Sixty Years in the Making: The Definition of Aggression for the International Criminal Court

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By Keith A. Petty*

I. Introduction

In the pre-dawn hours of June 25, 1950, a firestorm of artillery gave cover to the North Korean army as it crossed the thirty-eighth parallel into South Korea, thereby starting the Korean War. In January 1991, American-led coalition forces attacked Iraqi targets in response to President Saddam Hussein’s invasion and annexation of Kuwait. On the morning of September 11, 2001, nineteen members of the al Qaeda organization hijacked four commercial jets and used them as weapons in coordinated attacks against targets within the United States, killing 2,973 people. While each of these instances involves the coercive use of force, only the first could be qualified as criminal aggression, the second is collective defense, and the third is uncertain.

The post-war trials of axis war criminals marked the last time individuals were tried and punished for the aggressive use of force.

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Today, the Rome Statute of the International Criminal Court (ICC) provides for jurisdiction over the crime of aggression, but only when that crime is defined. For the past sixty years, leading legal and political minds have tried and failed to articulate a working definition. But the Assembly of States Parties to the Rome Statute is nearing agreement on a draft crime of aggression.

Aggression is particularly difficult to define due to the political nature of the crime. In fact, prior to the trial of the German Kaiser following World War I, the Allies admitted that the indictment “has not a juridical character as regard its substance, but only in its form. The ex-Emperor is arraigned as a matter of high international policy . . . .” Besides the issue of “victor’s justice,” some criticize attempts to define aggression on the ground that any definition reached by consensus is irrelevant to the question of whether aggression actually occurred. Others claim that modern aggression continuously takes new forms and any present-day definition would soon be obsolete or incomplete.

Recent progress by the Special Working Group on the Crime of Aggression for the Assembly of States Parties to the Rome Statute (“Special Working Group”) proves that these efforts are anything but futile. Not only is a definition required by the Rome Statute itself, but no authoritative definition exists for the purposes of individual criminal liability. Furthermore, the ability to prosecute this crime will deter potential aggressors and facilitate the protection of the rights of the victims of aggression.

Several legal issues must be resolved prior to reaching the definition of aggression. Primarily, the issue of State responsibility will be discussed in Section III in the context of the relationship between the ICC and the Security Council, the nature of the acts required to constitute aggression, and whether a specific list of acts is preferred to a general definition. Second, individual criminal


3. Id. at 5.
responsibility, including the leadership requirement, the actus reus, and the mens rea elements of the crime, will be discussed in Section IV. Finally, Section V offers recommendations and concludes that any definition should serve as a starting point for the prohibition of a wider range of unlawful uses of force. Prior to the legal issues, a brief discussion of the historical background of the legal regime regulating the use of force, and the long road toward a definition of aggression will assist in framing the relevant issues.

II. Historical Background

The crime of aggression developed from the principles governing the initiation of armed conflict among States, known as the jus ad bellum. These principles were once known as the “just war” doctrine, which has its roots in antiquity from 330 BCE to 300 CE and is closely associated with the teachings of St. Augustine between 354-430 CE. Early Islamic traditions also recognized the just war concept, often referred to as jihad, or the “struggle for what is right.”

Between 1226-1274 CE, St. Thomas Aquinas further developed the just war concept by enumerating criteria for the just use of force.

The modern legal theory of jus ad bellum took shape after the devastation of WWI. The Assembly of the League of Nations and the Kellogg-Briand Pact each made strides in prohibiting the


6. The three criteria are: the sovereign authority alone can declare war; there must be a just cause – those attacked must somehow be at fault; and there must be a just intent – the advancement of good or avoidance of harm. AREND & BECK, supra note 4, at 14 (citing ST. THOMAS AQUINAS, Summa Theologiae, Seconda Secundae, Q. 40 (Art. 1), in A. D’ENTREVES, AQUINAS: SELECTED POLITICAL WRITINGS 159 (J. Dawson trans. 1948)).

7. See generally BROWNLIE, supra note 4, at 71, for a discussion of League Assembly resolutions relating to aggression.

unlawful use of force as an extension of foreign policy among States; these principles later embodied in article 2(4) of the U.N. Charter. Although these instruments regulate State conduct without mention of individual responsibility, they did advance international law between 1919 and 1945 toward the criminality of aggression.

Not until after WWI did the international community seriously undertake prosecuting aggression. Articles 228-230 of the Treaty of Versailles contemplated prosecuting German combatants before Allied military tribunals for the “violation of the laws and customs of war.” Where these efforts failed, the post-WWII tribunals were successful. Axis war criminals were prosecuted at the Nuremberg Tribunal, the Tokyo Tribunal, and in the Subsequent Proceedings under Control Council Law No. 10. While none of the implementing documents of these tribunals specifically defined aggression, each court was authorized to judge a) when a State had committed aggressive acts, and b) when an individual was responsible for those acts.


