision amounted to was that the procedure to try persons individually on the suspicion of state terrorism should be sped up, and that a practice which might obstruct or put more obstacles in order to let this principle materialize, should be cut. In putting the whole set of facts and arguments in the broader context of promoting the concept of crimes against peace and humanity, the Court somehow accepted a kind of provisional function of the Security Council in order to bring war criminals to trial at a moment when a more permanent system of international criminal justice is still lacking.”

\(^{306}\) Nico Schrijver quotes Thomas Franck (1992) 86 *AJIL* 523.


\(^{308}\) *Ibid.*

\(^{309}\) China, Russia and the United States.
3.4 The Crime of Aggression is Not Unique

The "close and complex relationship" between the ICC and the Security Council Lehto describes portrays the inevitable link as a divider rather than a connector. Divider discourse strands often lead to dead end concepts such as the notion of aggression as a "unique" or "state" crime; the concern for conflicting "findings" by the ICC and the SC; and the requirement of a Council determination that an act of aggression occurred before the ICC exercises jurisdiction. These contentions are based on what are arguably false dichotomies: aggression vs. other crimes; state vs. individual; act of aggression vs. crime of aggression; Security Council vs. ICC; the political realm vs. the judicial realm.

Take, for example, the assertion that the crime of aggression is different from all the other crimes. Not only does this state the obvious, it ignores the fact that each crime is different from the other (with the possible exception of genocide and crimes against humanity which are similar in nature). After all, the four international crimes need to be different otherwise there would be no need to include them under the Rome Statute.

If there is one crime that is especially different from the remaining three, it would have to be "war crimes". War crimes can be conceived of and carried out by the individual soldier. Although the state is responsible for the soldier being where he or she is in a context of armed hostilities, the war crime is not necessarily sanctioned by the soldier’s state. The same cannot be said about genocide, crimes against humanity and the crime of aggression. In the case of these three crimes, at the heart of the crime is a state (or non-state entity) policy to either engage in a particularly grave illegal use of force against another state or against one’s own people. The policy is state (or collectivity) driven; the crime is driven and carried

310 "The Conference may, if it so wishes, opt for an express exclusion and decide that a prior determination of the Security Council of an act of aggression is always a prerequisite for the Court to deal with a complaint related to a crime of aggression. (...) I will mention only one such reason, namely the close and complex relationship between the two institutions." Marja Lehto, supra note 208 at149.
out by individuals. Nevertheless, there are still those who argue that aggression is not committed by individuals.

Aggression has particular features which distinguish it from the other crimes under the Statute. It is not a crime committed by individuals. It is an unlawful act which could only be committed by a collectivity. Therefore aggression per se cannot be entertained directly by the ICC as it does not pertain rationae personae to individuals who come under its jurisdiction.

This reasoning is flawed. First, it reflects a misconception of “state crimes” ignoring the reality that individuals act as agents of the state. Second, it fails to specifically tie the state crime feature to the crime of aggression alone and the argument remains that if aggression is an unlawful act or crime “committed by a collectivity”, so are genocide and crimes against humanity. True, the “unlawful” or “wrongful” act (delict) can be attributable to a state and give rise to state responsibility. However, the crime of aggression, just as the crime of genocide and crimes against humanity, is committed by individuals and therefore the ICC does have jurisdiction over this crime. So long as the mantra that aggression is unique goes unchallenged, aggression will remain in the eyes of some the enigma, or paradox.

Characterizing the crime of aggression as a “state crime” as such is not problematic provided we recognize that individual criminal liability attaches, and we include “organized collectivities” or “non-state actors” in our concept of state. To argue that this is what distinguishes aggression from the other crimes, however, is specious. The other crimes also require state, quasi-state or military infrastructure as well as organisational capability. Genocide, crimes

311 While acknowledging that individuals are behind the crime of aggression, Schuster asserts that aggression has “traditionally expressed itself in actions undertaken by the State against another State”. Schuster, supra note 4 at 15. It is unclear however whether he makes his point to suggest that aggression does not normally happen between “individuals and states” or between “states and their own people”. Muller-Schieke goes further still, suggesting that aggression is “inherently a state crime”. Irena Kaye Muller-Schieke, “Defining the Crime of Aggression Under the Statute of the International Criminal Court” (2001) 14 LJIL 409 at 410.

312 Gomaa, supra note 220 at 58.

313 See discussion on rationae personae under Section 4.5 below.
against humanity, even “war crimes” require at least the initial involvement of
the state, quasi-state or paramilitary forces.

As Robinson correctly points out, aggression possesses involves issues not
associated with the other core crimes: the prohibition on the use of force, the
notion of self-defence, humanitarian intervention questions. However, these
features are not sufficient to place aggression in a class by itself. Certainly, not
to the extent where it warrants the imposition of special conditions on the
Court’s exercise of jurisdiction over it.

3.5 The Role of the Security Council

Before applying the principles raised in the foregoing discussions to the relationship
between the ICC and Security Council over matters of aggression, we must first
establish the nature of the legal relationship between the two bodies. The Security
Council was created under Chapters III and V of the United Nations Charter as the
organ authorized to take decisions and measures for the purposes of establishing or
maintaining international peace and security. For its part, the International Criminal
Court was established under Article 1 of the Rome Statute. Article 2 of the
Statute provides that “[t]he Court shall be brought into relationship with the United
Nations through an agreement to be approved by the Assembly of States Parties to
this Statute and thereafter concluded by the President of the Court on its behalf.”

In September 2004 the Draft Relationship Agreement between the International
Criminal Court and the United Nations was adopted at the Third Annual Assembly

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314 See note 192 supra and accompanying text.
315 “An International Criminal Court (“the Court”) is hereby established. It shall be a permanent
institution and shall have the power to exercise its jurisdiction over persons for the most serious
crimes of international concern, as referred to in this Statute, and shall be complementary to national
criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the
provisions of this Statute.” Rome Statute, Article 1.
316 Article 2, Rome Statute.
of States Parties (hereinafter the “Agreement”). The Agreement provides in its preamble, “the International Criminal Court is established as an independent permanent institution in relationship with the United Nations system” and more specifically,

Noting the responsibilities of the Secretary-General of the United Nations under the provisions of the Rome Statute of the International Criminal Court,

Desiring to make provision for a mutually beneficial relationship whereby the discharge of respective responsibilities of the United Nations and the International Criminal Court may be facilitated, (…)318

Articles 2 and 3 of the Rome Statute contain the provisions under which the two bodies agree to be governed. Article 17 of the Draft Relationship Agreement, entitled, “Cooperation between the Security Council of the United Nations and the Court” contains three ways in which the Council can become involved in the affairs of the ICC:

1. The Council can refer a matter to the Court pursuant to Article 13 b) of the Rome Statute;
2. The Council can request the Court not to commence or proceed with an investigation or prosecution, in accordance with the Statute’s Article 16; and
3) The Court makes a finding pursuant to Article 87, paragraph 5 (b) or paragraph 7 of the Rome Statute.320

318 Ibid. Preamble, paras. 8-9.
319 Ibid. “Principles: 1) The United Nations recognizes the Court as an independent permanent judicial institution which, in accordance with articles 1 and 4 of the Statute, has international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.” Article 2, Rome Statute. “Obligation of cooperation and coordination: The United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute.” Article 3, Rome Statute.
320 Article 17, Rome Statute.
Article 18 of the Draft Agreement, “Cooperation between the United Nations and the Prosecutor”, specifically provides that “[w]ith due regard to its responsibilities and competence under the Charter of the United Nations and subject to its rules, the United Nations undertakes to cooperate with the Prosecutor and to enter with the Prosecutor into such arrangements or, as appropriate, agreements as may be necessary to facilitate such cooperation, in particular when the Prosecutor exercises, under article 54 of the Statute, his or her duties and powers with respect to investigation and seeks the cooperation of the United Nations in accordance with that article.”

Read together, the provisions in the UN Charter, the Rome Statute and the Draft Agreement do not lend themselves to the interpretation that there is a fundamental and constitutive “inequality” between the United Nations and the ICC, nor between the UN Security Council and the ICC. We must therefore look to provisions within the Rome Statute for a more detailed description of the relationship between these two bodies: namely, Articles 13 b) and 16. In deference to the primary jurisdiction the ICC exercises over all its crimes, any such request would need to be characterized as a measure taken within the context of collective security (i.e. under Chapter VII).

Article 5(2) of the Rome Statute provides that the definition of aggression and the conditions of the Court’s exercise of jurisdiction shall be consistent with the relevant provisions of the Charter. Articles 13(b) and 16 are a “built-in mechanism” to take the ICC off or to put it on a particular file. Lockerbie demonstrated what can happen when such a mechanism did not exist. An Article 16 provision would have created the “loophole” for the Council to request that the ICJ to suspend proceedings.

321 Article 18(1) Rome Statute.
As potentially obtrusive as Article 16 is, it has one saving grace; the beauty of this provision is that it is “reversible”, in that it is “renewable”. If situations truly threaten international peace and security, the Council can adopt strong measures. Twelve months hence, however, circumstances may have changed and the decision to defer will be up for review and require, once again, Council agreement. As Condorelli notes, “Il est alors parfaitement logique d’imaginer un système dans lequel, indépendamment de toute intervention du Conseil de sécurité et sans que soient d’aucune façon contredits les principes fondamentaux de la Charte, ces Etats joueraient de la possibilité de saisir la Cour en lui soumettant eux-mêmes la situation les concernant, dans laquelle un ou plusieurs crimes individuels d’agression paraissent avoir été commis.” 322

The decision of whether any matter involving aggression should be investigated by the International Criminal Court should not left to the national interests of one of the five permanent members.

The nature and character of the processes involved at the Security Council militate against the notions of fairness and justice required by any tribunal worthy of respect. 323 To inject such a highly politicized process in the independent judicial proceedings of the Court would contaminate the Court with political considerations and the interests of the Security Council members. 324 Since its permanent members dominate the Council, the political interests of these members will also dominate the Court if the Council is allowed to interfere in its processes, and the Court’s independence and fairness would be in grave jeopardy. 325

The crime of aggression is not unique and there are no more jurisdictional issues between the ICC and the SC than there are between the SC and the ICJ. There is no need for the conditions that are specified in Article 5(2) of the Rome Statute,

322 Condorelli, supra note 188 at 160.
324 Ibid.
325 Ibid.
especially an absolute power over the crime of aggression vested with each one of the P-5 members. There is no *prima facie* justification for treating this crime differently from the other three categories of crimes.

If special conditions usurping the jurisdiction of the ICC over the crime of aggression are adopted, the ICC will become a politically-tainted entity. It is incumbent upon states now, to ensure that the Court’s jurisdiction over the crime of aggression not be subject to political influence in its jurisdiction over the crime of aggression. Articles 13 b) and 16 of the Rome Statute already render the Court subject to the Council’s political control *for matters related to its duty to maintain international peace and security*. This “collective security regime” is more than sufficient to deal with volatile situations. If it is essential that “conditions” under which the Court shall exercise its jurisdiction over the crime of aggression be established, then the relevant provision should read as follows:

> The conditions under which the Court shall exercise its jurisdiction over the crime of aggression are, *mutatis mutandis*, those that apply to the Court’s exercise of jurisdiction over the other three categories of crimes; namely those provided for in Articles 12, 13 and 16 of the Rome Statute.

A working relationship between the ICC and the Council is feasible under the existing provisions of the Rome Statute. As Bergsmo observes,

> It is a matter of considerable importance that one aspires to address such future tensions on the basis of fundamental premises and in the proper forum recognized by the ICC Statute. The Security Council’s pre-eminent role in the maintenance of international peace and security is fully recognized by the ICC Statute. The Council is the forum in which the essential dictates of the making, enforcement and keeping of international peace and security must be measured against the requirements of international criminal justice. The UN Charter and the ICC Statute both point in the same direction. It would serve the objects and purposes of neither the Charter nor the Statute to prevent a natural and dynamic relationship between the Security Council and the ICC from evolving, on the grounds that the jurisdictional regime of the Court is not entirely as one had wished.\(^{326}\)

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Chapter 4: General Scope of the Crime of Aggression

The core concepts of aggression and the crime of aggression are essentially one and the same, and if they are not then they are closely intertwined. Similar to the concept of national self-defence, aggression requires a dual level of analysis which confounds the simple attempt to model the rights of states or other collective entities on the rights of persons. Our analysis of the scope of the crime of aggression begins with a review of the general prohibition on state use of force to establish the parameters of what constitutes an unlawful use of force. As it is then necessary to identify the recognized exceptions to this prohibition, we will examine the concepts of national self-defence and Chapter VII collective use of force. In the context of this analysis we will review the “hard cases” of so-called “humanitarian intervention” (or, responsibility to protect) and the more nebulous anticipatory self-defence. If a case of unlawful use of force is not justified on the basis of an established exclusion it remains, under international law, an unlawful use of force that may constitute aggression.

It is the nature, not the degree of gravity, which determines whether a particular unlawful use of force constitutes aggression. Theoretically, therefore, all unlawful use of force is aggression of one form or another – to some degree or another. Conceiving of varying degrees of aggression enables us to move the discourse from the traditional “either / or” debate to a more inclusive and flexible process to define aggression. To define aggression, we must identify its nature and characteristic feature(s). At its essence, aggression is the unlawful use of force that gives rise to a

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327 The same can be said for assault; we can conceive of assault as a delict or tort, or as a crime. The facts giving rise to one characterization over the other are the same and therefore it serves no useful purpose to keep the two separate in the effort to define them. Notionally, the act and the crime are the same.

328 David Rodin, War & Self-Defence (Oxford: Oxford University Press, 2002) at 6. The author’s comment pertains to self-defence; the reference to aggression has been added.

