

THE INTERNATIONAL CRIMINAL COURT AND CRIMES OF AGGRESSION: BEYOND THE KAMPALA CONVENTION

*Surendran Koran**

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* Surendran Koran began practice as a lawyer in 1996, serving as a trial lawyer in Kerala, India, for ten years, before moving to Delhi to practice before the Supreme Court of India. He practiced there for three years until he moved to the USA. During his practice in India he argued civil, criminal, electoral, and labor and industrial dispute cases. He earned his LL.M in International Law from the University of Houston Law Center. He would like to extend his wholehearted thanks to his professor, Jordan J Paust who provided unparalleled support and guidance in accomplishing this task. He is also profoundly thankful to his wife and daughters, who, despite the demands on their own time, were understanding and gave him the time needed. They are, it goes almost without saying, the chief motivation for this undertaking. A previous version of this paper was presented at the 7th Cornell international graduate conference of the Cornell University Law School.

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I. INTRODUCTION

“There can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance.”

- Benjamin B. Ferencz, a former Nürnberg prosecutor¹

Finally, the long-awaited dream has become reality. Even though crime of aggression had long been recognized, its definition had remained ambiguous and lacking in broad agreement until the Kampala Convention, where the definition of crime of aggression was adopted by consensus among state parties.² There in Uganda, after years of negotiation and discussion, the state parties adopted a generally agreed definition of crime of aggression after reviewing the statute adopted at the Conference of Rome.³ Even though there were great differences of opinion as to what constitutes a crime of

1. Rome Statute of the International Criminal Court: Overview, UNITED NATIONS, <http://untreaty.un.org/cod/icc/general/overview.htm> (last visited Oct. 24, 2011).

2. Review Conference of the Rome Statute of the International Criminal Court, RC/Res.6, art. 8 *bis* Kampala, Uganda, May 31–June 11, Official Record RC-11, *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/OR/RC-11-ENG.pdf [hereinafter Review Conference].

3. *Id.*

aggression among members of a special working group, among the state parties to the Rome Statutes it has always been agreed that it “shall apply only to persons in a position effectively to exercise control over or to direct the political or military actions of a state.”⁴ Hence, the parties agreed that the crime of aggression is a leadership crime, one committed by those who are in active and direct control at a high level of a political or military decision-making body.

The “leadership” requirement that figures in an act of aggression dates back to the Nuremberg Trials where the chief prosecutor from the United States, Robert H. Jackson, stated in his opening statement:

The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.⁵

He added: “We have no purpose to incriminate the whole German people.”⁶ The chief prosecutor further confirmed:

The case as presented by the United States will be concerned with the brains and authority back of all of the crimes. These defendants were men of station and rank which does not soil its own hands with blood. They were men who knew how to use lesser folk as tools. We want to reach the planners and designers, the inciters and leaders without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness.⁷

Nevertheless, despite the clear logic of the Nuremberg statement, the definition adopted by consensus among the state parties at Kampala failed to address possible aggression by or

4. *Id.* art. 25 ¶ 3 *bis*.

5. Robert H. Jackson, Chief of Counsel for the United States, Opening Statement Before the International Military Tribunal at Nuremberg (Nov. 21, 1945), *available at* <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/>.

6. *Id.*

7. *Id.*

against non state actors or any other nontraditional form of aggression such as cyber crime or crimes committed by organized groups.⁸ This paper will analyze the importance of the definition of the crime of aggression. In doing so, the perspective given by a historical background will also be discussed, as will the new definition approved in the Kampala Conference. This paper will also provide a critical evaluation of the agreed definition that puts a special emphasis on the importance of this definition for the present century and will explore its limitations for addressing issues that relate to intervention on account of some perceived necessity, acts against *non state* actors, crimes committed by *non state* actors, and interventions inspired by humanitarian impulses. There is no doubt that the Rome Statute and the subsequent adoption of a definition of crimes of aggression are a significant move towards institutionalizing the concept of the crime of aggression.

II. HISTORICAL BACKGROUND

Whether the notion of “aggression” is a useful concept in the development of international law and order is a problem that has almost continuously engaged the attention of international lawyers and scholars of the international system for the past several years.⁹ That such has been the case stems in part from the difficulty of reaching an agreement on a proper definition of the notion. In order to analyze the definition of crime of aggression, it is helpful to make an overview of the historical events and attempts made to define and regulate illegal war and aggression. The term aggression was frequently used, but seldom ever defined in the international arena, mainly because of political interests.¹⁰ The crime of aggression is best understood in the light of historical, political, and legal

8. Review Conference, *supra* note 2.

9. JULIUS STONE, *AGGRESSION AND WORLD ORDER* 1 (1958).

10. Dov Jacobs, *The Sheep in the Box: The Definition of the Crime of Aggression at the International Criminal Court*, in *THE REVIEW CONFERENCE & THE FUTURE OF THE ICC: PROCEEDINGS OF THE FIRST AIDP SYMPOSIUM FOR YOUNG PENALISTS* 131–32 (Christoph Burchard, Otto Triffterer, and Joachim Vogel, eds., 2010), available at <http://ssrn.com/abstract=1562083>.

developments in the international arena.¹¹ For the sake of convenience, the historical development in the definition and regulation of the crime of aggression is divided into two sections. The first section deals with the attempts and events before World War II and the second deals with those that occurred after World War II.

A. *Pre-World War II Attempts to Prohibit War*

1. *Ancient Concepts: Holy War*

War has been an integral part of history throughout the ages. For our purposes, the concept of aggression, as distinct from the fact of aggression, has a history that dates back to ancient Greece.¹² In the ancient period, the concept of “holy war,” meant that recourse to war was morally permissible if it was thought to be divinely ordained.¹³ By this reckoning, even wars of conquest were acceptable if sanctioned by some divinity or divinities.¹⁴ This was, more or less, the basis used to legitimate the conquest of the Americas, e.g., the Christianization of heathen peoples.¹⁵ Wars not endorsed or instigated by the supernatural were not holy and, therefore, were not permissible.¹⁶

2. *Just War Concept*

Many centuries later, the concept of a holy war was replaced by the just war doctrine. “The crime of aggression developed from the principles governing the initiation of armed conflict among states, known as the *jus ad bellum*.”¹⁷ However, in time,

11. GERHARD KEMP, *INDIVIDUAL CRIMINAL LIABILITY FOR THE INTERNATIONAL CRIME OF AGGRESSION* 248 (2010).

12. *See generally* IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 1–107 (1963).

13. ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW & THE USE OF FORCE* 11 (1993).

14. *Id.*

15. *Id.* at 12.

16. *Id.*

17. Keith A. Petty, *Sixty Years in the Making: The Definition of Aggression for the International Criminal Court*, 31 *HASTINGS INT’L & COMP. L. REV.* 531, 533 (2008).

the early just war concept that war was lawful and moral when initiated in pursuit of a just cause no longer corresponded to reality.¹⁸ Under the evolved, or more refined, just war concept, war would be considered just not simply because it had a just cause; it also needed to be waged by an authority that had the right to wage it.¹⁹ A well known writer in this vein, Hugo Grotius, introduced two requirements for embarking on a war. First, he maintained that for a war to be permissible, it should be undertaken by a lawful authority, and secondly, there should be a just cause for the war.²⁰ He elaborately discussed the circumstances under which war could be justified and also elaborated a detailed list of unjust causes.²¹ Further, he also introduced the concept of personal responsibility for unlawful war.²²

However, in time, with the emergence of modern sovereign states, the just war concept was less widely recognized and validated. Indeed, the international system faced fundamental changes with the introduction of newly emerged sovereign states around the world. During this period, in spite of the moral limitations trying to dissuade parties from using war as recourse, the prevailing legal doctrine came to accept the right of states to wage war whenever they desired to do so.²³ Nevertheless, even during the period in which it was held that going to war was legal, there were attempts to prohibit war in the international system, or at least reduce its likelihood

18. AHMED M. RIFAAT, *INTERNATIONAL AGGRESSION* 32 (1979).

19. AREND & BECK, *supra* note 13, at 12.

20. HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES: THE CLASSIS OF INTERNATIONAL LAW* 97, 100, 169–85 (Francis W. Kelsey trans., (1925)); *see also* AREND & BECK, *supra* note 13, at 15.

21. GROTIUS, *supra* note 20, at 97, 100, 169–85; *see also* AREND & BECK, *supra* note 13, at 15.

22. Yasin A. M'Boge, *The Council and The Court: Shared Objectives or Opposing Views on the Crime of Aggression (Research Paper No. 31/2010)*, 1, 5, UCD Working Papers in Law, Criminology, and Socio-Legal Studies, July 16, 2010, available at <http://ssrn.com/abstract=1641142>.

23. Matthias Schuster, *The Rome Statute and Crime of Aggression: A Gordian Knot in Search of a Sword*, 14 *CRIM. L. FORUM* 1, 3 (2003), available at <http://www.springerlink.com/content/n77241m571373484/fulltext.pdf>.

through treaties, understandings, and alliances.²⁴ Until World War I broke out, the closing years of the nineteenth century and the opening decade of the twentieth was a time in which Western European intellectuals cherished the illusion that international conflict was receding into history and civilization had progressed beyond recourse to war to settle disputes, though the Franco-Prussian War had occurred as recently as 1870 and there were wars in distant places (e.g., between Spain and the US, between Japan and Russia).²⁵

3. *Paris World Peace Conference*

Although major organized movements for peace and against aggression were started after World War I ended, intergovernmental attempts were being made to prohibit aggressive war even before that. For example, “the Paris World Peace Conference of 1878 adopted a resolution which declared, ‘. . . que la guerre offensive est un brigandage international.’”²⁶ This mirrored the modern idea that eliminating aggressive war was both a state and individual responsibility.²⁷

4. *Hague Conventions on Neutrality (1899 & 1907)*

The first Pacific Settlement of International Disputes (Hague I), July 29, 1899, was marked as the beginning of an organized attempt to prohibit wars of aggression. Even though the first Hague Convention failed to achieve its purpose of maintaining general and lasting peace, its real value lay in the fact that it opened the door for another conference²⁸ to push the discussion forward through Article 2 of the first convention on the Pacific Settlement of International Disputes. Article 2 states that “[i]n case of serious disagreement or conflict, before an appeal to arms, the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of

24. *Id.* at 3–4.

25. RIFAAT, *supra* note 18, at 32.

26. *Id.*

27. *Id.*

28. *Id.* at 27.

one or more friendly Powers.”²⁹ However, the conference ultimately failed to achieve its objectives because larger powers were unwilling to limit or reduce armaments.³⁰

The Pacific Settlement of International Disputes (Hague II), of October 18, 1907, renewed the attempt to reduce the occasions for wars of aggression. Article 1 of the convention provided that “[w]ith a view to obviating as far as possible recourse to force in the relations between States, the Contracting Powers agree to use their best efforts to ensure the pacific settlement of international differences.”³¹ To achieve that end, the contracting parties agreed under Article 2 of the Conference to resort “to the good offices or mediation of one or more friendly Powers,” so far as circumstances might allow.³²

In 1907 a further attempt was made to limit the act of war. Article 1 of the Hague Convention Relative to the Opening of Hostilities (Hague III) attempts to maintain peaceful relations among states, by providing that “[t]he Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.”³³ Though the Hague conference failed to prohibit war, it succeeded, formally if not in practice, in requiring the state parties to submit disputes to a permanent court of arbitration.³⁴

Nonetheless, in spite of several ongoing attempts to restrict or prohibit wars of aggression, it remained more or less accepted that “[the state] had an unrestricted right to go to war and to

29. Hague Convention for the Pacific Settlement of International Disputes of 1890 art. 2, July 29, 1899, 32 Stat. 1779, 1 Bevans 230, *available at* http://avalon.law.yale.edu/19th_century/hague01.asp [hereinafter Hague I].

30. RIFAAT, *supra* note 18, at 27.

31. Hague Convention for the Pacific Settlement of International Disputes of 1907 art. 1, Oct. 18, 1907, 36 Stat. 2199, 1 Bevans 577, *available at* http://avalon.law.yale.edu/20th_century/pacific.asp.

