

# ENABLING THE INTERNATIONAL CRIMINAL COURT TO PUNISH AGGRESSION

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According to Article Five of the Rome Statute, the International Criminal Court (ICC) cannot exercise its jurisdiction over the crime of aggression until amendments are adopted: (1) defining the crime; and (2) setting out the conditions, consistent with the United Nations (U.N.) Charter, under which the ICC is to act.<sup>1</sup> This Essay analyzes the problems posed by these stipulated requirements, and suggests solutions to fulfill them.

## I. DEFINING THE CRIME OF AGGRESSION

### A. *Brief Historical Review*

#### 1. *The Nuremberg Precedents*

On August 8, 1945, after intensive negotiations, the victorious powers of World War II, “acting in the interests of all the United Nations,”<sup>2</sup> drew up a constitution for an International Military Tribunal (IMT) “for the just and prompt trial and punishment of major war criminals of the European Axis.”<sup>3</sup> The IMT Charter was endorsed by twenty-one nations with diverse systems of jurisprudence. The first offense within the Court’s jurisdiction was described as:

Crimes against Peace: namely, planning, preparation, initiation or waging of wars 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.<sup>4</sup>

Justice Robert H. Jackson, on leave from the U.S. Supreme Court and designated by President Harry Truman to be Chief Prosecutor for the United States, was the principle architect of the trial. Influenced by the

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1. Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

2. Charter of the International Military Tribunal pmbl., Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

3. *Id.* art. 1.

4. *Id.* art. 6.

historical record and existing treaties such as the 1928 Kellogg Pact (outlawing the use of force), Jackson became convinced that “[n]o political, military or other considerations” excuse going to war.<sup>5</sup> According to Jackson, “[w]hatever grievances a nation may have, . . . warfare is an illegal means for settling those grievances.”<sup>6</sup> After debating several drafts, Jackson concluded that, rather than listing the several treaties prohibiting the use of force, it would be more expedient to leave it to judges to consult their sources. Professor Andre Gros, who represented France at the trial, noted that “there are plenty of documents in actual international law defining aggression.”<sup>7</sup> The British, eager to avoid political debate, were hesitant. The Soviets argued that the side that fired the first shot should obviously be considered the aggressor and should be punished accordingly. The final text was the best compromise possible.

In his opening statement to the IMT, Jackson emphasized: “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.”<sup>8</sup> In its final and comprehensive Judgment of October 1946, the Nuremberg Tribunal held that to initiate a war of aggression “is not only an international crime; it is the supreme international crime . . . . It contains within itself the accumulated evil of the whole.”<sup>9</sup> Rejecting the defense’s argument that it was applying *ex post facto* law, the Tribunal held that the IMT Charter was not an arbitrary exercise of power by victorious nations, but “the expression of international law existing at the time of its creation.”<sup>10</sup> There was nothing unfair about not having a more precise definition of the crime of aggression; to allow the accused to remain immune would have been unfair. “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

5. Robert Jackson, Opening Statement for the Prosecution at Nuremberg (Nov. 21, 1945), available at <http://www.yale.edu/lawweb/avalon/imt/proc/11-21-45.htm> [hereinafter Jackson Opening Statement].

6. *Id.*

7. Minutes of Conference Session of July 19, 1945, Int’l Conference on Military Trials, <http://www.yale.edu/lawweb/Avalon/Imt/Jackson/jack37>.

8. Jackson Opening Statement, *supra* note 5.

9. Judgment of the International Military Tribunal for the Trial of German Major War Criminals: The Nazi Regime in Germany, available at <http://www.yale.edu/lawweb/avalon/imt/proc/judnazi.htm#common>.