329 This is not as far-fetched as it may sound. We know that simply touching a person without their consent constitutes an assault. Whether it constitutes the crime of assault or whether a Crown Attorney would take the time to prosecute an individual in this case is an entirely separate matter. The de minimus principle also addresses the “degree of gravity” factor. Similarly, there can exist different degrees or forms of aggression.
breach of the peace. Article 39 of the UN Charter is instructive as it establishes the continuum of situations ranging from threats to the peace to acts of aggression that may trigger an international response. The “act of aggression” on this continuum necessarily constitutes a breach of the peace, just as every breach of the peace constitutes, at a minimum, a threat to the peace.

Proceeding on the basis that aggression can exist in varying degrees (and forms) and that it must result in a breach of the peace, it becomes possible to conceptualize the crime of aggression as a sufficiently grave unlawful use of force that breaches the peace. As is the case with assault, not every act of aggression will be or needs to be prosecuted as a crime of aggression and consequently, the distinction between the act and crime of aggression becomes less important.

The first section will examine the prohibition on the use of force under the law of the Charter. This will be followed by a review of established exceptions to the prohibition on the use of force and intervention, namely, Security Council mandates authorizing the use of force pursuant to Article 39 and 42 (i.e. Chapter VII use of force) and individual or collective self-defence under Article 51 of the Charter. This section will also examine recent developments in the area of “humanitarian intervention” that reflect the international community’s growing willingness to authorize (via the UN Security Council) the collective use of force in situations of grave humanitarian crises. Section 3 presents a fairly thorough analysis of anticipatory self-defence, concentrating on both pre and post-Charter formulations of the purported exception to the prohibition on the use of force.

Section 4 reviews the two major categories of defences to crimes (excuses and justifications) and analyses the consequences of each in the context of the crime of aggression. This is followed by a discussion on the rationae personae jurisdiction of the ICC in regard to the crime of aggression. The last section on the definitional parameters draws together the principal conclusions reached throughout the chapter.
4.1 The Prohibition on the Use of Force

Based on the law of the UN Charter, the prohibition on the use of force is a general norm prohibiting states from using military (or other) force against each other. For the purposes of establishing the general parameters of the crime of aggression, this prohibition should be seen as applying to states and other collective entities.

Article 2(4) prohibits the threat or use of force in any manner “inconsistent with the Purposes of the United Nations”. The first Purpose under Article 1(1) includes the “suppression of acts of aggression or other breaches of the peace”. Thus Articles 2(4) and 1(1) establish a category of breaches of the peace that, in part, consists of aggression. In addition, Article 39 of the Charter lists three triggers that potentially give rise to Security Council decisions or collective action, in order of increasing gravity: threat to the peace, breach of the peace and act of aggression.

While aggression, per se, is not mentioned under 2(4) it is therefore implicit in the provision in that it is constitutive of the prohibited force. The concept of aggression therefore is necessarily dependent on the scope of 2(4). The prohibition on the use of force extends to such uses as are inconsistent with the Purposes of the United Nations and, theoretically at least, indirect and non-military uses of force. Query whether aggression requires any use of armed force at all, be it direct or indirect. Since the United Nations came into existence states have increasingly resorted to “indirect force”. While they initially showed an ostensibly willingness

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330 The four Purposes of the United Nations under Article: “1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace; 2. To develop friendly relations […]; 3. To achieve international co-operation in solving international problems […] and in promoting and encouraging respect for human rights and for fundamental freedoms […]; and 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.” Article 1, UN Charter.

331 Belatchew Asrat, Prohibition of Force Under the UN Charter; A study of Article 2(4) (Stockholm, Almqvist & Wiksell, 1991) at 104.

332 Carroll Carpenter, supra note 77 at 229. “Indirect aggression refers to State actions that support or control rebels in another State. It is a notion similar to agency theory and has been described as ‘intervention in the internal affairs of a state’…” Ibid. at 230.

333 Ibid.
to abide by the rule against the use of force in the formal sense (i.e. "against the territorial integrity or political independence of any state") they had a completely different attitude in the course of their actual dealings with one another. States began seeking out other methods of covert pressure in order to pursue their national policies without direct armed confrontation.

Based on the law of the Charter the prohibition on the use of force applies to the threat of force, as well as a) armed and unarmed coercion used against the territorial integrity or political independence of a state or in a manner inconsistent with the purposes of the United Nations; and b) indirect uses of force against the territorial integrity or political independence of a state or in a manner inconsistent with the purposes of the United Nations.

In *Corfu Channel* the International Court of Justice considered, *inter alia*, the legality of the November 1946 passage of U.K. warships in Albania’s territorial waters. The United Kingdom argued that it was applying a new and special theory of intervention, and subsidiarily, that it was engaging in a form of self-protection. Dismissing the U.K.’s second argument the Court found that “[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations.” Although it recognized the failure by Albania to fulfill its international duties, the ICJ declared that subsequent actions taken by the British

334 *Rifat*, *supra* note 7 at 217.
335 "The incompatibility of the classical external armed aggression with the present rules regulating international relations, led to the development of other methods of covert or indirect aggression. These methods include, *inter alia*, economic, diplomatic and ideological pressure. Other more dangerous modes of indirect aggression are subversion, fomenting of civil strife, aiding armed bands or the sending of irregulars to assist rebel groups in the target State. These acts are usually conducted by the strong and powerful nations against the weaker, newly independent and developing States. The covert indirect aggression, by the fomentation of civil strife is vitally concerned with destroying the target State’s political independence and gaining control over its resources by the help of the newly brought into power ‘puppet’, ‘affiliated’ or ‘dictator’ government." *Ibid.*
336 The last category of indirect force may include “unarmed” indirect force as well, although no examples have been discussed by the authors reviewed. Perhaps this is because the concept of unarmed coercion itself includes both “direct” and “indirect” forms.
337 *Assessment of the amount of compensation due from the People’s Republic of Albania to the United Kingdom of Great Britain and Northern Ireland* (*Corfu Channel*) ICJ Reports 15 December 1949.
Navy nevertheless “constituted a violation of Albanian sovereignty.” Since the Charter’s inception the UN General Assembly has acted formally, adopting numerous resolutions and declarations, to tighten the prohibitions of Article 2(4), essentially, reminding states of their international duties and obligations.

4.2 Established Exceptions to the Prohibition on the Use of Force

While Article 2(4) of the Charter appears to introduce its own opportunities for interpretation, states have only rarely chosen to exploit them electing instead to “quantify their actions in terms of exceptions to the rule under international law.” The qualification of justifications for the use of force as exceptions reflects a tendency on the part of states to use international law to legitimize their actions - even if they happen to be in flagrant violation of the widely accepted rules. In Nicaragua the ICJ held that so qualifying one’s actions further validates the norm.

If a State acts in a way prima facie incompatible with a recognized rule but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact

340 Louis Henkin, International Law: Politics and Values (Dordrecht, Martinus Nijhoff Publishers, 1995) at 116. Examples of resolutions and declarations include, inter alia, Essentials of peace (UNGA resolution 290 (IV) 1 December 1949, 261st plenary meeting); Uniting for Peace (resolution 377(V) adopted 3 November 1950 at the 302nd plenary meeting); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (General Assembly resolution 2131 (XX) adopted on 21 December 1965); Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States (General Assembly resolution 2625 (XXV) 24 October 1970, 18839 plenary meeting).
341 “There has thus been a major change of circumstances - in terms of the formulation of the rule itself but also in terms of contemporary political attitudes - which has impacted upon the working of this rule. We know this because when states have attempted to pick apart the composite elements of the rule - an endeavour surely designed to thwart the intended impact of this rule - they have not met with even a modicum of success. Kritsiotis, supra note 339 at 58.
342 See Kritsiotis, supra note 339, generally, for an esoteric discussion on how law and politics commingle and the role the former plays in foreign policy.
justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.\textsuperscript{343}

Jessup reviewed self-defence, defence of national lives and property, intervention, and retaliation or reprisals in the context of traditional practices of forceful action as listed in treatises on international law.\textsuperscript{344} While the use of force by a state in defence of national lives and property found on the territory of another state may, in theory, escape the first and second provisions of Article 2(4),\textsuperscript{345} it is inconsistent with the Purposes of the United Nations.\textsuperscript{346} The first Purpose of the United Nations is to “maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression ....”\textsuperscript{347} Landing one’s armed forces in another state is a “breach of the peace” or “threat to the peace” even though it was considered lawful under traditional international law.\textsuperscript{348} It was a measure of forcible self-help permitted by international law because there was no international organization competent to act in an emergency.\textsuperscript{349}

Jessup also reviewed situations of state intervention and retaliation as a means of vindication for past wrongs.\textsuperscript{350} His examples are taken from various regions of the world, with a focus on the Republics of the Caribbean area.\textsuperscript{351} Only collective intervention is contemplated under Article 2(6) of the Charter relative to ensuring

\textsuperscript{343} *Nicaragua supra* note 152 at p. 98.


\textsuperscript{345} “...against the territorial integrity or political independence of any state...” Article 2(4), UN Charter.

\textsuperscript{346} Jessup, *supra* note 344 at 169.

\textsuperscript{347} Article 1(1), UN Charter.

\textsuperscript{348} Jessup, *supra* note 344 at 169.

\textsuperscript{349} “The organizational defect has now been at least partially remedied through the adoption of the Charter, and a modernized law of nations should insist that the collective measures envisaged by Article 1 of the Charter shall supplant the individual measures approved by traditional international law.” *Ibid.* at 169-170.

\textsuperscript{350} Because powerful states can impair the political independence of a weaker state without the use of military force, intervention need not involve the use of armed force. *Ibid.* at 172.

\textsuperscript{351} In 1948, Jessup writes: the history of American and Caribbean relations is “fortunately now ancient history (…) Because interventions have played so vivid a part in inter-American relations, the movement to secure agreement by treaty on the illegality of intervention gathered momentum in the Inter-American Conferences.” *Ibid.* at 172-174. History has a tendency of repeating itself.
the compliance of non-Members in the interest of international peace and security.\textsuperscript{352}

Traditional international law recognized a state’s right to reprisals or retaliation to vindicate the rights infringed by another state.\textsuperscript{353} This right however no longer exists under the Charter system. If it is a Member of the United Nations, an aggrieved state is under a duty to refer its case to the Security Council and not to take forceful action on its own behalf.\textsuperscript{354}

The two Charter exceptions to the prohibition on the use of force are: 1) UN Security Council use of force mandates pursuant to Articles 39 and 42; and, 2) the temporary unilateral or collective use of force in self-defence under Article 51. “Humanitarian intervention” will be looked at following our review of UN use of force mandates. Anticipatory self-defence, for its part, is not an established exception and involves a number of complex issues that merit a separate section all their own.

4.2.1 \textit{Chapter VII} Use of Force

Security Council resolutions pursuant to Article 42 under Chapter VII of the Charter authorizing the use of force constitute a valid exception to the general prohibition on the use of force. Prior to taking such decisions the Council must first meet the first formal requirement and establish that measures provided for under Article 41 “would prove inadequate or have proved inadequate”.

\textsuperscript{352} Article 2(6) UN Charter: “The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.” He goes on, “the conclusion may be stated that the acceptance of the hypothesis of community interest contemplates the admission of the right of the organized international community to intervene in the general interest.” \textit{Ibid.}, at 174.

\textsuperscript{353} \textit{Ibid.}

\textsuperscript{354} \textit{Ibid.} at 175.
The first substantive limitation imposed on such Security Council decisions to use force is that they must conform to the purposes and principles of the United Nations. The second constraint on Security Council discretion is the category of peremptory international legal norms, or *jus cogens*. Where the execution of an obligation under the Charter such as a binding Security Council decision would violate *jus cogens*, member states are relieved from giving effect to the obligation in question. Given that the Charter is a treaty, it is only logical that peremptory norms apply to it as well as all others. Though the category of *jus cogens* norms is not definitive, de Wet lists the core of such norms as identified by authors: the prohibition of the unilateral use of force, the right to self-defence, the prohibition of genocide, the prohibition of the violation of basic norms of international humanitarian law, the prohibition of racial discrimination and slavery, and the right to self-determination.

Originally, framers of the Charter expected the Security Council to enter into agreements with Members to assure the availability of troops when the Council deemed armed intervention to be necessary to maintain international peace and security. This plan however did not materialize. Instead, the “authorization model” provided a pragmatic and affordable way to carry out UN operations and became the established alternative to Article 43 agreements. No theoretical distinction needs to be drawn between the military mandate delegated to individual member states and that which authorizes a regional (defence) organization to resort to armed intervention; in both scenarios the central role of the Security Council to

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356 Ibid. at 188.
357 Ibid.
358 Ibid.
359 Ibid. at 191.
360 Article 43(1) and (3), UN Charter
361 de Wet, *supra* note 355 at 308.
maintain international peace and security requires that it maintain ultimate control over an authorized military operation at all times.\textsuperscript{362}

Iraq provides us with some of the more interesting examples of the use of force employed pursuant to, and not pursuant to a UN use of force mandate. Indeed, the following review demonstrates the importance of having Council use of force resolutions that a) use clear and unequivocal language that not only permits the use of force but explicitly describes the purpose, and b) establish a clear time frame to ensure the Council will be free to terminate the mandate authorizing the use of force once the specific goal has been reached.