32. *Id.* art. 2.

33. Hague Convention Relative to the Opening of Hostilities art. 1, Oct. 18, 1907, 36 Stat. 2259, 1 Bevans 619, *available at* http://avalon.law.yale.edu/20th_century/hague03.asp [hereinafter Hague III].

34. Schuster, *supra* note 23, at 3.

acquire territory by right of conquest.”³⁵ The first attempt to outlaw aggressive wars as crimes against humanity was made by the Soviet government through a decree passed at the second All Russia Congress on November 8, 1917.³⁶ Yet, this ambitious document made no attempt to define the term aggression.³⁷

5. 1919 Responsibility Commissions Report

The First World War witnessed the death of millions of people. At the end of the war, attempts were made to establish individual accountability for the aggressive war. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties was instituted at the plenary session of the Paris Peace Conference of January 25, 1919.³⁸ The Commission determined that the nations who went war to pursue a policy of aggression were responsible for initiating the conflict.³⁹ The Commission concluded its report on the third point that “[a]ll persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to prosecution.”⁴⁰

However, the commission opined that no criminal charge should be made against individuals or authorities on the breach of neutrality.⁴¹ Rather, considering the gravity of the outrages and the problems involving the complicated trials of others for war crimes, “they should be the subject of a formal

35. RIFAAT, *supra* note 18, at 17; Schuster, *supra* note 23, at 3.

36. RIFAAT, *supra* note 18, at 32–33.

37. *Id.* at 33.

38. Paris Peace Conference, *Violation of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities Conference of Paris 1919*, in COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES 1 (1919), available at <http://ia700406.us.archive.org/20/items/violationoflawsc00pariuoft/violationoflawsc00pariuoft.pdf>.

39. See generally JORDAN J. PAUST, ET AL., INTERNATIONAL CRIMINAL LAW 579 (3d ed. 2007) [hereinafter PAUST, INTERNATIONAL CRIMINAL LAW].

40. *Id.* at 583.

41. *Id.* at 584.

condemnation by the conference.”⁴²

6. *Treaty of Versailles: 1919*

The aftermath of the First World War provided another opportunity for the international community to consider a system to prevent the illegal use of force, or wars of aggression. The Versailles Treaty made an attempt to introduce an international responsibility for the declaration of and taking part in an illegal war, with a corresponding duty to make “reparation” for the illegal damages caused.⁴³ The Versailles Treaty thus marked the beginning of a new era in the International system. As a result of the Versailles negotiations and as part of its final peace treaty, the League of Nations was formed.⁴⁴ Article 227 of the treaty provided for the public arraignment of William II, the former German Emperor, “for a supreme offence against international morality and the sanctity of treaties.”⁴⁵ While the arraignment of the former Emperor marked an attempt to create individual responsibility for the war of aggression, the “charge clearly lacked a legal ground.”⁴⁶ However, years before the Nuremberg trial there existed the concept of individual responsibilities. As early as 1268, Conradin Von Hohenstafen was arrested and later, on October 29, 1268, executed for initiating an unjust war.⁴⁷ This position can also be seen from the 1818 decision of the Congress at Aix-La-Chapelle to detain Napoleon for waging war against the world peace.⁴⁸

42. *Id.*

43. RIFAAT, *supra* note 18, at 36.

44. Schuster, *supra* note 23, at 3.

45. Treaty of Peace between the Allied and Associated Powers and Germany, art. 227, June 28, 1919, 11 Martens (ser. 3) 323, 2 Bevans 43, available at <http://avalon.law.yale.edu/imt/partvii.asp>, [hereinafter Versailles Treaty]; see also PAUST, INTERNATIONAL CRIMINAL LAW, *supra* note 39, at 584.

46. Schuster, *supra* note 23, at 3.

47. JORDAN J. PAUST, ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 1072 (3d ed. 2009) [hereinafter PAUST, INTERNATIONAL LAW AND LITIGATION].

48. PAUST, INTERNATIONAL CRIMINAL LAW, *supra* note 39, at 561.

7. *League of Nations*

The end of the First World War provided another opportunity for seriously considering the need to limit wars of aggression. Many thought it was crucial that states consider a new approach to the previously unsuccessful attempts by creating a world organization to handle the responsibilities associated with new and complex issues and to reduce wars, along with other forms of aggression.⁴⁹ This led to the formation of the League of Nations. The Second Plenary Session of the Preliminary Peace Conference adopted a resolution on January 25, 1919, for the creation of League of Nations, which the conference felt essential for the maintenance of the post-war settlement, and, as such, the League was viewed as an “integral part of the general treaty of peace.”⁵⁰ Hence, Articles 11–15 dealt with the requirements that members should follow before going to war in order to be in compliance with Article 10 of the Covenant,⁵¹ which specifically referred to aggression. Article 10 states:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.⁵²

Except for Article 10, the other Articles utilized the term war or threat of war. In brief, the League restrictions focused on the recourse to war, and no limit was imposed on the use of force in circumstances short of the threshold of war.⁵³ Article 11 of the Covenant clarified that war was no longer a private concern but

49. RIFAAT, *supra* note 18, at 41.

50. *Id.* (quoting DENYS P. MYERS, HANDBOOK OF THE LEAGUE OF NATIONS 3 (1935)).

51. See Covenant of the League of Nations arts. 11–15 (discussing how the League will handle disputes between members), available at http://avalon.law.yale.edu/20th_century/leagcov.asp.

52. *Id.* art. 10.

53. AREND & BECK, *supra* note 13, at 22.

was, rather, an international concern.⁵⁴ Even though the Covenant imposed limitations, it nevertheless left open substantial rights to have recourse to war.⁵⁵ Notably, the recommendation of a Committee of Jurists to establish an International Criminal Court with compulsory jurisdiction was rejected.⁵⁶

The attempt to outlaw war and to define aggression under the 1923 Draft Treaty on Mutual Assistance and the 1924 Protocol for the Pacific Settlement of International Disputes both failed to achieve their objectives.⁵⁷ The draft treaty for mutual assistance focused on enumerating factors that indicated aggression, but provided no clear definition of aggression itself.⁵⁸ On the other hand, the 1924 Protocol for the Pacific Settlement of International Disputes introduced a definition of aggression by stating that “every state which resorts to war in violation of the undertakings contained in the Covenant or in the present protocol is an aggressor.”⁵⁹ However, both of these attempts to outlaw aggression were prematurely aborted.

8. *Kellogg Briand Pact: 1928*

The adoption of The Kellogg-Briand Pact in 1928 marked a step forward in League efforts to form a consensus on the criteria of aggression.⁶⁰ The adoption of Kellogg Briand was a landmark in outlawing aggression. It must be remembered that the treaty was not an isolated event in the international system, but combined and continued a number of “treaties and resolutions which condemned and declared aggressive war to be an international crime.”⁶¹ Article 1 of the pact asserts that “[t]he

54. RIFAAT, *supra* note 18, at 43.

55. AREND & BECK, *supra* note 13, at 20.

56. BENJAMIN B. FERENCZ, ENFORCING INTERNATIONAL LAW-A WAY TO WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS/VOLUME TWO 435 (1983).

57. *See* Schuster, *supra* note 23, at 4; *see also* AREND & BECK, *supra* note 13, at 22.

58. Schuster, *supra* note 23, at 4.

59. Protocol for the Pacific Settlement of International Disputes art. 10 (1924).

60. *See* STONE, *supra* note 9, at 31–32. Note the Kellogg-Briand Pact is also commonly referred to as the “Pact of Paris” or “General Treaty for Renunciation of War.” *See id.* at 32; RIFAAT, *supra* note 18, at 64.

61. RIFAAT, *supra* note 18, at 64.

High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.”⁶² The High Contracting Parties also agreed to settle disputes “by pacific means.”⁶³ Nevertheless, the pact still failed to define what constituted aggression.⁶⁴ Significantly, it outlawed only war and not the use of force that fell short of war.⁶⁵ Yet, compared with the League of Nations, the Kellogg Briand Pact was a great step forward in developing a legal system to outlaw wars of aggression.⁶⁶

B. Post-World War II Period

1. International Military Tribunal at Nuremberg

Even though the London agreement eventually decided to include aggression as an international crime, the agreement failed to establish a definition for the crime of aggression. However, the Nuremberg Charter provided for individual criminal responsibility. Article 6 began with the statement that:

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:⁶⁷

62. General Treaty for Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 94 L.N.T.S. 57, 63, *available at* <http://treaties.un.org/doc/Publication/UNTS/LON/Volume%2094/v94.pdf> [hereinafter *The Kellogg-Briand Pact*].

63. *See id.* art. 2.

64. Schuster, *supra* note 23, at 4.

65. AREND & BECK, *supra* note 13, at 23.

66. RIFAAT, *supra* note 18, at 78.

67. Charter of the International Military Tribunal at Nuremberg art. 6, *available at* <http://avalon.law.yale.edu/imt/imtconst.asp> [hereinafter *Nuremberg Tribunal*]; *see also* JORDAN J. PAUST ET AL., 2008 DOCUMENT SUPPLEMENT TO INTERNATIONAL LAW AND LITIGATION IN THE US 259 (2008) [hereinafter *PAUST, DOCUMENT SUPPLEMENT*].

6(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;⁶⁸

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.⁶⁹

A similar definition can be seen under Article 5(a) of the Tokyo Charter for the International Military Tribunal for the Far East (1946), which reads:

(a) Crimes against peace: namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.⁷⁰

The Nuremberg Judgment speaks about the gravity of the offence:

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity.⁷¹ War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world.⁷²

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

68. Nuremberg Tribunal, *supra* note 67, art. 6(a); *see also* PAUST, DOCUMENT SUPPLEMENT, *supra* note 67.

69. Nuremberg Tribunal, *supra* note 67.

70. *International Military Tribunal for the Far East Charter (IMTFE Charter)*, UIO: THE FACULTY OF LAW (Nov. 9, 2011), <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml>; *see also* PAUST, DOCUMENT SUPPLEMENT, *supra* note 67, at 261.

71. Nuremberg Judgment, 6 F.R.D. 69, 86 (1947).

73. *Id.*

contains within itself the accumulated evil of the whole.⁷³

The Nuremberg Charter, with the decision issued by the Military Tribunal, thus marked the formal beginning of a defining process that had begun before World War I. At the same time, it laid the foundation for further developments in that it sanctioned the final condemnation of aggression, qualifying it as international crime.⁷⁴ It also made it imperative to issue a rule prohibiting aggression.

The growing international concern with the concept of aggression led to further attempts to define aggression.⁷⁵ The most important contribution in this regard derived from what the Soviet Union had offered at the disarmament conference of 1933, where it enumerated various acts considered to be acts of aggression.⁷⁶ The proposal failed to receive general acceptance as other great powers were unwilling to support it.⁷⁷ However, a similar draft was adopted in The Convention for the Definition of Aggression on July 5, 1933 that was concluded between the Soviet Union, Afghanistan, Latvia, Estonia, Persia, Poland and Turkey as the bellicose nature of the new German government was emerging.⁷⁸

In order to give effect to the Moscow Declaration of 1943, the London Agreement of 1945, and to establish a uniform legal basis for the prosecution of war criminals and other similar offenders, other than those dealt with by the International military tribunal, the Control Council Law No. 10 was enacted.⁷⁹

Article II (1)(a) of the Allied Control Council Law No. 10 (1945) asserts:

(a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a

74. Nuremberg Tribunal, *supra* note 67, art. 6(a).

75. RIFAAT, *supra* note 13, at 88.

76. *Id.* at 88–89.

77. *Id.* at 91.