9. U.N. Charter art. 2, para. 4. See also Schabas, supra note 1, at 29.


In 1998 the Rome Statute for the International Criminal Court was adopted, calling for the prosecution of genocide, war crimes, crimes against humanity, and the crime of aggression once it has been defined. The Preparatory Commission was then responsible for defining aggression for the Court. In July 2002, the requisite number of States ratified the Rome Statute, thereby giving it legal affect and ending the mandate of the Preparatory Commission. Since then, the Assembly of States Parties to the Rome Statute took over and designated a Special Working Group on the Crime of Aggression.

The Special Working Group has several hurdles to overcome before it can submit a final draft definition to the Assembly of States Parties. First, there is a limited amount of time for delegates of States Parties to meet and work on the draft, an issue that also plagued the


13. G.A. Res. 3314 (XXIX), annex, U.N. Doc. A/9631 (Dec. 14, 1974). While this definition of aggression is intended to assist the Security Council’s political determination of aggression, it has been relied on heavily in the subsequent efforts to draft a criminal provision for aggression.


Preparatory Commission. Articles 121 and 123 of the Rome Statute allow for amendments to be made to the Statute seven years after it comes into force – July 2009. Between now and the 2009 Review Conference, the Assembly of States Parties only have about two weeks to work since they only meet for five to seven days a year.

Second, and more significantly, there are several legal issues that remain contentious among the delegates. The four most pressing issues include: 1) The role of the Security Council vis-à-vis the Court, 2) deciding when State conduct reaches the level of aggression (the “threshold” issue); 3) including specific acts or drafting a general definition, and 4) the distinction between State responsibility and individual culpability. The following sections address each of these issues in turn.

III. State Responsibility and Aggressive Acts: Preconditions to ICC Jurisdiction

The Nuremberg Charter directly links State obligations under international law to individual accountability. This same approach is seen in recent efforts to define aggression. As a result, the ratione materiae of the crime of aggression has two parts. First, there must be an aggressive act by a State. Second, an individual must commit acts which set in motion the State aggression, as discussed in Section IV below. Even though the ICC exercises jurisdiction over individuals and not States, an individual cannot invade another

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22. Nuremberg Charter, supra note 11.
country. Conversely, States do not commit aggression in a vacuum. Only regime elites and persons of influence initiate the machinations of unlawful force. This section discusses the determination of State aggression and the role of the Security Council in relation to the ICC.

A. Aggressive State Conduct as a Political Decision

There is general consensus that there cannot be individual responsibility for aggression unless the State in question has committed an act of aggression. It is widely held that the ICC may come into play only once there has been such a determination. Under the U.N. Charter framework, the U.N. Security Council is responsible for determining which acts constitute aggression. The issue remains whether State aggression is a purely political question for the Security Council or whether the Court may act on its own. The Chairman to the Special Working Group clearly presented these two options in his discussion paper: “Where the Security Council does not make such a determination within [six] months after the date of notification, Option 1: the court may proceed with the case, Option 2: the court may not proceed with the case.”

During the meetings of the Preparatory Commission and the Assembly of States Parties, some argued that there is no legal or practical basis for limiting ICC jurisdiction over the crime of aggression to decisions made by the Security Council. This

25. See INT’L CRIM. CT., Assembly of States Parties, Resumed fifth session, Discussion Paper Proposed by the Chairman, ¶ 4, ICC-ASP/5/SWGCA/2, (January 29–Feb. 1, 2007) [hereinafter Discussion Paper], which states, “[w]here the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court.” Id. See also Politi, supra note 24, at 49. For the historical basis for determinations of aggression by the League of Nations, see POMPE, supra note 4, at 73.
27. Dr. Pompe framed the issue in the following way: “Whatever higher principles or sociological laws politics may obey, its essence remains the free decision, while the essence of law is the binding rule.” POMPE, supra note 4, at 85.
29. Umberto Leanza, The Historical Background, in THE INTERNATIONAL
argument finds its strongest support among Arab and developing countries. The ICC must remain independent, they contend, regarding determinations of State aggression and the consequences in the field of individual criminal responsibility. This puts the responsibilities of the two bodies in stark contrast. While the Security Council is aimed at governing State conduct that disturbs international peace and security, the ICC deals with the responsibilities of an individual actor. Furthermore, the ICC is not a U.N. body, regardless of the “special relationship” between them. This means that it should be more autonomous in its operations.

Professor Giorgio Gaja does not foresee a conflict between an independent ICC and the role of the Security Council. He argues:

One cannot assume that the absence of a finding by the Security Council that aggression occurred necessarily implies that in the Security Council’s view there is no aggression and that therefore a conflict would arise with a positive finding by the ICC that an individual has committed a crime of aggression.

