



***THE CRIME OF AGGRESSION AND THE UNITED STATES:
NEGOTIATIONS OF THE INTERNATIONAL CRIMINAL COURT***

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1. Introduction

The 1998 Rome Statute of the International Criminal Court (ICC) for the first time created a permanent international court to try individuals for genocide, war crimes, and crimes against humanity. However, the negotiations did not produce an agreement on the crime of aggression. Article 5 of the Rome Statute provides that the Court shall have jurisdiction over the crime of aggression only once the Assembly of States Parties (ASP) amends the Rome Statute to include a definition of the crime and the conditions for the exercise of jurisdiction.¹ The first opportunity to amend the Statute will be in late 2009 or early 2010 when the ASP will hold a Review Conference, as mandated by the Statute, to be convened seven years after its entry into force on July 1, 2002.² At that time states will likely consider a proposal on aggression and determine whether it is possible to agree on a universally acceptable provision. Even if the ASP decides to amend the Statute, the crime of aggression may face additional challenges due to the difficulty of implementing amendments at the national level. Pending the entry into force of an amendment, the Court is unable to exercise jurisdiction over the crime of aggression.³

By signing the Rome Statute in December 2000,⁴ the United States agreed to “reaffirm the illegality of aggression in principle.”⁵ Nonetheless, the US government expressed profound concerns that devising a definition of aggression that satisfies the requirements of criminal prosecution would be nearly impossible. Moreover, according to US negotiators, it would be equally difficult to implement the Court’s jurisdiction in a manner that is compatible with the

¹ Rome Statute of the International Criminal Court, art. 5(2), UN Doc. A/CONF.183/9 of July 17 1998 and corrected by procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002, hereinafter Rome Statute.

² *Id.*, art. 121(1) (stipulating that an amendment may be proposed upon expiry of seven years from the entry into force of the Rome Statute). *See also* art. 123(1) (providing that any proposed amendments to the Statute will be considered at a Review Conference, which will be convened seven years after the entry into force of the Statute).

³ Andreas Zimmermann, *Article 5 Crimes Within the Jurisdiction of the Court*, Commentary on the Rome Statute of the International Criminal Court, ed. Otto Triffterer, p.102, Nomos Verlagsgesellschaft Baden-Baden, 1999.

⁴ President Clinton signed the Treaty of Rome in December 2000. The Bush Administration suspended the US signature in May 2002, by a note to former UN Secretary General Kofi Annan, informing him of the US decision not to become party to the Rome Statute.

⁵ Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law, Justice for the New Millennium*, p. 134, Transnational Publishers, Inc., Ardsley, New York, 2002 (quoting from the Preamble to the Rome Statute, *supra* note 1).

United Nations (UN) Charter.⁶ Particularly, the US stressed the importance of preserving the role of the UN Security Council (UNSC) as set out in UN Charter Articles 24 and 39.⁷ Because the US has a formal policy of disengaging from the ICC and its activities, the Administration is currently unwilling to participate in the negotiation process for a provision on aggression.

This paper's objective is to respond to the US concerns regarding the crime of aggression. First, the paper analyzes the driving force behind inclusion of the crime into the Rome Statute and reviews the historic background of aggression. Then, it describes the US objections to the crime of aggression. Next, the paper focuses on the current efforts of the Special Working Group on the Crime of Aggression (SWGCA) to define the crime and to establish the conditions for the exercise of jurisdiction by the Court. Finally, the paper responds to US concerns and discusses possible scenarios at the forthcoming Review Conference.

2. From Nuremberg to Rome: Evolution in the International Approach to Aggression

2.1. Driving force for prosecution of the crime

Aggression came to be known as “the supreme international crime” differing from other war crimes only in that it “contain[ed] within itself the accumulated evil of the whole.”⁸ Examples of acts of aggression include the unlawful invasion, use of armed force, and occupation by one state of another's sovereign territories. By virtue of its nature, aggression may often lead to the commission of war crimes, crimes against humanity, and genocide. Aggression's gravity and overarching scope have made it a sensitive matter for nation states and civil society. The painful legacy of aggressive wars commands strong emotions in the

⁶ Rome Statute, *supra* note 1, art. 5(2) (stating that a provision defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime shall be consistent with the relevant provisions of the UN Charter); Statement by the US Delegation to the Preparatory Commission for the ICC, pp. 2-4, September 26, 2001, <http://www.state.gov/documents/organization/16461.pdf> (last visited June 24, 2007).

⁷ Statement by the US Delegation to the Preparatory Commission for the ICC at p. 4; Charter of the United Nations and Statute of the International Court of Justice, (hereinafter UN Charter), UN Department of Public Information, DPI/511, reprint April 2003, art. 24 (providing that “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”). *See also* art. 39 (stipulating that “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain and restore international peace and security”).

⁸ Sadat, *supra* note 5, at p.132.

international community and triggers a shared determination to punish those most responsible. In the years after World War II, Germany and a group of Northern African and Arab nations emerged as leaders of the international effort to address the state act of aggression.

The international community has widely recognized that it must prevent aggression. Nonetheless, it has been reluctant to acknowledge the existence of acts of aggression in many instances. Throughout the entire history of the United Nations, the Security Council made only one determination of aggression, in 1976.⁹ Defining aggression for the purposes of international criminal law and including it into the Rome Statute could encourage states to address aggression more effectively than they did in the past. Moreover, prosecution of the crime of aggression by the ICC could deter the commission of other heinous crimes.

2.2. Post World War II Tribunals

The post-World War II military tribunals in Nuremberg and Tokyo for the first time held individuals accountable for crimes against peace, the predecessor of the crime of aggression.¹⁰ The Charter of the International Military Tribunal at Nuremberg (IMT) made clear that the allied powers viewed aggressive wars as punishable under international law.¹¹ Under the IMT's Charter the Tribunal could convict the accused of "crimes against peace" if they acted as leaders or accomplices who helped to plan or wage the crime of aggressive war and who had personal knowledge that their State contemplated aggression.¹² However, the Charter did not include individual criminal responsibility for the planning or waging of aggressive wars, in part because the framers perceived aggression as a state act. Nor did the Charter include a definition of

⁹ Giorgio Gaja, *The Long Journey Towards Repressing Aggression*, The Rome Statute of the International Criminal Court: Commentary, Antonio Cassese *et al.* (eds.), Vol. 1, p. 434, Oxford University Press, 2002 (noting that the sole exception was Security Council's Resolution 387 from 1976, which "condemned South Africa's aggression against the People's Republic of Angola").

¹⁰ United Nations, Rome Statute of the International Criminal Court, *Crimes within the Court's Jurisdiction, The Crime of Aggression*, <http://www.un.org/icc/crimes.htm#aggression> (last visited July 3, 2007).

¹¹ International Law Commission, *Principles of International Law of the Charter and Judgment of the Nuremberg Tribunal*, Second Session International Organization, Vol. 4, No. 4., November 1950, p. 717, Principle VI (a) provides that a "crime against peace" is the (i) planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; or (ii) the participation in a common plan or conspiracy for the accomplishment of any acts mentioned under (i).

¹² Benjamin B. Ferencz, *Can Aggression Be Deterred by Law?* 11 Pace Int'l L. Rev., p.345, 1999.

aggression. Instead, the allies established “a nexus between the state’s aggressive war and the act of the individual implicated”¹³ in order to hold the defendants accountable.

In 1946 The United Nations affirmed the principles of international law set out in the Nuremberg Charter. The UN directed its Committee on Codification of International Law to incorporate them into the formulation of an international criminal court that could enforce an international penal code.¹⁴

2.3. The work of the United Nations

Article 2(4) of the UN Charter, prohibiting aggressive wars, requires all members to “refrain . . . from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”¹⁵ Article 2(4) does not refer to individual criminal responsibility and instead constitutes a “fundamental norm of international law binding . . . states” to refrain from using or threatening to use force.¹⁶ In 1974 the UN General Assembly adopted Resolution 3314 defining for the first time the state act of aggression. The resolution described aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the Charter of the United Nations.”¹⁷ The Security Council would make the final decision whether a State had committed aggression.¹⁸

¹³ Mohammed M. Goma, *The Definition of the Crime of Aggression and the ICC Jurisdiction Over That Crime*, p. 55, *The International Criminal Court and the Crime of Aggression*, Mauro Politi and Giuseppe Nesi (eds.), Ashgate, 2004.

¹⁴ UN General Assembly Resolution 95(I), *Affirmation of the Principle of International Law recognized by the Charter of the Nuremberg Tribunal*, UN Doc. A/Res.95 (1946).

¹⁵ UN Charter, *supra* note 7, art. 2(4).

¹⁶ Sadat, *supra* note 5, at pp. 132-3.