78. *Id.*

79. Control Council Law No. 10, Dec. 20, 1945, *available at* <http://avalon.law.yale.edu/imt/imt10.asp>.

war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.⁸⁰

2. *Organization of American States*

While the foregoing doctrinal developments were focused on Europe or Asia, another important organization formed to maintain peace and security was the regional Organization of American States. Article 1 of the Organization's charter provided that "the American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice."⁸¹ The charter proclaimed that their purposes, among others, were to strengthen the peace and security of the continent and provide for common action by such States in the event of aggression.⁸²

3. *United Nations Charter*

The aftermath of the Second World War convinced the world powers of the importance of establishing a universal international organization to deal with international conflicts, after the first international organization, the League of Nations, having failed to achieve this object. This led to the formation of the United Nations, where the delegates voiced their determination "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."⁸³

The principle embodied in Article 2(4) of the UN charter originated from the concept enunciated by the League of Nations and Kellogg-Briand Pact.⁸⁴ The Preamble to the UN charter proclaimed that "armed force shall not be used, save in the

80. *Id.* art. II(1)(a).

81. Charter of Organization of American States art. 1, Apr. 30, 1948, 119 U.N.T.S. 48, *available at* http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm.

82. *Id.* art. 2(a), (d).

83. U.N. Charter pmb1.

84. RIFAAT, *supra* note 18, at 121.

common interest.”⁸⁵ Article 1 of the UN Charter makes it crystal clear that the purpose of the UN is “[t]o 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.”⁸⁶

In pursuit of the above purposes, the UN Charter states under Article 2(3) that “[a]ll members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”⁸⁷ The most important provision in the UN Charter that prohibits the use of force is Article 2(4) which asserts that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁸⁸

Article 39 empowers the Security Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression.”⁸⁹ Thus, the provisions of the UN Charter are predicated on the assumption that avoiding an aggressive use of force is more important than the pursuit of justice that might conceivably involve the use of force.⁹⁰ Yet, even though the Charter used the word aggression repeatedly, it did not make an attempt to define the term “aggression.”

4. *1970 Declaration on Principles of International Law*

The 1970 Declaration on Principles of International Law is yet another step to restrict the illegal use of force by States. The declaration asserts:

States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in

85. U.N. Charter pmb1.

86. *Id.* art. 1, para. 1.

87. *Id.* art. 2, para. 3.

88. *Id.* art. 2, para. 4; *see also* PAUST, DOCUMENT SUPPLEMENT, *supra* note 67, at 6.

89. U.N. Charter art. 39; *see also* AREND & BECK, *supra* note 13, at 31–32.

90. AREND & BECK, *supra* note 13, at 40.

any other manner inconsistent with the purpose of the United Nations. Such a threat or use of force constitutes a violation of International law and the Charter of the United Nations.... A war of aggression constitutes a crime against peace, for which there is responsibility under International law.⁹¹

5. *1974 General Assembly Resolution No. 3314 (XXIX)*

Numerous proposals and suggestion for the definition of aggression came before the UN, but none gained general acceptance. Nevertheless, after repeated attempts and discussion in the international arena, the UN General Assembly eventually adopted a resolution on the definition of aggression.⁹² Article 1 states that “[a]ggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”⁹³

It is important to mention that in the explanation to Article 1 it is clearly stated that the term “State” is used without prejudice to questions of recognition or to whether a State is a member of the United Nations.⁹⁴ Article 2 of the resolution states the first use of armed force by one state against another in contravention of the Charter constitutes prima facie evidence of aggression.⁹⁵ Article 3 lists a number of acts that constitute aggression.⁹⁶ However, the acts mentioned in Article 3 of the resolutions are not exhaustive as Article 4 of the resolution authorizes the Security Council to define any other act as an act of aggression.⁹⁷ Article 5(2) states that “[a] war of aggression is a crime against international peace. Aggression gives rise to

91. G.A. Res. 2625 (XXV), ¶1, U.N. Doc. A/8082 (Oct. 24, 1970).

92. See RIFAAT, *supra* note 18, at 222, 262–64.

93. G.A. Res. 3314 (XXIX), annex art. 1, U.N. Doc. A/9890 (Dec. 14, 1974); see also PAUST, DOCUMENT SUPPLEMENT, *supra* note 67, at 64.

94. G.A. Res. 3314 (XXIX), *supra* note 93.

95. *Id.* annex art. 2; see also PAUST, DOCUMENT SUPPLEMENT, *supra* note 67, at 64.

96. See G.A. Res. 3314 (XXIX), *supra* note 93, annex art. 3.

97. *Id.* annex art. 4.

international responsibility.”⁹⁸ The resolution thus targeted state actions and no mention was made of *non state* actions or individual responsibility.⁹⁹

III. ROME STATUTE AND THE CRIME OF AGGRESSION

Even though the discussion about establishing an international criminal court has a long history, serious efforts in this regard began in the early 1990s. This development restored the importance of contextualizing; i.e., placing the crime of aggression in an international perspective by addressing chief features of the context. Over time, the International Law Commission presented several reports containing various proposals. In its 1994 draft statute for the International Criminal Court, under Article 20, the International Law Commission included the crime of aggression among other crimes that would fall within the jurisdiction of the ICC.¹⁰⁰ Article 23(2) specifically stipulated that a charge of aggression shall not be brought unless there is a Security Council determination that the concerned state had committed an act of aggression.¹⁰¹

In June 15–17 of 1998, there came to pass another historical event in the evolution of international law when the United Nations Conference of Plenipotentiaries was held in the City of Rome to deal with the establishment of an International Criminal Court.¹⁰² “One hundred and sixty states participated in this conference in addition to over 150 other organizations.”¹⁰³ Finally, at the end of the conference, 120 states voted to sign the ICC statute; seven nations including the USA and China voted against the statute.¹⁰⁴ In spite of the fact that seven countries,

98. *Id.* annex art. 5(2); *see also* Schuster, *supra* note 23, at 8.

99. Schuster, *supra* note 23, at 8.

100. Rep. of the Int'l Law Comm'n, 46th Sess., Sept. 1, 1994, U.N. Doc. A/49/355; GAOR, 49th Sess., Supp. No. 10 (1994); *see also* Schuster, *supra* note 23, at 8.

101. Rep. of the Int'l Law Comm'n, *supra* note 100, art. 23.

102. Lori Sinanyan, *The International Criminal Court: Why the United States Should Sign the Statute (But Perhaps Wait to Ratify)*, 73 S. CAL. L. REV. 1171, 1173 (2000).

103. *Id.*

104. *Id.*

including two major world powers, voted against the statute, the participants in the conference went ahead and established the International Criminal Court as a permanent court to investigate, prosecute, and thereby bring to account individuals who are responsible for the most heinous crimes.¹⁰⁵

At the Rome Diplomatic Conference, the delegates could not agree on including a definition of aggression, nor could they agree on defining aggression as an individual crime, or on the role of the Security Council in its activation. As a compromise, the Conference simply included crimes of aggression under Article 5(1)(d) of the Rome Statute, but the definition and conditions for exercising jurisdiction were not specified and were left for later review by a subsequent conference.¹⁰⁶ The decision to put the crime of aggression under the jurisdiction of the International Criminal Court (ICC) was, however, a decided step forward in evolving an international criminal justice system.

IV. KAMPALA REVIEW CONFERENCE AND THE ADOPTION OF A DEFINITION OF CRIME OF AGGRESSION

Finally, the long awaited review conference of the Rome Statute was held in Kampala, Uganda, from May 31 to June 11 2010. At the opening of the conference, UN Secretary General Ban Ki-moon proclaimed, “[t]he old era of impunity is over and a new age of accountability was setting in slowly but surely. In this new age of accountability, those who commit the worst of human crimes will be held responsible.”¹⁰⁷ After a long negotiation and discussion, the conference adopted a consensus definition on the crime of aggression.¹⁰⁸ The definition adopted by the Kampala conference was inserted as Article 8 *bis* to the Rome statute, which reads:

Article 8 *bis*
Crime of aggression

105. *Id.*

106. *Id.* at 1202.

107. Mubatsi A. Habati, *Super Powers Affirm Control Over ICC at Kampala Conference*, THE INDEPENDENT, June 28, 2010, <http://www.independent.co.ug/index.php/news/news-analysis/79-news-analysis/3090-superpowers-affirm-control-over-icc-at-kampala-conference->.

108. Review Conference, *supra* note 2.

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
 - a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
 - b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
 - c) The blockade of the ports or coasts of a State by the armed forces of another State;
 - d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
 - e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
 - f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of

aggression against a third State;

- g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.¹⁰⁹

The definition consists of two parts, a mixed combination of the generic and specific definitions. This came about as a result of the compromise entered into by the state parties.¹¹⁰ The first paragraph gives a general definition of aggression, and the second part gave an enumerated list of acts of aggression. The second paragraph serves as an explanation of the first paragraph because it starts with the words “for the purpose of paragraph 1”¹¹¹ The second paragraph of Article 8 *bis* is a verbatim reproduction of Articles 1 and 3 of the 1974 resolution adopted by the General Assembly with respect to the crime of aggression.¹¹² But the addition of the phrase “in accordance with the provisions of the United Nations General Assembly resolution 3314 (XXIX) of December 1974,” in the second sentence is ambiguous.¹¹³ Left open was the question of whether and to what extent provisions other than Articles 1 and 3 of 1974 resolutions were applicable or relevant for the ICC. The definition of “act of aggression” in Article 8 *bis* (2) does not stipulate a requirement of illegality, an omission that could lead to the implication that the use of military or other force in self defense might constitute an act of aggression.¹¹⁴ Merely

109. *Id.* Paragraph two of article 8 *bis* is problematic in two respects. First it is ambiguous as to whether and to what extent other provisions of the 1974 resolution applicable to ICC. Secondly, by incorporating the second sentence that directly referencing 1974 General Assembly Resolution implied that a limit which itself recognized limits in the General Assembly Resolutions article, 2 and 3 “in contravention of the Charter.” *Id.*

110. *Delivering on the Promise of a Fair, Effective, and Independent Court: The Crime of Aggression*, COAL. FOR THE INT’L CRIM. COURT, <http://www.iccnw.org/?mod=aggression> (last visited Nov. 13, 2011).

111. *Id.*

112. G.A. Res. 3314 (XXIX), *supra* note 93, annex art. 1, 3.

113. Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise and the Crime of Aggression*, 8 J. INT’L CRIM. JUST. 1179, 1191 (2010).

114. *Id.*

referring to the 1974 General Assembly Resolution would have been quite problematic as a basis for defining state conduct as a constituent element in the crime of aggression.¹¹⁵ The direct reference to the 1974 resolution imposed a limitation which itself recognized limits in General Assembly resolution's Articles 2 and 3 "in contravention of the Charter."¹¹⁶

Article 1 of the Rome Statute was concerned with individual accountability and empowers the ICC to exercise its jurisdiction over persons for the most serious crimes of international concern.¹¹⁷ Although Article 2(4) of the UN charter prohibits the threat or use of force by states,¹¹⁸ individual responsibility for the crimes of aggression provided under the Rome Statute is attributed only to those individuals who are in a position to effectively exercise control over and direct the political or military action of a state.¹¹⁹

This definition, for the purpose of the Rome Statute, requires an analysis of whether a given act is in violation of the UN charter and, if so, if it is a manifest violation of the Charter. The use of force is treated as a crime of aggression only if it satisfies both analyses.¹²⁰ Further, in order to consider whether an act of aggression is a manifest violation of the UN Charter, it must be analyzed in the context of its character, scale, and gravity.¹²¹ All three elements are to be satisfied for the test of manifest violation. This is clearly stated in Paragraph 7 of the understanding regarding the amendment to the Rome Statute, which provides that

It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity, and scale must be sufficient to justify a "manifest" determination. No one component

115. *Id.* at 1192.

116. G.A. Res. 3314 (XXIX), *supra* note 93, annex art. 2, 3.

117. Rome Statute of the International Criminal Court, art. 1, July 17, 1998, 218 U.N.T.S. 90 [hereinafter *The Rome Statute*].

118. U.N. Charter art. 2, para. 4.

119. Review Conference, *supra* note 2, art. 25 bis, ¶ 3.

120. *Id.* ¶¶ 6-7.