In fact, the International Court of Justice (“ICJ”) does not limit its own jurisdiction or decision-making in such a way, and could at times interfere with the measures the Security Council adopts under its Chapter VII powers. The Nuremburg Tribunal was also not limited in this way. Under the Nuremberg Charter, the tribunal determined whether a State committed aggressive acts without a prior determination by an international organization.

The ICTY encounters related issues. Prior to establishing individual criminal responsibility in the Tadic case, the court first had to determine whether the nature of the conflict was internal or

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31. Id.
34. Leanza, supra note 29, at 14.
35. Nuremberg Charter, supra note 6. See also Pompe, supra note 4, at 76.
international. Similarly, in a Rule 61 decision in Rajić, the Trial Chamber found that Croatia’s support of Bosnian Croats against Bosnian forces was sufficient to make the case “in the context of an international armed conflict,” thus establishing jurisdiction. This decision was reached without effect as to Croatia’s responsibility. But the ICTY did not have to deal with the crime of aggression, which is considerably more politicized because it requires a finding of State responsibility.

Since the Rome Conference, the permanent members of the Security Council maintain that there must be a Security Council finding of aggression prior to ICC jurisdiction. Other delegations to the Assembly of States Parties suggest that the ICC must take no action at all when the Security Council is silent on the matter. This position finds support in Article 5(2) of the Rome Statute, which states that any provision on the crime of aggression must be consistent with the U.N. Charter. Read in light of Article 39 of the Charter, the Security Council is solely responsible for making that determination.

Applying this standard to the North Korean invasion of South Korea in 1950, it is clear that the ICC—if it had existed at the time and all jurisdictional issues were satisfied—would be able to proceed with the investigation of the North Korean leadership. U.N. Security Council Resolution 82, condemning North Korea’s “breach of the peace,” was the only occasion the Security Council expressly declared that a U.N. member committed aggression. The question remains

40. Id. at 14.
whether the ICC would have jurisdiction over similar actions that did not warrant a Security Council resolution—Iraq's invasion of Kuwait in 1990, for example. The U.S. led coalition—acting under the principle of collective self defense under article 51 of the Charter—was acting no less lawfully without such a resolution. Should the crimes committed by Osama Bin Laden and other leaders of al Qaeda be less susceptible to judicial scrutiny because they do not fit conveniently into traditional notions of State aggression?

It is cases like these that require a non-exclusive decision making process. While the Security Council should play the primary and most authoritative role in such decisions, other international organs must be permitted to make recommendations as to whether aggression occurred. This should only occur in the event of Council paralysis. The debate continues, however, over which U.N. body should determine when aggression occurs when the Security Council fails to do so.

B. When the Security Council Fails to Act

The U.N. Security Council has traditionally been the gatekeeper of decisions relating to international peace and security. Regarding aggression, the Rome Statute clearly raises an issue as to the overlap of the roles of the ICC and the Security Council. Specifically, article 5(2) states that the definition of aggression: “shall be consistent with the relevant provisions of the Charter of the United Nations.”

This provision implies Security Council involvement, but not exclusively. The issue is whether the ICC may initiate a case on aggression without an explicit determination by the Security Council that a State committed aggression, or whether another body is competent to make that decision.

The Special Working Group is currently discussing two additional options when the Security Council does not make a determination after it has been notified by the ICC prosecutor. These are:

Option 3: the Court may, with due regard to the provisions of articles 12, 14 and 24 of the Charter, request the General Assembly

45. Leanza, supra note 29, at 12.
46. Rome Statute, supra note 16, art. 5(2).
of the United Nations to make such a determination within [12] months. In the absence of such a determination, the Court may proceed with the case.

Option 4: the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.\(^\text{48}\)

The ICJ previously weighed in on this debate. In the *Certain Expenses* case, it found that the Security Council had the primary, but not exclusive responsibility in this area. The Court added, “[T]he Charter made it abundantly clear that the General Assembly was also to be concerned with international peace and security.”\(^\text{49}\)

The Chairman of the Special Working Group on the Crime of Aggression, Christian Wenaweser, suggests that there is precedent for the General Assembly to make recommendations when the Security Council is silent.\(^\text{50}\) For example, the Uniting for Peace Resolution has allowed the General Assembly to intervene on multiple occasions in cases of the Council’s failure to act on issues of international peace and security.\(^\text{51}\) In fact, the U.S. and U.K. delegations, during the debates prior to the adoption of the Uniting for Peace Resolution, argued that when the Security Council did not exercise its authority the General Assembly was not precluded from using its powers under the Charter.\(^\text{52}\) Therefore, the Security Council has the primary, but not exclusive, role of determining aggression.