Following Iraq’s invasion of Kuwait in 1990, the Security Council determined that there was a breach of the peace. UNSC Resolution 660 demanded that Iraq immediately withdraw all forces from Kuwait. Iraq refused to comply. In January of 1991, the Council adopted Resolution 678 authorizing member states cooperating with Kuwait to “use all necessary means” to uphold and implement resolution 660.\textsuperscript{363}

The authorization to use force to remove Iraqi forces from Kuwait terminated upon the signing of the cease-fire agreement that was recognized in UNSC Resolution 687.\textsuperscript{364} This meant that any additional military enforcement that followed Resolution 687 to ensure, for example, compliance with the cease-fire agreement obligations, required another Security Council mandate.\textsuperscript{365} By calling an end to hostilities and confirming that the Council would remain seized of the matter to ensure compliance with the attending obligations, Resolution 678 provided a “functional limit” to the force that could be used.\textsuperscript{366} Moreover, only the Security

\textsuperscript{362} Ibid.
\textsuperscript{363} Security Council resolution 678 (January 1991) It was widely recognized that the authorization to use force was comprised in the term “use all necessary means”. See John Quigly, “The United Nations Security Council: Promethean Protector or Helpless Hostage?” (2000) 35 Tex. Int’l Law J. 129.
\textsuperscript{364} de Wet, supra note 355 at 282.
\textsuperscript{365} Ibid.
\textsuperscript{366} Ibid.
Council was empowered to decide when use of force is commenced and when it terminates under its mandate. Accordingly, the use of armed force against Iraq which has taken place since Resolution 687, and is still going on, is unlawful. What is more, due to the narrowness of the use of force authorization provided by the Security Council, and the fact that it was confined to the 1991 Gulf War, it is more than likely that many of the military actions taken by the U.S., the U.K. and France during the course of the first Gulf War were also unlawful. By 1999, the unofficial US position was that it was acting in self-defence however it did not so advise the Security Council. Officially, the U.S. relied on its “new American policy”.

In March 2003, the United States invaded Iraq allegedly in anticipatory self-defence based on either fabricated or dated evidence of an Iraqi stockpile of biological weapons and other weapons of mass destruction. At the time of writing, with the

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367 Ibid.
368 Two years after the first Gulf War ended, the US, the UK and France then launched another series of air strikes against Iraq. In January of 1993, based on Iraq’s continued state of non-compliance with Resolution 687, the United States launched another attack on Baghdad in which it employed the use of forty cruise missiles. Quigly, supra note 356 at 144. Months later, the U.S. launched yet another missile attack in downtown Baghdad targeting the Iraqi intelligence headquarters. The US characterized the failed assassination attempt on Bush Sr. as a “direct armed attack” on the United States (an unprecedented interpretation of the right of self-defence in the Charter era). de Wet, supra note 355 at 286. In September 1996 the U.S. launched more missile attacks on air defence installations in Southern Iraq, thereby unilaterally extending the southern no-fly zones. A year and a half later, the U.S. sent armed forces to the Persian Gulf to put pressure on Iraq to permit greater access to UN weapons inspectors. From December 1998 on, the U.S. carried out missile and air attacks in the no-fly zones firing at air defence installations it identified as “having fired on them or having threatened them. Finally, in early 1999 when Iraq began challenging US and UK aircraft flying in the no-fly zones a number of shooting incidents resulted.” Quigly, supra note 363 at 141-151.
369 The United States gave little detail to the Security Council about these military operations, even though Resolution 678 included an obligation to keep the Council informed of operations. As a result, the Council was in no position to monitor what was being done pursuant to its authorization. The Council barely met during the period of hostilities carried out in its name against Iraq.” Quigly adds that “[o]ne analyst found the lesson to be extracted from the Persian Gulf War was, that if there is to be an effective institutional means of constraining military adventurism, at least by the United States, it must be located in the international arena. The danger of the ‘new’ world order is that it will simply replace a system of two superpowers with that of a single superpower. If that comes to pass, the most pressing need of the new order will be to devise mechanisms to constrain the use of military force by U.S. Presidents.” Quigly, supra note 363 at 155.
370 Ibid. at 151.
371 The US relied on UK intelligence which has since been discovered as less than reliable. “Thanks to evidence presented to Lord Hutton, a senior judge who is carrying out an inquiry into David
war still raging in Iraq, the United States finally called off its own search for weapons of mass destruction in Iraq, not having found a single one.372

U.N. sanctioned uses of force engage the full responsibility of the United Nations, not the individual member states employing force on its behalf. If member states proceed to use force under the purported authority of the U.N., without there being an explicit UNSC mandate to this effect, then such actions fall under the general prohibition on the use of force and are unlawful. In these circumstances, it is possible that such uses of force would not only be unlawful. Depending on the circumstances, they may also constitute aggression.

4.2.2 Humanitarian Intervention

"Humanitarian intervention" describes the use of armed force to protect civilians from a humanitarian crisis.373 Finding arguments in support of it unpersuasive, Henkin also believes they contribute to an erosion of the prohibition on the use of force.374

Kelly’s death, we know that the officials had in front of them a draft of a dossier on Iraq’s W.M.D. that the British intelligence services and the Foreign Office, the British equivalent of the State Department, had produced in the spring and summer of 2002. It said that “Iraq has a capability to produce chemical and biological weapons,” but did not say that Saddam had actually produced any such weapons in recent years. It also said, “Iraq has a nuclear weapons program,” but added that Iraq “will find it difficult to produce fissile material while sanctions remain in place,” and went on to say that even if sanctions were lifted “Iraq would need at least five years to produce a weapon.” John Cassidy, “Letter from London: The David Kelly Affair”, The New Yorker, 8 December 2003, 90 at 92. The Iraq dossier permitted a change in the official government statement from “The Iraq military may be able to deploy chemical or biological weapons within forty-five minutes of an order to do so” to “the Iraqi military are able to deploy chemical or biological weapons within forty-five minutes of an order to do so.” Ibid.

372 “A spokesperson for George W. Bush said the U.S. president still believes he was right to invade Iraq even though investigators have not turned up proof to back up his primary argument for going to war: ‘Based on what we know today, the president would have taken the same action because this was about protecting the American people (...) This was about advancing freedom and democracy in a dangerous region of the world.’ Sheldon Alberts, “NO WMDs IN IRAQ – PERIOD” The Montreal Gazette, 13 January 2005 at A14.

373 Quotes are used in deference to exceptions taken by humanitarian groups to attach the word “humanitarian” with a term signifying the use of force.

374 “If any presence or exercise of authority perceived to be unlawful or unjust is an “armed attack” against the “proper sovereign” of the territory, any use of force against it becomes plausible as “self-
Violations of human rights are indeed all too common, and if it were permissible to remedy them by external use of force, there would be no law to forbid the use of force by almost any state against almost any other. 375

Nevertheless, the international community must face the critical issue of how to protect people caught in new and large-scale humanitarian crises. While humanitarian intervention has been controversial both for its over-zealousness in the case of Kosovo and its complete absence during the Rwandan genocide, there appears to be general agreement that the international community should not refrain from intervening in cases of massive violations of human rights. 376

UN sanctioned "humanitarian intervention" falls under the Chapter VII regime where force is authorized pursuant to a Security Council determination of a threat to the peace, a breach of the peace or an act of aggression and the limitations that apply to the Council’s discretion there would also apply to humanitarian interventions. Indeed, a threat to the peace need not, technically speaking, be international per se. However, additional conditions have been developed to guide the Security Council in its decisions regarding humanitarian intervention.

In 2000, Canada established the independent International Commission on Intervention and State Sovereignty (ICISS), the first international concerted effort to clarify questions associated with humanitarian relief and intervention.377 The Commission’s report, “The Responsibility to Protect”, stresses the primary responsibility of sovereign states to protect their own citizens from avoidable catastrophe, and suggests that when states are unable or unwilling to do so this responsibility must then be borne by the broader community of states. The

375 Ibid. at 144-45.
377 Ibid.
Commission established four categories of criteria that must be met before force is employed during any military operation involving humanitarian intervention: the Just Cause Threshold; the Precautionary Principles; the Right Authority; and the Operational Principles. These guidelines are relevant to the scope of the crime of aggression in that they provide more objective parameters for the legitimate use of force. The humanitarian intervention “litmus test”, if you will, can inform our analysis of anticipatory self-defence, what constitutes an unlawful use of force, and aggression.

The Report issued by the High-level Panel on Threats, Challenges and Changes transcribes nearly verbatim the conclusions reached in the Just Cause Threshold and Precautionary Principles sections of the ICISS report. In its recommendations to the Security Council, the High-level Panel identifies what it calls the five basic criteria of “legitimacy” for the use of force.

(a) **Seriousness of threat.** Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie*, the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

(b) **Proper purpose.** Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

378 In 2003 the Secretary-General of the United Nations appointed a High-level Panel of experts and commissioned a report to address recent and purportedly new collective security threats, and to make recommendations as to how to *re-vamp* the United Nations so that it may properly address these developments. The report is entitled, “A More Secure World: Our Shared Responsibility”. Seeking to apply the express language of the Charter, the high panel concludes that three particularly difficult questions arise in practice: First, when a State claims the right to strike preventively, in self-defence, to a threat that is not imminent; secondly, when a State appears to be posing an external threat, actual or potential, to other States or people outside its borders; and thirdly, where the threat is primarily internal to a State’s own people. (footnoted version at: http://www.un.org/secureworld/report3.pdf)

379 Though the two texts are identical, with the exception of one or two words, the footnoted version of the High-level Panel Report makes no reference to the ICISS report.

380 *Supra* note 378 at para. 207.

381 Originally, the “Just Cause Threshold” in the ICISS report.
(c) Last resort. Has every non-military option for meeting the threat been explored, with reasonable grounds for believing that other measures will not succeed?

(d) Proportional means. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

(e) Balance of consequences. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction? 382

The Panel suggests that if the SC is to win the respect it must have as the primary body in the collective security system, it is critical that its most important and influential decisions, those with large-scale life-and-death impact, be better made, better substantiated and better communicated. 383 Second, and more importantly, the Panel recommends the Council should adopt and systematically address a set of agreed guidelines going directly not to whether force can legally be used but whether, as a matter of good conscience and good sense, it should be. 384 These criteria can inform our analysis of what constitutes an unlawful use of force, and what constitutes aggression.

If a state purports to use force in “humanitarian intervention” and does so without the authorization of the UN Security Council, said use of force is prima facie unlawful, and may constitute a crime of aggression. Nevertheless, if such use of force is deemed justifiable by an international political or judicial body then there is no individual criminal liability. A UN-authorized use of force in humanitarian intervention is prima facie lawful, however, it must remain within the parameters established by the mandate.

382 High-level Panel Report, supra note 378 at 205.
383 Ibid.
384 Ibid.
4.2.3 Self-Defence

Article 51 of the United Nations Charter codifies international law on individual and collective self-defence. Its limitations are implicit and explicit.\(^{385}\)

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.\(^{386}\)

Article 51 explicitly provides that the exercise of self-defence is based on three conditions: there must have been an armed attack; any measures so taken by a state must be immediately reported to the Security Council; and, such measures, being temporary, are subordinate to the Security Council's authority to adopt measures in furtherance of international peace and security. The inherent constraints in the concept of self-defence have their source in international humanitarian law. They are the principles of necessity and proportionality.\(^{387}\)

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\(^{385}\) Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) 8 July 1996 ICJ General List No. 95 at para. 40. ['"Nuclear Weapons"']

\(^{386}\) Article 51, UN Charter.

\(^{387}\) In Nuclear Weapons the ICJ confirmed that the right of self-defence was recognized under customary international law and that the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. The Court stated in Nicaragua: "there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law". Nicaragua, supra note 152 at para. 176. "This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed." Nuclear Weapons, at para 41. Both Nicaragua and the United States had officially recognized that the issue of whether a particular response to an attack is lawful depends on observance of the criteria of necessity and proportionality of the measures taken in self-defence. "The Parties also agree in holding that whether the response to the attack is lawful depends on observance of the criteria of the necessity and proportionality of the measures taken in self-defence. Since the existence of the right of collective self-defence is established in customary international law, the Court must define the specific conditions which may have to be met for its exercise, in addition to the conditions of necessity and proportionality to which the Parties have referred." Nicaragua, supra note 152 at para 194.
The one explicit condition that remains controversial provides that the right of self-defence can be exercised “if an armed attack occurs.”[^388] An ordinary reading of Article 51 can lead to no conclusion other than an armed attack triggers the right of self-defence. The ICJ holding in *Nicaragua* confirms this position. It concluded that Nicaragua did not engage in an armed attack against El Salvador, Honduras or Costa Rica, and therefore no right of individual or collective self-defence was triggered.[^389] The Court further held that the conduct of the United States was not indicative of the existence of an armed attack under Article 51 of the Charter. For instance, at no time did the United States advise the Security Council of the measures it deemed were necessary in self-defence.[^390] The Court confirmed that an armed attack was a *sine qua non* to the exercise of the right of self-defence.[^391]

This interpretation reflects the views of the United States as expressed in regard to proposals for the control of atomic warfare at the end of World War II.[^392] In a memorandum dated 12 July 1946, after quoting from the text of Article 51, the United States made this very important statement:

> Interpreting its provisions with respect to atomic energy matters, it is clear that if atomic weapons were employed as part of an “armed attack,” the rights reserved by the nations to themselves under article 51 would be applicable. *It is equally clear that an “armed attack” is now something entirely different from what it was prior to the discovery of atomic weapons.* It would therefore seem to be both important and appropriate under present conditions that the treaty define “armed attack” in a manner appropriate to atomic weapons and include in the definition not simply the actual dropping of an atomic bomb, *but also certain steps in themselves preliminary to such action.*[^393]