121. *Id.*

can be significant enough to satisfy the manifest standard by itself.¹²²

The threshold question for establishing the commission of aggression depends on the gravity of the state action.¹²³ This definition eliminates less severe and “less significant instances of the use of armed force” from the jurisdiction of the ICC.¹²⁴ From this perspective, not every act of aggression is a crime of aggression. Therefore, the act of aggression can be characterized as a crime of aggression only when it amounts to a manifest violation of the UN charter. In other words, the act of aggression is to be analyzed taking into account the severity of the aggression, just as other crimes, such as crimes against humanity and war crimes, are placed in the context of their magnitude or substantiality to determine their relevance to the jurisdiction of ICC.¹²⁵ Hence, the process of determination focuses on whether there is an act of aggression and, if so, whether the said aggression is a manifest violation of the UN Charter as provided under Articles 15 & 15 *bis* of the Rome Statute.¹²⁶

A. *Mens Rea Requirement*

The amendment to the elements of a crime of aggression stipulates that the awareness of the perpetrator and the use of force are inconsistent with, as well as, being a manifest violation of the charter of the United Nations.¹²⁷ This awareness is nothing but the *mens rea* of the perpetrator: the threshold of criminal aggression is evaluated on the basis of the mental state of the actor.¹²⁸

122. *Id.* ¶7

123. See generally Keith A. Petty, *Criminalizing Force: Resolving The Threshold Question for the Crime of Aggression in the Context of Modern Conflict*, 33 SEATTLE U. L. REV. 105 (2009).

124. *Id.* at 107.

125. *Id.* at 117.

126. The Rome Statute *supra* note 117, art. 15; Review Conference, *supra* note 2, art. 15 *bis*.

127. Review Conference, *supra* note 2, ¶¶ 4–5.

128. Petty, *supra* note 123, at 117.

B. Leadership Responsibility

A further characteristic of the definition of aggression is the special treatment of leadership responsibility. This leadership requirement is explicitly stated in the definition itself. Paragraph one of Article 8 *bis*, incorporates into a recognized “crime of aggression,” the planning, preparation, initiation, or execution of the crime by a person in a position effectively to exercise control over or to direct the political or military action of a State.¹²⁹ This requirement is further provided under Article 25 *bis* (3) of the Rome statute which states that “[i]n respect of the crime of aggression, the provisions of this Article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.”¹³⁰ Hence, it is abundantly plain that the requirement refers only to those individuals who occupy a position that allows them to exercise control over or direct the political or military actions of a state.

This leadership responsibility has historical precedents. The execution of Conrad Von Hohenstaufen, along with his friend and companion Frederick Baden, on 29 October 1268,¹³¹ the 1818 decision of the Congress at Aix-La-Chapelle to detain Napoleon for waging war,¹³² and the Treaty of Versailles¹³³ are early historical examples of the concept of leadership responsibility. The U.S. Chief Prosecutor echoed these early precedents before the Nuremberg tribunal, stating that “[w]e have no purpose to incriminate the whole German people . . . [w]e want to reach the planners and designers, the inciters and leaders, without whose evil architecture the world would not have been for so long scourged with the violence and lawlessness.”¹³⁴

129. Review Conference, *supra* note 2.

130. *Id.* art. 25, ¶ 3 *bis*.

131. PAUST, INTERNATIONAL LAW AND LITIGATION, *supra* note 47, at 1072.

132. PAUST, INTERNATIONAL CRIMINAL LAW, *supra* note 39, at 561.

133. The Versailles Treaty, *supra* note 45, art. 230–31.

134. Jackson, *supra* note 5.

C. Individual Responsibility

Even though, for purposes of the ICC jurisdiction, the crime of aggression can be committed only by a state against another state, responsibility for such unlawful acts reposes on the individual who is responsible for such action by the state. The individuals who hold positions that enable them to exercise effective control over or to direct the political or military action of a state are, thus, responsible for the act of aggression.¹³⁵ It follows, then, that all individuals participating in the act of aggression are not responsible for the crime of aggression for purposes of the ICC jurisdiction. Indeed, the principle of individual responsibility is clearly enunciated under the Nuremberg Judgment, where it is stated, "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."¹³⁶ Nonetheless, the International Military Tribunal, in its judgment, extended the responsibility to those who have participated in the plan and extended their cooperation in unlawful acts of aggression.¹³⁷ Thus,

Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here anymore than it does in the comparable tyranny of organized domestic crime.¹³⁸

135. Review Conference, *supra* note 2.

136. Judgment of the International Military Tribunal, The Trial of German Major War Criminals: The Law of the Charter (1946), *available at* <http://avalon.law.yale.edu/imt/judlawco.asp>.

137. *Id.*

138. *Id.*

The historic definition of crimes of aggression, however, did not agree with this broad extension of responsibility. On the contrary, it limited the responsibility to those holding positions from which they could effectively exercise control over or direct the political or military action of a State.¹³⁹ This restriction of responsibility to key individuals, rather than extending it to subordinates who merely obey the directions of the superiors, under pain of severe sanctions for disobedience, seems a more realistic approach.

D. Independence from Other International Organs

One of the major aspects of the exercise of jurisdiction, or even the initiation of an investigation into a supposed crime of aggression, is that no predetermination of the crime of aggression by any outside agency, including the Security Council, is required.¹⁴⁰ In an earlier draft, the act of aggression was to be predetermined by the Security Council.¹⁴¹ Indeed, a forceful attempt was made by some major powers, especially the United States of America, to incorporate a provision that would require predetermination by the Security Council to assert the existence of a crime of aggression.¹⁴² This was evident from the statement of Stephen Rapp, ambassador to the Assembly of State Parties:

I would be remiss not to share with you my country's concerns about an issue pending before this body to which we attach particular importance: the definition of the crime of aggression, which is to be addressed at the Review Conference in Kampala next year. The United States has well-known views on the crime of aggression, which reflect the specific role and responsibilities entrusted to the Security Council by the U.N. Charter in responding to aggression or its threat, as well as

139. Review Conference, *supra* note 2.

140. Robbie Manson, *Identifying the Rough Edges of the Kampala Compromise*, 21 CRIM. LAW FORUM 3–4, 417 (2010).

141. *Id.*

142. Brett D. Schaefer, *The US Loses on Aggression in Kampala*, NAT'L REVIEW ONLINE (June 14, 2010), <http://www.nationalreview.com/corner/231855/u-s-loses-aggression-kampala-brett-d-schaefer>.

concerns about the way the draft definition itself has been framed. Our view has been and remains that, should the Rome Statute be amended to include a defined crime of aggression, jurisdiction should follow a Security Council determination that aggression has occurred.¹⁴³

Despite the pressure from United States and other major powers, these attempts failed in the Kampala Conference.

The Kampala Conference recognized the independent determination of an act of aggression by the ICC.¹⁴⁴ Importantly, even though a prosecutor, in view of Article 15(6) *bis*, is required to ascertain if the Security Council had already made a determination of an act of aggression and to notify the Secretary General of the situation with relevant information, he can proceed with the investigation on his own if there is no such determination by the Security Council within six months of notification.¹⁴⁵ The only requirement is the need to obtain authorization from the pre-trial division of the Court in accordance with the provisions of Article 15 of the Statute.¹⁴⁶ In view of Article 15 of the Statute, the determination by the pre-trial chamber is without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.¹⁴⁷ This effectively provides independence to the ICC to determine whether the act constitutes an act of aggression and to settle questions relating to jurisdiction and admissibility.

This independent investigative power and the determination of the crime of aggression and admissibility are incorporated under Article 15 *bis* paragraph 6–9 of the Rome Statute which asserts:

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the

143. *Id.*

144. *Id.*

145. Review Conference, *supra* note 2, art. 15 bis, ¶¶ 6, 8.

146. *Id.* ¶ 8.

147. The Rome Statute, *supra* note 117, art. 15, ¶ 4.

State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15, and the Security Council has not decided otherwise in accordance with Article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.¹⁴⁸

This independence of the ICC with respect to the crime of aggression is further provided under Article 15 *bis* (9) of the Statute, which reads: "A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this statute."¹⁴⁹ The power of the Court to decide its own competence, under the principle *Kompetenz-Kompetenz*, is considered a fundamental attribute of a judiciary body.¹⁵⁰ An example of this attribution can be seen in Article 36(6) of the ICJ Statute, which asserts that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."¹⁵¹ Additionally, a provision under Article 15(7) *bis* stated that if the Security Council has already determined there is a crime of aggression, the prosecutor may proceed with the investigation, eliminating the risk of a conflicting decision or opinion by the

148. Review Conference, *supra* note 2, art. 15 bis ¶¶ 6–9.

149. *Id.* ¶ 9.

150. Jacobs, *supra* note 10, at 136.

151. Statute of the International Court of Justice, art. 36 para 6, June 26, 1945, 59 Stat. 1055, 3 Bevens 1153 [hereinafter ICJ Statute].

two international organs.¹⁵²

E. Lack of Clarity in and Limitations on the Exercise of Jurisdiction by the ICC on Crimes of Aggression

The conditions for the exercise of jurisdiction by the Court “proved to be politically controversial and diplomatically vexed.”¹⁵³ The definition incorporates a lot of ambiguities, which make the situation still more complex. In addition to the ambiguous provisions already discussed with respect to Article 8 *bis*, there are other provisions which lack a clear meaning. This is evident from the wording contained in Article 12(1), Article 15 *bis*, and Article 15 *ter*:

Article 15 *bis*

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this Article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.¹⁵⁴

Article 15 *ter*

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this Article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.¹⁵⁵

Article 15 *bis* relates to the state referral and *proprio motu* (prosecutorial referral), and Article 15 *ter* relates to Security

152. Review Conference, *supra* note 2, art. 15 *bis* ¶¶ 6–7.

153. Manson, *supra* note 140, at 1–2.

154. Review Conference, *supra* note 2, art. 15 *bis* ¶¶ 2–3.

155. *Id.* art. 15 *ter* ¶¶ 2–3.

Council referral.¹⁵⁶ Both new Articles have the same language and same meaning. Article 15 *bis*(2) and 15(2) *ter* intended to delay the jurisdiction of the ICC with respect to the crime of aggression.¹⁵⁷ But this delaying tactic will not have a large impact as it can only delay the jurisdiction for one year because it is not exceedingly hard to get the ratification or acceptance by thirty states, as required in those provisions.

Some writers are of the view that the provisions contained in Article 15(3) *bis* and 15(3) *ter* are not only intended to delay the exercise of jurisdiction by the ICC, but really provide a complete deferral of the exercise of jurisdiction by the Court, unless and until a further decision is taken by the Assembly of State Parties at some time after January 1, 2017.¹⁵⁸ Article 15(3) *bis* and 15(3) have identical language and meaning that provides “[t]he Court shall exercise jurisdiction over the crime of aggression in accordance with this Article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.”¹⁵⁹ The above interpretation has some force if the forgoing provisions are read along with the understanding of the amendment to the Rome Statute provided as annex III to the Kampala resolutions. Paragraph 3 of the understanding provides:

It is understood that in case of Article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with Article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.¹⁶⁰

This can be interpreted to mean that even if it is ratified by the required number of states, it has no effect unless another decision is reached by seven-eighths of the state parties after

156. *Id.* art. 15 *bis*; *id.* art. 15 *ter*.

157. Review Conference, *supra* note 2, art. 15 *bis* ¶ 2; *id.* art. 15 *ter* ¶ 2.

158. Manson, *supra* note 140, at 9–10.

159. Review Conference, *supra* note 2, art. 15 *bis* ¶ 3.

160. *Id.* annex III ¶ 3.

January 1, 2017.¹⁶¹ If this view is accepted, the Court can exercise jurisdiction over the crime of aggression only after January 1, 2017.

Nevertheless, if this interpretation is accepted, it will have the effect of undercutting the Kampala Convention and its definition of crimes of aggression. It is undeniable that the main purpose of the Kampala Convention was to adopt such a definition and to provide jurisdiction over these crimes to the ICC.¹⁶² The Review Conference Resolution RC/Res.6 recalled paragraph 1 of Article 12 of the Rome Statute.¹⁶³ Paragraph 1 of Article 12, provides: “A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5.”¹⁶⁴ Thus, a crime of aggression is already part of the aggression included under Article 5 of the Rome Statute. By recalling that provision in the Review Conference Resolution, the Assembly of State Parties accepted the definition and other amendment to the Rome Statute.