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The ICJ is better suited than the General Assembly to determine when aggression occurs. This method is indicated in Option 4 above. First, the Court is competent to determine such matters under article 36(2) of the Statute of the ICJ.\textsuperscript{53} Second, there is precedent for the ICJ to make such determinations. In the Nicaragua case, the Court had to determine whether Nicaragua committed aggressive acts justifying the U.S. claim of self-defense.\textsuperscript{54} Finally, the ICJ is the more appropriate body due to the simple fact that it is a Court made up of leading experts in international law. In the General Assembly, member State representatives often base decisions on political affiliations. For the purposes of determining whether the ICC should proceed with a criminal investigation, only sound legal analysis will suffice.

A Security Council resolution or an ICJ advisory opinion finding that State aggression occurred will serve as an indispensable precondition to the Court exercising jurisdiction. After that, the Court may decide the extent to which an individual is culpable under all of the circumstances of the case. This approach will enhance the independence of the Court, since there would be no need to define aggression if the Security Council or ICJ determinations were binding as regards individual criminal responsibility.\textsuperscript{55}

\textbf{C. The “Threshold” Issue}

Assuming the appropriate international body determines that aggression has been committed, the Court must then decide whether the nature of the State conduct amounts to “aggression.” This is known as the “threshold” issue. The Chairman’s Discussion Paper includes two options which would qualify the State act of aggression in terms of its nature or its object and result. Specifically, it states:

[An act] which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations . . .

such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or

\textsuperscript{53} I.C.J. STATUTE art. 36, para. 2. See also Escarameia, supra note 49, at 137.
\textsuperscript{54} Military and Paramilitary Activities (Nicar v. U.S.), 1986 I.C.J. 14 (June 27) [hereinafter Nicaragua Case]. See also Gomaa, supra note 47, at 76.
\textsuperscript{55} Politi, supra note 24, at 49-50.
annexing, the territory of another State or part thereof.\textsuperscript{56}

The first option, or the “manifest violation” requirement, finds strong support in the Special Working Group.\textsuperscript{57} Delegates are confident this requirement will prevent borderline cases from going before the Court.\textsuperscript{58} Others argue, however, that this clause is unnecessary because the Court’s jurisdiction is already limited to “the most serious crimes of international concern,”\textsuperscript{59} and by the restrictive use of the term “aggression” in the U.N. Charter.\textsuperscript{60}

The second option, which lists examples of the “manifest” violations, will likely not be included in the final definition. Many view this as unjustifiably restrictive, limiting the Court’s ability to prosecute aggression for anything short of an armed invasion.\textsuperscript{61} Furthermore, the non-exhaustive nature of the list may in fact violate the principle of legality \textit{nullum crimen sine lege} (without a law there can be no punishment).\textsuperscript{62}

While these arguments seem to have the most traction, it is worth noting that others argue that examples of the “object or result” of aggressive acts are more in line with U.N. Charter principles. For example, a strict interpretation of article 2(4) of the Charter might require that the territorial integrity and political independence of a State “must be seriously endangered by the use of force if this is to deserve the qualification ‘aggression.’ ”\textsuperscript{63}

Ultimately, the “object or result” language is far too limiting and, in fact, is covered in the provision related to State acts which

\textsuperscript{56} Discussion Paper, supra note 25, at 3. Compare this with the Preparatory Commission’s draft, which would have included “flagrant” violations of the U.N. Charter. \textit{PrepComm Report, supra note 23, at 3, ¶ 1.}

\textsuperscript{57} Press Conference, supra note 20.


\textsuperscript{59} Rome Statute, supra note 16, art. 1. \textit{See also} Report of the Special Working Group, supra note 29, at 11, ¶ 17.

\textsuperscript{60} \textit{Report of the Special Working Group, supra note 29, at 11, ¶ 17. See also} Heller, supra note 58.

\textsuperscript{61} \textit{Report of the Special Working Group, supra note 29, at 11, ¶ 18.}

\textsuperscript{62} \textit{Id. See also} International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) at art. 15(1), 1496\textdegree plen. mtg. (Dec. 16, 1966) (stating “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”). \textit{See also} DINSTEIN, supra note 11, at 130-31.

\textsuperscript{63} POMPE, supra note 4, at 106.
constitute aggression. This is discussed in detail in the next section.

D. Exclusive v. General Definition for State Conduct
Constituting Aggression

In 1950, the North Korean armed forces invaded South Korea in a clear violation of the U.N. Charter. They used artillery, tanks, aircraft, and ground forces. But what if North Korea had used tactics never considered by the international community? Would these actions not amount to aggression?