[^388]: Article 15, UN Charter.
[^389]: *Nicaragua*, at para. 229.
[^392]: Jessup, *supra* note 344 at 165.
[^393]: U.S. Memorandum No. 3, of July 12, 1946, *International Control of Atomic Energy: Growth of a Policy*, Dept. of State Pub. 2702 (1946). *Ibid.* at 164. Emphasis added. The argument is often made that since the invention of the nuclear bomb, self-defence has changed dramatically, or, as the point is made in this quote that the concept of an armed attack must be expanded to include preliminary steps leading up to actual attack (i.e. the dropping of bombs). Although the point is well taken here to demonstrate the US interpretation of Article 51, the premise of the argument that our notions of “armed attack” and “self-defence” need to change is dubious. Evidently, the premise is that states ought to be permitted to use force in anticipation of an on-coming attack. Julius Stone refers to Tom
Had Article 51 already authorized the use of force in “self-defense” when there was no armed attack yet, or in anticipation of one, the suggested clarification would not be necessary.\(^{394}\) “Certain steps in themselves preliminary to such action” therefore did not fall under the notion of “armed attack”.\(^{395}\) The significance of this document is even more far-reaching. The exclusive reference to the nuclear context tends to show that steps taken in preparation of dropping atomic or other nuclear weapons were viewed as the \textit{only possible exceptions} to the condition of an armed attack. Barring a nuclear (or theoretically equivalent) crisis, then, according to the United States, there must be an armed attack before force can be used in self-defence. Read in conjunction with the ICJ holding in \textit{Nuclear Weapons},\(^{396}\) one could argue that a threat or use of nuclear weapons might only be lawful if the very existence of the threatened state was at issue. In Henkin’s view, the only exception to the Charter regime requiring an armed attack before self-defence is exercised, is an all-out nuclear threat.\(^{397}\)

Among the two implicit limitations to the exercise of self-defence, the requirement of necessity raises the most questions.\(^{398}\) In the context of his discussion on self-

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394 Jessup, supra note 344 at 167.
395 This memo is critical to the issue of anticipatory self-defence in that it reflects what the framers of the UN Charter (most notably, the United States) had in mind in regard to the notion of “armed attack”.
396 Wherein it was concluded that the threat and use of nuclear weapons was unlawful with the possible sole exception that there exists an “extreme circumstance of self-defence, in which the very survival of a State would be at stake.” (\textit{Nuclear Weapons}, conclusions.)
397 The framers of the Charter did not appear to contemplate the extreme case where a country learns certainly and unimpeachably that another is about to destroy it. Henkin, supra note 367.
398 The other implicit limitation is “proportionality”.

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preservation, Oppenheim wrote that uses of force are excusable as are necessary in self-defence "because otherwise the acting State would have to suffer, or have to continue to suffer, a violation against itself." Oppenheim’s original text does not distinguish uses of force in self-defence employed when there is an armed attack and those where no armed attack has occurred. Following the creation of the United Nations, Lauterpacht’s revisions articulated an important modification. While acknowledging that a state should judge for itself whether a case of “necessity in self-defence” exists, Lauterpacht added that it was also obvious that the question of the legality of action taken was suitable for and “must ultimately be determined by a judicial authority or by a political body like the Security Council of the United Nations, acting in a judicial capacity.” Nevertheless, he insists that the determination of legality of any such use of force be made, and believes

The refusal on the part of the State concerned to submit to or to abide by the impartial determination of that question must therefore be deemed to be prima facie evidence of a violation of International Law under the guise of action in self-preservation.

Self-defence as provided for under Article 51 of the UN Charter is an established exception to the prohibition on the use of force. It is possible that the provision signifies a technical “departure” from the pre-Charter traditional right to self-defence in that the right now depends on the trigger of the “armed attack.” This

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400 Therefore, we may then say that the condition of necessity is reviewable by either the UN or a world court. “But, unless the notion of self-preservation is to be eliminated as a legal conception, or unless it is used as a cloak for concealing deliberate breaches of the law, it is obvious that the question of the legality of action taken in self-preservation is suitable for determination and must ultimately be determined by a judicial authority or by a political body, like the Security Council of the United Nations, acting in a judicial capacity.” Ibid. at para. 130.

401 This view differs substantially from that expressed in previous editions where there was no reference to an outside body determining the legality of a state’s use of force in self-preservation. See, generally, discussion on Lauterpacht’s call for an “obligatory judicial settlement” of the question of legality. While making clear reference to the Security Council, he refrains from mentioning Article 51 of the United Nations Charter. Perhaps this omission is attributable to a reluctance to stray too far from the substance of what Oppenheim wrote. This, however, is pure speculation. Oppenheim, supra note 392 at 297-298.

402 In fact, technically, it is not a departure as the law essentially remains the same. The only legal use of force in self-defence is that which meets the conditions of necessity and proportionality. The
possibility does not necessarily mean, however, that the traditional right of self-
defence was more extensive. The use of force in self-defence, pre and post-Charter, was subjected to a variety of constraints, they just may be more obvious under the Charter.

4.3 Anticipatory Self-Defence

Some authors believe that traditional (i.e. pre-Charter) international law rules apply and that the conditions imposed by the Charter are not *limitative* of the right of self-defence. In particular, Asrat maintains that the word "inherent" preserves the customary law scope of the right to the extent that anticipatory defence "would continue in effect under the Charter in justified cases." The prevailing school of thought however supports an ordinary reading of Article 51 that does not provide for anticipatory self-defence, to avoid abuses of the use of force. According to the Charter, alarming military preparations by a neighbouring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself to be threatened.

Grotius did not believe that the use of force was necessary if one state believed another to be a potential threat to the security of that state. The idea of using

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404 *Ibid.* at 211. Asrat argues that since "Article 41 does not exhaust the available right of forcible self-defence implied under Art. 2(4), the scope of that right will depend on the construction of the term "force" in the latter Article." *Ibid.* at 216. He adds that because authors fault the draftsmanship of Article 51, "[t]his should serve as a caveat for not relying exclusively on the literal interpretation of the Article. (...) A legal provision in a textually deficient Article should not by itself warrant an interpretation that would alter established rights." *Ibid.* at 219-220. Although he presents no evidence of any "faulty draftsmanship", Asrat nevertheless asserts that we are not to rely on its basic construction.
405 Jessup recognizes that under traditional international law, a case for self-defence could have been made where injury was threatened but no attack had yet taken place. Jessup, *supra* note 337 at 166.
407 "That the possibility of being attacked confers the right to attack is *abhorrent to every principle of equity*. Human life exists under such conditions that complete security is never guaranteed to us.
force in anticipation of an attack did not begin with the proliferation of nuclear,
chemical or biological weapons of mass destruction. The concept dates back
several centuries, and has been controversial ever since. In this section we will
explore the notions associated with the concept of anticipatory self-defence,
namely, self-preservation, necessity, and, of course, self-defence. This will be done
in two parts to trace developments occurring before and after the UN Charter came
into existence.

4.3.1 Pre-Charter Conceptions

At the beginning of the twentieth century, most authors maintained that states had a
"right of self-preservation." 408 Oppenheim disagreed. He did not deny that state
actions were often based on self-preservation, but believed that interventions using
force should only be permitted to repulse or repel the intruder. In the end, he
concluded that self-preservation was an excuse, not a legal basis for intervention. 409
Actions based on self-preservation, in turn, were excusable if they were necessary
for the purposes of self-defence. The notion of self-preservation went from being a
basis of action to being the premise of the basis of the action. This transformation
had the effect of limiting the number of situations where self-preservation could be
asserted, while necessity became the principle condition for the so-called right or
concept of self-defence. 410

The scaling down of self-preservation was necessary to preclude a state from basing
its use of force on "self-preservation" when its own existence was not threatened. 411
It was up to states to decide when a case of necessity (i.e. self-defence) had arisen

For protection against uncertain fears we must rely on Divine Providence, and on a wariness free
from reproach, not on force." Hersch Lauterpacht, International Law, Volume 2 The Law of Peace,
409 Ibid. at 178.
410 Self-preservation could only be invoked on the condition that the circumstances warranted self­
defence, or it was necessary.
411 Oppenheim, supra note 408 at 178.
and Oppenheim acknowledged that it was impossible to lay down a hard and fast rule regarding the question when and when not a state can take recourse to self-help which violates another state. As noted earlier, the Lauterpacht revisions to Oppenheim introduced the development of a world body or "international and objective" standard, in the organization of the United Nations against which the lawfulness of the use of force could be assessed. For an act of defence to be just it must be necessary; there must be "clear evidence, not only of the power, but also the animus of the party; and such evidence as amounts to moral certainty." Thus, the condition of necessity, based on the two sub-conditions of power (ability) and animus (a display of animosity or hostility) is thereby entrenched in the notion of self-defence.

Two and a half centuries after Grotius, Westlake expressed the view that there is no absolute right of self-preservation. First, at that time, there was no "superior" to judge the respective merits of the alleged competing claims or of the alleged rights. Second, international society had not "consented to an absolute right of self-preservation". Westlake argued that self-preservation was a "primitive instinct, and an absolute instinct so far as it has not been tamed by reason and law, but one great function of the law is to tame it." He approved of a right of self-defence in exceptional cases expressly allowed by law, and denied such a right by the mere

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412 Ibid. at 179.
413 What is interesting about the original Oppenheim text is that it provides examples of uses of force in "anticipatory self-defence" but refrains from making any comment as to their legality or justification. See case of the Danish fleet, the Caroline incident and others. Ibid. at paras 131 et seq.
414 "Neither did [Grotius] concede to States the absolutefaculty of action in self-preservation - a right which, till recently, writers coupled with the legal power of the State to determine, with finality and to the exclusion of any outside tribunal the justification of action in self-defence." Lauterpacht, supra note 407 at 328. "By way of example he discusses the case of the justice - which he denies - of a war undertaken against a neighbouring State on the ground that it engages in building a fortress or fortifications which might prove a source of danger. Against such apprehension, he says, the proper remedy is to build counter-fortifications, not to resort to arms. 'Advantage does not confer the same right as necessity.'" Ibid. at 348.
416 Lauterpacht, supra note 407 at 398.
417 Ibid.
418 "In principle we may not hurt another or infringe his rights, even for our self-preservation, when he has not failed in any duty towards us." Ibid. at 328.
fact of the internal growth of a neighbouring state, or of the danger of contagion of revolution.\textsuperscript{419} The international society, he opined, is not for the mutual insurance of established Governments.\textsuperscript{420}

Nevertheless, as late as the 1920s many international law writers continued to assert a broad right of self-preservation which, in their view, took precedence over all others as an “absolute right in the last resort”.\textsuperscript{421} Such a right would not, therefore, be limited to situations of necessity and was broader than the traditional notion of self-defence. If self-preservation were an absolute right as some authors claimed, according to Brierly, it would destroy the imperative character of any system of law, for all obligations to observe law would become merely conditional.\textsuperscript{422} Even municipal law was far from recognizing an absolute right in the individual to “preserve himself at all costs”.\textsuperscript{423}

While it was often maintained that every violation of the rule against force was excused so long as it was motivated by self-preservation, Brierly observed that in reality, more and more, such violations came to be excused in cases of necessity only.\textsuperscript{424} Thus, by the 19\textsuperscript{th} century the issue of necessity took on central importance in determining the “legality” of actions taken in self-defence.

One well-recorded incident involving the use of force before an attack is the celebrated case of \textit{The Caroline}. This event did not give rise to a legal case, rather,
it was an international dispute that triggered what would become a highly celebrated exchange of diplomatic messages between two world powers of the day: Great Britain and the United States. It marked the winds of change from the previous reliance on self-preservation to the more legally formal plea of self-defence based on necessity.\footnote{In 1837 the Government of the Colony of Canada ordered British soldiers to cross the American border at Niagara to destroy a vessel that was being used to transport ammunition and American sympathizers loyal to the cause of Canadian insurgents. Diplomatic efforts to put an end to the operation were apparently unsuccessful. During the night of December 29, 1837 the American steamer \textit{The Caroline}, moored on the American side of the Niagara River, was invaded by British forces, set on fire and sent over the falls of Niagara. In the process, two Americans were killed and several others were injured. When the U.S. Government complained about the attack Great Britain defended its actions, \textit{inter alia}, based on “self-defence and self-preservation”. See, generally, R.Y. Jennings, “The \textit{Caroline} and McLeod Cases” (1928) AJIL 82.}

In anticipation of an uprising, and on behalf of the Canadian government, Great Britain sent its soldiers to burn a ship on US territory that was being used to transport arms and rebels. Great Britain alleged that its actions were based on “self-preservation and self-defence”. The United States Government, however, demanded a show “\textit{necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation}”.\footnote{\textit{Ibid.} at 90.} Great Britain responded by stating that its course of action was necessary. Although this marked the end of the official dispute, and the British believed that their actions were \textit{justifiable} under the Law of Nations, they also apologized.\footnote{Records show that two individuals were killed during the attack. Jennings, supra note 425.} \textit{The Caroline} is generally cited as authority for anticipatory self-defence, as well as its contribution to the definition of self-defence.

Jennings provides a comparison of the notions of self-defence and self-preservation which can be applied to the modern day juxtaposition of self-defence and anticipatory self-defence.\footnote{\textit{Ibid.} at 91.}

\begin{quote}
[S]elf-defence presupposes an attack, self-preservation has no such limitation, and, broadly applied, would serve to cloak with an appearance of legality almost any unwarranted act of violence on the part of a state.\footnote{\textit{Ibid.} at 90.}
\end{quote}
Just as the *prima facie unlawful* use of force in self-preservation may be *justified*, similarly the use of force in anticipatory self-defence is unlawful, although it may be justified. Necessity is what makes either use of force justified.