The original Article 5(2) was incorporated because the state parties were not in agreement on the definition of a crime of aggression and therefore included the crime as one of the core crimes within the jurisdiction of the ICC, deferring adoption of the definition and jurisdiction for a future date.¹⁶⁵ Article 5(2) provides for the adoption of the definition of crime of aggression in a future date and the condition under which the jurisdiction can be exercised.¹⁶⁶ Consequently, in view of Article 5(2), the Review Conference adopted Article 15 *bis* and 15 *ter* imposing conditions for the exercise of jurisdiction by the Court.¹⁶⁷ But these conditions, especially the conditions under Articles 15(3) *bis* and 15(3) *ter*, are inconsistent with the already existing paragraph 1 of Article 12 as well as Article 121(5) of the Rome

161. *Id.* art. 15 bis ¶ 3; The Rome Statute, *supra* note 117, art. 121 ¶ 4.

162. Review Conference, *supra* note 2; *id.* art. 8 bis ¶ 1.

163. Review Conference, *supra* note 2.

164. The Rome Statute, *supra* note 117, art. 12, ¶ 1.

165. *Id.* art. 5, ¶ 1–2.

166. *Id.* ¶ 2.

167. Review Conference, *supra* note 2, art. 15 bis, art. 15 ter; The Rome Statute, *supra* note 117, art. 5.

Statute, which states “any amendment to Article 5 shall enter into force for the state parties after one year of its acceptance or ratification.¹⁶⁸ Neither Article 12(1) nor Article 121(5) was amended in conformity with Articles 15 *bis* (3) and 15(3) *ter*.

The Review Conference Resolution “[r]esolved to activate the Court’s jurisdiction over the crime of aggression as early as possible.”¹⁶⁹ Also, the resolution provided that it “further decides to review the amendments on the crime of aggression seven years after the beginning of the Court’s exercise of jurisdiction.”¹⁷⁰ The above two provisions in the Review Conference Resolution, coupled with Articles 12(1) and 121(5), made it clear that it was not the Assembly of State Parties or the Review Conference intention to delay or defer the ICC jurisdiction over the crime of aggression for another seven years. Rather, what the Assembly of State Parties intended was to consider any further amendment or change of jurisdiction as to the crime of aggression after seven years, which means after January 1, 2017.

The inconsistent provision in paragraph 3 of Article 15 *bis*, Article 15 *ter*, and paragraph 3 of the Understanding are to be considered as an oversight of the drafters or a simple mistake, or, at the very least as bad drafting.¹⁷¹ One thing that is crystal clear is that it cannot be construed as a deferral of the activation of the ICC jurisdiction until 2017. The second part of paragraph 3 of Articles 15 *bis* and A15 *ter* are to be interpreted unless a contrary decision is adopted after January 2017 with the same required majority (7/8) of State Parties.¹⁷² The question of when the amendment and ICC jurisdiction enter into force also needs clarification. In view of Article 12(1) the State Parties declared that they accepted the jurisdiction referred to in Article 5.¹⁷³ The Review Conference Resolution recalled the above provision,

168. Review Conference, *supra* note 2, art. 15 *bis* ¶ 3; *id.* art. 15 *ter* ¶ 3; The Rome Statute, *supra* note 117, art. 12, ¶ 1, art. 121 ¶ 5.

169. Review Conference, *supra* note 2.

170. *Id.*

171. Compare art. 15 *bis* ¶ 3, with art. 15 *ter* ¶ 3.

172. Review Conference, *supra* note 2, art. 15 *bis* ¶ 3; The Rome Statute, *supra* note 117, art. 121, ¶ 4.

173. The Rome Statute, *supra* note 117, art. 12.

which meant that they accepted the amendment to the Rome Statute.¹⁷⁴ Article 121(5) provides that any amendment enters into force after one year of ratification or acceptance.¹⁷⁵ This means that the requirement is either a ratification or acceptance by the state parties. Since in view of Article 12(1) the state parties already accepted the jurisdiction and the resolution also accepted the amendment, it would definitely enter into force one year after the review conference. A contrary interpretation of the provisions would be an attempt to defeat the legitimate intention of the Assembly of State Parties as to the jurisdiction of ICC over the crimes of aggression.

There is also a contradictory or inconsistent meaning evident in Article 12(2)(b) and Article 121(5). In view of Article 12(2) the Court can have jurisdiction over the national of a state if that state is party to the statute and has accepted it.¹⁷⁶ However, the provisions in the second sentence of Article 121(5) explain that if a state party opted out of the jurisdiction, the Court could not exercise jurisdiction over the crime committed by that state or committed on its territory.¹⁷⁷ This makes the situation particularly problematic. In view of the second sentence in Article 121(5), if an aggressor committed the crime within the territory of a state that is not a party to the statute or had decided not to accept the jurisdiction of the Court, then the Court could not exercise jurisdiction over the aggressor, even if his own nation is a party to the statute and has accepted the jurisdiction.¹⁷⁸ It is true that with respect to the effect of the amended provisions that are inconsistent with the already existing provisions, it can be argued either “that the amendment in question does not affect those articles or that it goes beyond those articles to the extent that it deals with the conditions for the exercise of jurisdiction.”¹⁷⁹

174. Review Conference, *supra* note 2.

175. The Rome Statute, *supra* note 117, art. 121, ¶ 5; *see also* PAUST, DOCUMENT SUPPLEMENT, *supra* note 67, at 333.

176. The Rome Statute, *supra* note 117, art. 12, ¶ 2, art. 121; *see also* PAUST, DOCUMENT SUPPLEMENT, *supra* note 67, at 273–74, 333.

177. The Rome Statute, *supra* note 117, art. 121, ¶ 5.

178. *Id.*

179. Kreß and Holtzendorff, *supra* note 113, at 1197.

F. Retroactivity of the Statute

Article 22(1) of the Rome Statute provides that “a person shall not be [held] criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”¹⁸⁰ This provision invokes the principles of *nullum crimen sine lege* (no crime without law), *nulla poena sine lege* (no penalty without law), and *nullum crimen, nulla*, which prohibits the retroactive operation of penal law and declares that legal rules be proclaimed before their application.¹⁸¹ Relevant also is the principle of *poena sine praevia lege poenali* (no crime may be committed nor punishment imposed without a preexisting penal law).¹⁸² “The principle of no retroactivity has now been so widely recognized internationally that it has come to represent a general principle of law recognized by civilized nations.”¹⁸³

In the words of Theodor Meron, “the prohibition of penal measures is a fundamental principle of criminal justice and a customary, even peremptory, norm of international law that must be observed in all circumstances by national and international tribunals.”¹⁸⁴ Professor Jordan J. Paust addressed the issue of *ex post facto* rule in his latest article in *Jurist*, providing an unusually nuanced reading of the foregoing principles:

[A]lthough Israel, its courts, and its legislation did not exist during the Holocaust, it could lawfully prosecute someone like Eichmann for prior conduct in violation of international law. Moreover, the Charter of the international military tribunal at Nuremberg and Far East had not existed prior to criminal conduct addressed by the tribunals, nor had the Control Council Law No. 10 existed prior to the international criminal activity addressed in numerous military commissions that had prosecuted tens of thousands of accused within

180. The Rome Statute, *supra* note 117, art. 22, ¶ 1.

181. Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71, 83 (2009).

182. *Id.*

183. *Id.* at 84.

184. THEODOR MERON, WAR CRIMES LAW COMES OF AGE 244 (1998).

Europe.¹⁸⁵

He further emphasized that no *ex post facto* problem is encountered with respect to the creation of new charters or enactments and new tribunals as long as what was covered had been crimes under international law.¹⁸⁶

Here lies the chain of reasoning for defining the jurisdiction of the ICC, since the provision clearly states that “a person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”¹⁸⁷ Further, Article 22(1), explicitly places an additional limit on retroactivity, one that did not apply to IMT at Nuremberg. Essentially, the question here for consideration is when the Court will have jurisdiction to try the crime of aggression.

To resolve the apparent contradiction, one must look at the provisions contained in paragraph 3 of Articles 15 *bis* and 15 *ter*, along with the paragraph 3 of the Understanding Regarding the Amendment to the Rome Statute of the International Criminal Court. It is well understood that the main purpose of the Kampala Review Conference was adoption of a definition of crimes of aggression that would provide jurisdiction to the ICC in respect of such crimes, where a key question relates to when the amendment entered into force.¹⁸⁸ In view of the discussion above, there is no doubt that the Court can exercise jurisdiction after one year of the Kampala Review Conference when the State Parties have accepted the amendment to the statute. The original acceptance during the adoption of the Rome Statute was thus reinforced by the amendment that was accepted by the State Parties at the Review Conference.¹⁸⁹ Again, once the amendment was accepted, there is no question of further ratification in view of Article 121(5) and Articles 15 *bis* and 15

185. Jordan J. Paust, *US Inaction: Aiding and Abetting Nazis After the Fact*, Jurist (Nov. 19, 2010), available at <http://jurist.org/forum/2010/11/us-inaction-aiding-and-abetting-nazis-after-the-fact.php>.

186. *Id.*

187. Rome Statute, *supra* note 117, art. 22, ¶ 1.

188. Review Conference, *supra* note 2; *see also id.* art. 8 bis ¶ 1.

189. The Rome Statute, *supra* note 117, art. 128; Review Conference, *supra* note 2.

ter, which require either ratification or acceptance.¹⁹⁰ Thus, the Court has jurisdiction over the crime of aggression after one year from the date of its acceptance by the state parties in the review conference.

G. The State Action Requirement and Possible Consequences.

The purpose of the United Nations is abundantly clear from the wording of Article 1, which aimed to “maintain international peace and security.”¹⁹¹ The preamble to the UN Charter states that in the name of all people “armed force shall not be used, save in the common interest.”¹⁹² The preamble of the Rome Statute, in effect, recognized the fact that the unimaginable atrocities that had occurred during the past century had deeply shocked the conscience of humanity, giving rise to a general acceptance that such grave crimes threaten the peace, security and well-being of the world.¹⁹³ While the First World War brought huge casualties to the combatants, and the Spanish Civil War brought its share of domestic atrocities to international attention, it was the overwhelmingly pernicious nature of the Nazi regime in Germany, its utter disregard for the basic rights of its own citizenry, and the horrors it inflicted on neighboring populations that generated widespread international recognition of the urgent need for redressing international crimes of aggression.¹⁹⁴ The horrifying onslaughts of the twentieth century were simply unprecedented in human history, replete though that history had been with both internal and domestic conflicts and repression.¹⁹⁵ The International Criminal Court was thus established to exercise jurisdiction

190. The Rome Statute, *supra* note 117, art. 121, ¶ 5; Review Conference, *supra* note 2, art. 15 bis, art. 15 ter.

191. U.N. Charter art. 1.

192. U.N. Charter pmbl.

193. The Rome Statute, *supra* note 117, pmbl.

194. Grant M. Dawson, *Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 413, 421 (2000); *see also* Jackson, *supra* note 5.