¹⁷ UN General Assembly Resolution 3314, *Definition of Aggression*, art. 3 provides a non-exhaustive list of state acts of aggression, which regardless of a declaration of war, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in which territory beyond the termination of the agreement;

In the early 1990s the United Nations Security Council established the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY)¹⁹ and Rwanda (ICTR),²⁰ responding to the widespread ethnic cleansing reported in both countries. Although the tribunals did not prosecute crimes against peace, focusing instead on genocide, war crimes, and crimes against humanity, their establishment constituted a major step in the international effort to hold accountable those individuals responsible for atrocity crimes. ICTY and ICTR reflected a profound commitment to the international prosecution of atrocities and laid the legal foundations upon which the framers of the Rome Statute established the ICC.

In 1996 the International Law Commission (ILC), a UN related body of independent experts from various regions of the world, released its revised Draft Code on Crimes against Peace and Security of the Mankind, which reaffirmed Nuremberg's legacy that crimes of aggression entail individual criminal responsibility.²¹ Nonetheless, the ILC emphasized that only individuals who actively participate or take a leading part in the planning or initiation of aggression would be responsible for the crime.²² The Draft Code restricted jurisdiction over the crime of aggression to an international criminal court unless a state intended to try its nationals for the crime.²³ Moreover, the Draft Code stipulated that "aggression by a State was . . . *sine qua non* condition for the attribution of individual criminal responsibility for the crime of

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- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
 - (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

¹⁸ Resolution 3314, *supra* note 17, preamble.

¹⁹ UN Security Council, *Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia*, UN Doc. S/Res/827, 1993.

²⁰ UN Security Council, *On the Establishment of the International Tribunal for Rwanda*, UN Doc. S/Res/ 955, 1994.

²¹ The International Law Commission presented its first Draft Code in 1951 and revised it multiple times during the period 1951-1996. International Law Commission, *Draft Code of Crimes against the Peace and Security of the Mankind*, Yearbook of the International Law Commission: 1996 Document: A/51/10 vol. II(2), p.18, (hereinafter Draft Code), draft art. 2 sets out that:

1. A crime against the peace and security of mankind entails individual responsibility.
2. An individual shall be responsible for the crime of aggression . . .

²² *Id.*, draft art. 16 (providing that "an individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.")

²³ *Id.*, draft art. 8, (stipulating that "jurisdiction over the crime set out in article 16 shall rest with an international criminal court"; however, a state referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.)

aggression.”²⁴ Thus in 1996 ILC marked important progress in the effort to prosecute individuals for crimes of aggression. However, the Commission was unable to achieve success in producing a workable definition for the crime.

2.4. The Rome Conference

Many delegates who joined the negotiations that led to the 1998 Rome Conference²⁵ became passionate about the establishment of an international criminal court in the hope that it would prosecute individuals for the crime of aggression. Germany and a large group of Arab and African countries led the intense diplomatic efforts to reach an agreement on aggression. Despite the commitment of these states, however, delegations were unable to reach a compromise during the negotiations of the 1996-1998 Preparatory Committee and at the Rome Conference. The two major disagreements which caused a split among the states concerned the question of defining the crime and the role of the Security Council in the exercise of the Court’s jurisdiction.

Two main approaches emerged with respect to the definition. The group of Arab and African countries favored a definition based on the 1974 General Assembly Resolution.²⁶ The rest of the negotiating states, led by Germany, rejected the use of Resolution 3314 because not “all of the acts contained therein . . . involve[ed] individual criminal responsibility.”²⁷ An unmodified version of Resolution 3314, providing for an act of one state against another, seemed impracticable for the purposes of criminal law which prosecutes individuals, and thus difficult for judges to apply.

The definition in Resolution 3314 did not include elements of the crime or mental state (*mens rea*) requirements. These deficiencies raised legality concerns that a prosecutor could charge the defendants with vaguely defined crimes or without giving sufficient consideration to their mental culpability.²⁸ The Resolution did not provide a usable definition of the crime because it did not specify what aspect of the individual’s conduct leading to the commission of

²⁴ Ferencz, *supra* note 12, at p. 350.

²⁵ The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court. During the 1998 Rome Conference, states negotiated and finalized the provisions of the Rome Statute, establishing the ICC.

²⁶ Zimmermann, *supra* note 3, at p. 103.

²⁷ *Id.*

²⁸ Gaja, *supra* note 9, at p. 434.

aggression by the state, should a criminal court prosecute. Furthermore, Resolution 3314 did not offer a clear distinction between aggression and other heinous crimes, often committed during armed conflicts, such as war crimes and crimes against humanity. Faced with the difficulty of pinpointing the relevant aspects of the defendant's criminal conduct and differentiating aggression from other atrocious crimes, a criminal judge applying Resolution 3314 would have been unable to adjudicate the crime effectively.

Taking into consideration these deficiencies of Resolution 3314, Germany proposed an approach which followed closely Article 6(a) of the Statute of the Nuremberg Military Tribunal.²⁹ In Germany's view, it was important to tailor narrowly the definition of the crime to individual criminal responsibility rather than rely on the Resolution 3314.

In addition to the failed efforts to define the crime of aggression, states in Rome split due to their disagreement over the role of the Security Council. The US proposed that before the ICC could exercise jurisdiction, the Security Council should determine that there has been an illegal state act of aggression.³⁰ Arab and African countries, which advocated a broader definition of the crime, envisaged no role for the Security Council whatsoever in order to maintain independence of the Court. The issue remained unresolved at the conclusion of the Rome Conference. However, the Rome Statute provided that the crime could become part of the Court's jurisdiction with a statutory amendment which is consistent with the relative provisions of the UN Charter.³¹

3. US Objections to the Crime of Aggression

3.1. Preparatory Commission and the involvement of the US

The UN General Assembly established the Preparatory Commission at the end of the Rome Conference vesting it with a mandate to prepare the practical arrangements for the establishment and operation of the Court.³² In addition, the Commission undertook the task of

²⁹ International Law Commission, *supra* note 11 (discussing Principle VI(a), formulated by the ILC, which reflects the exact language of article 6(a) of the Nuremberg Charter).

³⁰ Zimmermann, *supra* note 3, at p. 104.

³¹ Rome Statute, *supra* note 1, art. 5(2).

³² The Preparatory Commission was created in accordance with a resolution by the UN General Assembly, which urges states to sign and ratify the Rome Statute, UN General Assembly, *Establishment of an International Criminal*

preparing a provision on the crime of aggression, including a definition, elements, and the conditions for the exercise of jurisdiction, which would be submitted to a Review Conference.³³ After the Commission held its final session in July 2002, it forwarded its work to the ASP which was preparing to convene for the first time in September of the same year.

During the negotiations at the Preparatory Commission, the US emerged as a strong proponent of the view that the crime of aggression should codify customary international law in a manner consistent with the principles of legality in criminal law.³⁴ The US delegation rejected the notion that Resolution 3314 constituted such a codification: the scarce use of this Resolution by the Security Council was indicative of insufficient international agreement to establish a norm of customary international law; and the reference to acts of state in the language of the resolution was impractical for the purposes of criminal law.³⁵ Moreover, the US emphasized that there is a clear distinction in the UN Charter between aggression and other unlawful use of force. In the view of the US, aggression was the most egregious type of states' use of force and not every violation of Article 2(4) is tantamount to it.³⁶

3.2. Major US objections

3.2.1. US involvement abroad

The ICC's potential impact on the US presence abroad is an overarching concern for the US. Justifying the decision to suspend US signature of the Rome Statute in 2002, John Bolton³⁷ noted that "US military forces, civilian personnel and private citizens are active in peacekeeping and humanitarian missions in almost 100 countries at any given time."³⁸ Moreover, he added that ratification of the Rome Statute would interfere with the "independence and flexibility that [is

Court, UN Doc. A/Res/53/105, January 26, 1999, <http://daccessdds.un.org/doc/UNDOC/GEN/N99/762/49/PDF/N9976249.pdf?OpenElement> (last visited June 29, 2007).

³³ Coalition for the International Criminal Court, *Preparatory Commission*, <http://www.iccnw.org/?mod=prepcommission> (last visited July 10, 2007).

³⁴ US Statement on the Crime of Aggression Submitted to the Preparatory Commission for the International Criminal Court, (hereinafter US on Aggression), December 6, 2000, <http://www.state.gov/documents/organization/6578.doc> (last visited June 15, 2007)

³⁵ *Id.*

³⁶ *Id.*

³⁷ In 2002 John Bolton served as US Under Secretary of State for Arms Control and International Security Affairs.