10. Judgment of the International Military Tribunal for the Trial of German Major War Criminals: The Law of the Charter, available at <http://www.yale.edu/lawweb/avalon/imt/proc/judlawch.htm> (last visited Oct. 19, 2007).

law be enforced.”<sup>11</sup> Leading German officials were found guilty of planning and waging aggressive war against ten nations. Five of the twenty-two defendants were sentenced to death. Jackson reported to his President: “[A]t long last the law is now unequivocal in classifying armed aggression as an international crime instead of a national right.”<sup>12</sup>

The legal principles of the IMT Charter and Judgment—including the brief definition of aggression—became the foundation for later trials by the Allied Powers in Japan and other countries. The quadripartite Control Council Laws authorized several “subsequent proceedings.” These proceedings borrowed the IMT definition of Crimes against Peace, but inserted one additional illustration: “Initiation of invasions of other countries.”<sup>13</sup> The 1946 Charter of the Military Tribunal for the Far East adopted the exact wording of the IMT Charter regarding aggression, adding only a clarifying clause explaining that a war of aggression could be “declared or undeclared.”<sup>14</sup> The Tokyo Judgment of November 1948, which found the defendants guilty of the crime of aggressive war, conformed completely with the definitions laid down at Nuremberg. Nations were beginning to live up to Jackson’s hope that a firmer enforcement of the laws of international conduct would “make war less attractive to those who have governments and the destiny of peoples in their power.”<sup>15</sup>

## 2. *The U.N. Searches for a Consensus Definition of Aggression*

At its first session, held on December 11, 1946, the General Assembly of the United Nations established Committees for the Progressive Development of International Law and its Codification, as required by the U.N. Charter. It also affirmed the principles of international law recognized by the IMT Charter and Judgment. As “a matter of primary

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11. *Id.*

12. REPORT OF ROBERT H. JACKSON, U.S. REPRESENTATIVE TO THE INT’L CONFERENCE ON MILITARY TRIALS: LONDON, 1945, *reprinted in* CONFERENCE ON MILITARY TRIALS, DEPARTMENT OF STATE PUBLICATION 3080 (Government Printing Office) (1949), *available at* <http://www.yale.edu/lawweb/avalon/imt/jackson/jackson.htm>.

13. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity art. 2, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50–55 (1946).

14. Charter of the International Military Tribunal for the Far East art. 5(a), Jan. 19, 1946, *amended* Apr. 26, 1946, TIAS No. 1589, 4 Bevens 20.

15. ROBERT JACKSON, REPORT TO THE PRESIDENT ON ATROCITIES AND WAR CRIMES, JUNE 7, 1945, *reprinted in* UNITED STATES DEPARTMENT OF STATE BULLETIN (Government Printing Office) (1945), *available at* <http://www.yale.edu/lawweb/avalon/imt/jack01.htm>.

importance,”<sup>16</sup> the General Assembly called for the formulation of a general Code of Offenses against the Peace and Security of Mankind, or of an International Criminal Code, based on the precedent of Nuremberg. In addition, genocide, on any grounds, was affirmed as a crime under international law for which both principals and accomplices would be punishable.

After considerable discussion by U.N. Delegates (but little progress), the dual problems of drafting the Criminal Code and creating the related Criminal Court were referred to an International Law Commission (ILC) composed of legal experts from different parts of the world. In 1950, the ILC formulated the Nuremberg Principles while noting the absence of a precise definition for a “war of aggression.” In 1952, a Special Committee on the Question of Defining Aggression was formed by the General Assembly. Until there was a definition, the Criminal Code would be incomplete, and without a Code, the Court could not function. Definition, Code, and Court were made dependent upon each other. The problems were interconnected, but opinions on how to resolve them remained sharply divided. By the end of 1954, the onset of the Cold War had put these problems on hold.

New Committees reported annually to the growing number of U.N. Member States. Extended debates were continued in the Assembly’s Sixth (Legal) Committee. In 1967, the Special Committee was expanded to thirty-five members, representing every legal system. Most nations agreed that an International Criminal Court was highly desirable, but many also doubted that it was attainable. Some powerful countries did not want to yield any portion of their sovereignty to a new, untested institution. Nations were so busy committing or contemplating aggression that they had no time or desire to define the crime. The high moral and legal principles of Nuremberg were ignored, and aggression continued to be committed with impunity by nations large and small. The result was the continuation of indecisive discussions and the postponement problems that could not be resolved. The world lacked an international criminal court competent enough to hold any state to account for the supreme international crime. War-making, instead of being condemned as criminal, continued to be glorified as heroic, and the cost in human lives was incalculable.