195. Milton Leitenberg, *Death in Wars and Conflicts in the 20th Century*, CORNELL U. PEACE STUD. PROGRAM, 2006, at 1; Keith Krause, *War, Violence, and the State, in SECURING PEACE IN A GLOBALIZED WORLD 187–88* (Michael Brzoska and Axel Krohn eds., 2009).

over persons “for the most serious crimes of international concern”¹⁹⁶ and thereby attain the objective set forth in the Charter of United Nations—the achievement of international peace and security.¹⁹⁷

One of the strengths of international law is its dynamism, i.e., its capacity to develop in accordance with the changing realities of international life and the evolving values of the international community.¹⁹⁸ There has been a growing awareness and discussion of the deficiencies of international law in grappling with violence perpetrated by *non state* actors, a harbinger of which had been the overseas aggressions of Hitler’s “fifth columns.”¹⁹⁹ More recently has been the multitude of terrorist actions instigated and carried out by the militants of the sundry Islamic fractions scattered from West Africa to the Philippines and beyond. Accordingly, an increasingly important area of concern has focused on non state organizations that are engaged in protracted episodes of violence, giving rise to questions of accountability under international law.²⁰⁰ “International criminal justice does not only have as a purpose the prosecution of those who are responsible for serious crime, but it also plays a role in the establishment of a peaceful and safe international society.”²⁰¹ This involvement of non state actors in the unlawful use of force and aggression was almost unavoidably taken into consideration by the International Military Tribunal, leading to its famous statement that “[c]rimes 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.”²⁰²

Yet, for the purpose of the ICC, the Kampala definition

196. The Rome Statute, *supra* note 117, art. 1.

197. U.N. Charter art. 1, para. 1.

198. John Cerone, *Much Ado About Non state Actors: The Vanishing Relevance of State Affiliation in International Criminal Law*, at 1, 29, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=john_cerone.

199 *Id.* at 1; see Frederic Megret, *War? Legal Semantics and the Move to Violence*, 13 *EUR. J. INT’L L* 361, at 380 (2002).

200. Cerone, *supra* note 198, at 1.

201. Jacobs, *supra* note 10, at 139.

202. Military Tribunal, *supra* note 136, at 41.

limits the crime of aggression to only when it is committed by a state against another state.²⁰³ In the broader context, it is clear that this was an unrealistic approach in the international situation of our times. Professor Noah Weisbord, an independent expert delegate to the Special Working Group on the Crime of Aggression that was charged by the ASP with drafting the new definition, recognizes this defect.²⁰⁴ The exclusive focus of the definition of aggression on state behavior leaves out of consideration a large amount of non state violence that is in fact integral to the present reality of international armed conflict.²⁰⁵ For example, the Palestine issue is one of the core concerns in today's international system,²⁰⁶ but in the narrow definition of a crime of aggression, the ICC might not be able to take jurisdiction, even if an act of aggression by its character, gravity, and scale constituted a manifest violation of the Charter of the United Nations.

With respect to state actors, the State is defined under Article 1 of the Montevideo Convention on Rights and Duties of States as a person of international law possessing the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) the capacity to enter into relations with other states.²⁰⁷ These characteristics are likewise considered the basis for statehood by the international community.²⁰⁸ In a sense, the status of Palestine in the international community began to be defined in quasi-state terms in the resolution of the

203. Review Conference, *supra* note 2.

204. Michael Anderson, *Reconceptualizing Aggression*, 60 DUKE L.J. 411, 412 (2010).

205. *Id.* at 420.

206. *The Questions of Palestine and the United Nations*, UN.ORG, <http://unispal.un.org/pdfs/DPI2499.pdf>; see also *Palestine Issue Placed Third on U.N. Agenda; Will Not Come Up for About Two Weeks*, JTA JEWISH NEWS ARCHIVE, Sep. 30, 1948, <http://archive.jta.org/article/1948/09/30/3016082/palestine-issue-placed-third-on-un-agenda-will-not-come-up-for-about-two-weeks>.

207. Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19, art. 1, available at <http://treaties.un.org/doc/Publication/UNTS/LON/Volume%20165/v165.pdf>.

208. Kavitha Giridhar, *Legal Status of Palestine*, DRAKE UNDERGRADUATE SOC. SCI. J., Apr. 2006, at 1, available at <http://www.drake.edu/artsci/PolSci/ssjrn/2006/giridhar.pdf>.

General Assembly that granted observer status to the Palestine Liberation Organization, enabling it to participate in the sessions and work of the General Assembly, along with participation in the sessions and work of all international conferences convened under the auspices of the General Assembly, as well as in the sessions and work of all international conferences convened under the auspices of other organs of the United Nations.²⁰⁹

Even so, there is controversy among scholars as to the status of Palestine in terms of statehood. Some, like John Quigley, are of the view that “Palestine lacks independence but does not lack statehood.”²¹⁰ Those inclined to this perspective argue that the General Assembly resolution A/RES/43/177 supports this argument.²¹¹ The General Assembly itself decided that, effective as of December 15, 1988, the designation “Palestine” should be used in place of the designation “Palestine Liberation Organization” in the United Nations system, without prejudice to the observer status and functions of the Palestine Liberation Organization within the United Nations system, in conformity with relevant United Nations resolutions and practice.²¹² The General Assembly further acknowledged the proclamation of the State of Palestine by the Palestine National Council on November 15, 1988.²¹³ The General Assembly also affirmed the need to enable the Palestinian people to exercise sovereignty over their territory occupied since 1967.²¹⁴ In its 82nd plenary session, the UN General Assembly adopted a resolution acknowledging the proclamation of Palestine independence by the Palestine National Council on November 15, 1988.²¹⁵ One hundred and four states supported this resolution: forty-four

209. G.A. Res. 3237 (XXIX), U.N. Doc. A/RES/3237 (Nov. 22, 1974).

210. John Quigley, *Palestine Statehood: A Rejoinder to Professor Robert Weston Ash*, 36 RUTGERS L. REC. 257, 258 (2010).

211. G.A. Res. 43/177, U.N. Doc. A/RES/43/177 (1988).

212. *Id.*

213. *Id.*

214. *Id.*

215. Question of Palestine, G.A. Res. 43/177, U.N. Doc. A/RES/43/177 (Dec. 15, 1988).

abstained; only the United States and Israel opposed it.²¹⁶ Following the 1988 Palestine declaration, eighty nine states recognized Palestine.²¹⁷

It is relevant to this point that Arafat, in a statement before the General Assembly in 1988 stated that

No one, Mr. President, would dispute the fact that the Palestine problem is the problem of our contemporary world. It is the oldest on your agenda. It is the most intricate and complex. Of the regional issues, it poses the most serious threat to international peace and security. . . . The first and decisive resolution of our Palestine National Council was the proclamation of the establishment of the State of Palestine, with the holy city of Jerusalem [al-Quds ash-Sharif) as its Capital. The State of Palestine was declared.²¹⁸

On November 15, 1988, the Palestine National Council declared independence in the following words:

The Palestine National Council hereby declares, in the Name of God and on behalf of the Palestinian Arab people, the establishment of the State of Palestine in the land of Palestine with its capital at Jerusalem.²¹⁹

On the other hand, some scholars, like Robert Weston Ash, hold the view that Palestine lacks the status of a State under the International law on various grounds.²²⁰ They are advocating this proposition based on the position taken by the Palestinian leaders on different occasions.²²¹ At the Arab Summit in Beirut in March, 2002, for example, Mr. Arafat declared, “[w]e are all confident in the inevitability of victory The right to self-determination and the

216. John Quigley, *The Palestine Declaration to the International Criminal Court: The Statehood Issue*, 35 RUTGERS L. REC. 1, 4 (2009).

217. *Id.* at 5.

218. Yasser Arafat, Speech at UH General Assembly. Geneva (Dec. 13, 1988), available at <http://www.nizkor.org/hweb/imt/tgmwc/judgment/j-law-conspiracy.html>.

219. Palestine Declaration of Independence, G.A. Res. A/43/827, at 15, U.N. Doc. A/RES/43/827 (Nov. 18, 1988).

220. See generally Robert Weston Ash, *Is Palestine a “State”? A Response to Professor John Quigley’s Article, “The Palestine Declaration to The International Criminal Court: The Statehood Issue,”* 36 RUTGERS L. REC. 186, 187–93 (2009).

221. *Id.*

establishment of the independent state of Palestine, with holy Jerusalem as its capital.”²²² In 2005, in his inaugural speech as the Palestine Authority President, Mahmoud Abbas said, “The greatest challenge before us, and the fundamental task facing us[,] is national liberation. The task of ending the occupation [and] establishing the Palestinian state.”²²³

On November 24, 2008, President Abbas addressed the General Assembly of the United Nations, stating “we are certain that your role contributes in [a] clear and effective way in enhancing international solidarity with our just cause and enlarges the circle of international support for the aspirations of our people for freedom and independence and the establishment of their State.”²²⁴ Mr. Abbas also referred to Jerusalem as “the capital of our future independent State.”²²⁵ Later, Palestinian Prime Minister Salam Fayyad “called for the establishment of a Palestinian state within two years.”²²⁶ It could be argued that in the United Nations Palestine is considered not a state, but an entity. As such it has received a standing invitation to participate as observer in the sessions and related works of the General Assembly.²²⁷ Further, it maintains a permanent observer mission at headquarters.²²⁸

This line of controversy leads to the conclusion that there is no consensus among the international community, and indeed a great deal of uncertainty, as to the status of Palestine. This is evident from the decision of Switzerland in June 1989, when the P.L.O. submitted to the Government of Switzerland ratification documents for the Geneva Conventions of 1949.²²⁹ The validity of this ratification depended on Palestine’s recognition as a state, since ratification of treaties is open only to states.²³⁰ The Swiss Government replied to the P.L.O. three months later that

222. See Ash, *supra* note 220, at 188.

223. *Id.* at 188–89.

224. *Id.* at 189.

225. *Id.*

226. *Id.* at 190.

227. *Id.* at 194.

228. *Id.*

229. *See id.* at 196–97.

230. *See id.*

due to the uncertainty within the international community as to the existence or the non existence of a State of Palestine, an issue that has still not been settled in an appropriate framework, the Swiss Government, in its capacity as depositary of the Geneva Conventions and their additional Protocols, “could not put itself in a position to decide whether this communication can be considered as an instrument of accession in the sense of the relevant provisions of the Conventions and their additional Protocols.”²³¹ The 42nd World Health Assembly and the Executive Board of United Nations Educational, Scientific and Cultural Organization (UNESCO) deferred consideration of a Palestinian application for membership in their organizations.²³² In addition, the ICC has not yet recognized Palestine as a Sovereign State.²³³ It is also important to mention that the Rome Statute is only open to ratification by states recognized by the United Nations.²³⁴

This controversy is important in considering the definition of crime of aggression and achieving the goal stated in the Rome Statute. If the State of Israel should initiate an aggressive act against Palestine which, by its character, gravity, and scale constituted a manifest violation of the Charter of the United Nations, a dispute could arise, but with conflict as to the jurisdiction of ICC. If the Court should come to the conclusion that Palestine is not a state in the legal sense of the term, it could not invoke jurisdiction over Israel even if Israel is a party to the Statute because Palestine is not a state. Neither could the ICC initiate proceedings against the aggressor, for the same reason that Palestine is legally not a state. Given such drawbacks in the definition of a crime of aggression adopted by the Review Conference of Rome statute, it is unsuitable as a realistic approach to the present world situation.

This is true in the reverse situation too. If a Palestinian organization attacked Israel, that aggression, by its character, gravity and scale, would constitute a manifest violation of the

231. Quigley, *supra* note 216, at 3–4.

232. Daniel Benoliel & Ronen Perry, *Israel, Palestine and the ICC*, 32 MICH. J. INT'L L. 73, 85 (2010).

233. *Id.* at 73.

234. *Id.* at 79.

Charter of the United Nations, yet the ICC could not initiate prosecution against the Palestinian group as it is not recognized as a State, the primary requirement under the definition.

H. Individual or Organization

For more than two centuries, international law has encompassed more than just state-to-state transactions and relationships.²³⁵ *Non state* actors have played a vital role in the international system in numerous ways and have rights and duties under international law.²³⁶ The belief that under traditional international law individuals or organizations have no rights or duties is a misconception of the first order in international law.²³⁷ It has long been recognized that international law imposes duties and liabilities upon individuals as well as states.²³⁸ Article 9 of the IMT charter provides:

[A]t the trial of any individual member of any group or organization, the Tribunal may declare, in connection with any act of which the individual may be convicted, that the group or organization of which the individual is a member is a criminal organization.²³⁹

Article 10 of the IMT Charter provides:

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.²⁴⁰

Professor Jordan Paust has analyzed the issue of the role of

235. See Jordan J. Paust, *Non state Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977, 977 (2010) [hereinafter Paust, *Non state Actor Participation*].