In its commentary on the draft articles of state responsibility, the International Law Commission reviewed the history of the notion of necessity as it applied to state action.\(^{430}\) The ILC first acknowledged that most writers consider it incorrect to speak of a ‘subjective right’ of the State which invokes the state of necessity.\(^{431}\) While in the past there were several cases like the *Caroline* in which the doctrine of necessity was invoked, it must be borne in mind that 2(4) of the Charter requires states to refrain from the use of force against the territorial integrity or political independence of another state, or in another manner contrary to the purposes of the Charter.\(^{432}\) With this rule of *jus cogens* in place, can or should necessity be invoked to preclude wrongfulness in the context of state responsibility?\(^{433}\) The central issue, as formulated by the ILC, is whether the Charter intended to impose an obligation which cannot be avoided by pleading necessity.\(^{434}\) Put differently, should we infer that the drafters of the Charter implicitly exclude the applicability of the necessity plea “however well founded it might be in specific cases, to any conduct not in conformity with the obligation to refrain from the use of force?”\(^{435}\) Unfortunately, the ILC chose not to answer its own question.\(^{436}\)

\(^{429}\) It is to be “doubted whether this distinction, which appears so obvious to the modern lawyer, was at all appreciated in the earlier stages of the development of international law. Indeed, Vattel ... speaks of self-protection (droit de sûreté) as the complement of a duty which every state owes to itself of self-preservation (le soin de se conserver).” \(Ibid.\)

\(^{430}\) With jurists having rejected the existence of a right of self-preservation, the justification for intervention was then said to have been embodied in a “no less theoretical ‘right of necessity’. ILC Yearbook, 1980 at 35.

\(^{431}\) \(Ibid.\)

\(^{432}\) \(Ibid.\) at 44.

\(^{433}\) \(Ibid.\)

\(^{434}\) \(Ibid.\)

\(^{435}\) \(Ibid.\) at 44-45.

\(^{436}\) The ILC said that it was not “called upon to take a position on [it]” and the task of interpreting the provisions of the Charter “devolves on other organs of the United Nations. At this juncture, the ILC discussion on necessity blended into a review of humanitarian intervention and the facts and circumstances that warrant the use of force in that context. \(Ibid.\)
The plea of necessity will excuse certain uses of force in certain situations. Rodick refers to the tests as developed by the courts at the beginning of the twentieth century such as, for example, the rule that the burden of proof must rest upon the person setting up the plea, that the necessity must be real and not imaginary, and that it must be genuine and not tainted with collusion or fraud. Rodick also believes that a plea of exceptional necessity may rightfully be asserted to excuse the action of the invaded state in using force to repel such an attack.

In the 1920s, forced intervention to maintain the balance of power frequently related to policies of regional control and the alleged necessities of national defense. In the case of the Monroe Doctrine, the United States defended its acts not only upon the ground of expediency, but also on the basis that circumstances of necessity required it to assume a certain degree of responsibility for the condition of governments in Latin America, and it would be dangerous to its safety if there were foreign intervention in this area. The United States made such a plea under the Monroe Doctrine in connection with the affairs of Mexico in 1861-65, the northern frontier of the United States in 1867, Cuba, and also the Caribbean and Lower California. The point Rodick makes is that the “danger” ought to be of such a nature as to seriously threaten the existence of the state, and be so imminent that other means of defense are lacking.

438 “The plea of exceptional necessity will also excuse the action of a vessel in making an involuntary entrance in the case of stress of weather, lack of vital materials in the form of equipment, provisions, water and fuel, and in the case of pursuit by pirates and enemies.” Ibid. at 32.
439 “It is true that in so doing it is in turn forced to violate the sovereignty of the state responsible for the attack; but such violation may be made the subject of an excuse because the state that receives it has not only compelled the first state to act in self-defence; but it is also held directly responsible for the first violation, and indirectly responsible for the violation which it suffers in return, which results from the first, because it had knowledge of the condition that produced the first violation and through sufferance permitted it to continue” Ibid. at 33-34.
440 Ibid. at 47.
441 Ibid. at 47-48.
442 Ibid.
443 “Judged by these standards, it is believe that a legal justification for the type of intervention under discussion is rarely, if ever, to be found; and the writer cannot be too emphatic in giving his opinion
By these standards, Rodick was unable to recall a single instance in his day in which it was clearly established that the plea of necessity was lawfully asserted to excuse an act of intervention solely for the purpose of property rights. Given the state of the law at that time, therefore, it appeared that the only cases that should benefit from the doctrine of necessity were those where force was used in defence against sudden invasion where the circumstances were so exceptional in their nature as to set them apart from "normal cases of self-defence exercised against an invasion by a foreign power."

Lauterpacht believed that all these principles must become an integral and non-controversial part of international law. When this happens, by their educative influence and their deterrent effect, the rules will promote the cause of international security. His hope was that the United Nations, without necessarily interfering with the task of the International Law Commission, would succeed in placing these principles, with all requisite clarity, on the international statute book. These concepts of necessity, self-defence and anticipatory self-defence are necessary components to the concept of aggression and will therefore figure in the definition of the crime of aggression.

4.3.2 Charter-Era Formulations

While self-defence and necessity are the core concepts of the Caroline dictum, and this incident continues to be cited as the justification for state use of force in anticipatory self-defence, the notion of self-preservation is controversial and hardly figures at all in post-Charter doctrine. Similarly, the notion of anticipatory self-defence, an expanded notion of self-defence, is not considered lawful.

to the effect that the cases of intervention that have been discussed in this chapter are political in their nature, and are not to be considered as subject to legal justification and excuse." Ibid. at 48-9.

444 Ibid. at 51.
445 Ibid.
446 Lauterpacht, supra note 407 at 83.
447 Ibid. at 83-4.
448 Ibid. at 84.
Even though there may not be an established consensus in support of the permissibility of anticipatory self-defence, there is certainly not a consensus opposed to it. In consequence, it would seem to be impossible to prove the existence of an authoritative and controlling norm prohibiting the use of force for preemptive self-defence.\footnote{Arend, supra note 80 at 79.}

Arend maintains that there exist two Charter-era schools of thought in regard to the notion of anticipatory self-defence.\footnote{Ibid.} The first “restrictionist” school includes writers such as Brownlie, Dinstein, Henkin and Jessup. The second group known as “Counter-restrictionists” includes Bowett, O’Brien, McDougal and Stone.\footnote{Interestingly, the authors do not place Thomas Franck into one category or the other. They do refer to Professor Franck as the strongest proponent of what they term the ‘rejectionist’ approach.} Restrictionists take the view that Article 51 restricts the right to self-defence to situations where an armed attack has occurred. Counter-restrictionists base their broader interpretation of Article 51 on a variant reading of the provision and the possible impact of certain post-World War II developments - such as the failure of collective security.\footnote{Arend, supra note 80 at 73.} They take the view that international law adapts to political realities. The use of armed force in anticipation of an attack is “permissible”, “excusable”, “legitimate” and even “legal” state behaviour.\footnote{Henkin believed that the disparity between these views might disappear with the decision in Nicaragua. Henkin, supra note 340 at 121. Henkin adds “at least there had been [a division among lawyers]; it remains to be seen whether the opinion of the International Court of Justice in Nicaragua v. United States will dispel doubts and persuade the doubters.” This situation appears to be similar to that described by the classical writers who often reported that “many” or “the majority of writers” believed that self-preservation (or anticipatory self-defence) warranted the use of force if deemed necessary by the threatened state.}

Arend argues that developments since World War II challenge the validity of the Charter paradigm, whereby the failure to enforce international law has contributed to the “emergence of new values concerning the recourse to force” in a new “Post-Charter Self-Help” paradigm.\footnote{Anthony Arend, “International Law and the Recourse to Force: A Shift in Paradigms” 27 (1990) Stan. J. Int’l L. 1 at 2.} The second purported development, he believes, is
the emergence of a “new value hierarchy” recognizing a right to use force for: self-determination; reprisals; and, correction for past injustices. In view of his opinion that Article 2(4) is “dead” Arend presents three Charter interpretation models: the legalist approach; the “core interpretist” approach; and, the “rejectionist” approach.

Thomas Franck’s article entitled “Who Killed Article 2(4)?” encapsulates the classical elaboration of the rejectionist, legal realist and counter-restrictionist view. Franck foresaw the abuse of anticipatory self-defence, if it was generally permitted. Then, in 1990, Franck delivered a paper in which he spoke of an emerging belief that the use of force was permissible against illegitimate regimes to promote the self-determination of peoples. States, Franck argued, were gradually

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455 Reminiscent of the “new American policy” adopted during the 1998 bombing campaigns in Iraq, Arend reports that in 1987 the United States Government had recently advocated the use of force to correct “unjust” conditions abroad and to create “just societies” (S. Rosenfeld, The Guns of July, 64 Foreign Aff. 698 (1986). Ibid. at 12.

456 The legalist approach supports the condition of an “armed attack” actually occurring prior to any right of self-defence. The “core-interpretist” approach, Arend suggests, believes there is at its essence a basic norm within 2(4) that must be respected while interpretations loyal to this core obligation are still free to change form depending on the circumstances. Ibid. at 19-26.

457 Thomas Franck, “Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States” (1970) 64 AJIL. 809. At the time Franck wrote this article, he argued that “[t]he prohibition against the use of force in relations between states has been eroded beyond recognition. According to Franck, this erosion was due to three main factors: “the rise of wars of national liberation”; the rising threat of wars of total destruction,” and “the increasing authoritarianism of regional systems dominated by a super-Power”. Arend and Beck, supra note 80 at 184.

458 “Tested against the perceptions of the reasonable man, most of the instances when states perceived themselves about to be attacked or in imminent danger are simply not credible. Perhaps only in the case of Israel’s invasion of the Arab states in 1967 does it seem at all convincing, on the facts, that the use of force was truly pre-emptive in a strict sense, i.e. undertaken in reasonable anticipation of an imminent large-scale armed attack of which there was substantiated evidence” Franck, ibid. at 821.

459 T. Franck, Secret Warfare: Policy Options for a Modern Legal and Institutional Context, Paper Presented to the Conference on Policy Alternatives to Deal with Secret Warfare: International Law, U.S. Institute of Peace, March 16-17, 1990 (on file with the Stanford Journal of International Law). “Whatever decent instincts came to cluster around the magnet of ‘self-determination,’ creating a widely-accepted exception to article 2(4), must now carry forward, in the post-colonial era, to imbue a new internationally-recognized human right to political freedom”, and “kin to such a right would be another: a right of the democratic members of the international community to aid, directly or indirectly, those fighting for their democratic entitlement.” “When the most basic of these rights have been found to have been violated – and only then – an enunciated international consensus might now be ready to form around the proposition that the use of some levels of force by states could be justified to secure democratic entitlements for peoples unable to secure them for themselves.” ” (pp. 17-18 of paper) Arend, supra note 454 at 41-42.
coming to agree on a right to democratic governance.\textsuperscript{460} Ten years later, he published \textit{Recourse to Force} arguing in favour of the doctrine of prevention.\textsuperscript{461} A central hypothesis to his theory was the Charter's quasi-constitutional nature that enabled it to evolve through the interpretive practice.\textsuperscript{462}

But Franck's support for anticipatory self-defence appears to have waned as his intolerance of states that flout international law for their own national interests, has grown.\textsuperscript{463} The 2002 National Security Strategy of the United States ("NSS") is a restatement of several presidential statements in which a focused effort was made to redefine the concept of self-defence as an entitlement under international law to take into account the exigencies of modern terrorism, including the possibility of nuclear attack by \textit{non-statal} actors such as Al Qaeda.\textsuperscript{464} Franck examines two of its assertions: that the U.S. cannot let its enemies strike first; and that while the U.S. will strive to enlist international support, it will not hesitate to act alone, if necessary, to exercise the right to self-defence by acting pre-emptively against such terrorists.\textsuperscript{465} The glaring absence of a "higher authority" to determine the

\textsuperscript{460} Ibid.
\textsuperscript{461} Thomas Franck, \textit{Recourse to Force; State Action Against Threats and Armed Attacks} (Cambridge, Cambridge University Press, 2002).
\textsuperscript{462} Franck cites the transformation of the meaning of the P-5 \textit{abstention} as an example of an "evolving interpretive practice". Article 27(3) of the Charter provides that an abstention by a P-5 member is the equivalent of a negative vote, while today an abstention is viewed as an abstention and not a vote against the proposed resolution. This is hardly an example of an "evolving practice" as this has been the practice of the Council since it began functioning as a \textit{UN} body. Franck's list of examples demonstrate this point: there was no \textit{evolution} -- rather -- it was realized at a very early stage that the Council would be paralyzed unless the "abstention" was regarded for what it is and not a vote against a particular resolution. \textit{Ibid.}
\textsuperscript{464} \textit{Ibid.} at 67.
\textsuperscript{465} In regard to the first assertion Franck writes, "To meet that threat, the president promises that "the United States will, if necessary, act pre-emptively." To the same end, he introduces the concept of "anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack" By itself, this seems a reasoned extrapolation of existing rights of self-defense. "After all, the principle of anticipatory self-defence has been known to international law for almost two centuries and has gained a certain credibility, despite the restrictive terms of Charter Article 51. (...) However, the president appeared in his statement to be exponentially expanding the range of permissible preemption, from that of the \textit{Caroline} doctrine (...) to something like a balancing of reasonable probabilities. Whether, and how wisely, this interpretation seeks to transform international law is debatable, even if it is widely acknowledged that a strict reading of Article 51 is no longer tenable in the fact of modern terrorism and aggression." \textit{Ibid.}
lawfulness of a unilateral decision to use force belies a refusal to submit to international norms. Accordingly, the current U.S. administration conflates an expanded concept of anticipatory self-defence with a militant and highly transformative assertion of a right to determine for itself whether and when the conditions exist to justify recourse to this expanded right.466

The High-level Panel report on Threats, Challenges and Change raised the issue of the pre-emptive self-defence as being one of the three problematic situations where international law needed some clarification.467 Introducing Article 51 as “restrictive”, the panel wrote

A threatened state, according to long-standing international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the action is proportionate”.468

This suggests that international law recognizes – as lawful – that force can be used if three conditions are met: necessity, proportionality and imminence. However, technically speaking, no such legal right exists under international law. At best, some authors are willing to concede that anticipatory self-defence is not unlawful if it is justified – and this would be only under very limited circumstances such as an all-out nuclear threat. Nevertheless, in support of the blanket assertion the panel cites three Columbia University law professors.469 First, Friedmann focuses on the prospect of an all-out nuclear attack.470

466 In this statement, Franck appears to believe that there is room to argue that anticipatory self-defence is warranted in the case of terrorism. Ibid.
467 High-level Panel Report, supra note 378 at 15.
470 “The ability of missiles and nuclear warheads, to paralyze and destroy the nerve centres even of vast countries such as the U.S.S.R. and the U.S.A, and to kill or maim major parts of their populations in one blow, may make it a form of suicide for a state to wait for the actual act of aggression (i.e. armed attack) before responding. (...) It was to avoid and eliminate the political and military dangers of letting nations judge by themselves the vital issues of attack and defence that the relevant provisions of the United Nations Charter were formulated. But the inability of the UN, as at present organized, to act swiftly has handed the power of decision back to the national states. (...)
But while this immensely increases the necessity for a reliable international
detection organization and mechanism, in the absence of effective
international machinery, the right of self-defence must probably now be
extended to the defence against a clearly imminent aggression, despite the
apparently contrary language of Article 51 of the Charter. The dangers of
such an interpretation should not be underestimated.471

The phrase “should probably be extended” demonstrates an understanding that no
international legal right to use force in a pre-emptive manner exists, but that
perhaps one should exist. The Friedmann reference, therefore, does not support the
contention that long-standing international law supports the use of force if the
threatened attack is imminent.