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16. *History of the United Nations War Crimes Commission* 260 (H.M. Stationery Office, London 1948).

The original General Assembly Resolutions of 1946, inspired by Nuremberg, envisaged the creation of a code of international offenses, including the supreme crime of aggression, to be enforced by a new International Criminal Tribunal. After over a quarter of a century of contentious debate by lawyers, scholars and diplomats, the U.N. Special Committee to Define Aggression finally arrived at a consensus definition that was accepted by the General Assembly on December 14, 1974, as G.A. Resolution 3314. The compromise left much to be desired. The preamble called upon states to refrain from all acts of aggression. It then recommended, as though by afterthought, that the Security Council (S.C.) should “as appropriate take account of that Definition as guidance.”<sup>17</sup> The Preamble made no reference to an international criminal court. Nor did it address the question of criteria for individual culpability. Delegates seemed to have forgotten, or chosen to ignore, the General Assembly mandates of 1946.

Article One of G.A. Resolution 3314 set forth a generic definition:

Aggression 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.<sup>18</sup>

The following seven articles contain illustrations of acts of aggression, which “regardless of a declaration of war,”<sup>19</sup> include such traditionally war-like acts as invasion, annexation, bombardment, blockade, and attack. Article Two requires acts to be “of sufficient gravity,” but it also allows the S.C. “in conformity with the Charter,” to determine that there was no aggression “in light of other relevant circumstances.”<sup>20</sup> However, the enumerated acts are not exhaustive, and the Council may also determine that “other acts constitute aggression.”<sup>21</sup> In short, it was left to the S.C. to decide whether aggression by a state has occurred or not. Repeated reference to the U.N. Charter was intended to make the pill more palatable.

Article Five, reminiscent of Jackson, provides that: “[N]o consideration of whatever nature, whether political, economic, military or otherwise,

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17. G.A. Res. 3314(XXIX), pmb., U.N. Doc. A/RES/29/3314 (Dec. 14, 1974).

18. *Id.* art. 1.

19. *Id.* art. 3.

20. *Id.* art. 2.

21. *Id.* art. 4.

may serve as justification for aggression.”<sup>22</sup> Article Seven was an exculpatory paragraph designed to exempt from a charge of aggression peoples struggling for “self-determination,” and freedom from “alien domination . . . .”<sup>23</sup>

The U.N. Charter itself was ambiguous. Its Article Two sought to restrain the use of force, while Article Fifty-one allowed an undefined but “inherent right” to self-defense against an armed attack.<sup>24</sup> Little noted was the caveat that when war-making ceased to be an inherent right, unrestrained self-defense also ceased to be an inherent right. The contradictions and vagaries entwined throughout the Charter, and the consensus definition of aggression, opened the door to conflicting interpretations. No court existed that was competent to enlighten nations and hold wrongdoers to account. The permanent members of the S.C., particularly the U.S. and the United Kingdom, would not have accepted any definition of aggression without retaining the last word in determining when aggression had occurred. Powerful nations remained unwilling to yield their power, and weak nations lacked the power to object.

No legal code can be effective unless the society in which it operates is prepared to be bound by common restraints. With nations in different stages of social, political and economic evolution, it has proved impossible to obtain clear agreements defining the legal limits of permissible force. The resulting consensus gave some indication of what conduct should be prohibited; the product was merely a *guide* recommended for consideration by the Council. This weak consensus became acceptable only after the insertion of exculpatory clauses that parties could interpret so as to justify their own illegal use of armed force. The wording left no doubt that the 1974 consensus definition of aggression bound no one. It reflected the fears, doubts, and hesitations of its time. However, it was also a cautious step toward a more rational world order.