236. See *id.* at 994.

237. See *id.*

238. Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process* 25 MICH. J. INT'L L. 1234 (2004)[hereinafter Paust, *Reality of Private Rights*].

239. Nuremberg Tribunal, *supra* note 67, art. 9.

240. *Id.* art. 10.

non state actors and concluded:

In any event, it is irrefutable that traditional international law, even through the early 20th Century, recognized roles, rights, and duties of “nations,” tribes, peoples, “belligerents,” and other entities and communities in addition to the “state” even though their roles were at times uneven, shifting, complex, and misperceived. This fact alone demonstrates the error of a states-alone theory and the error that such a remarkably unrealistic theory had ever been “traditional” outside of rigid state-oriented positivist circles and those who blindly repeat their printed preferences or the necessarily demeaning and pejorative nonsense that under “traditional” international law “states” were the only actors and the only “subjects” with rights and duties.²⁴¹

It is an uncontested fact that there have long been actors in international legal processes other than states and that international law is far more complex than the concept of mere state-to-state interactions.²⁴² Further, it is indisputable that *non state* actors play a vital role in the international system in numerous ways and accordingly, have rights and duties under international law.²⁴³ As early as the 1919 Report of the Responsibilities Commission during the Paris Peace Conference, it was recognized, that individuals are subject to criminal sanctions for war crimes and offenses against the laws of humanity that are perpetrated by state and *non state* actors.²⁴⁴

One of the important concerns with respect to the definition of a crime of aggression and the jurisdiction of the ICC relates, to acts of *non state* actors. As we have seen in the past century, organized groups can commit more heinous international crimes and other more disastrous activities than some states.²⁴⁵ “War is

241. Paust, *Non state Actor Participation*, *supra* note 235, at 994.

242. *Id.* at 978.

243. *Id.* at 994.

244. *Id.* at 998.

245. See, e.g., Charlie Savage, *Accused Al-Qaeda Leader Arraigned in 2000 Cole Attack*, N.Y. TIMES, Nov. 10, 2011, at A21 (detailing Al-Qaeda’s attack on the USS Cole in 2000; Holly Fletcher, *Backgrounder: Aum Shinrikyo*, COUNCIL ON FOREIGN RELATIONS (May 28, 2008), <http://www.cfr.org/japan/aum-shinrikyo/p9238> (detailing Aum

changing. Independent groups other than state are increasingly its perpetrators.”²⁴⁶ John Robb writes, “[a]irplanes are being turned into flying bombs, cell phone networks are being used to simultaneously detonate bombs from miles away, and critical computer networks are being hacked.”²⁴⁷ Indeed, it is understood today that crimes, such as cyber attacks and terrorist acts, can be committed chiefly or only by individuals or groups. These are instances of aggressive acts commonly committed by *non state* actors. It is unrealistic to claim or assume that international law only relates to state-to-state relations or that individuals do not have duties or obligation under international law.²⁴⁸ Even the ICC Statute recognizes jurisdiction over genocide and crime against humanity by individuals and organizations and war crimes.²⁴⁹

I. *Self Defense and Crime of Aggression*

Article 51 of the UN Charter specifically permits the use of force for the purpose of self-defense by providing that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense 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.”²⁵⁰ A plain reading of this article holds that self defense is available even against *non state* actors because the article allows a state to protect itself if an armed attack occurs against a member of the United Nations. There is

Shinrikyo’s 1995 Japanese sarin gas attack and other attempted biological attacks); Dan Fletcher, *The Khmer Rouge*, TIME, Feb. 17, 2009, available at <http://www.time.com/time/world/article/0,8599,1879785,00.html> (detailing the wide-scale mass murder committed by the Khmer Rouge, who began as a guerilla group before taking control of Cambodia); Maria Goody, *Timeline: London’s Explosive History*, NPR (July 7, 2005), <http://www.npr.org/templates/story/story.php?storyId=4734400> (detailing Irish Republican Army Attacks on London dating back as far as 1939).

246. Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. COMP. & INT’L L. 1, 13 (2009).

247. JOHN ROBB, BRAVE NEW WAR: THE NEXT STAGE OF TERRORISM AND THE END OF GLOBALIZATION 11 (2007).

248. Paust, *Reality of Private Rights*, *supra* note 238, at 1241.

249. Rome Statute, *Supra* note 117, art. 5.

250. U.N. Charter art. 51.

absolutely nothing in the language of article 51 that holds that the right of self defense is restricted to armed attacks by a state.²⁵¹ Nonetheless, the question that arises here is when an act of self defense crosses the threshold of aggression and how that can that be triggered under international law.

In this context, it is relevant to consider the note sent by then Attorney General of United Kingdom to the then Prime Minister Tony Blair with respect to the invasion of Iraq:

Aggression is a crime under customary International Law which automatically forms part of domestic law. It might therefore be argued that International aggression is a crime recognized by the common law, which can be prosecuted in the UK courts.²⁵²

Even though major differences exist among the international law scholars with respect to the sanctity of the US-led Iraq invasion, this quoted opinion of the Attorney General shows a general acceptance of the recognition of aggression as a an international crime. It is important to note that, even though the acts of non state actors may be excluded from the purview of a defined crime of aggression, such acts can be held crimes of aggression under customary international law.²⁵³

In a classic case on the use of armed force against a *non state* actor, the Caroline Incident, it was recognized that the use of force directed against *non state* actors within the territory of another state is legitimate, even during peace time, and is permissible if the method used is within the international standard.²⁵⁴ Hence, it is understood that the use of force for purposes of self defense is available outside the context of war and even without the permission or consent of the state from whose territory the *non state* actors' attack originates.²⁵⁵ The limitation imposed on such acts of self defense is the reasonable necessity as well as the method and means used for the self

251. Jordan J. Paust, *Self-Defense Targetings of Non state Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. OF TRANS'L LAW & POLICY 237, 241,(2010)[hereinafter Paust, *Self-Defense Targeting*].

252. Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L.J. 161, 171 (2008).

253. The Review Conference, *supra* note 2.

254. Paust, *Self-Defense Targeting*, *supra* note 251 at 241–42.

255. *Id.* at 244.

defense.²⁵⁶ However, when the use of force for the purpose of self defense crosses the threshold of aggression, the situation becomes more problematic.

In 1981, when Israel attacked the Iraq nuclear reactor, the Security Council adopted a resolution condemning the act of Israel, stating that the attack had caused danger to international peace and security.²⁵⁷ The Security Council also stated, in this particular case, that the act of Israel was a clear violation of the Charter of United Nations and the norms of international conduct.²⁵⁸ In the same resolution, the Security Council considered that Iraq was entitled to the appropriate redress for what it suffered.²⁵⁹ The above statement and conclusion of the Security Council makes it abundantly clear that if the use of force crosses the threshold of an act of aggression, the aggressor is accountable for the same. Thus the self defense argument is available not only against states but also against *non state* actors. In such events, if the state's use of force has crossed the threshold of aggression, the ICC will not have jurisdiction to decide the matter, as the action is not against another state.

The definition limits the application of the term crime of aggression only in respect of the use of armed force by one state against another. The definition clearly covers only the traditional concept of warfare and thereby precludes from its consideration the most prevalent modern use of force other than by armed forces.²⁶⁰ The purpose of including the crime of aggression within the jurisdiction of the ICC is clear, to maintain international peace and security, and further, to achieve the object and general purpose of the United Nations. Accordingly, it should be asked whether the present definition of crimes of aggression, by excluding the most prevalent modern use of force from the jurisdiction of ICC, is sufficient to achieve the objectives of peace and security. While deciding *Nicaragua v.*

256. *Id.* at 242–43.

257. S.C. Res. 487, U.N. Doc. S/RES/487 (1981).

258. *Id.* ¶ 1.

259. *Id.* ¶ 6.

260. The Review Conference, *supra* note 2.

US, the International Military Tribunal observed that the General Assembly Resolution 3314 of 1974 declared that such would fall within the confines of customary international law.²⁶¹ Natural persons cannot commit criminal aggression with impunity.²⁶²

A breach of international peace and security unquestionably occurred in New York on September 11, 2001. The attack on the World Trade Center not only disturbed the peace and security of the United States; its impact also affected the world as a whole, which was exactly what the perpetrators wanted: to terrorize the whole world. “With the continuing decline of state-on-state warfare, independent terrorist organizations represent perhaps the greatest threat to the international peace and security.”²⁶³ It is now well understood that “some, like al-Qaeda, can launch attacks whose devastation rivals the military capabilities of many states.”²⁶⁴ John Roob predicts that the threat posed by international terrorism “will finally reach its culmination—with the ability of one man to declare war on the world and win.”²⁶⁵ In view of the September 11th terrorist attack, the United Nations Security Council adopted a resolution that recognized the inherent right of individuals or of collective self-defense to call for all states to work together urgently to bring to justice the perpetrators, organizers, and sponsors of these terrorist attacks and also declared that those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts would be held accountable.²⁶⁶

Of course, even though this would not fall under the strict definition of a crime of aggression, it could nonetheless be considered an act of aggression under customary international law. The exclusion of ICC jurisdiction for such heinous crime is

261. MUHAMMED AZIZ SHUKRI, *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION: WILL AGGRESSORS EVER BE TRIED BEFORE THE ICC* 35 (Mauro Polity & Giuseppe Nesi eds., 2004).

262. *Id.* at 36.

263. Anderson, *supra* note 204, at 419.

264. Anderson, *supra* note 204, at 420.

265. *Id.*; ROBB, *supra* note 247, at 8; *see also* Weisbord, *supra* note 246, at 14.

266. Security Council Resolution No. S/RES/1368 (2001).

unrealistic. Again, in the matter of a crime of aggression committed by an organized group, if the organizers are nationals of state parties, they are liable under the international law. In this respect, the *Henfield* case should be mentioned.²⁶⁷ In that case, it was stated by Judge Wilson, while charging the jury, that “being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its law “[h]e was bound to keep the peace in regard to all nations with whom we are at peace.”²⁶⁸ Nevertheless, and notwithstanding all these instances, the Review Conference at Kampala failed to address the issues relating to the use of force by or against *non state* actors.

J. Humanitarian Intervention

Another aspect that needs to be considered in analyzing the definition of a crime of aggression is the issue of humanitarian intervention; for this category of intervention can be a crucial question in an array of such crimes. By and large, The International Court of Justice has held against the unilateral use force by one state against another state in the case of humanitarian intervention.²⁶⁹ In the *Nicaragua* case, for instance, the Court held that “use of force is not the appropriate mechanism to prevent human right violations in another state.”²⁷⁰

Moreover, Article 2(4) of the UN Charter provides “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”²⁷¹ In view of this Article, humanitarian intervention is *prima facie* a violation of Article 2(4) as it necessarily requires the use of force against the territorial integrity and political independence of the targeted

267. See *Henfield's Case*, 11 F. Cas. 1099, 1120 (C.C.D. Pa. 1793) (No. 6360).

268. *Id.*

269. Petty, *supra* note 123, at 121.

270. Petty, *supra* note 123, at 121–22.

271. U.N Charter art. 2, para 4.

state.

A great deal of lively debate also focused on the actions of NATO in halting the mass killing that occurred in Kosovo in 1999. In this episode, “NATO bombed Serbia into submission without the authorization of the Security Council prescribed by the U.N. Charter.”²⁷² Consequently, then Secretary General Kofi Annan created a High Level Panel (HLP) in 2004 to prepare a report on “our State Responsibility,” stating:

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.²⁷³

Thus, severe human rights violations and other criminal atrocities within the states have been linked to the responsibility of Security Council as is evident from the provisions of Article 24(1) of the UN Charter, which states:

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.²⁷⁴

The UN Security Council Resolution No. 232 of 1966 shared a concern over the high level of violence in a rebellion in South Rhodesia and adopted a resolution to prevent the atrocities therein.²⁷⁵ Moreover, Security Council Resolution 688 of 1991 directly dealt with the humanitarian intervention authorized by the UN in respect to the Kuwait/Iraq issue and the repression of the Iraqi civilian population, especially the Kurdish people.²⁷⁶ In

272. Michael W. Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 CASE W. RES. J. INT'L. L. 57, 68 (2008).

273. *Id.* at 69.