The Panel’s second reference Louis Henkin who, in no uncertain terms, confirms
that there exists no right of anticipatory self-defence.472 Henkin considers whether
the Charter would permit a pre-emptive nuclear strike in the face of an imminent
nuclear attack but surmises the concern is irrelevant.473

Anticipatory self-defence as a rule of law has meaning only in less extreme
cases. There, anticipatory self-defence, it should be clear, is a euphemism
for “preventive war”. The U.N. Charter does not authorize it. Nothing in
international relations, including new weapons, suggests that
international society would be better if the Charter were changed – or read
– to authorize it.474

The judgment as to when to resort to such measures now places an almost unimaginable burden of
responsibility upon the leaders of the major Powers.” Friedman, ibid at 259­-260 (Section entitled:
“The Threat of Total Destruction and Self-Defence”).
471 ibid. at 260. Emphasis added.
472 Henkin, supra note 374 at 142-3.
473 The nation planning the attack will not be deterred by the Charter, and a nation that believes
another is planning its obliteration will not wait for the nuclear bombs to drop. Ibid.
474 Henkin adds that if the reason for a new “reading” of the Charter permitting anticipatory self­
defence is the case where a state learns “certainly and unimpeachably” that another is about to
destroy it, “reasonable readings of the Charter and responsible concern for international order would
limit the new reading to that extreme case. Ibid. In regard to “preventive strikes”, the Montreal
newspaper La Presse reported: “La Russie se reserve le droit de faire des “frappes preventives”
(agence France-Presse), specifically, the Russian leader was quoted as saying “Nous sommes contre
cette politique (d’utilisation de la force sans accord de la communauté internationale), mais si dans
la pratique de la vie internationale, ce comportement continue à être un choix prioritaire, alors la
Russie se reserve le droit d’agir de même. (...) Les nations qui nous menacent doivent savoir quelle
sera notre réponse.” La Presse, Montreal, 18 October 2003 at page A24.
According to Henkin, if there is clear evidence of an attack so imminent that there was no time for political action to prevent it, and the only meaningful defense for the potential victim is a pre-emptive attack then arguably the Charter regime of Articles 2(4) and 51 was not intended to bar such attack. But this argument, he notes, would claim a small and special exception for the special case of the surprise nuclear attack.\textsuperscript{475}

The third reference in support of the assertion that pre-emption is long-standing international law is by Oscar Schacter. Schacter’s position actually comes close to an endorsement of the Panel’s statement, but is still not very strong. He believes it is not necessary to read Article 51 in a way to exclude completely legitimate self-defense in advance of an actual attack.\textsuperscript{476}

In my view, it is not clear that article 51 was intended to eliminate the customary law right of self-defence and it should not be given that effect. But we should avoid interpreting the customary law as if it broadly authorized preemptive strikes and anticipatory defence in response to threats.\textsuperscript{477}

All three references not only fail to support, they contradict the High Panel report statement recognizing a right of anticipatory self-defence under international law. Thus the Panel’s view of the state of the law is incorrect, misleading and potentially dangerous.\textsuperscript{478} Occasionally, the tone of the High Panel Report is alarmist.\textsuperscript{479}

\textsuperscript{475} Henkin, supra note 374 at 143-144. Emphasis added.
\textsuperscript{476} Schacter, supra note 469, generally.
\textsuperscript{477} Ibid. at 1634.
\textsuperscript{478} One redeeming feature of the High-level Panel’s position concerning the use of force in self-defence is its concluding paragraph: “We do not favour the rewriting or reinterpretation of Article 51. High Panel Report, supra note 378 at para.192.
\textsuperscript{479} “In the world of the twenty-first century the international community does have to be concerned with nightmare scenarios combining terrorists, weapons of mass destruction, and irresponsible States, and much more besides, which may conceivably justify the use of force, not just reactively, but preventively and before a latent threat becomes imminent.” Ibid. at para.194.
Arguably we are not living in a more dangerous world than that which witnessed the first and second world wars. 480

The Security Council is the international “higher authority” vested with the power to use force, if necessary, in compliance with provisions of the UN Charter. The International Court of Justice has the jurisdiction to decide the lawfulness of a particular use of force, as it did in the case of Nicaragua. Soon, the International Criminal Court will be the forum where individuals will be prosecuted for the unnecessary unlawful use of force that breaches the peace, or, the crime of aggression. With international judicial and political bodies now in place, it is incumbent upon us to establish objective international standards to permit the use of force, identify unlawful uses of force and those among the latter that constitute aggression, and the crime of aggression. A comprehensive definition of the crime of aggression requires that we establish the parameters of anticipatory self-defence as well as the other key concepts that are directly related.

4.4. Defences for the Crime of Aggression

Most domestic criminal systems agree there is a need to distinguish between two categories of defences: justifications and excuses. 481 What is less clear is whether,

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480 In 1915 the terrible technology was the submarine and torpedo. During the World War I Germany indiscriminately hit military and civilian targets. In 1915 Germany sunk the Lucitania killing 1189 passengers and crew, despite rescue attempts. The commercial liner carrying British and American citizens was bombed off the coast of Cobh, Ireland. Three decades later the United States became the first country in the world to use weapons of mass destruction. It dropped atomic bombs killing more than half a million Japanese civilians. Countless others were born with deformations and debilitating, life-threatening disease as an indirect result of the dropping of the bombs. Moreover, the statement neglects to specify that any such “reactive” use of force and “preventive” use of force “before a latent threat becomes imminent” could only be engaged at the request of the Security Council. What distinguishes the current collective security situation from those throughout the twentieth century is not the terrorism factor. What makes the world of today different from that of the past is that the United States is no longer as removed from the terrorist and other use of force threat as it used to be. This, it is suggested, is not reason to change international law.
and to what extent, international criminal law recognizes this distinction for either unlawful or practical reasons.\(^{482}\) A case in point: while the Rome Statute excludes criminal responsibility in particular situations, it does not specify whether the defences to any of the crimes in its jurisdiction constitute excuses or justifications.\(^{483}\) Article 31 of the Rome Statute provides that criminal responsibility is excluded if, at the time of that person’s conduct, the person suffers from mental illness, is in a state of (non-voluntary) intoxication, acted reasonably to defend him or herself or another person, or if the conduct in question was caused by duress.\(^{484}\) The ICC may also take into consideration such grounds as may be derived from *applicable law as set forth in article 21*.\(^{485}\)

Excuses and justifications give rise to legal effects in relation to both the perpetrator and victim of a crime. Essentially, if an accused is excused for a certain crime, his or her behaviour is still considered *unlawful* though not *criminal*. If, on the other hand, a crime is justified then it is deemed neither criminal nor unlawful.\(^{486}\) Cassese lists three possible consequences of domestic criminal behaviour that is excused. The person who aids or abets or who is an accomplice to the crime remains criminally responsible unless he or she is entitled to the same excuse as the principal perpetrator.\(^{487}\) A victim of excused violent criminal conduct is permitted to act in self-defence (within legal parameters) as the conduct giving rise to the action in self-defence, although excused, is *per se* contrary to the law.\(^{488}\) A third

\(^{481}\) "When the law provides for a justification, an action that would per se be considered contrary to law, it is regarded instead as lawful and thus does not amount to a crime. (...) the act is the lesser of the two evils or (...) is required by law. (...) By contrast, in the case of excuses, the action contrary to a norm is regarded as unlawful, but the wrongdoer is not punished. His misconduct is not considered reprehensible on one of two grounds, or both: (i) mens rea is lacking; (ii) society and law, while disapproving of that behaviour, intend to take account of special circumstances." Antonio Cassese, "Justifications and Excuses in International Criminal Law" in Cassese, The Rome Statute *supra* note 21, Chapter 24.1 at 951-2.

\(^{482}\) Ibid.

\(^{483}\) Ibid. at 953. Articles 31-33, Rome Statute.

\(^{484}\) Article 31, Rome Statute.

\(^{485}\) Article 31(3), Rome Statute.

\(^{486}\) Cassese, *supra* note 481 at 952-3.

\(^{487}\) Ibid. The excuse is therefore a personal exception that is attached to the individual.

\(^{488}\) Ibid.
consequence is that the person who has been excused for the crime may nonetheless be liable under civil law to compensate the victim. 489

In contrast, if a criminal act is justified, there is no “aiding or abetting” or “accomplice” as the behaviour in question is deemed neither criminal nor unlawful. 490 Self-defence is permitted to repel unlawful violence, and is therefore unlawful if it is in reaction to justified conduct deemed licit from the outset. 491 Finally, the purported victim of a justified criminal act is not entitled to compensation. 492 Thus, while both defence categories effectively preclude individual criminal liability, the excused crime remains unlawful in character while the justified crime is deemed not unlawful ab initio.

When we apply the legal consequences of the two categories of defences to the crime of aggression, the Gordian knot begins to unravel all on its own and ceases to be “impossible to resolve”. 493 By examining the consequences of defences in relation to aggression, self-defence and anticipatory self-defence we can see how these concepts inter-relate. On its face, this exercise may seem pointless as the Rome Statute does not distinguish between excuses and justifications. If, in its decisions on aggression however, the Court employs such terms as “justified” or “excused” this would arguably open, or close, the door to certain legal consequences.

Although unlikely, if a perpetrator of aggression raised a defence of excuse no criminal liability attaches however a duty to compensate the victim may lie – albeit,

489 Ibid.
490 Ibid.
491 Ibid.
492 Ibid.
493 “It is an incredibly intricate problem that, at least at present, it is impossible to resolve. However, there is one difference to the mythical story [of the Gordian knot]: while Alexander, not being able to disentangle the closely interwoven ropes of the knot, is said to have cut it with his sword, present circumstances do not provide for a similar remedy, namely a decisive and legally sound solution that would make it possible to leave aggression as one of the four categories of crimes in the Rome Statute.” See Schuster supra note 4 at 2.
more likely than not, on the entity on whose behalf the perpetrator was acting. If, on the other hand, the crime of aggression was justified then such use of force is not unlawful ab initio and there is no duty to compensate. A second consequence of the distinction merits closer scrutiny: the victim of an excused aggression would have a right to use force in self-defence whereas the victim of a justified aggression would not. If, in the latter case, the victim used force in “self-defence” it would be doing so outside the realm of legality. Self-defence is not warranted except in situations where the act that triggered it is illegal. If the original “crime” of aggression is cleansed of its unlawfulness (and not only its criminality) then self-defence is neither justified nor lawful. In such a case, whether the “victim” is guilty of either the crime of aggression or a less grave violation of the prohibition on the use of force is a question that would be decided by the ICC.

This last point is particularly relevant to the concept of national self-defence. If State X invades State Y and the latter responds in “self-defence” with a bombing campaign of State X’s military headquarters, then the actions of both states must be examined closely. State Y’s allegation of self-defence does not ipso facto carve its actions out of the general category of unlawful use of force. The allegation of self-defence must be considered by the Court and confirmed as well-founded in law and in fact. It will be recalled that a “victim” who uses force in self-defence may, itself, be acting outside the realm of legality (i.e. if the action that triggered the so-called self-defence was either lawful or justified). Barring a UN Security Council mandate for State Y to use force, if State X’s invasion is justified then State Y’s use of force in self-defence becomes unlawful. Depending on the nature of State Y’s use of

494 First, it is highly unlikely given that the only real defence available to the perpetrator is international self-defence. Second, if a distinction between excuses and justifications can theoretically be applied by the ICC, then non-state entities (in the case of excused crimes) would be equally subject to having to compensate the victim for its actions. This, in turn, would militate in support of the standing of such a non-state entity before the ICJ.

495 Query whether there is a difference between the significance of the word “legal” and the term “not illegal”. The former tends to characterize the behaviour in question with greater normative force.