### 3. *The International Law Commission Defines Aggression*

The wheels of justice grind slowly, but the law gradually changes to meet the needs of an evolving world. When it became apparent in the 1990s that an international criminal court would become a reality, the General Assembly increased its pressure on the International Law Commission (ILC) to produce a definition of individual culpability for

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22. *Id.* art. 5.

23. *Id.* art. 7.

24. U.N. Charter arts. 2, paras. 4, 51.

aggression that would meet the standards of criminal law. Decision makers had to give fair notice that those responsible for the illegal use of massive force would no longer be immune from prosecution. The ILC had, for years, been deliberating on general statutes for an international criminal court as well as a separate code for specific international crimes. In September of 1994, the ILC completed a draft statute for the ICC. That draft became the subject of intense debate within the various U.N. Preparatory Committees. In July of 1996, after more than fifteen years of discussion, the ILC completed its work on the Draft Code of Crimes. Article Sixteen, dealing with the “crime of aggression” stated: “An individual, who as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.”<sup>25</sup>

The ILC Commentary made plain that, fifty years after Nuremberg, it would be retrogressive to not include aggression among the other crimes over which the ICC had jurisdiction. The ILC’s brief definition of aggression is consistent with the U.N. Charter and Judgment of the Nuremberg Tribunal. Only an individual who plays a decisive role as leader or organizer would be found culpable, and only then if he actively participates in the planning and preparation of aggression. States can act only through individuals. The Commission Report provided that a violation of the law by a state “is a *sine qua non* condition for the possible attribution to an individual of responsibility for a crime of aggression.”<sup>26</sup> Thus, a successful prosecution would require both proof that a state had committed an act of aggression and proof that the individual defendant met the stated requirements for personal criminal responsibility.

#### 4. *What Happened to the Definition of Aggression at the 1998 Rome Conference*

The ILC drafts became the basis for intense negotiations. By the time the Preparatory Commissions met in Rome in the summer of 1998, there were still many points of difference to be reconciled regarding the structure and authority of the ICC. The crime of aggression was probably the most difficult point of contention. Many states argued that aggression

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25. Draft Code of Crimes Against the Peace and Security of Mankind art. 16, U.N. GAOR, 48th Sess., Supp. No. 10 at 14, U.N. Doc. A/CN.4/L.532, corr. 1, corr. 2 (1996).

26. International Law Commission, *Report of the International Law Commission on the Work of its Forty-Eighth Session*, G.A. Res. 51/60, at pt. II-D, art. 16, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10.

should not be included in the ICC's jurisdiction. The U.S. and U.K. were among those that were hesitant about accepting new legal restraints that would hamper their freedom of military or humanitarian intervention. Arab States seemed eager to retain the perceived protection of the exculpatory clauses in the 1974 consensus definition. Many others, including the European Union and about thirty "nonaligned" countries, argued that without jurisdiction over aggression, the ICC would be unacceptable. There was a stalemate.

After five weeks of hectic effort at the Diplomatic Conference in Rome, the U.N. announced on July 17, 1998, for the first time in human history, the creation of a permanent International Criminal Court. The announcement was a bit of an exaggeration since the treaty still needed to be ratified by at least sixty nations before it could go into effect. Article Five listed the crime of aggression, along with genocide, crimes against humanity, and war crimes, as the only crimes within the ICC's jurisdiction. In addition, it was stipulated that the Court could not exercise its jurisdiction with respect to the crime of aggression until certain new provisions were adopted. Agreement on a definition of aggression was needed, as well as the settlement of the conditions under which the ICC could operate.<sup>27</sup> These required additions also needed to be "consistent with the relevant provisions" of the U.N. Charter.<sup>28</sup> Any amendments to the Rome Statute required approval by seven-eighths of the parties, and no amendments could be considered for at least seven years after the statute went into effect. Lacking the ability and time to resolve its differences, the parties placed the problem of defining aggression on the back burner.