³⁸ Statement by John Bolton, *The United States and the International Criminal Court*, Department of State, November 14, 2002, <http://www.state.gov/t/us/rm/15158.htm> (last visited June 15, 2007).

necessary] to defend . . . [US] interests around the world”,³⁹ and US citizens would be subjected to the jurisdiction of the Court much more often than other nationals due to America’s greater involvement.⁴⁰

Claiming that aggression is “something in the eye of the beholder,”⁴¹ ICC opponents in the US express concern that the Court would question legitimate initial use of force, such as a pre-emptive strike in the interest of national security. Thus, they argue, if the US used force in controversial circumstances, the ICC would have a green light to investigate high level US military officials.⁴² Moreover, since the US President is also the country’s commander in chief,⁴³ the Court could subject him/her to its jurisdiction. Such outcome is troublesome to ICC opponents in the US who point out that the President and his/her advisors will not be safe from politicized criminal charges, instigated by countries which disagree with US foreign policy. Opponents of the Court argue that such politicized prosecutions will result in an impediment to the US ability to carry out military operations and policy programs abroad.⁴⁴ To address these concerns Congress passed the American Servicemembers’ Protection Act of 2002, also known as ASPA, which takes measures to ensure the protection of members of the US armed forces and all US citizens from the jurisdiction of the Court,⁴⁵ and prohibits cooperation of any agency of the federal government, or any state or local government with the ICC.⁴⁶ The Act specifically rejects

³⁹ *Id.* See also Lee A. Casey, *The United States and the International Criminal Court: Concerns and Possible Courses of Action*, p. 3, February 8, 2002, <http://amicc.org/docs/fedsoc.pdf> (last visited August 15, 2007).

⁴⁰ Jennifer Elsea, *US Policy Regarding the International Criminal Court*, Report for Congress, p. 8, Updated September 3, 2002, Congressional Research Service, Library of Congress.

⁴¹ Bolton, *supra* note 38.

⁴² Rome Statute, *supra* note 1, art. 28 (providing that “a military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control” where such military commander “either knew or should have known that the forces were committing or about to commit such crimes” and “failed to take all necessary and reasonable measures to prevent or repress their commission”).

⁴³ U.S. Const. art. II, § 2 (vesting the President with the powers of commander in chief of the Army and Navy of the United States, and of the militia of the several states.)

⁴⁴ Casey, *supra* note 39.

⁴⁵ Elsea, *supra* note 40, at p. 11.

⁴⁶ American Servicemembers’ Protection Act of 2002, §2004, codified in 22 U.S.C. §7421 (providing among other measures that “the agencies of the federal and state governments may not extradite any person from the United States to the ICC or support the transfer of U.S. citizens, and that no agent of the Court may conduct investigations on U.S. territory”).

the Court’s jurisdiction over aggression as a threat to national security and efforts to respond to terrorism.⁴⁷

3.2.2. *Conditions for the exercise of jurisdiction*

States Parties to the ICC generally agree that before the ICC could investigate or prosecute the crime of aggression by an individual, there should be a determination that the suspect’s nation state committed an act of aggression against another state’s sovereign territory.⁴⁸ Article 5(2) of the Rome Statute requires that the provision setting out the conditions for the exercise of jurisdiction over the crime of aggression be consistent with the relevant provisions of the UN Charter.⁴⁹

The US has consistently stated that the Security Council has exclusive powers to make a determination of aggression. In support of this view, US officials cite UN Charter Article 24, vesting the Security Council with “primary responsibility for the maintenance of international peace and security” and Article 39, reaffirming that the determination of an act of aggression lies with the Security Council.⁵⁰ The US argues that the phrase “primary responsibility” in Article 24 refers only to the Council’s obligation to maintain peace and security and does not have any bearing on the exclusive power of the UNSC to determine acts of aggression.⁵¹ Moreover, according to the US, state practice under the UN Charter demonstrates that a legally sufficient determination of aggression could not be made in any other manner.⁵² Thus, unless the Security Council has determined the existence of aggression in the case at hand, the ICC does not have jurisdiction over the crime.⁵³

⁴⁷ *Id.*, § 2002 cl. 9 (recognizing the possibility of international criminal prosecution of the President and other senior officials once the ICC is able to exercise jurisdiction over the crime of aggression.)

⁴⁸ David Scheffer, *The United States and the International Criminal Court*, 93 Am. J. Int’l L. 12, 20 (1999). *See also* Gaja, *supra* note 9, at p. 439 (noting that “if the national of one state commits aggression on the territory of another, he can be tried by the Court only if both states have accepted the amendment on aggression”).

⁴⁹ Rome Statute, *supra* note 1.

⁵⁰ UN Charter, *supra* note 7.

⁵¹ Statement by the US Delegation to the Preparatory Commission for the ICC, *supra* note 6, at p. 3.

⁵² *Id.*

⁵³ *Id.* at p. 4.

3.2.3. Amendment process

Under Article 121 of the Rome Statute, “Any amendment to articles 5, 6, 7, and 8 of this Statute [the crimes within the jurisdiction of the Court] shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance.”⁵⁴ However, with respect to a “State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by the State Party’s national or on its territory.”⁵⁵ As a result, the nationals of States Parties which have ratified the Rome Statute but have not accepted an amendment defining the crime of aggression will not be subject to the Court’s jurisdiction with regard to that crime. Nor will the ICC be able to investigate or prosecute such individuals who committed the crime of aggression on another State Party’s territory.⁵⁶ This is an exception to the Court’s capacity to subject the nationals of any non-State Party to investigation and prosecution when such individuals have committed crimes within the ICC’s jurisdiction.⁵⁷

According to the US critics, it is “neither reasonable nor fair” that newly added crimes such as aggression “would apply to a greater extent to states that have not agreed to the terms of the Rome Statute than to those that have” accepted the Court’s jurisdiction with respect to the rest of the crimes in the Statute.⁵⁸ ICC opponents in the US argue that this is an example of the unlimited jurisdiction of the Court.

3.2.4. Complementarity

The jurisdiction of the ICC is predicated on the principle of complementarity. Complementarity stands for the notion that national judicial proceedings take precedence over the Court’s investigations and prosecutions such that the ICC’s jurisdiction complements that of

⁵⁴ Rome Statute, *supra* note 1, art. 121(5).

⁵⁵ *Id.*

⁵⁶ *See supra* note 48.

⁵⁷ ICC’s exercise of jurisdiction over nationals of non-States Parties needs to meet certain preconditions. Rome Statute, *supra* note 1, art. 12(2) (providing that “the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3: (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national”). *See also* art. 12(3) (stipulating that a non-State Party “may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question”).

⁵⁸ Bolton, *supra* note 38.

national courts. The principle of complementarity is spelled out in Article 17 of the Rome Statute which stipulates that a case is inadmissible to the ICC under three circumstances: 1) when the case is being investigated or prosecuted by a state which has jurisdiction; 2) when the case has been investigated by a state which has jurisdiction over it and the state has decided not to prosecute; or 3) when the person prosecuted has already been tried for the same conduct.⁵⁹ Under the first two circumstances the ICC could nonetheless exercise jurisdiction if the domestic proceedings were illegitimate due to the state's inability or unwillingness genuinely to investigate or prosecute.⁶⁰ The Court could make a determination of "unwillingness" when the national proceedings were undertaken for the purposes of shielding the person from criminal responsibility, when there has been an unjustified delay in the proceedings, inconsistent with the intent to bring the person to justice, or when the proceedings were not conducted independently or impartially.⁶¹ When the UN Security Council refers a situation to the Court, the ICC does not have to pursue an investigation or prosecution. However, if the ICC decides to do so, national courts *de facto* lose priority of investigation and prosecution.⁶² It is important to note that even under such circumstances states are still be able to challenge the admissibility of the case in subsequent proceedings. Furthermore, the Court's proceedings thus far in the Darfur situation, referred by the UN Security Council in March 2005, demonstrate the Prosecutor's deference to national proceedings.

There are two potential arguments that complementarity does not have a realistic application to US jurisdiction over the crime of aggression. First, there is no national criminal law to prosecute crimes of aggression. Therefore, some may argue that US courts cannot prosecute individuals for such crimes and the ICC's jurisdiction applies automatically.

⁵⁹ Rome Statute, *supra* note 1, art. 17(1)(a)-(c). The prohibition from trial for the same conduct is also stipulated in art. 20.

⁶⁰ *Id.*

⁶¹ *Id.*, art. 17(2)(a)-(c).

⁶² *Id.*, art. 13 (b) (providing that the Court may exercise jurisdiction if "a situation . . . is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations"). *See also* Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, p. 59, Nomos Verlagsgesellschaft, Baden-Baden, 1999.

Second, the US recognizes the political question doctrine under which sensitive political issues are left to the legislative and the executive branches to handle.⁶³ US courts would generally decline deciding such cases and would find the underlying question non-justiciable, essentially beyond the scope of competence of the judicial system.⁶⁴ An argument against the ICC's exercise of jurisdiction over the crime of aggression is that alleged crimes of aggression are always non-justiciable because they satisfy at least one of the non-justiciability factors, set out by the US Supreme Court, and therefore the principle of complementarity does not apply.