496 It is conceded that the notion of self-defence in domestic criminal law may differ from that of a state using force in “self-defence”. However, for the purposes of this rather simplistic analogy the two are taken to be synonymous.
force, it may even constitute a crime of aggression.\textsuperscript{497} If, on the other hand, State X’s action was neither lawful nor justified then the use of force by State Y in self-defence (in compliance with the principles of international humanitarian law), is permissible as long as it is necessary and proportionate.\textsuperscript{498} As both State X’s initial use of force may amount to aggression, and State Y’s “self-defence” may conceivably constitute aggression (depending on its nature), it is important for the actions of both entities, to be thoroughly reviewed before any party to a conflict is prosecuted.\textsuperscript{499}

The situation is even clearer in the case of “anticipatory self-defence” (i.e. no armed attack, and no Security Council authorisation). A state or other entity that uses force against another and defends its action on the basis of “anticipatory self-defence”, is engaging in a \textit{prima facie} unlawful use of force that may constitute a crime of aggression. The only time “anticipatory self-defence” will not be unlawful is when it is deemed justified pursuant to an established set of objective criteria.

If the use of force in anticipatory self-defence is deemed justified, it follows that there is no right on the part of the “victim” to use force in self-defence. Consequently, any such use of force would be unlawful. Again, depending on the nature of such unlawful use of force, it may also constitute a crime of aggression. If the use of force in anticipatory self-defence does not meet the objective criteria, it is not justified and remains unlawful. Again, depending on its nature, it may even constitute a crime of aggression. A use of force that is not justified, in anticipatory self-defence (or self-defence, for that matter) opens the door to compensatory recourse by the victim. The most sensible and reliable mechanism to determine the lawfulness or criminality of a particular use of force is an ICC investigation.

\textsuperscript{497} One can imagine the possibility of State Y having aggressive motives and “waiting” for the right opportunity to “punish” or “teach a lesson to” State X.

\textsuperscript{498} If State Y’s use of force in self-defence violates the principles of international humanitarian law then, as discussed in the previous chapter, it is conceivable that State Y’s use of force in “self-defence” may, too, constitute aggression.

\textsuperscript{499} This demonstrates all the more the inappropriateness of the UN Security Council to deal with the crime of aggression. It is not equipped, nor does it possess the moral authority to fairly investigate armed conflicts for the purposes of attributing or apportioning blame.
Generally, a use of force is *lawful* if it is authorized by the Security Council or is necessary for the purposes of self-defence *if an armed attack occurs*. Nevertheless, to ensure that the initial “armed attack” was indeed unlawful (i.e. not *justified*), the use of force in self-defence must also be subject to review and possible investigation by the ICC Prosecutor. A use of force is justified, albeit not lawful *per se*, if it is *necessary*. A justified use of force is neither lawful nor unlawful as these concepts are commonly understood. “Self-defence” is the purpose of the use of force; “necessity” is established if the use of force meets a standard of objective criteria. An allegation of self-defence or anticipatory self-defence does not in itself justify a use of force; necessity must be proven. Necessity therefore requires a test to determine whether a use of force in anticipatory self-defence is necessary and not unlawful – and – to determine whether a use of force in Article 51 self-defence (i.e. “if an armed attack occurs”) was necessary and therefore lawful.

4.5 Rationae Personae

The International Criminal Court has jurisdiction over natural persons. For the purposes of defining aggression however it must be established *who* exactly among natural persons will be subject to prosecution for the crime of aggression. There are two facets or dimensions to the *rationae personae* jurisdiction: one *horizontal* (i.e. persons belonging to *which* collectivities) and the other *vertical* (i.e. chain of command, hierarchy of responsibility etc...).

The horizontal dimension of our inquiry pertains to the typical feature of the phenomenon of aggression, namely, that it requires substantial infrastructure and/or resources to be carried out. Aggression, crimes against humanity, and the crime of genocide, as a general rule have a massive and systemic nature that presupposes

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500 What use would the odd investigation of the most flagrant examples of aggression be in deterring would-be aggressors?
501 “1. The Court shall have jurisdiction over natural persons pursuant to this Statute. 2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.” Article 25, Rome Statute.
The category of accused therefore is dependent on the type of entity, in addition to states, that is capable of action falling within the "summit category" of prohibited use of force. Once we establish the entities that can be involved in aggression, we can identify the individuals who are ultimately responsible for the unlawful use of force.

By way of analogy, Article 7 of the Rome Statute entitled "Crimes against humanity" defines *Attack directed against any civilian population* as a "course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a *State or organizational* policy to commit such attack.*\(^{503}\) If a crime against humanity can be carried out or dictated by a state or organizational policy it stands to reason that aggression can also be carried out in furtherance of an *organizational* policy.

The fact that many non-state actors can, at least theoretically, engage in unlawful uses of force (that may amount to aggression) further "dis-embeds" or disassociates the crime from the traditional notion that aggression is a state crime. Commenting on the oftentimes prevailing assumption that a person who is liable for aggression is acting on behalf of a particular *state* Condorelli writes,

> C’est une conception qui m’apparaît, quant à moi, très discutable: je ne vois pas, en effet, pourquoi il devrait être a priori exclu que l’on puisse criminaliser comme auteurs d’agressions des particuliers n’agissant pas pour le compte d’États, mais plaçant leur action dans le cadre de puissants *groupes non-étatiques*, comme des multinationales du crime organisé, des mafias, des armées privées, des cartels de la drogue ou des centrales terroristes. Que l’on puisse ou non parler d’"agression" au sens « inter-étatique » de la Charte lors d’attaques d’envergure venant de telles organisations si aucun État n’est derrière elles, il n’en reste pas moins qu’il ne serait pas du tout choquant d’imaginer que de telles attaques soient

\(^{502}\) "The Rome Statute also reflects the notion that the crime of aggression constitutes par excellence, though still very imprecisely as regards the system of application, the archetype of the ‘double crime’, simultaneously a State crime and potentially an individual crime. Crimes against humanity, and a fortiori the crime of genocide, without necessarily being undertaken by a sovereign State, nonetheless as a general rule presuppose collective organization." Dupuy, *supra* note 118 at 1089.

\(^{503}\) Article 7(2)(a), Rome Statute. Emphasis added.
qualifiées de « crimes d’agression » sur le plan de la responsabilité pénale individuelle.\textsuperscript{504}

Powerful collective entities are capable of carrying out aggression. The events of 11 September 2001 and certain reactions within the international community to these events confirm the well-foundedness of this assertion “de manière éclatante”.\textsuperscript{505} However, international criminal organizations are not the only non-state entities capable of carrying out aggression. International regional arrangements and collective security organizations such as NATO are equally capable of the summit category of unlawful use of force. The US-led NATO invasion of Kosovo not only represented a break with the prior legal regime, it was a supremely illegal war.\textsuperscript{506} At that time, NATO based its use of force on reasons that only the UN Security Council can invoke: impending humanitarian disaster and threats to peace and international security.\textsuperscript{507} The essence of aggression therefore is not in the perpetrator-entity; rather, it is in the nature of the unlawful use of force.

Although the Charter outlaws the use of force by states, is anyone prepared to argue that the general prohibition on the use of force does not or should not apply to non-state entities?

The second, vertical dimension of the matter of personal jurisdiction involves who in the chain of command, or on behalf of an organized collectivity, can be held criminally liable for the crime of aggression.\textsuperscript{508} This issue has already ripened to

\textsuperscript{504} Condorelli, supra note 188 at 156-7.
\textsuperscript{505} Ibid.
\textsuperscript{506} “Of course NATO tried to defend its actions on legal as well as moral grounds. [...] As Christine Gray put it, ‘It is no longer simply a case of interpreting euphemisms such as ‘all necessary means’ to allow the use of force when it is clear form the preceding debate that the use of force is envisaged; the USA, the UK and others have gone far beyond this to distort the words of resolutions and to ignore the preceding debates in order to claim to be acting on behalf of the international community.’” Mandel, supra note 24 at 89-90.
\textsuperscript{507} Mandel also included “Security Council resolutions” - however that scenario constitutes an established exception to the general prohibition on the use of force (i.e. UN authorized use of force). Ibid.
\textsuperscript{508} See Rodin, supra note 327, generally, who makes the forceful argument that soldiers should be held responsible for the unlawful use of force – provided the requisite knowledge and intention are present. The trickle-down effect would be that fewer individuals would enlist in armies knowing there was a possibility that they could be held personally accountable for their behaviour.
the point where there appears to be ample consensus. The common understanding and assumption at the 2002 ICC Preparatory Commission was that only state leaders could be held criminally responsible for the crime of aggression. It is unclear whether the consensus was on the word “state”, “leaders” or on the combined term “state leaders”. It is suggested however that the emphasis should be on leaders given the prospect that collective entities can be involved in aggression has yet to be fully examined. In her discussion paper, the Coordinator for the Working Group on the Crime of Aggression Fernandez de Gurmendi proposed a definition based on an “updated formulation” of the Nuremberg Charter definition and jurisprudence:

For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

At its first informal inter-sessional meeting in June 2004, the Special Working Group on the Crime of Aggression discussed the leadership aspect of the crime and concluded that it remained to be determined whether the leadership could be limited to one person or to the upper echelons of the chain of command. In this connection, it was also suggested that all persons in a position to exert decisive influence over the policies of the State [or collective entity] should be held criminally responsible, so that political, social, business and spiritual leaders could be included within the leadership group. The point was made that the preliminary definition had been crafted in a manner broad enough to encompass most influential leaders. However, another view held that responsibility for the crime of aggression should be understood to be rather restrictive, basically limited to political leaders, excluding for example

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509 Fernandez de Gurmendi, supra note 239 at 186.
510 Ibid.
advisors who clearly would lack any effective control over the actions of a State.\textsuperscript{512}

Unlike the Coordinator’s discussion paper the Report of the SWGCA concluded that there was agreement that aggression was a crime “characterized by being committed by those in a position of leadership” and arguably left open the possibility that aggression can be committed by non-state as well as state entities.\textsuperscript{513}

Consequently, it is proposed that the \textit{rationae personae} jurisdiction of the ICC encompass individuals acting on behalf of state as well as collective entities. These leaders must be in a position to exert decisive influence or effective control to direct, plan, prepare or order the unlawful use of force.

4.6 Parameters for the Scope of the Crime of Aggression

The purpose of this chapter was to clarify some of the more complex issues associated with the crime of aggression. Although there remain a number of unanswered questions, it is suggested that we have at least managed to address the core issues of a working definition. The concepts that form the basis of a definition for the crime of aggression are: unlawful use of force; UN authorized use of force; self-defence; anticipatory self-defence; defences (excuses and justifications); and, \textit{rationae personae}. “Humanitarian intervention” is relevant to the crime of aggression if there is no UN Security Council authorization for the use of force by one or more states in that context.

The primary concept is the category of unlawful use of force. This is the use of force prohibited by the UN Charter. Although technically this prohibition targets states, it can conceivably apply to collective entities. UN-authorized use of force

\textsuperscript{512} Ibid.
\textsuperscript{513} Ibid. at 11 para 53(a).
(including humanitarian intervention mandates) and national self-defence under Article 51 of the UN Charter are the two exceptions and constitute lawful uses of force. The former is a formal mandate under a SC resolution and must be explicit (i.e. the use of force cannot be inferred) in terms of purpose and duration. The use of force in self-defence is only lawful “if an armed attack occurs” and it is necessary and proportionate. No armed attack, no legal right of national self-defence.

The more controversial anticipatory self-defence, and un-UNSC authorized humanitarian intervention are prima facie unlawful uses of force. Both are subject to review on the basis of an international standard as established through objective criteria such as those proposed under tests B and C, respectively, in Chapter 5 below. If they meet the standard, which has as its source the principle of necessity, they are deemed not unlawful. If they do not meet the standard, depending on their nature, they may constitute crimes of aggression.

If an unlawful use of force is unnecessary and breaches the peace, it constitutes a crime of aggression. An unlawful use of force is subject to review on the basis of an international standard as established through objective criteria such as those proposed under test A in Chapter 5 below. If the unlawful use of force meets this standard, then it constitutes a crime of aggression. In its simplest form, aggression can be defined as the unlawful use of force that is unnecessary and a breach of the peace.
Chapter 5  A Proposed Working Definition for the Crime of Aggression

Having explored the major issues relating to the scope of the crime of aggression, the groundwork is now laid for certain conclusions to be drawn that will become the cornerstones of a definition. A working definition for the crime of aggression should follow and reflect a rigorous analysis of the various concepts it touches upon, in particular, the general prohibition on the use of force, self-defence; anticipatory self-defence; Chapter VII use of force (Security Council use of force mandates); humanitarian intervention or the responsibility to protect; possible defences and *rationae personae* considerations.

Current proposals for a definition for the crime of aggression do not reflect such an analysis. The 2002 PrepCom consolidated text, for example, presents two options, neither of which touches upon the general prohibition on the use of force, self-defence, anticipatory self-defence, the concept of necessity or justification. The first option contains three variations, yet none of the four possible texts envisions the possibility that a non-state entity can be involved in the crime of aggression.

The PrepCom consolidated texts are circular, referencing undefined terms or concepts that hinder rather than advance the debate. Even the use of the term “gravity” in Option 1’s third variation is a disappointment. More static than purposeful, it fails to establish any definitional parameters. Option 2 of the PrepCom document conflates the idea of conditions for the Court’s exercise of jurisdiction over the crime and the definition of the crime of aggression by asking the ICC to defer any jurisdiction that it might have over the crime of aggression to the veto-carrying members of the UN Security Council. If a precondition requiring a Security Council determination of an act of aggression is ever agreed to, then the

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515 According to Schuster, there are five alternatives however “Option 1” is incomplete and does not stand on its own without one of the ensuing variations.
ICC has no jurisdiction over the crime of aggression and there is no need to define it.