##### *5. The Assembly of State Parties Considers the Crime of Aggression*

Having received more than the required number of ratifications, the Rome Statute went into effect on July 1, 2002. It was an historic occasion. The first Assembly of State Parties (ASP) appointed new Preparatory Commissions to continue debate about the unresolved problems regarding aggression, but few agreements were reached. The ASP also established a Working Group to seek reconciliation of conflicting views. Although not specifically required by the wording of Article Five, meetings were held at Princeton and the Hague to consider improvements on principles of law that still seemed ambiguous. It should have come as no surprise that lengthy discussions produced few agreed-upon alterations. Despite the

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

28. *Id.*



merits of several carefully prepared scholarly submissions, the prospects of getting near-unanimous concurrence was not particularly promising. It seemed to be overlooked that the test was not whether a suggested change would *improve* the statute, but whether it would be overwhelmingly *accepted* at an amendment conference.

*B. A Compromise Proposal: A Comprehensive Definition*

In response to the first mandate of Article 5, the following text was suggested for consideration by the ASP:

Because the forms of aggression may be so variable and unpredictable that it has not been possible to reach universal agreement on a more precise definition of the crime, it is proposed that the following amendment be adopted: In determining whether an individual has committed the crime of aggression, the ICC judges shall apply the following:

- 1) Relevant provisions of the UN Charter;
- 2) The Charter and Judgment of the International Military Tribunals as affirmed by the UN General Assembly in 1946;
- 3) The consensus definition of aggression in G.A. Resolution 3314 of 1974;
- 4) The definition of aggression by the International Law Commission in 1996;
- 5) Rules for interpreting international law as laid down for the International Court of Justice established by the Charter of the United Nations;
- 6) Relevant judicial decisions by other competent international criminal tribunals;
- 7) National laws and decisions relating to the crime of aggression.<sup>29</sup>

The proposal relied on declarations and precedents drawn verbatim from documents and legal principles that were already generally accepted. Many experts argue that the crime of aggression has already been recognized as an international common law crime. Therefore, it is not

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29. Benjamin B. Ferencz, *Enabling the Int'l Criminal Court to Punish Aggression*, <http://www.benferencz.org/arts/90.html> (last visited Sept. 3, 2007).

necessary to try to invent a new statutory definition beyond what is prescribed in the official instruments listed above.

The consolidated definition conforms to principles of legality and fairness by putting potential aggressors on notice that they tread a very perilous path. Since deterrence is the primary goal of criminal law, an all-inclusive definition should not be objectionable to those who are prepared to be bound by the rule of law. Of course, as is the case in every great historical document, as more amendments are proposed, it will be more difficult to gain universal acceptance for alterations. Competent judges must be relied upon to reach wise decisions or suggest legislative changes should they appear necessary in the future. In the interim, unless the ICC is given authority to act on the crime of aggression, malevolent or misguided leaders may continue to commit aggression with impunity.

## II. CONDITIONS FOR ICC JURISDICTION OVER THE CRIME OF AGGRESSION

As noted previously, Article Five of the Rome Statute stipulates that before aggression can be prosecuted by the ICC, an amendment must be adopted “setting out the conditions under which the court shall exercise jurisdiction with respect to this crime.”<sup>30</sup> Furthermore, “[s]uch a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”<sup>31</sup>

### A. Provisions of the U.N. Charter Relevant to Aggression

As originally conceptualized, the United Nations system of collective security was to be relatively simple. Peace-loving nations would agree upon certain fundamental principles for a more humane and just international society. Nations would disarm and an international military force would be created for their protection. A few of the most powerful states, acting as agents for the others, would be entrusted with enforcement. The U.N. Charter made no reference to criminal prosecutions. Justice Robert Jackson and allied jurists were then negotiating in London for the IMT Charter. The trial against major war criminals began three months later and judgment was rendered in October 1946. When the first General Assembly of the U.N. met in New York at the end of December 1946, it affirmed the Nuremberg principles and

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

31. *Id.*

promptly began to move toward the creation of a permanent international criminal jurisdiction to close the gap in the international legal order.