3.3. US and the Crime of Aggression since the Preparatory Commission

At the end of the Preparatory Commission's work the major US objections to the Court remained the ICC's potential impact on US foreign involvement and capacity to prosecute aggression without a prior determination by the Security Council, as well as US concerns about the amendment process and distrust of the principle of complementarity. When the Commission concluded its sessions in 2002, the US engagement with the negotiation of a provision on aggression ended as well. Since that time, the US government has declined involvement in the process and in the Court, it has been silent on aggression except as a reason to oppose the ICC.

⁶³ *Baker v. Carr*, 369 U.S. 186, at 217 (1962) (describing six factors to determine whether an issue is non-justiciable:

- (1) Textually demonstrable constitutional commitment of the issue to a coordinate political department
- (2) Lack of judicially discoverable and manageable standards for resolving the issue.
- (3) Impossibility of deciding an issue without an initial policy determination of a kind clearly for non-judicial discretion
- (4) Impossibility of a court undertaking an independent resolution of the issue without expressing a lack of respect due to the other governmental branches.
- (5) Unusual need for unquestioning adherence to a political decision already taken.
- (6) Potentiality of embarrassment from multifarious pronouncements by various departments on one question.)

⁶⁴ In *Johnson v. Eisentrager*, 339 U.S. 749, 789 (1950) Black, J. dissenting. ("It . . . is not the function of the Judiciary to entertain private litigation . . . [which challenged] the legality, the wisdom, or the propriety of the President in sending armed forces abroad or to any particular region"). See also *United States of America v. Manuel Antonio Noriega*, 746 F. Supp. 1506, 1538 (S.D.F.L. 1990) (noting that assessing the exact motives behind the invasion of Panama "not only runs squarely into the political question doctrine, which precludes courts from resolving issues more properly committed to the political branches, but would constitute unprecedented judicial interference in the conduct of foreign policy"); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973) (holding that the court lacked "competence to evaluate the Executive's decision authorizing the bombing of Cambodia" and finding the issue a non-justiciable political question).

4. Current Work of the Special Working Group on the Crime of Aggression

4.1. Establishment and Mandate

In 2002 the Rome Statute entered into force without a provision defining the crime of aggression or setting out the conditions for the exercise of jurisdiction over it. During its first session, the ASP established the Special Working Group on the Crime of Aggression (SWGCA) to continue international efforts to reach an agreement on the definition, elements, and jurisdictional conditions for the crime.⁶⁵ The SWGCA is open to all states on an equal basis and both States Parties and non-States Parties participate in the meetings⁶⁶ along with civil society representatives. As a result even major political powers, who have expressed concerns about certain aspects of the work of the ICC, such as Israel and Russia, have joined the sessions of the SWGCA and actively participated in the negotiation process.

Since 2003 the SWGCA has convened at ASP sessions and at informal inter-sessional meetings. During these meetings participating states have introduced and debated various proposals about the definition and the conditions for the exercise of jurisdiction. The Chairman of the Special Working Group has the task of narrowing down the list of options and incorporating those with largest support into a working paper, which has been presented at subsequent sessions for discussion. The ASP has agreed that the SWGCA should conclude its work at least 12 months prior to the first Review Conference,⁶⁷ which is expected to take place in late 2009 or early 2010.⁶⁸

4.2. Issues before the SWGCA

The biggest challenge during the Special Working Group's efforts to formulate a provision on aggression has been devising a definition of the crime that judges can apply in

⁶⁵ CICC Background Paper on the Crime of Aggression, ASP 5, Resumed Session, January 29-February 1 2007, (hereinafter CICC Background Paper), p. 1 http://www.iccnw.org/documents/Aggression_Background_Paper_ASP5ResumedSession_23Jan07.pdf (last visited July 1, 2007).

⁶⁶ Although the US is able to participate fully as an observer during all ICC meetings, it does not have the right to vote since it has not ratified the Rome Statute.

⁶⁷ Report of the Special Working Group on the Crime of Aggression, (hereinafter Report), para. 4, Assembly of States Parties International Criminal Court, ICC-ASP/5/SWGCA/1, 29 November 2006.

⁶⁸ *Id.*, para. 12

court. Discussions have focused on two aspects of the crime – the state act of aggression and the individual’s crime.

4.2.1. Act of Aggression

The majority of states view the **act** of aggression as a predicate to the individual **crime** of aggression. Unlike the crime, which necessarily implicates individuals, the act is always attributed to a collective entity, such as a state.⁶⁹ A state must be formally declared an aggressor⁷⁰ before the ICC can prosecute its nationals for the crime.

Defining the act of aggression has proven difficult. During the negotiations of the Special Working Group delegates proposed three main approaches. One approach is a generic definition, which would describe the illegal use of force in general terms without providing a list of prohibited acts.⁷¹ A second approach is a specific definition that would enumerate such acts⁷² in a manner similar to Article 3 of General Assembly Resolution 3314.⁷³ A third approach many delegations have also favored is a combination of the two approaches: a general provision elaborated by an exhaustive list of specific acts.⁷⁴

In addition, the act of aggression should meet certain requirements of character, scale and gravity, separate from the general provisions in the Rome Statute, which qualify individual criminal accountability. While delegates have not yet reached an agreement as to which phrase best conveys the required scope of the act, there is a general consensus that the definition should contain a “threshold” in order to exclude borderline and less than borderline cases from the

⁶⁹ Discussion Paper Proposed by the Chairman, (hereinafter Discussion Paper), p. 4, Assembly of States Parties, International Criminal Court, 16 January 2007, ICC-ASP/5/SWGCA/2, (noting that in addition to the general preconditions contained in Article 12 of the Rome Statute, “it is a precondition that an appropriate organ has determined the existence of an act of aggression as required by element 5; element 5 requires that an act of aggression, “that is . . . an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, was committed by a State”).

⁷⁰ *Id.*, at p. 5.

⁷¹ CICC Background Paper, *supra* note 65, at p. 3.

⁷² *Id.*

⁷³ Resolution 3314, *supra* note 17.

⁷⁴ CICC Background Paper, *supra* note 65, at p. 3

jurisdiction of the Court.⁷⁵ Negotiations so far suggest that the act, by its character, gravity, and scale should constitute “a manifest violation of the Charter of the United Nations.”⁷⁶

4.2.2. *Definition of the Crime of Aggression*

There has been a general agreement at the meetings of the SWGCA that the crime of aggression would require that the defendants act in a leadership capacity. Under the two primarily suggested definitions of the crime,⁷⁷ the person committing the crime should be “in a position effectively to exercise control over or to direct the political or military action of a state.”⁷⁸ This would limit the ICC’s jurisdiction only to the individuals with political or military decision-making power who ordered the criminal conduct. Moreover, since none of the customary international law immunities apply before the Court,⁷⁹ all responsible persons, including members of the government, could be subject to prosecution.

Delegates have proposed three main approaches to the definition of the crime of aggression. The “differentiated approach” provides for a choice between the conduct verbs “leads,” “directs,” “organizes and/or directs,” and “engages in” to describe the perpetrator’s participation in the planning, preparation, initiation, and execution of the [state] act of aggression.⁸⁰ These conduct verbs focus on the acts of the principal perpetrator, the individual who is most responsible for the commission of the crime of aggression. In addition, the proponents of this approach recognize that non-principal perpetrators who participated only marginally in the commission of the crime should also be subject to criminal prosecution. To ensure that such persons are subject to the Court’s jurisdiction, supporters of the differentiated approach suggest applying Article 25 paragraph 3 (a-d) of the Rome Statute to the crime of aggression. Under this article individuals who “order,” “solicit,” “induce,” “aid,” “abet,” “otherwise assist” the commission of the crime are criminally responsible for a crime within the

⁷⁵ Report, *supra* note 67, paras. 14-16.

⁷⁶ Discussion Paper, *supra* note 69, at p. 5.

⁷⁷ *Id.*, at p. 3 (noting that “differentiated approach” corresponds to Variant (a) and “monistic approach” corresponds to Variant (b)).

⁷⁸ *Id.*

⁷⁹ Rome Statute, *supra* note 1, art. 27(2).