There has been a great deal of debate about whether to specifically list the acts constituting aggression or to leave the definition a general one. Three options were considered at the Rome Conference: 1) Use an open ended, general definition, 2) combine a general definition with an illustrative list of acts, or 3) specifically list the acts.

The inability of the parties at Rome to agree on this provision is partly responsible for the lack of a legal definition of aggression. A general definition may be an easier method to reach agreement and it would also allow the ICC greater flexibility in determining which acts constitute criminal aggression. This approach, however, could run afoul of the principle of legality. Indeed, this is one of the primary criticisms leveled at the post-WWII tribunals.

Even though the crime of aggression was not actually defined, the post-war tribunals had jurisdiction over “crimes against peace.” In fact, the Dutch Judge of the Tokyo Tribunal later suggested that aggressive war was not a crime under international law at the beginning of the war. Similarly, in the Nuremberg Judgment, the Court essentially stated that punishing crimes against peace breached the principle nullum crimen sine lege. Even Robert H. Jackson, Chief Prosecutor at Nuremberg, admitted in his opening statement that the Nuremburg Charter “fails itself to define a war of

64. See generally 1 THE KOREAN WAR (The Korean Institute of Military History ed., University of Nebraska Press 2000).
66. Politi, supra note 24, at 48.
68. Schabas, supra note 1, at 29 (quoting B.V.A. RÖLING & ANTONIO CASSESE, THE TOKYO TRIAL AND BEYOND 98 (1993)).
69. Id.
aggression.\textsuperscript{70}

Since then, a mixed definition of aggression was developed by the U.N. General Assembly, but not for the purposes of individual criminal liability.\textsuperscript{71} General Assembly Resolution 3314 (G.A. Res. 3314) was adopted in order to assist the Security Council determine when aggression is committed.\textsuperscript{72} For this reason, and due to the non-binding nature of General Assembly resolutions, some argue that G.A. Res. 3314 may not be used by the Court to determine individual accountability.\textsuperscript{73} This is a narrow viewpoint, which fails to consider the impact that G.A. Res. 3314 has had on shaping the definition of aggression. Moreover, after the ICJ decision in the \textit{Nicaragua} case, at least part of this resolution is considered customary international law.\textsuperscript{74}

Supporters of a specific list of acts argue that this approach will avoid any breach of the principle of legality. They predict that a general definition will not add to the effective prosecution and punishment of the crime, but instead will lead to inconsistent Court decisions.\textsuperscript{75} These arguments rely heavily on article 3 of G.A. Res. 3314 which lists acts of aggression, including: invasion or attack by the armed forces of a State of the territory of another, military occupation, annexation of territory by force, bombardment against the territory of another State, blockades by armed force, attacking the armed forces of another State wherever located, the use of armed forces within a State beyond the originally agreed upon terms, one State allowing another State to use its territory to perpetrate attacks against a third State, sending by one State of non-state armed groups to conduct attacks against another State.\textsuperscript{76}

The draft crime submitted by the Special Working Group offers two alternatives: a general reference to G.A. Res. 3314 or a specific

\textsuperscript{70} 2 \textsc{Trial of the Major War Criminals Before the International Military Tribunal} 98-155 (1947) [hereinafter \textit{Nuremberg Judgment}], available at <http://www.yale.edu/lawweb/avalon/imt/proc/11-21-45.htm>. \textit{See also} Gomaa, \textit{supra} note 47, at 61 n.20.

\textsuperscript{71} G.A. Res. 3314, \textit{supra} note 13.

\textsuperscript{72} \textit{See} Press Conference, \textit{supra} note 20. Aggression may be considered differently for political purposes than it is when a “judicial inquiry is made into criminal liability.” \textsc{Dinstein}, \textit{supra} note 11, at 126.

\textsuperscript{73} Leanza, \textit{supra} note 29, at 13.

\textsuperscript{74} \textit{Nicaragua Case}, \textit{supra} note 54. \textit{See also} \textsc{Dinstein}, \textit{supra} note 11, at 127.

\textsuperscript{75} Politi, \textit{supra} note 24, at 48.

\textsuperscript{76} G.A. Res. 3314, \textit{supra} note 13 at art. 3.
reference to the acts listed in articles 1 and 3. The relevant provision reads as follows: “For the purpose of paragraph 1, ‘act of aggression’ means an act referred to in [articles 1 and 3 of] United Nations General Assembly resolution 3314(XXIX) of 14 December 1974.”

The Chairman of the Assembly of States Parties, Ambassador Christian Wenaweser, stated that it is still unclear, as indicated by the brackets in the provision above, whether the acts in G.A. Res. 3314 will be specified. This would be a mistake.