To gain widespread acceptance, the U.N. Charter included compromises and inconsistent principles expressed in language subject to various interpretations by nations with conflicting interests and perceptions. The Preamble, in the name of “We the People,” expressed a determination “to save succeeding generations from the scourge of war.”<sup>32</sup> (The undefined term “war” appears nowhere else.) It also reaffirmed faith in “the equal rights . . . of nations large or small.”<sup>33</sup> However, some nations were “more equal” than others. Those major powers that had won the war—the U.S., U.K., U.S.S.R., China and France—felt entitled to retain a right to veto any future enforcement action that might require their troops. Without such a privilege, the U.S. surely would not politically have been able to muster the two-thirds Senate majority needed to ratify the U.N. treaty. The Security Council, with its inequitable veto rights, was charged with the duty of determining “the existence of any threat to the peace, breach of the peace, or act of aggression” and of deciding on measures to restore international peace and security.<sup>34</sup> The lofty Charter plan could only be effective if those who were allies in war could remain allies in peace. Unfortunately, it did not quite work out that way.

The problem of agreeing on a Code of International Crimes, and a Court to it, was winding its way slowly through the United Nations when an unanticipated event brought about a sudden and dramatic transformation. In 1991, civil wars broke out in Yugoslavia, as rival ethnic groups sought sovereignty and independence. It was widely reported that mass rapes were occurring, and that captives were being treated under conditions reminiscent of Auschwitz and Dachau. It did not take the Security Council long to set up a special tribunal in 1993 to bring to justice those who committed the atrocities. Similarly, a temporary tribunal of limited jurisdiction was created by the Security Council in 1994 to cope with genocide in Rwanda, where some 800,000 innocent civilians were brutally murdered. Since these incidents were internal conflicts, the crime of aggression was not implicated, but the need for a permanent international criminal court became increasingly obvious.

As the plans for the ICC began to take shape, it became clear that there were two separate, but linked, problems that had to be resolved before the crime of aggression could be punished. Because the act of aggression

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32. U.N. Charter, *supra* note 24, pmb1.

33. *Id.*

34. *Id.* art. 39.

requires a high threshold of violence to concern the international community as a whole, such acts could only be committed by a state or similar entity. Yet, as noted at Nuremberg, crimes are committed by individuals, not abstract entities. Only after prohibited acts occurred could the individuals responsible for them be held accountable before a criminal court. The act of aggression by a state and the crime of aggression by an individual were mutually dependent, and the distinctions between the two were by no means clear.

After studying the problem of aggression for years, the ILC finally concluded in 1996 that the determination that a state had committed an act of aggression was an absolute pre-requisite for any individual to be convicted of the crime of aggression. This meant that, so long as the Security Council had to decide whether an act of aggression had been committed by a state, the permanent members could effectively control whether any individual would stand trial for the crime. It was not clear how the ICC could maintain its desired judicial independence if it had to await a prior determination by another body.

The U.N. Charter vested in the Security Council “primary responsibility for the maintenance of international peace and security,” and all members agreed to carry out the Council’s decisions.<sup>35</sup> To be sure, the Council was not given a completely free hand. It was obliged to act “in conformity with the principles of justice and international law” and “in accordance with the Purposes and Principles of the United Nations.”<sup>36</sup> Unfortunately, due to ideological and other differences, some of these principles soon gave way to political considerations. The Council fell into disrepute—particularly among smaller states, which often felt like little fish in a big pond. This distrust led many states to seek ways to avoid Council control when it came to punishing aggressors.

### *B. Assuring the Independence of the Criminal Court*

Though the Security Council had primary jurisdiction to determine whether an act of aggression by a state had occurred, that prerogative was not exclusive. The General Assembly also had a role to play. When North Korean troops, aided by China, invaded South Korea in 1950, the S.C. seemed paralyzed by the absence of the Soviet representative, who had walked out in protest. The U.S. declared that the attack was “an act of aggression.” A U.S. Army counter-attack was mobilized under the U.N.