⁸⁰ Discussion paper, *supra* note 69, at p. 3.

jurisdiction of the Court.⁸¹ Moreover, it is proposed that the ASP add a new subparagraph to Article 25 to re-confirm that forms of participation apply only to persons in a leadership position who exercise control over or direct the political or military action of a State.⁸²

The second, “monistic approach” suggests the conduct verbs “orders or participates.” According to the proponents of the monistic approach, these verbs encompass all forms of commission and participation⁸³ and thus represent the entire scope of prohibited criminal behavior. Therefore, the various types of individual criminal involvement described in Article 25, paragraph 3 are repetitive and the article does not apply to the crime of aggression. Analysts have observed that since Article 25 paragraph 3 is inapplicable to the crime of aggression under the monistic approach, this crime would be treated differently from the rest of the crimes in the ICC’s jurisdiction.⁸⁴ Such an outcome would be desirable for those who consider aggression to be a unique crime that needs to be addressed in a unique manner.

Under both differentiated and monistic approaches, the conduct verbs establish a connection between the actions of the defendant and the resulting state act of aggression. Both contemplate the exclusion of “attempt”, reflecting the caution many countries have expressed regarding the inclusion of attempted aggression.⁸⁵ Moreover, States Parties participating in the SWGCA widely agree that Article 28 on the responsibility of commanders does not apply to the crime of aggression by virtue of the leadership character of the crime.⁸⁶

The practical differences between the differentiated and the monistic approaches lie in the level of generality with which they describe the prohibited criminal conduct. By virtue of the reference to the specific criminal conduct in Article 25, paragraph 3, the differentiated approach

⁸¹ Roger Clark, *The Crime of Aggression and the International Criminal Court*, The Legal Regime of the International Criminal Court: Essays in Honor of Professor Igor Pavlovich Blischenko, on file with author, p. 51.

⁸² Discussion Paper, *supra* note 69, at p. 3

⁸³ CICC Background Paper, *supra* note 65, at p. 3.

⁸⁴ Clark, *supra* note 81, p. 51 (discussing that the “monistic approach” follows the word of the International Law Commission, which in its 1995 Commentary to Draft Code of Crimes against the Peace and Security of Mankind stated that “in relation to the crime of aggression it was not necessary to indicate . . . different forms of participation because the definition . . . provides already all the elements necessary to establish the responsibility”).

⁸⁵ Report, *supra* note 67, para. 8.

⁸⁶ Discussion Paper, *supra* note 69, at p. 3, footnote 4. *See also* Clark, *supra* note 81, at p. 57-58 (noting that Article 28 connects the military and other superiors to the conduct of those under their control, which is already part of the contemplated definition of the crime of aggression).

seems more narrow. The monistic approach, on the other hand, uses a broader description of the criminal conduct and does not enumerate the precise criminal acts that fall under the terms “orders” and “participates.” Although the US has not expressed a preference for either approach, US officials would likely prefer the specificity of the differentiated approach over the potential ambiguity of the monistic approach. Under both approaches, the required mental state (*mens rea*) of the perpetrator during the commission of the crime is intent and knowledge.⁸⁷

Thus far delegates have been unable to agree which of the two “variants” should be used. Moreover, during the inter-sessional meeting of the SWGCA in June 2007, the participating delegations expressed broad support for the proposal of a third, alternative approach, to the definition of the crime. This proposal merges the “differentiated” and “monistic” approach by removing the conduct verb and stating merely that the crime of aggression means “the planning, preparation, initiation or execution of an act of aggression.”⁸⁸ Thus far, more delegations have expressed support for the differentiated approach.

4.2.3. *Conditions for the exercise of jurisdiction*

To date, delegations have not succeeded in agreeing on the conditions for the exercise of jurisdiction over the crime of aggression. The January 2007 *Discussion Paper* advances the possibility that before initiating investigations the Prosecutor should first “ascertain whether the Security Council has made a determination of an act of aggression committed by the state concerned” and if there is no such determination, the ICC will have to notify the Council of the situation before it.⁸⁹ The paper further notes that States Parties will have to choose between four possible avenues of action in case the UNSC does not make a determination within a fixed period of time, possibly six months. Under the second option the ICC may not proceed with the case if the Security Council has not made a determination of aggression. This is the position of

⁸⁷ Discussion Paper, *supra* note 69, at p. 3,

⁸⁸ Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 11 to 14 of June, 2007, p. 17, ICC-ASP/6/SWGCA/INF.1, July 25, 2007.

⁸⁹ *Id.* at p. 4, para. 4. Another proposal not mentioned in the 2007 Discussion Paper is that no provision on a prior determination of an act of aggression by the Security Council is necessary. This proposal argues that Rome Statute Articles 13(b), which gives the Council the power to refer a crime to the Court, and 16, which permits the Council acting under Chapter VII to request a stay of the proceedings, give the UN body sufficient powers over the Court’s jurisdiction.

the States Parties who view the Security Council's role in determining aggression as exclusive. The remaining options allow the Court to proceed but while the first option permits for unconditional continuation of the proceedings, the third and the fourth stipulate certain requirements. The third option requires the ICC to request from the UN General Assembly a determination of aggression within a suggested period of 12 months⁹⁰ and allows the Court to proceed with the case in the absence of such determination. The fourth option, on the other hand, provides that the Court may only proceed if it ascertains that the International Court of Justice has made a finding⁹¹ that the concerned state committed an act of aggression.

It is important to note that even if the Security Council has to determine that a state act of aggression has occurred before the Court can exercise jurisdiction over the crime of aggression, such determination would not be binding on the ICC. Thus if the Prosecutor receives the Council's determination and proceeds with investigations and prosecution, he/she will still need to show that the defendant's state committed an act of aggression within the definition included in the amended Rome Statute. Only upon such showing would the Prosecutor meet the burden of proof requirements for each element of the crime of aggression.

4.3. Expected SWGCA proposal for the Review Conference

It is difficult to predict whether the SWGCA will reach a compromise proposal in time for the Review Conference and, if so, what the parameters of such agreement would be. To date the participants at Special Working Group have agreed that the state act of aggression is a necessary element of the crime. One could expect that the definition of the act will provide a relatively generic chapeau, delineating in broad terms the illegal use of force by one state against

⁹⁰ *Id. Option 3* explains that such request will be made in accordance with the provisions of Articles 12, 14, and 24 of the UN Charter. *See supra* note 7, art. 12 (stating that the General Assembly shall not make recommendations with regard to a dispute or situation the Security Council is dealing with but that with the consent of the Council, the Secretary General could notify the Assembly of the matters relative to international peace with which the Council is dealing); *see also* art. 14 (providing that the General Assembly can make recommendations for the peaceful adjustment of situations in accordance with the provisions of Article 12) and art. 24 (conferring on the Security Council primary responsibility for the maintenance of international peace and security). Thus, the General Assembly could make a determination of aggression only when the Security Council is not seized of the matter.

⁹¹ *Id. Option 4* stipulates that the finding of the ICJ be made in a proceeding brought under Chapter II of the ICJ's statute. *See supra* note 7, Chapter II (determining the jurisdiction of the ICJ over nation states and stipulating that the court can adjudicate all matters referred to it by the parties and all matters specifically provided for in the U.N. Charter, treaties and conventions). *See also* art. 96 (providing that the General Assembly or the Security Council may request the ICJ to give an advisory opinion on any legal question).

another. In addition, the proposed definition will most certainly include a qualifier for the gravity of the state act of aggression. This will ensure that only the most serious violations of international law, such as aggressive wars, will meet the requirements of the element of state act. Furthermore, the definition of the act of aggression will likely incorporate parts of General Assembly Resolution 3314 of 1974, in particular the list of prohibited acts in Article 3. The long wait for defining aggression in Resolution 3314 – about 30 years – indicates the difficulty of reaching international consensus. Thus, many participants may feel that it would be wiser to incorporate the already existing approach from Resolution 3314 into the definition of the state act and focus present international efforts on defining the individual criminal conduct and setting out the conditions for the exercise of jurisdiction.

During the SWGCA negotiations participating states agreed that the crime of aggression is a leadership crime. However, it is still unclear which of the suggested definitions will gain the most support. Whether it is the currently preferred “differentiated,” the “monistic” or any other approach, it will have to reflect the perpetrators’ leadership position with the aggressor state as well as link their criminal conduct to the “planning, preparation, initiation or execution”⁹² of the state act of aggression. Furthermore, the definition of the prohibited conduct will need to be as specific as possible in order to satisfy the principle of legality, which does not permit prosecution of vaguely defined crimes.

The most problematic aspect of the crime of aggression will remain reaching an agreement on the conditions for the exercise of jurisdiction. It is almost certain that any future proposal by the Special Working Group will include a role for the Security Council. However, it may be too early to say whether such proposal will require a prior determination of a state act of aggression or a mere notification of the Council. One approach, which has not become part of the *Discussion Paper*, could reconcile the Security Council’s determination of state aggression with the Court’s independent prosecution of the crime. Under this proposal,⁹³ the Council should make a determination of aggression by applying its procedural rather than substantive powers.