In 2002, the Coordinator for the Working Group on the Crime of Aggression prepared a “discussion paper” which further clears the way for the UN Security Council to usurp complete jurisdiction over the crime of aggression. This paper is divided into two sections entitled, “Definition of the Crime of Aggression and Conditions for the Exercise of Jurisdiction” and “Elements of the Crime of Aggression” however this is something of a misnomer. It may as well have been collapsed into one large section entitled, “Conditions for the Exercise of Jurisdiction”. This paper essentially presents two possible “definitions” for the crime of aggression: either the crime of aggression is a “war of aggression” or it is an “act of aggression” as this term was defined in the 1974 UNGA Resolution 3314. Neither option is a definition for the crime of aggression.

The proposed “conditions” for the Court’s exercise of jurisdiction require a feat of mental gymnastics. Most prominent among them, unsurprisingly, is that the Security Council gain complete jurisdiction over the Court’s crime of aggression. Interestingly, in the event that Council should make no determination on the act/crime of aggression at issue, one option has the Court relegated to the position of pageboy to petition either the Security Council (after it fails to make any determination in regard to the situation!) or the General Assembly, in turn, to seek a declaratory judgment from the International Court of Justice on whether or not an “act of aggression” has occurred. Either that, or Option 2 proposes that the Court dismiss the case if the Security Council cannot be bothered to make any determination in regard to a particular case.

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516 PCNICC/2002/WGCA/RT.1/Rev.2.
517 Ibid.
518 Ibid. Clause 5, Option 4.
519 Ibid. Clause 5, Option 2. Should the Council, in its infinite wisdom, fail to make any determination as to whether a particular matter constitutes aggression, wouldn’t the ICJ be overstepping its own jurisdiction by rendering an advisory opinion on the matter? Isn’t the Council the only body with a monopoly on the subject (as some would argue)? If not, then there is no reason
The Coordinator’s discussion paper is underhanded in that it purports to be a definition when in fact it renders a definition unnecessary: an assault on the fundamental principle of justice calling for fair and equal application of the law. In the context of her proposals the Court’s role is all but illusory. If the crime of aggression is placed in the hands of the Security Council, selective justice will be rendered. That both the discussion paper and the PrepCom consolidated text demonstrate hostility towards the prospect that the Court will exercise its unfettered jurisdiction over the crime of aggression is an outrage.

Once it is agreed that the Court have not only *de jure* but *de facto* jurisdiction over the crime of aggression, the next challenge is to ensure that the definition is not so restrictive that it renders impossible the Court’s exercise of discretion in its application of the law. Pellet warns of the consequences of drafting definitions in too much detail. By not trusting judges to interpret and apply international law, the Statute may limit “the chances of making the Court an efficient instrument in the struggle against the crimes it is supposed to repress” ⁵²⁰

The following proposed working definition for the crime of aggression is comprised of three tests and five clauses addressing the central issues related to the crime of aggression.

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⁵²⁰ Alain Pellet, Cassese, The Rome Statute, Volume II, 1051 at 1058.
Crime of Aggression

For the purpose of this Statute, “crime of aggression” means an unnecessary, unlawful use of force which constitutes a breach of the peace so grave that individual criminal responsibility attaches to those persons in a position to control, direct, plan, prepare, or order it.

An unlawful use of force that meets the criteria as established under Test A constitutes a crime of aggression.

A crime of aggression is committed on behalf of a state or other collective entity.

The Court’s jurisdiction over the crime of aggression is subject to the same conditions, mutatis mutandis, as those that apply to the other three crimes under the Court’s jurisdiction.

Nothing in this provision shall be construed as extending or limiting the scope of those provisions relating to an act of aggression contained in the Charter of the United Nations.

Unlawful Use of Force

For the purpose of this Statute, “unlawful use of force” means:

i) The direct or indirect, armed or unarmed use of force against the territorial integrity or political independence of a state, or for a purpose otherwise inconsistent with the purposes of the United Nations;

ii) The use of force in excess of the parameters as established in a United Nations Security Council resolution authorizing the use of force;

iii) The use of force in excess of that which is necessary in a situation of self-defence; or,

iv) Any other unlawful use of force as described herein.

The unlawful use of force can occur at the outset of a conflict or intervention, or it can occur during the course of on-going hostilities.
Individual and Collective Self-defence

If an armed attack occurs against a state or a non-state entity, the latter may use such force as is necessary to repel the attack, in the manner set out below, until the United Nations Security Council takes measures to restore or maintain international peace and security.

A state or non-state entity may use force to the extent that it is necessary and proportionate to repel an attack or to put an end to recurring attacks. The state or non-state entity that is the victim of the initial armed attack may request help from other states or non-state entities and collectively, these states and / or non-state entities may use the force necessary and proportionate to repel the armed attack in question.

Any use of force employed in individual or collective self-defence in excess of what is required for the purposes of repel the initial armed attack is prima facie unlawful and subject to review by the Court to establish whether such use of force constitutes a crime of aggression (i.e. Test A).

Any use of force in individual or collective self-defence must be immediately reported, in sufficient detail, to the United Nations Security Council and remains subject to measures the latter may adopt to maintain or restore international peace and security.

Nothing in this provision shall be construed as extending or limiting the scope of Article 51 of the Charter of the United Nations.

Anticipatory Self-Defence

If no armed attack has occurred the use of force in anticipatory self-defence, to pre­empt or prevent an armed attack, is prima facie unlawful and constitutes a crime of aggression.

The use of force in anticipatory self-defence is subject to review by the Court and may be deemed justified if:

i) It is established that the threat is so imminent and grave as to warrant the use of force to avert a catastrophe (i.e. Test B); and,
ii) The use of force in question is not in excess of what is required to repel the imminent attack or avert the catastrophe.

If all the requirements under Test B are met then the crime of aggression was justified and individual criminal liability for the aggression is excluded.

If a use of force was deemed justified under the circumstances, however, the Court deems the use of force employed by the defendant exceeded that which was necessary to repel the imminent attack or avert the catastrophe, then such excessive use of force is unlawful and may constitute a crime of aggression. The Court will then apply Test A.

All other uses of force employed in “anticipatory self-defence” that fail to meet Test B requirements are unlawful and, if they meet Test A requirements constitute a crime of aggression.

Security Council Authorized Use of Force
(“Chapter VII” Use of Force)

The United Nations Security Council may authorize a state or non-state entity to use force to restore or maintain international peace and security.

A state or non-state entity may therefore use force as expressly and explicitly provided for under the UNSC mandate that is, with respect to: whom is authorized, the type and extent of force authorized, the purpose of the force authorized, and the period for which the use of force is authorized.

Any use of force that exceeds the parameters as established in the UNSC resolution authorizing the use of force is unlawful, subject to review by the Court and may constitute the crime of aggression.
Test A: Aggression Threshold Criteria

An unlawful use of force constitutes a crime of aggression when it is unnecessary and a breach of the peace so grave that triggers individual criminal responsibility. The nature of such unlawful use of force is determined by the Court based on the following criteria.

1) Gravity of scale (disproportionate/unnecessary/wanton)
2) Gravity of effects (disproportionate/unnecessary/wanton)
3) Unwarranted circumstances (unnecessary)
4) Unjustifiable purpose or motivation (bad faith)

Anticipatory Self-Defence Criteria (Test B)

If there is no armed attack, the use of force is illegal and may constitute a crime of aggression. The following criteria shall assist the Court in its determination of whether a situation of grave threat existed and warranted a unilateral use of force by a state or non-state entity. A grave threat exists or existed, and a use of force is warranted when all of the following criteria are met:

1) Identifiable object at risk due to threat;
2) Identifiable source of threat;
3) Identifiable nature and scale of threat;
4) Proof of seriousness of threat;
5) Proof of peaceful attempts to diffuse tension or resolve dispute;
6) Proof of rejection of alternative peaceful means by the source of the threat;
7) Identifiable plan of action and goals sought;
8) Identifiable means of use of force;
9) Reasonable proof that goals would be achieved by use of force;
10) Reasonable proof of damage due to use of force;
11) Reasonable proof that actions within bounds of international humanitarian law.

If a situation of grave threat existed and a use of force is warranted, then any use of force in excess thereof is illegal, and therefore subject to review by the Court, and may constitute a crime of aggression.

Individual criminal responsibility is excluded if the Court concludes that all the above requirements have been met and the use of force was justified.
Responsibility to Protect Criteria (Test C)

If a state is in violation of its international duty to protect its nationals, another state – before it intervenes for the purposes of thwarting or curtailing a humanitarian crisis, must obtain a UNSC mandate to use force. In the event that no such mandate is obtained, said use of force will be prima facie unlawful and subject to review by the Court.

The following criteria shall assist the Court in its determination of whether a situation of grave threat existed and warranted a unilateral use of force by a state or non-state entity. A grave threat exists or existed, and a use of force is warranted when all of the following criteria are met:

1) Identifiable object at risk due to threat;
2) Identifiable source of threat;
3) Identifiable nature and scale of threat;
4) Proof of seriousness of threat or actual harm done;
5) Proof of peaceful attempts to diffuse tension or resolve dispute;
6) Proof of rejection of alternative peaceful means by the source of the threat;
7) Identifiable plan of action and goals sought;
8) Identifiable means of use of force;
9) Reasonable proof that goals would be achieved by use of force;
10) Reasonable proof of damage due to use of force;
11) Reasonable proof that actions within bounds of international humanitarian law.
CONCLUSION

In 2009 the Assembly of States Parties will be presented with the first occasion to adopt a definition for the crime of aggression. The choices made between now and the time when a consensus is reached will require continuous and rigorous analysis to promote fruitful and enlightened discussion. It is hoped that during the next four years the debates concerning the crime of aggression will reflect an understanding of whether the questions at issue are of a political or legal nature. This thesis has tried to present the issues from a legal framework standpoint while noting when policy considerations may play a role. It is not impossible to define the crime of aggression: an international crime over which the ICC and not the Security Council will exercise ultimate jurisdiction (barring the situation where the Council invokes Article 13(b) or 16 of the Rome Statute). We must simply seize the opportunity.

This focus of this thesis has been on two core issues: the role of the Security Council, and the general scope of the definition of the crime of aggression. The debate on the role of the Security Council can be summarized in one question: should the ICC’s exercise of jurisdiction over the crime of aggression be subject to the national interests of each P-5 member? If the answer to this question is what it should be (a resounding “No”) then there can be no further conditions imposed on the ICC’s jurisdiction. A carefully formulated definition will ensure that there is no conflict with any provision contained in the UN Charter. The Council’s discretion to determine “acts” of aggression does not in and of itself create a jurisdictional conflict between the Council and the ICC. The UN Charter vests the Security Council with the authority to take action in the event of (what it may determine is) a “threat to the peace”, a “breach of the peace” or an “act of aggression”. A determination under Article 39 has as its object the **triggering of action** under Article 41 or 42; the determination is not an end in itself nor is it a judicial decision. If the Court’s jurisdiction over the crime of aggression becomes subject to an Article 39 determination, then it must be understood that this will only lead to one conclusion: each P-5 member will have the political power under its veto to prevent
any matter involving aggression from being brought before the ICC. While there may be jurisdictional overlap between the Council and the Court, there is no jurisdictional conflict *per se*, as one jurisdiction is political while the other is legal. A similar overlap has existed for decades between the Council and the International Court of Justice. If we remove jurisdiction over the crime of aggression from the hands of the ICC and place it into the hands of the Council, which is what preconditions would do, not only will the ICC’s reputation be tarnished but it will have the effect of perpetuating the *status quo* and render meaningless any purported definition of aggression. If the ICC must wait for a Council determination of aggression, this will be a clear step backwards. It will also ignore the fact that the Rome Statute was concluded in large part *because* the crime of aggression was recognized as falling under the ICC’s jurisdiction. If preconditions on the ICC’s exercise of jurisdiction are established, Condorelli reminds us, this will be the result of a purely political decision, not one based on the provisions of the UN Charter. Again, a carefully-drafted definition will render pre-conditions unnecessary. The ICC must have the same “unfettered” jurisdiction over the crime of aggression it enjoys over the other three international crimes.

The general scope of the definition of the crime of aggression must reflect a clear grasp of the component concepts through which aggression can be understood. The crime of aggression is not a Gordian Knot in the true sense of the term. It is a complicated matter. With patience and uncompromisingly rigorous legal analysis however we can untangle the political from the legal strands. No sword will be necessary. It can well remain right where it is, and the rest of the work is up to us. When the day comes that the Assembly of States Parties to the International Criminal Court has adopted the definition of the crime of aggression, provided that it is without pre-conditions, it shall be the first time in history that would-be perpetrators of aggression will be on notice, *at last*.

When the crime of aggression is clearly defined, and it is the International Criminal Court that has sole jurisdiction over it (barring cases under Articles 13(b) and 16)
then, and only then, will we be taking a step towards a higher level of civilization. Only then will states be treated on level playing field in matters relating to the use of force. In this connection, Pierce’s reply to Dr. Kokintz, the inventor of the Q-bomb in the novel *The Mouse that Roared*\(^{521}\) comes to mind.

[After declaring war on the United States, invading and successfully stealing the its (and the world’s) most powerful weapon, the Q-bomb, the tiny duchy of Grand Fenwick has now become the most powerful nation in the world. Pierce and Dr. Kokintz contemplate the future of the world...]

*(Dr. Kokintz)* Whoever has the most weight in the world receives the most consideration. That is the one international law which is recognized by all. You must admit that it would be more disastrous for all free men if the United States were destroyed than if, say, Belgium or Ireland or Grand Fenwick were destroyed.

*(Pierce)* Perhaps, but a Belgian or an Irishman or one of our own people would not agree. And so long as the world can contemplate the destruction of a small nation without any deep regret, so long will it be uncivilized. It is the same in the government of communities – the rights of the weakest and poorest citizen must receive the same support as those of the richest and the most powerful. Otherwise civilization is merely a name and not a real force. But without civilization, no individual is safe, no nation is safe, and in these days even the world itself is not safe.

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