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35. *Id.* arts. 24, 25.

36. *Id.* arts. 1, 24.

flag. The Assembly passed a resolution finding that “China, by giving direct aid and assistance to those who were already committing aggression in Korea . . . has itself engaged in aggression in Korea,”<sup>37</sup> and authorized economic sanctions.

Other examples illustrate that where a political will existed, there was a way to interpret the Charter to achieve a desired goal. For example, it became standard practice for the S.C. to treat abstention as a positive vote, even though the Charter specifically required an affirmative vote. Recently, new concepts like the “duty to protect” have provided the opportunity for moral arguments to justify humanitarian interventions requiring the use of force, even when no prior Security Council authorization is obtained. Given the flexibility of the Charter, it is argued that when the Council fails to act, the General Assembly can unite and take measures in the cause of peace. If the General Assembly is competent to authorize economic and military sanctions in response to acts of aggression by a state, why should it be impermissible for it to authorize a criminal trial against aggressors? It may not be advisable to stretch the Charter in that direction, because the General Assembly is not a judicial body, and may be even more politically oriented than the Security Council.

A better proposition is that the International Court of Justice (ICJ) (known as The World Court) could, on request from the General Assembly, issue an Advisory Opinion that would serve as a legal determination that an aggressive act by a state has occurred. The ICJ has issued such opinions regarding the legality of a U.S. naval blockade of Nicaragua, the crime of genocide, and the legality of nuclear weapons. Thus, there is no reason why the ICJ could not render an objective opinion concerning the legality of an act of aggression by a state. In its deliberations, the ICJ would take into consideration whatever arguments are presented to justify the alleged aggression. If, on the basis of an ICJ Opinion, the ICC Prosecutor decides, and the panel of ICC judges agree, that those responsible for the act should be indicted, there would be no injustice to the accused because the defendants would still have the opportunity to present their exculpatory arguments and evidence to the ICC. And, of course, the ICC judges may acquit the accused if they are convinced that fairness and justice so requires.

Referrals from the ICC to the General Assembly, the ICJ, or any other international agency, such as the European Court of Human Rights, add

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37. G.A. Res. 498, U.N. Doc. A/1771 (Feb. 1, 1951).

costly and time-consuming procedure. Victims will argue that justice delayed is justice denied. The ICC is a self-contained entity governed by a treaty signed by over a hundred nations. It should not be made dependent upon organizations outside its control. In addition, there is no assurance that substitute agencies would be willing or able to accept such a burdensome assignment from the court.

Efforts to bypass the Security Council reflect the frustration of small states that have been waiting for years for legal protection against aggression. They are now demanding an end to a system that allows aggressors to defy the rule of law. The Security Council's vested role under the U.N. Charter presents an obstacle. However, badly needed Charter alterations are nowhere in sight. And misinterpreting or stretching the law is a dangerous practice. I believe there is a way to respect the Charter, as correctly interpreted by the International Law Commission, while bringing justice to those leaders responsible for the supreme international crime.

### *C. Alternative Ways to Achieve Justice*

It should be noted that national courts will, under the Rome Statute principles of complementarity, always be given priority to try their own nationals for any crime within the jurisdiction of the ICC. If a state is willing and able to provide a fair trial, the accused will never be judged by the ICC. However, the crime of aggression is such that nations are not likely to try their own national leaders unless there has been a change of government. The ILC has concluded that there can be no prosecution by the ICC for the crime of aggression until the Security Council determines that an act of aggression has taken place. Even if this were true, that does not mean that the ICC will be indefinitely paralyzed. There are two steps that could be taken to bring wrongdoers to timely justice.