⁹² Discussion Paper, *supra* note 69, at p.3

⁹³ This proposal has been discussed informally and in particular by Roger Clark, who served on the delegation of the Government of Samoa in the negotiations on the Rome Statute and currently represents Samoa on the Special Working Group on the Crime of Aggression. *See* Clark, *supra* note 81, at p. 28.

Under the UN Charter, when the Council votes on procedural matters the Permanent five members (P5) may not use their veto powers and the Council reaches a majority with the affirmative votes of any nine members.⁹⁴ Thus the Security Council still would be the body with an ultimate say when there has been an act of aggression but the veto power would not violate the principles of equal application of the law discussed below.⁹⁵ Nonetheless, this proposal has not gained enough support to become part of the Chairman's *Discussion Paper* and the short remaining period until the Review Conference suggests that states may lack sufficient opportunity to discuss it.

5. Addressing US Objections

5.1. US interests and the work of SWGCA

The US will soon have to face the important decision of whether to participate in the forthcoming Review Conference during which States Parties will attempt to incorporate a provision on aggression into the Rome Statute. In order to better understand the likelihood of future US participation in the Conference, it may be useful to contemplate what formulation of aggression would be acceptable to the US government.

Based on its previous objections, the US may accept a definition of the act of aggression that follows a relatively broad approach but does not enumerate specifically prohibited acts of state use of force.⁹⁶ Thus, the US would likely disagree with the current proposals negotiated at the SWGCA's sessions which refer to Article 3 of Resolution 3314.⁹⁷ Due to its previous view that only the gravest acts should be termed aggression, the US will most certainly agree that it is necessary to include a threshold for the gravity of the state act. This will ensure that the ICC only addresses crimes resulting from aggressive wars as opposed to lesser uses of force against the

⁹⁴ UN Charter, *supra* note 7, art. 27(2). *See also* art. 27(3) ("Decisions of the Security Council on any other [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members").

⁹⁵ However, the problem exists that UNSC's power to make a determination of aggression is granted under Chapter VII of the UN Charter, which delineates the body's substantive powers.

⁹⁶ US on Aggression, *supra* note 34 (explaining that the US disagrees with delegations "that would seek to define aggression by means of an itemized list of examples of acts").

⁹⁷ *Id.*

territorial integrity or political independence of states.⁹⁸ Adding a gravity threshold should appease US fears that unfriendly states may use the crime of aggression as a means of waging frivolous accusations of political nature against US leadership. Moreover, the US will likely seek to stress the legality of legitimate use of armed force such as individual and collective self-defense.

As for the conditions for the exercise of jurisdiction, the US would seek to guarantee that the Security Council has a primary and exclusive role in determining aggression for the purposes of the Court's jurisdiction. The US would disagree with the currently discussed proposals at the SWGCA, which suggest that the Court may proceed with a case even without the Council's determination. However, the US may be more accepting of a compromise solution such as a procedural determination by the Security Council despite the fact that it would forego its veto power. The US refusal to engage in the work of the SWGCA or participate in the forthcoming Review Conference may reflect its view the SWGCA is unlikely to reach such compromise in the immediate future.

5.2. Response to major US objections

In spite of its objections, the US has a strong interest in participating in the SWGCA's efforts to formulate a definition of the crime of aggression and the conditions for the Court's jurisdiction. The US in its foreign policy has consistently condemned threats and use of illegal force. By actively engaging in the negotiation process, the US would have the opportunity to learn about the current process, better present its concerns about the work of the ICC, and seek mutually acceptable solutions with regard to the crime of aggression.

5.2.1. US Involvement Abroad

Acceptance of the Court's jurisdiction will not lead to the prosecution of more American citizens than other nations'. Aggression, once defined, will require that the individual prosecuted acted in a leadership capacity and committed extremely grave criminal conduct tantamount to

⁹⁸ *Id.* ("Aggression, whether in the context of an act of aggression by a State or the commission of the crime of aggression by an individual, is not a description that should be lightly applied. . . . To do so would not only degrade the concept of aggression, but raise the risk of aggravating what may be a minor dispute and making it more difficult to resolve.").

widespread and systematic atrocities.⁹⁹ Thus, the conduct of a single individual, even if amounting to a war crime under international law, would not likely be of sufficient gravity to meet the heightened requirements of the Court's jurisdiction.

It is unlikely that the ICC will serve as a forum for unfriendly nations seeking to question the US Executive's conduct of foreign affairs. The ICC's Assembly of States Parties which oversee the work of the Prosecutor and the Court are overwhelmingly democracies and US allies. Furthermore, once the ASP agrees on specific definition of the crime and sets out the conditions for the exercise of jurisdiction and amends the Rome Statute, all nations, including the US, will have clearer and more transparent guidelines as to what acts of state constitute aggression for the purposes of criminal law and under what conditions the responsible individuals would face international criminal accountability. Due to the sensitive nature of aggression as the supreme international crime, any future definition is expected to pose a very high burden of proof on the Prosecutor. The safeguards in the Rome Statute make it highly unlikely that US officials will be subjected arbitrarily to the Court's investigations and prosecution.

Last, under the principle of complementarity, discussed above, the US judicial system will take precedence over the jurisdiction of the ICC when US courts are willing genuinely to prosecute an American citizen for a crime within the ICC's jurisdiction. Thus in the unlikely instance that the ICC Prosecutor decides to open formal investigations or prosecute a member of the US government for the crime of aggression, the US could request the Court to stay investigations until US authorities have had the opportunity to determine whether prosecution in the US is appropriate or necessary.¹⁰⁰ Considering the ICC's commitment to promoting national judicial prosecution of atrocities,¹⁰¹ the Court will likely respond positively to such a request and defer to the national courts for the time being.

⁹⁹ Rome Statute, *supra* note 1, art. 5 (stipulating that jurisdiction of the Court is limited to "the most serious crimes of concern to the international community as a whole"). *See also* Preamble.

¹⁰⁰ The question of prosecuting members of the US government for the crime of aggression in US courts is discussed *infra* under the sub-section on Complementarity.

¹⁰¹ Rome Statute, *supra* note 1, Preamble (recalling that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes," and emphasizing that the ICC shall be "complementary to national criminal jurisdictions").

5.2.2. Conditions for the exercise of jurisdiction

The US contention that the Security Council is the sole body to determine when an act of aggression has taken place raises substantial legitimacy concerns for the ICC. Vesting the Council with exclusive powers under Chapter VII would allow each of the P5 to use their vetoes to block a determination of aggression. Thus the P5's political agendas could prevent the Court from exercising jurisdiction when prosecution would be otherwise permissible under international criminal law. Moreover, such an argument makes it very unlikely that an individual who is a national of a P5 member will ever be subjected to prosecution for the crime of aggression.¹⁰² As a result, the ICC may lose its legitimacy as an independent court of law and become subsidiary to the UNSC's veto powers.

Allowing the P5 to use their veto in determining which situations should be brought before the Court also violates the principles of equal application of the law, the core of sovereign equality.¹⁰³ Furthermore, imposing the Security Council's Chapter VII powers as a restriction on the jurisdiction of the Court goes against the principles of separation of powers and arguably gives the Council impermissible judicial powers.¹⁰⁴ In addition, given the Council's reluctance to find aggression in the past, premising the jurisdiction of the ICC on its exclusive determination deprives the provision on aggression of its meaning.¹⁰⁵

The US view on the role of the Security Council has encountered consistent resistance from non-P5 states. During the SWGCA sessions "many . . . delegations . . . expressed deep opposition to any influence that the Security Council might exercise over proceedings in the Court."¹⁰⁶ Opponents of the US position counter that the UN Charter provisions regarding the Security Council were not created with an eye to a potentially essential role of the Council in the work of an international criminal court. Thus these provisions are ill-adapted for the purpose of

¹⁰² William Schabas, *An Introduction to the International Criminal Court*, p. 27, Cambridge University Press, 2001.

¹⁰³ Claus Kress, *The Crime of Aggression before the First Review of the ICC Statute* (Turin Speech), Conference on International Criminal Justice, May 15, 2007, p. 10. See also Mark Stein, *The Security Council, the International Criminal Court and the Crime of Aggression: How Exclusive Is the Security Council's Power to Determine Aggression?*, p. 7, 16 *Ind. Int'l & Comp. L. Rev.* 2005.

¹⁰⁴ Stein, *id.*, p. 8 (noting that the Security Council is a political body that has used the term "aggression" in its resolutions in a political manner against politically disfavored states or groups, without applying the consistency, which is crucial for a judicial body).

¹⁰⁵ Gaja, *supra* note 9, at p. 434.