Specific acts should be left out of the definition; the principle of legality, while crucial to drafting criminal offenses, is not at issue here. Even if questionable at the outset of Nuremberg, the criminalization of aggression cannot be questioned today. If one looks to the judgments of the post-WWII tribunals, and other documents outlawing aggression (the U.N. Charter, the Kellogg-Briand Pact, the Draft Treaty of Mutual Assistance, the Geneva Protocol, the Resolution of the League Assembly of 24 September 1927) there can be no doubt that this conduct, even if not codified, is a crime.

Furthermore, limiting the acts of aggression to a specific list unnecessarily handicaps the effective prosecution of this crime. It is impossible to foretell the various modalities of aggression that have not yet come into being.

IV. Individual Criminal Responsibility

Historically, the State was the only recognized actor on the international level. This is embodied in the U.N. Charter, where aggression is only categorized as State conduct. Even though individual responsibility for international crimes was seriously considered for the first time after WWI, it was the Nuremberg Tribunal that had the most lasting impact.

The Nuremberg Judgment states that, “[c]rimes against international law are committed by men, not by abstract entities, and

78. Press Conference, supra note 20.
79. Gomaa, supra note 47, at 62.
80. Id. at 65. It is worth noting that the Security Council has cited a non-state armed group as an aggressor in S.C. Res. 405, U.N. Doc. S/RES/405 (April 14, 1977). In that situation, mercenaries who attacked Benin committed acts of aggression, without specific reference to the State sponsor of the mercenaries involved. See Gomaa, supra note 47, at 65 n. 32.
81. BROWNLIE, supra note 4, at 154.
only by punishing individuals who commit such crimes can the provisions of international law be enforced.” As such, this section focuses on the individual perpetrators of aggression. Specifically, the issues are: which persons may be held accountable for personal jurisdiction purposes, which acts are considered criminal, and what mental state must the perpetrator possess for criminal liability. The objective is to draft a crime so that the Kim Il Sung, Saddam Husseins, and Osama Bin Ladens of the world may not commit aggression with impunity.

A. Ratione Personae – The Leadership Requirement

The ICC will only have personal jurisdiction—ratione personae—over certain categories of individuals for the crime of aggression. Compared to the other offenses under the Rome Statute, this type of limited jurisdiction is unique. It is clear that not every person involved in acts of aggression can be punished. The responsibility of government decision makers is not the same as that of the soldiers on the ground.

The post-WWII tribunals held that responsibility for the crime of aggression was limited to political, military, economic and industry leaders. The High Command case of the Subsequent Proceedings ruled that the criminality of aggressive war only attaches to “individuals at the policy-making level.” The I.G. Farben case added industrial leaders to the list of potential defendants. Therefore, the crime of aggression was applicable only to high ranking military officials, civil servants of the highest order, and civilians holding influential positions in public affairs or the economy.

Holding a particular office or job is not as important as the ability to exercise the power accompanying a high level position. Examples of the ability to exercise this power include: leadership, policy-making, decision-making, influencing high level officials,

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82. 1 NUREMBERG JUDGMENT, supra note 70, at 223. See also Gomaa, supra note 47, at 66, and DINSTEIN, supra note 11, at 120.
83. DINSTEIN, supra note 11, at 135.
84. United States v. Von Leeb (High Command), 11 N.M.T. 462, 486 (Nuremberg 1948). See also DINSTEIN, supra note 11, at 135.
86. DINSTEIN, supra note 11, at 137 (citing T. Taylor, The Nuremburg War Crimes Trials, 450 INT’L CON. 243, 309-10, 339 (1949)).
responsibility, authority, and discretion. The 1996 ILC Draft Code included individuals as leaders or organizers as subject to criminal liability for aggression. The Preparatory Commission required the person to be in a position to effectively exercise control over or to direct the political or military action of a State. The current draft definition maintains the leadership requirement.

Chairman Wenaweser states that the negotiations so far reflect the leadership requirement for criminal aggression. The person must be in a position to effectively exercise control over the military or political action of a State. Noticeably absent from the current draft, however, is the ability to hold non-civil servants liable, such as private economic actors or third-State officials.

Limiting the *ratione personae* this way would be a step back from the post-WWII tribunals. In fact, it may prohibit the prosecution of modern forms of aggression. Consider the terrorist attacks of September 11, 2001. Under the draft definition, a case of criminal aggression could not be initiated against Osama Bin Laden at the ICC – assuming all other jurisdictional requirements were met under the Rome Statute – because he is not a political or military leader of a State. Rather he is the leader of a non-state armed group. Furthermore, the Taliban almost certainly would not be held accountable, since the current draft definition of aggression does not consider outside State support within the purview of the Court.

It is uncertain how the Special Working Group will resolve this issue. It is particularly interesting in light of article 3(g) of G.A. Res. 3314, which specifically considers non-state armed groups’ attack on another state a form of aggression.