#### *1. Public Reports by the ICC Prosecutor*

The ICC Prosecutor, subject to statutory pre-trial judicial controls, may investigate the crime of aggression and issue a report of his findings. If the evidence adduced is insufficient to support a finding of guilt, the accused should be released. If such a finding could be made, the report should be made public. If the issue was previously referred to the Security Council for a determination regarding the act of aggression by the state involved, and there has been no response, the release of this report will add additional pressure on the Council to act promptly. An attempt by the

Council to halt an ICC investigation for a renewable twelve month period, as the statute allows, must be related to the Council's peace-keeping responsibilities.

It should not be forgotten that the S.C. is also bound by U.N. Charter obligations to respect principles of justice and international law. The ICC would be justified in ignoring S.C. decisions that clearly violate these Charter mandates. Admittedly, the ICC, like the ICJ and other human rights courts, has no independent enforcement power. However, abuse of the Security Council's Charter responsibilities for political reasons is bound to encounter public outrage. The "shame factor" may hasten its decision regarding the legality of the acts under consideration. In the final analysis, the rule of law can only be sustained by the fairness of ICC procedures and judicial pronouncements that earn the respect of victims and observers. A Security Council that shows contempt for the ICC will bring contempt upon itself.

## *2. Prosecute for Other Crimes in Addition to the Crime of Aggression*

It has become customary in war crimes prosecutions for the indictment to contain a number of crimes based on the same facts. Nuremberg defendants were indicted and convicted of the common plan or conspiracy to commit crimes against peace (aggressive war), war crimes, and crimes against humanity. It would be perfectly within the discretion of the ICC prosecutor to charge the accused with the crime of aggression, as well as with war crimes, crimes against humanity, or even genocide. The prosecutor would not need to remain immobilized while waiting for a Security Council determination that an act of aggression has taken place, nor for the opinion of any other body. The trial can proceed promptly on any or all of the other three related charges. These are all crimes within the ICC's statutory jurisdiction, and none have pre-requisites that require Security Council intervention. The maximum penalty for genocide, crimes against humanity, war crimes, or aggression are all limited to a term of life imprisonment. There would be no affront to victims, or benefit to the accused, if the aggression charge remains pending while these other counts proceed to judgment.

### III. SUMMARY AND CONCLUSION: THE IMPORTANCE OF CRIMINALIZING AGGRESSION

The most important achievement of the Nuremberg trials was the confirmation that war-making is no longer a national right, but has instead

become an international crime. That great historical step forward in the law must be sustained.

The distinguished jurists of the International Law Commission have agreed that the crime of aggression should be actionable by the ICC, even without a more detailed definition. Adopting a broad, consolidated definition of the crime of aggression to reflect norms that have already been universally accepted is a clear demonstration that illegal war-making will no longer be tolerated. It also gives fair notice to the accused.

The use of armed force is only permissible when approved by the Security Council in accordance with the U.N. Charter. Even when Council responses seem inadequate, the Charter mandates must be respected. The Charter principle of justice under international law can still be effectuated by means other than waiting for S.C. confirmation regarding the act of aggression. The prosecutor can proceed to trial promptly on related war crimes charges.

To be sure, punishing aggression will not, by itself, eliminate wars, but it is an important component of a vast matrix which encompasses social justice, disarmament, and a system of effective enforcement. If peace is to be protected, it is essential that all national leaders be aware that individuals responsible for the crime of aggression will be held criminally accountable before the bar of international justice—no matter how long it takes.

Unauthorized war-making is neither legal nor inevitable. Humankind has glorified wars since time immemorial. Admittedly, it will take a very long time to reverse ingrained habits of thought and substitute a “peace ethic” for the prevailing “war ethic.” Unpredictable events often determine the course of history. Many great military leaders have come to recognize that nations can no longer rely on the use of force but must turn to the rule of law if they are to survive. New forms of violence and terror pose increasing threats that emphasize the need for new thinking. As part of the movement toward a more just and humane world, those responsible for aggression must learn that they will no longer be immune, but will be held accountable by an International Criminal Court acting in the name of all peace-loving nations.