¹⁰⁶ Sadat, *supra* note 5, at p. 137.

the ICC. The flaws become apparent when the Council refuses to act or fails to make a determination of aggression at the time when it occurs. Such failure is problematic if the ICC is expected to rely on the Council's determination before initiating investigations. The UNSC cannot be expected to determine the existence of "stale aggression," aggression that has occurred in the past and as to which the Council sees no need for action.¹⁰⁷ As a result, in certain situations the Council may lack entirely the capacity to make a determination of a state act of aggression that is an element of the crime of aggression prosecuted by the Court. Currently under the Rome Statute, the Security Council may refer a situation to the Court pursuant to Article 13(b) and also defer any investigation or prosecution for renewable periods of 12 months under Article 16.

In response to the US contention that international practice has affirmed the exclusive power of the UNSC to determine an act of aggression, supporters of an independent ICC point to Article 51, which allows states to make their own determination of aggression pending a determination by the Security Council. Moreover, international judicial decisions such as the 1986 case of *Nicaragua v. United States of America* provide further support for this view. In that case Nicaragua accused the US of violating the principles of international law of the non-use of force by supporting the armed opposition to the Nicaraguan Government and devising strategies to overthrow the official authority.¹⁰⁸ In disposing of the US contention that it acted in collective self-defense to Nicaragua's alleged armed attack on Honduras, El Salvador, and Costa Rica, the International Court of Justice (ICJ) made a determination that no unlawful armed attack had been committed by Nicaragua and held that the US had thus "violated the principle prohibiting recourse to the threat or use of force."¹⁰⁹ The ICJ's independent determination that Nicaragua did not commit a breach of peace demonstrates that such determination could be made under customary international law,¹¹⁰ free of the involvement of the Security Council.¹¹¹

¹⁰⁷ Stein, *supra* note 103, at p. 15

¹⁰⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. US)*, 1984 ICJ REP. 392, International Court of Justice, June 27, 1986.

¹⁰⁹ *Id.*, p. 123

¹¹⁰ Customary international law consists of rules of law derived from the consistent conduct of states acting out of the belief that the law required them to act that way. It emerges as a result of a widespread repetition by states of similar international acts over time where these act are taken by a significant number of states and out of sense of obligation.

¹¹¹ In *Iran v. US*, 2003 ICJ 161, the ICJ also made a determination whether the US had faced an armed attack and had been justified in taking military action in self-defense.

The trouble with citing the *Nicaragua* decision as a proof of the Security Council's non-exclusive power to determine aggression is twofold. First, the US withdrew from participation in the case and subsequently from the ICJ's compulsory jurisdiction due to its disagreement with the Court's decision to exercise jurisdiction. Thus it is unlikely that ICC opponents in the US will view this case as determinative of international legal custom. Second, "the United States was found to be in violation of *customary international law* prohibiting the use of force and intervention, as distinguished from any conventional international law prohibitions found in the multilateral Charters" such as the UN Charter.¹¹² In fact, the ICJ explicitly stated that it was precluded from exercising jurisdiction over Nicaragua's claims founded on the provisions of the UN Charter.¹¹³ Therefore, the *Nicaragua* case does not stand for the notion that the ICJ could make a determination of aggression under the Charter.¹¹⁴

Moreover, during the negotiations in Rome a majority of delegations felt that under the provisions of the UN Charter, the Security Council had the final say whether a particular state action constituted a threat to international peace.¹¹⁵ Thus, it is probable the framers contemplated that the lack of such determination by the Council would mean that the ICC could not exercise jurisdiction over the crime of aggression.

Benjamin Ferencz, a former American prosecutor at the Nuremberg trials, proposed a solution to the Security Council issue. Recognizing that according to the principles of international law affirmed by the ILC no complaint of aggression can be brought unless the Security Council first determines that a state has committed the act of aggression, Ferencz suggested that the Council's exclusive power could be limited under Article 1 of the UN

¹¹² Monroe Leigh, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, p. 206, 81 Am. J. Int'l Law, No. 1. January 1987.

¹¹³ *Id.*, p. 207 (noting that the ICJ recognized that the US' Vandenberg reservation prevented it from, exercising jurisdiction to apply the provisions of the UN Charter). See also Anthony D'Amato, *The United States Should Accept by a New Declaration, the General Compulsory Jurisdiction of the World Court*, p. 2, 80 Am. J. Int'l. Law 331 (1986) (noting that the Vandenberg reservation to the jurisdiction of the ICJ requires all parties to a multilateral treaty (here the UN Charter) that would be affected by a decision on the treaty be parties to the case). D'Amato points out that due to the Vandenberg reservation, the plaintiff would have had to implead all member states of the UN when suing the US under the UN Charter provisions.

¹¹⁴ Rome Statute, *supra* note 1, art. 5(2) (requiring that the conditions for exercise of jurisdiction over the crime of aggression by the ICC be in accordance with the provisions of the UN Charter).

¹¹⁵ Ferencz, *supra* note 12, p. 350 (noting that the ILC Statutes drafted only four years before the Rome Conference, "made it plain that no complaint of aggression could be brought unless the Security Council first determined that a State had committed the act of aggression, subject of the complaint").

Charter.¹¹⁶ Since Article 1 sets forth the goal of suppressing acts of aggression “in conformity with the principles of justice and international law”¹¹⁷ and all members of the Security Council are bound by the UN Charter, if a member state accused of aggression fails to recuse itself from consideration and voting on the matter, “that would not be in conformity with principles of justice” and the ICC may justifiably disregard the Security Council determination.¹¹⁸ On the other hand, were the ICC to bypass the Security Council’s power to determine aggression, the defendant could argue successfully that “the Court was usurping the Council’s Charter authority” under Article 39 and was “acting outside its own judicial competence.”¹¹⁹ Furthermore, a member of the Council, although not itself accused of aggression, could sway its vote intending to protect the interests of an important ally. It would be a controversial political issue whether recusal is appropriate or necessary under such circumstances.

5.2.3. *Amendment process*

If the US ratified the Rome Statute before the ASP amended it, the US would be in a better position to bring its concerns to the negotiations and actively participate in shaping the definition of the crime. Once the ASP defines the crime of aggression, the ICC will have jurisdiction over citizens of non-State Parties, when they commit the crime of aggression on the territory of a State Party. Therefore, the US would benefit from ratifying the Statute and participating in the negotiation of the amendment on equal terms with the rest of the State Parties. Moreover, even if the US disagrees with the end result, once a State Party, it would not be bound by the amendment unless it explicitly agrees to be bound by it. By declining to accept the amendment, the US would essentially “opt out” of the Court’s jurisdiction over the crime of aggression and would shield its leaders and citizens from being charged with the crime.

¹¹⁶ Ferencz, *supra* note 12, at p. 356.

¹¹⁷ UN Charter, *supra* note 7, art. 1(1) (providing that the purposes of the United Nations are to “maintain international peace and security, and to that end: to take effective collective measures . . . for the suppression of acts of aggression or other breaches of peace, and to bring about . . . 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”).

¹¹⁸ Ferencz, *supra* note 12, at p. 356.

¹¹⁹ *Id.*

5.2.4. Complementarity

Complementarity permits the US to claim primary jurisdiction where the ICC may be willing to investigate or prosecute. Under Article 20 (3) of the Rome Statute, the ICC will not prosecute an individual already prosecuted in a national court for the same conduct when the consequences under the national law are comparable and the national proceedings are legitimate.¹²⁰ In a pre-trial decision in *The Prosecutor v. Thomas Lubanga Dyilo*, the Court stressed that for the purposes of the ICC a case encompasses “specific incidents during which one or more crimes within the jurisdiction of the Court seemed to have been committed by one or more identified suspects.”¹²¹ Thus the Court clarified that the focus should be on the criminal conduct and identity of the defendant, rather than on the specific charges that had been raised in a national proceeding.¹²²

US courts could successfully prosecute criminal acts relating to the crime of aggression under national laws against war crimes or other serious crimes. The US War Crimes statute,¹²³ for example, is one of the pieces of American legislation that address war crimes that applies to perpetrators who are members of the US military and US citizens in general. It punishes breaches of the 1949 Geneva Conventions and Protocols, which set out international provisions for the protection of civilians during armed conflicts, the treatment of prisoners of war and the

¹²⁰ Rome Statute, *supra* note, 1, art. 20(3) (“No person who has been tried by another court for conduct proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”)

For a discussion on whether Article 20(3) applies to the crime of aggression, see Nicolaos Strapatsas, *Complementarity & Aggression: A Ticking Time Bomb?*, pp. 10, 11, Draft Presented to the Marie Curie Research Course on International Criminal Law, 2007 (discussing that “the applicability of Article 20(3) to the crime of aggression has simply been postponed until a definition of the crime is agreed upon, and noting that the SWGCA agreed in 2004 that “article 20(3) . . . should be amended to include a reference to the provision relating to the crime of aggression when the latter is inserted therein”).

¹²¹ *Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 24 February 2006.