**B. The Actus Reus for Criminal Aggression**

The leaders responsible for influencing State conduct must have exercised their power to be guilty of aggression. This is the *actus reus*

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92. *Id. See also* Heller, *supra* note 58.
of the offense. The framework for this element of criminal aggression has changed little since the post-WWII tribunals. At Nuremberg, in order to be held criminally responsible, an individual must have been involved in the “planning, preparation, initiation or waging of a war of aggression.” The 1996 ILC Draft Code revised the level of participation and required that the individual actively participate in the aggression or give the orders to initiate aggressive acts. The Preparatory Commission adopted similar language.

The Special Working Group debated two variants on the acts required for individual criminal responsibility, but agreed to Variant A. According to Variant A, the “differentiated approach,” the crime of aggression means “the planning, preparation, initiation or execution of an act of aggression/armed attack.” This variation applies the modes of liability listed in article 25(3), subparagraphs (a)-(d) of the Rome Statute. These include: joint criminal enterprise, ordering/soliciting/inducing the commission of a crime, and aiding and abetting. It is noteworthy that this variant would add paragraph 3 bis to Article 25, which re-confirms that the modes of participation only “apply to persons being in a position effectively to exercise control over or to direct the political or military action of a State.”

Furthermore, it is clear from the negotiations that article 28 of the Rome Statute—command responsibility—will not apply to the crime of aggression due to the leadership nature of the crime.

The current draft may contain similar language to the post-WWII tribunals, but in practice is much more limiting. For example, at Nuremberg it was considered that perpetrators could be brought to
trial under the various forms of secondary liability (i.e. joint criminal enterprise, aiding and abetting) even if no armed conflict materialized.\textsuperscript{100} No matter how unlikely this scenario,\textsuperscript{101} it is a far cry from the Special Working Group’s draft, which does not even consider threats of aggression or attempts as acts constituting unlawful aggression.\textsuperscript{102}

\textit{C. The Mens Rea Requirement: Intent and Knowledge}

Every crime has two primary elements, the \textit{actus reus}, discussed above, and the \textit{mens rea}, covered here. The post-WWII tribunals considered knowledge an essential element of individual criminal responsibility for aggression. The level of knowledge depended on the stage at which the individual participated in aggressive war.\textsuperscript{103} Hence, a leading military or political figure who orders rearmament with no intent to participate in aggressive acts, or knowledge of such plans, cannot be culpable of the crime of aggression.\textsuperscript{104} This type of activity often occurs during peacetime. But if the individual acts with knowledge that aggression is planned, then that person possesses the requisite \textit{mens rea}.\textsuperscript{105}

The \textit{mens rea} requirement in recent drafts of aggression, however, is often treated as part and parcel to the act itself, if it is mentioned at all. For example, article 16 of the 1996 ILC Draft Code does not mention a mental state requirement.\textsuperscript{106} The Preparatory Commission used an “intentionally and knowingly” standard.\textsuperscript{107} Similarly, the Special Working Group’s draft specifies the requisite mental state in the “Elements of the crime of aggression” section.\textsuperscript{108}

Knowledge or intent is required in four distinct areas. First, the perpetrator must have “knowingly” been in the position of leadership

\begin{thebibliography}{99}
\bibitem{100} Dinstein, \textit{supra} note 11, at 135.
\bibitem{102} Threats of aggression were punishable at the Subsequent Proceedings at Nuremberg. Dinstein, \textit{supra} note 11, at 132. \textit{See also} Press Conference, \textit{supra} note 20.
\bibitem{103} Brownlie \textit{supra} note 4, at 167-75.
\bibitem{104} High Command, \textit{supra} note 84, at 488.
\bibitem{105} Nuremberg Judgment, \textit{supra} note 70, at 282-84. \textit{See also} Dinstein, \textit{supra} note 11, at 140.
\bibitem{107} PrepComm Report, \textit{supra} note 23, at 3.
\bibitem{108} Discussion \textit{Paper}, \textit{supra} note 25, at 4.
\end{thebibliography}
and control. Second, the “planning, preparation or execution of the act of aggression” must have been done “with intent and knowledge.” Third, the perpetrator must have known “that the actions of the State amounted to aggression.” Finally, the perpetrator had “intent and knowledge” that the act was a flagrant violation of the U.N. Charter. While these requirements may seem a bit overlapping, the Chairperson noted that the “elements” section of the draft crime had not been thoroughly reviewed by the Special Working Group.

As it stands, an expressed mens rea requirement may not be necessary depending on the outcome of the “threshold” issue discussed in Section III, C above. If the Assembly of States Parties accepts that a person commits aggression by planning, preparing, initiating or executing acts “such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof,” then there is little need for further elaboration. This formulation necessarily requires the perpetrator of aggression to intend to occupy or annex another State’s territory.