274. U.N. Charter art. 24, para 1.

275. S.C. Res. 232, U.N. Doc. S/RES/232 (1966).

276. S.C. Res. 688, U.N. Doc. S/RES/688 (1991).

Democratic Republic of Congo v. Uganda, the Court stated that “Uganda was not authorized to use force in the Democratic Republic of Congo.”²⁷⁷

There are arguments that humanitarian intervention, even if not authorized by the UN, is justified as it is not inconsistent with the purposes of the UN Charter.²⁷⁸ This argument derives its force from the main purpose of the UN, which is to maintain peace and security. The ECOMOG, a peace-keeping force dispatched by a group of West African states without the UN authorization to halt large-scale human rights violations in Liberia, was viewed favorably by the UN member states.²⁷⁹ It is also important to mention here the report of the International Commission on Intervention and State Sovereignty (ICISS) which concluded that

[t]he responsibility to protect its people from killing and other grave harm was the most basic and fundamental of all the responsibilities that sovereign imposes and if a state cannot or will not protect its people from such harm, then coercive intervention for human protection purposes, including ultimately military intervention, by others in the International community may be warranted in extreme cases.²⁸⁰

All things considered, humanitarian intervention is consistent with respecting and protecting human rights, even though it is not expressly authorized by the UN Charter.²⁸¹ In any event, even if the humanitarian intervention is considered as illegal, but not illegitimate, it would be difficult to argue convincingly that such intervention by its character, gravity, and scale constitutes a manifest violation of the UN Charter. Yet, while adopting the definition of a crime of aggression, the drafters failed to consider possible humanitarian intervention and did not include it as an exemption.

277. Petty, *supra* note 123, at 119.

278. *Id.* at 123–25.

279. *Id.* at 126.

280. *Id.*

281. *Id.*

K. Nontraditional Warfare: Cyber Warfare

One of the emerging and serious areas of concern in the international system is cyber warfare. Even though it is not developed to destroy the world as such, the recent situation in the world shows that a cyber attack could be one of the most dangerous threats to the international peace and security.²⁸² “Cyber warfare, a method still in its infancy, seems poised to become an important method for aggressive states, small groups, and individuals to disrupt an enemy’s essential infrastructure (or services) and cause massive damage.”²⁸³ “Cyber attacks represent a new form of disaggregated warfare substantially conducted by *non state* collectives.”²⁸⁴ “Although cyber warfare will probably not displace traditional, kinetic warfare, it will become an increasingly important weapon in the arsenals of nation-states.”²⁸⁵ Long before bombs were dropped on Georgia, a security researcher in Massachusetts watched an attack against the country in cyberspace.²⁸⁶ Meanwhile, researchers at Shadow server, a volunteer group dedicated to revealing malicious networks, determined that the command and control server directing the attack was based in the United States, having come online only a few weeks before the attack began.²⁸⁷ According to internet technical experts, this was the first known time a cyber attack was used in a shooting war.²⁸⁸

A study recently conducted for the US-China Economic and Security Review Commission stated:

The Chinese military, using increasingly networked forces capable of communicating across service arms

282. Scott J. Shackelford, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, 27 BERKELEY J. INT’L L. 192, 198 (2009).

283. Weisbord, *supra* note 246, at 19.

284. Jonathan A. Ophardt, *Cyber Warfare and the Crime of Aggression: The Need for Individual Accountability on Tomorrow’s Battlefield*, 2010 DUKE L. & TECH. REV. 3, 1 (2010).

285. Susan W. Brenner & Leo L. Clarke, *Civilians in Cyber warfare: Conscripts*, 43 VAND. J. TRANSNAT’L L. 1011, 1013 (2010).

286. John Markoff, *Before the Gunfire, Cyberattacks*, N.Y. TIMES, Aug. 13, 2008, at A1, available at <http://www.nytimes.com/2008/08/13/technology/13cyber.html>.

287. *Id.*

288. *Id.*

and among all echelons of command, is pushing beyond its traditional missions focused on Taiwan and toward a more regional defense posture. This modernization effort, known as informationization, is guided by the doctrine of fighting “Local War Under Informationized Conditions,” which refers to the PLA’s ongoing effort to develop a fully networked architecture capable of coordinating military operations on land, in air, at sea, in space and across the electromagnetic spectrum.²⁸⁹

This incident shows that cyber attacks will likely play a vital role in the future international system. The notion of aggression needs to be approached in a context of acts of aggression far beyond the narrow concept used in the traditional war of aggression. The Review Conference failed, however, to address these aspects while discussing the definition of crime of aggression.

L. Dynamic Approach to the Definition

Some writers like Noah Weisbord hold the view that in order to overcome the defects of the definition of crime of aggression, it is better to approach the word state as used in the definition in a dynamic way so as to include the non state actors within the ambit of the ICC jurisdiction.²⁹⁰ Philip Bobbitt argued to approach and interprets the term State in a dynamic way when he asserted that the “state has undergone many transformations in the constitutional order. Now it is about to undergo another.”²⁹¹ Weisbord answering the question of whether al-Qaeda is an example of this new form proposed that “Bobbitt’s dynamic conception of the state would offer diplomats drafting the definition of the crime and jurists interpreting it a way to

289. U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, CAPABILITY OF THE PEOPLE’S REPUBLIC OF CHINA TO CONDUCT CYBER WARFARE AND COMPUTER NETWORK EXPLOITATION 6 (2009), available at http://www.uscc.gov/researchpapers/2009/NorthropGrumman_PRC_Cyber_Paper_FINAL_Approved%20Report_16Oct2009.pdf.

290. Weisbord, *supra* note 246, at 30 (“I think the best, approach, despite the fact that it may at first seem counterintuitive to some jurists, is to read the word ‘State’ dynamically and incrementally to include state-like entities.”).

291. PHILIP BOBBITT, TERROR AND CONSENT : THE WARS FOR THE TWENTY-FIRST CENTURY 126 (2008).

include acts by al-Qaida and like groups within its ambit.”²⁹² Montevideo Convention’s definition of statehood, which is the most generally accepted definition, provides little assistance to those who would attempt to use a dynamic conception of the state to generate flexibility in the definition of aggression.²⁹³ Furthermore, this dynamic interpretation of state may be too dangerous in a different way. If the definition of aggression extends the statehood status to a terrorist organization, then the privileges enjoyed by states are also automatically extended to them.²⁹⁴ The most important privilege enjoyed by the state is the right of self defense under Article 51 of the UN charter. Professor Paust, upon examination of the characteristics of state, belligerents, insurgents and such, concluded that al-Qaida is not a state, nation, belligerent or insurgent group.²⁹⁵ He added “politically such an extension could also enhance the status of a terrorist group from that of an International Criminal organization to that of an enemy of a powerful State able to engage in a protracted war and to achieve certain victories.”²⁹⁶

In the modern international system statehood is considered the paramount type of international personality. It is too dangerous to extend such privilege to a terrorist organization as well as to enhance its status in the international system. Rather, it would be more advisable to define the act of aggression in a way to include the aggressions committed by such groups within the jurisdiction of the Court. Even though Weisbord advocated the dynamic concept, he suggested a modification to the definition that the “word state should be accompanied by the word ‘or group,’ or ‘/group,’ each time it is used to refer to the aggressor.”²⁹⁷ He further added “had the definition been law at the time of the 9/11 attacks, the suggested

292. Weisbord, *supra* note 246, at 15.

293. Montevideo Convention *supra* note 207; Michael Anderson, *Reconceptualizing Aggression*, 60 DUKE L. J. 411, 422–23 (2010).

294. See Anderson *supra* note 293, at 434.

295. Jordan J. Paust, *Responding Lawfully to Al Qaeda*, 56 CATH U.L. REV. 759, 760 (2007).

296. *Id.* at 762.

297. Weisbord, *supra* note 246, at 28.

modification would have included Osama bin Laden within their ambit, while the current draft would not because al-Qaeda is not a state.”²⁹⁸

M. Suggested Definition of a Crime of Aggression

Conventionally, at this point, the discussion runs in the following definitional terms:

Article 8 bis

Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity, and scale, constitutes a breach of international peace and security and amounts to a manifest violation of the Charter of the United Nations.

Explanation I: For the purpose of this Statute an act will not be constituted as an act of aggression if the action is undertaken for the purpose of self defense and complies with article 51 of the UN charter.

Explanation II: For the purpose of this statute the humanitarian intervention authorized by the UN or a regional organization will not constitute as an act of aggression.

V. CONCLUSION

Satisfactory achievement in defining crimes of aggression, however narrowly, would be a historical step forward in establishing aggression as part of the international legal system. As such, it would facilitate countries’ taking a spirited stand and effective action against the horrors stemming from acts of aggression. The International Military Tribunal was historic mainly because it made responsible individuals accountable for some of the most devastating aspects of war. What is needed to complement this jurisdiction is a corresponding definition of the jurisdictional boundaries of the International Criminal Court. Hence, a definition of crimes of aggression that recognizes

298. *Id.* at 30–31.

individual and leadership responsibility for such crimes would be another historic step in the development of a system of international criminal law. Incorporation of a threshold clause in the definition of aggression to the effect that a manifest violation constitutes an act of aggression would assist the Court in excluding fringe cases from its jurisdiction, building on the independence of the ICC, which was a landmark achievement of the Kampala Convention.

In accepting cases for adjudication and delimiting its jurisdictional scope to manageable dimensions, the Court would have to draw a line that balances its obligations to eliminate the heinous acts of aggression so as not to deter interventions to combat human rights violations and a state's right of self defense in combating terrorism. However, as we have indicated, the law has increasingly been overtaken by events, as the familiar expression puts it. Increasingly, important areas and forms of conflict have failed to be included, ostensibly on the grounds that there are serious difficulties in incorporating them into the customary categories of the political/legal conceptual structure. Given the likely course of world, regional, and even national conflicts in the future, in which non-state actors such as terrorist, ethnic, and religiously defined groups, amongst others work with technologically unconventional methods of conflict to assert their will, there is an urgent need for systematic reconsideration and refinement of the entire category of crimes of aggression. Terrorism has been around for many decades, even centuries, though it has taken new forms of late, forms that need to be addressed systematically. But emblematic of the urgency of the need today is the rise of cyber aggression, a wholly new category of aggression that rests upon a particularly dynamic chain of technological innovations.

The ambiguous and inconsistent nature of the different provisions of the Rome Statute examined in this paper clearly need to be resolved either by the Court while handling a case before it or by the Assembly of State Parties. The suggested modifications in how crimes of aggression are defined might throw a helpful light on both definitional defects and questions of the ICC's jurisdiction in respect to crimes of aggression. While it may well be that the fluidity and unpredictability of what malevolent groups can concoct to carry out their nefarious

purposes makes it impossible to reach a definition of aggression that is clear and unambiguous in all respect, it should be possible to reduce the ambiguity by remedying the limitations in the definition addressed in this thesis. This said, the role of non-state actors probably remains the most contentious and unresolved problem in need of attention, given that the amplified destructive capabilities of such groups makes them the greatest threat to international peace and security.

The likely future development of cyber aggression is as yet shrouded in ambiguity, but we can be certain that the dynamic developments that characterize information technology are virtually certain to spawn new ways of inflicting harm at long distance. In contrast, it may not be too optimistic to assert that the threats and actual uses of force that occur between states, the primary nature of aggression in the past two or three centuries, may have become less relevant in the present international situation. Once the ICC acquires an uncontested jurisdiction over crimes of aggression, one can hope that the jurisprudence that follows from the exercise of this jurisdiction will not only add clarity and guidance to the hitherto ambiguous terms, provisions, and clauses in the Rome Statute, but will also serve as a mechanism to deter the potential aggressors.