¹²² Thus, if a person has been prosecuted for war crimes by his/her national government, the ICC would not prosecute him/her for the criminal conduct which took place during the same incident for which that person’s national government already prosecuted him/her. This standard applies even if the ICC prosecuted first, it would have prosecuted under different charges, such as the crime of aggression.

¹²³ War Crimes Act, 18 U.S.C. §2441.

amelioration of the conditions of the wounded and sick.¹²⁴ In addition, the War Crimes statute prosecutes individuals for violations of certain articles of the Annex to the Hague Convention from 1907 Respecting the Laws and Customs on War on Land, which delineate prohibited military conduct in the course of war.¹²⁵ Collectively, these international conventions outlaw the mistreatment of civilians and military forces during armed conflicts and illegal territorial occupations. While US law does not subject individuals to prosecution for illegal planning or waging of war, American courts could prosecute such perpetrators for the various crimes against civilians and military personnel which ensued from their involvement in the planning and carrying out of an invasion or occupation. As a result, a prosecution under the War Crimes statute may entail the same underlying criminal conduct, circumstances, and results that may be included in the Rome Statute provision on crime of aggression.¹²⁶

If the US conducts legitimate judicial proceedings against the same defendant and with regard to the same underlying conduct which the ICC seeks to prosecute, the ICC is unlikely to disregard the US court's judgment. If the Prosecutor decided to investigate for an improper purpose, both the Pre-Trial Chamber¹²⁷ and the Assembly of States Parties¹²⁸ could check his powers. Thus the likelihood of purely political or blatantly unjustified prosecution is small.

¹²⁴ International Humanitarian Law – Treaties and Documents, 1949 Conventions & Additional Protocols & Their Commentaries, <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (last visited August 14, 2007).

¹²⁵ War Crimes Act, *supra* note 123 (pointing out that Article 25 of the Hague Convention outlaws the “attack or bombardment . . . of towns, villages, dwellings, or buildings which are undefended . . .,” language which is close to that of General Assembly Resolution 3314, art. 3 (b), *supra* note 17). See also Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, <http://www.icrc.org/ihl.nsf/FULL/195> (last visited August 14, 2007).

¹²⁶ Prosecution of the crime of aggression by the ICC Prosecutor would still require a showing of a state act of aggression and satisfying the leadership and gravity requirements under the Rome Statute. These “circumstances” are not required under the US statute.

¹²⁷ Rome Statute, *supra* note 1, art. 15(4) (providing that under the circumstances when the Prosecutor decides to open investigations *proprio motu*, the Pre-Trial Chamber would examine the request and the supporting material, consider whether there is a reasonable basis to proceed with an investigation, or whether the case falls within the jurisdiction of the Court, before it authorizes the commencement of the investigations.)

¹²⁸ *Id.*, art. 46:

1. [T]he Prosecutor . . . shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:
 - (a) Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or
 - (b) Is unable to exercise the functions required by this Statute.
2. A decision as to the removal from office of . . . the Prosecutor under paragraph 1 shall be made by the Assembly of States Parties

Justiciability would not likely hinder US prosecution. US courts have found cases which dealt with alleged violations of international criminal law justiciable, so long as they did not raise issues of *jus ad bellum*, or the notion of just and lawful war.¹²⁹ Moreover, US courts have emphasized the narrow scope of the political questions doctrine. For instance, in *In re “Agent Orange” Product Liability Litigation* Vietnamese nationals sued American manufacturers of Agent Orange, claiming that the use of the chemical during the war in Vietnam constituted a war crime under the US War Crimes statute, among others.¹³⁰ The US District Court for the Eastern District of New York noted that a case which calls for an assessment of the President's actions during wartime is no reason for a court to abstain from deciding it because of the political question doctrine.¹³¹ The court held that whether American corporations had acted in violation of international law during a war was a question of substantive international law and one that did not require it to make a policy determination involving non-judicial discretion.¹³²

A necessary element of the crime of aggression is the illegality of the war waged by a state. However, as discussed above, US courts could charge suspected perpetrators of crimes of aggression with war crimes. That may be sufficient to avoid the ICC's complementarity jurisdiction. Under the US War Crimes statute, for example, the question of whether the defendant committed a war crime is not predicated on demonstrating that the war was unlawful. Thus US courts could refrain from deciding if the executive's invasion or occupation of sovereign territories were legal and focus solely on the issue of whether American citizens committed war crimes under the defendant's orders.

¹²⁹ Strapatsas, *supra* note 120, at p. 27. See *Ariel Sharon v. Time Inc.*, 599 F.Supp. 538, (S.D.N.Y. 1984) in which Israeli defense minister brought a defamation claim against a magazine publisher for misrepresenting his involvement in an Israeli attack on two Palestinian refugee camps. In rejecting Time's argument that the claim was non-justiciable, the US District Court for the Southern District of New York held that the issue of Israel's authorizing or condoning the massacre of noncombatant, unarmed civilians is not in dispute in the defamation claim. Therefore the jury did not need to evaluate the legality of Israel's military acts and its determination would not interfere with the US Executive's authority.

¹³⁰ *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7 (E.D.N.Y. 2005).

¹³¹ *Id.*, p. 64.

¹³² *Id.*, p. 72 (noting that claims based on international law had been constitutionally committed to the judiciary (quoting from *Kadic v. Karadjic*, 70 F.3d 232, 249 (2d Cir.1995). See also *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (noting that while the military does have wide discretion in waging war, “it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims” such as whether a U.S. citizen captured during war was properly deemed an enemy combatant by the Executive).

In many countries, courts would be unwilling to investigate and prosecute incumbent government leaders for the crime of aggression. A successful prosecution of the crime would require a leadership change in the aggressor-state followed by an acceptance by the new government that its state committed an act of aggression and a real undertaking to hold those responsible to account.¹³³ In the meantime, the ICC could acquire jurisdiction over the crime and subject such leaders to investigations if the national courts were unwilling or unable to act. In the US, however, such outcome is unlikely. As discussed above, US courts could prosecute for war crimes and other serious crimes which, unlike aggression, do not require a showing of a state act and therefore political causes are less likely to hinder prosecution. Moreover, even if US courts are reluctant to adjudicate the acts of an incumbent Executive, under Article 16 of the Rome Statute, the US could seek a suspension of the ICC investigation for a renewable period of 12 months through the Security Council.¹³⁴ Thus, the US could achieve a delicate political resolution by making arrangements to postpone national investigations until the leader is no longer in office.

6. Conclusion

Defining the crime of aggression and amending the Rome Statute are particularly difficult challenges for the Assembly of States Parties of the ICC. The crime of aggression carries deeply emotional national legacies of unlawful armed attacks and occupation by the forces of foreign states. The crime is also problematic from a legal point of view because it requires a showing of a state act of aggression before individuals can be prosecuted for their participation in the planning of an illegal war and for the subsequent atrocities ensuing from such a war. Determination of state aggression is a sensitive political question which is usually vague and

¹³³ Strapatsas, *supra* note 120, at p. 13, *see also* Pål Wrange, *The Crime of Aggression and Complementarity*, Conference on International Criminal Justice, May 2007, p. 13, on file with author, (stating that a person responsible for aggression will most likely not be prosecuted in his or her own state while that person is in power, so the prosecution will take place under another, new regime, which might have its reasons for not allowing a completely impartial trial”).

¹³⁴ Rome Statute, *supra* note 1, art. 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”).

rarely consistent. Thus, the political determination of aggression is difficult to reconcile with the strict legal rules that will be required to prosecute the crime of aggression at the ICC.

The difficulty of defining the crime of aggression begs the question whether the crime has any substantive importance for the international prosecution of atrocities. One could argue that the crimes which are already part of the ICC's jurisdiction sufficiently cover the prohibited criminal conduct that the crime of aggression seeks to prosecute. Moreover, unlike genocide, war crimes, or crimes against humanity, which readily invoke images of egregious atrocities, the crime of planning an illegal war does not seem to have the same immediate psychological impact. Thus many wonder whether it is necessary to dedicate the current scale of negotiating effort and resources to the development of a provision on aggression.

Despite the challenges it poses, the crime of aggression may become part of the jurisdiction of the Court. Its importance lies in its capacity to deter the rest of the crimes prosecuted by the ICC. Aggression overarches all crimes committed in the course of war including war crimes, crimes against humanity, and genocide. By participating in international effort to address the crime of aggression, the US would join over 100 other states seeking to amend the Rome Statute in order to punish and deter the planners, and organizers of an unlawful use of force. With the legal and diplomatic expertise of US delegates, the Special Working Group on the Crime of Aggression would set the stage to prevent the initiation of armed conflicts which lead to the most heinous international crimes committed as a strategy of war and to prosecute the individuals bearing the greatest responsibility.