The requisite intent can, therefore, be inferred from the use of force directed against the territorial integrity or political independence of a State. Critics of this approach argue that intent for the purposes of criminal aggression is too important to leave to an inference and should be expressly provided for in the definition. Furthermore, it is argued that listing the “object or result” is unduly restrictive since it would be impossible to list all of the unlawful purposes.

The mens rea element should be expressed without referring to the “object or result” requirement. It should be included in the definition itself and not be relegated to the elements section alone. Currently, the draft elements section requires the perpetrator to have knowledge over too many aspects of the crime, such as, knowingly

109. Id.
110. Id. at 5.
111. Id.
113. Id. at 4 n.6.
114. Id. at 3.
115. THOMAS & THOMAS, supra note 2, at 53.
116. Id.
117. Id.
having a position of leadership or knowledge that the acts committed were a manifest violation of the Charter. The definition would add great clarity to this element if it required simply that the “planning, preparation or execution of the act of aggression was committed with intent and knowledge.”

V. Recommendations and Conclusion

The inherently political nature of defining the crime of aggression cannot be ignored. As stated by Mr. Wenewaser after the January 2007 meeting of the Special Working Group, “it was all very legal and very complex and very fascinating, but in the end it’s a political question.”

But after sixty years without an enforceable definition of aggression, the stakes could not be higher. As stated by Yoram Dinstein:

Only if it dawns on the actual decision-makers that when they carry their country along the path of war in contravention of international law they expose themselves to individual criminal liability, are they likely to hesitate before taking the fateful step.

The efforts of the Special Working Group to define the crime of aggression are heading in this direction. In order to make the most of this historic opportunity to criminalize aggressive conduct, the following recommendations should be implemented. First, the definition should not limit the Court’s jurisdiction when the Security Council fails to act. The ICC is not an organ of the United Nations, although they have a special relationship. But the inherently political nature of the Security Council’s decision making – something resulting in no action – should not prevent the Court from seeking justice. Determining when State conduct amounts to aggression is within the authority of the ICJ, which has handled similar issues in the past. Absent Security Council action, there is no reason why the ICJ cannot play a supporting role in making this determination.

Second, the threshold issue should be resolved by stating that acts which are “manifest violations” of the U.N. Charter constitute aggression. This is consistent with the Rome Statute’s desire to try only “the most serious crimes of international concern,” and

118. Press Conference, supra note 20.
119. Dinstein, supra note 11, at 117.
120. Rome Statute, supra note 16, art. 1.
provides the Court sufficient flexibility on this issue, unlike the “object or result” standard.

Third, consistent with the “threshold” issue, State acts of aggression should not be specifically listed in the Rome Statute. General Assembly Resolution 3314, which provides an illustrative list of prohibited acts, will be referenced. This is sufficient to guide the judge in determining what types of acts typically constitute aggression without removing the possibility of other, non-specified State acts that would also manifestly violate the U.N. Charter.

Finally, the crime of aggression should only be applied to individuals who are in a position to exercise their power. This includes military, political, and, as Kevin Heller suggests, influential private actors. This standard is consistent with Nuremberg and encapsulates those who realistically may be responsible for acts of aggression. Additionally, the actus reus element should remain unchanged, as it largely reflects the jurisprudence of the post-WWII tribunals, even if a bit more restrictive. Completing the definition, the mens rea element should be stated upfront, in the definition itself, and should be an intent and knowledge requirement.

Implementing these recommendations is merely a starting point. The Special Working Group is on the verge of drafting a strong, enforceable definition of aggression, which will encompass the full range of aggressive conduct existent today while leaving room to interpret aggression as it may manifest in the future. Perhaps an international criminal court with jurisdiction over the crime of aggression would have deterred Kim Il Sung and his advisors from ordering the invasion of South Korea. Likewise, Saddam Hussein may not have occupied and annexed Kuwait in 1990 if he thought it would result in life imprisonment in The Hague. Hopefully, the definition of aggression will be interpreted by the ICC to include the crimes committed by the leaders of non-state armed groups and the States who sponsor them, as in the case of al Qaeda and the former Taliban regime.

The success of any definition of aggression must be judged in time. In fact, the Court may not initiate action for aggressive conduct occurring prior to 2009 at the earliest, since the crime will not be retroactive. After that, if the crime of aggression is effectively prosecuted causing leaders to modify their behavior and stop using

121. Press Conference, supra note 20.
aggression as an extension of State policy, then the ICC will have succeeded in this endeavor. It would be tragic, however, if this crime is never prosecuted because there is no determination of aggressive State conduct, or States are clever enough to commit aggressive acts which do not fall within the purview of the definition. In either case, the next sixty years will prove just as challenging as the last.