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The following paper is dedicated to the memory of Professor Keith Aoki. A beloved father, husband, and a mentor to countless students, the deeds of his life will ring for all eternity. Professor Aoki taught me many things; the most important one is to always question what others take as a given. You will be missed dearly my friend.
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Introduction

The concept of the 'crime of aggression,' or similarly waging a 'war of aggression,' has been an amorphous term of general condemnation since the founding of the United Nations in at the end of the Second World War. The condemnation of ‘wars of aggression’ should come as little surprise considering the fact that the United Nations was founded on the principles of commitment to the maintenance of international peace and security, the development of friendly, or better stated non-hostile relations between nation-states, and the promotion of increased living standards, social progress, and human rights. Note, however, that at the founding of the United Nations in 1945 the general conceptions of “social progress” and “human rights” were not developed and functional in the way that they are today.

With the creation of the International Criminal Court, the founding document called the Rome Statute, adopted pursuant to a diplomatic conference in July of 1998, included the crime of aggression as one of the crimes under its jurisdiction. The key shortfall is that the Rome Charter never actually defined the crime of aggression, and therefore the

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2 Id.
3 Id.
4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
9 The concept of “social progress,” supra note 6.
10 The concept of “human rights,” supra notes 7.
11 International Criminal Court, About the Court, available at http://www.icc-cpi.int/Menus/ICC/About+the+Court/ [last retrieved May 4, 2011].
12 See Id.
International Criminal Court has been unable to prosecute any offenses under this crime. With the recent review conference taking place earlier this year, the crime of aggression was defined pursuant to Resolution 6, finalized on 28 June 2010.15

This paper seeks to review the history of crimes of aggression, including how they have shaped the world today. From here the paper discusses the success of the review conference in defining the crime of aggression, and the significance of the definition used. The paper examines how application of the law prohibiting acts of aggression could ideally change the process of interstate dispute resolution, and continues by analyzing how the definition of the crime of aggression may be applied to conflicts within the contemporary international order. This is illustrated by the use of case studies, namely those stemming from the War on Terror. Finally, the paper reviews the current docket of the International Criminal Court in order to determine the likelihood that the Court will use its newfound jurisdiction, and the likelihood that the goals of the International Criminal Court, as a reflection of the goals of the United Nations, will be met.

I. History of the Crime of Aggression and Wars of Aggression

Aggression as a general concept is something that can be understood on at least some level by nearly every lay person the world over, similar to the concepts of hunger,16 thirst,17 and fatigue.18 19 This is because aggression is part of the human experience.20 It is

15 Resolution RC/Res.6, adopted at the 13th plenary meeting on 11 June 2010, available at http://www2.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf [last retrieved May 4, 2011].
16 See generally Hunger index shows one billion without enough food, BBC News, Health, [last retrieved May 4, 2011].
17 MedicineNet, Definition of Hypovolemia.
something that is felt at some time and to some degree by every human being to reach maturity. More than a feeling innate to man, aggression has shaped the world that we live in today.\textsuperscript{21} While the concept of aggression is nothing new, the idea that it can be regulated and controlled by a distant legal body is a relatively new concept, and one that continues to develop.\textsuperscript{22}

a. New Theory Born Out of a History of Combat

Combat has shaped the world, and turned it into what it is today. The oldest form of writing, cave drawings,\textsuperscript{23} often depict violence and aggression, both between and against man and animal.\textsuperscript{24} From cave drawings 32,000 years old up through combat in the 20th and continuing into the 21st century,\textsuperscript{27} war has been, and continues to be, a part of everyday life in some parts of the world at any given time.\textsuperscript{30}

\textsuperscript{22} \textit{Supra} note 15.
\textsuperscript{27} See Willmott 2003. pp. 10–11, discussing the involvement of the world’s then great powers during World War One.
\textsuperscript{28} See also Keegan 1988, p. 8 and Bade & Brown 2003, pp. 167–168, both discussing the massive mobilization of troops by the powers of the day, primarily in Europe.
\textsuperscript{29} "Bush likens 'War on Terror' to WWII", ABC News Online [last retrieved May 4, 2011]
\textsuperscript{30} Keeley: \textit{War before civilization: The myth of the peaceful savage}.
\textsuperscript{31} Diamond, Jared, Guns, Germs and Steel.
\textsuperscript{32} "Review: War Before Civilization". Bneurosci.org. 2006-09-04.
\textsuperscript{34} World War One --- A New Kind of War | Part II, From 14 - 18 \textit{Understanding the Great War}, by Stéphane Audoin-Rouzeau, Annette Becker.
\textsuperscript{36} "The Conflict between Cain and Abel". 2008.
b. **History of Aggression in the Western World**

War is nothing new to the western world. While the west may not be the first to invent the concept of violence, the west has certainly revolutionized it. Consider the most massive wars in history, including World War One, involving over 70 million soldiers, World War Two, the deadliest conflict in all of human history and involving more than 100 million soldiers, and the long-standing Cold War. The first two began as western wars, although the consequences of the fighting were global, and the third involved a western nation, the United States, as one of the two major parties to the conflict.

c. **History of Aggression World-Wide**

An estimated 14,500 wars have occurred between 3500 BC and the present, resulting in the loss of 3.5 billion lives and countless other damages. To put this into

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38 Montagu, Ashley (1976), "The Nature of Human Aggression" (Oxford University Press)
41 See Keeley: War before civilization: The myth of the peaceful savage, discussing the finding in an ancient northern Sudan/southern Egyptian cemetery that approximately half of the people buried had died violently. This occurred as much as 12,000 years ago, long before what is contemporarily known as the ‘west’ existed.
44 Keegan ,1988, p. 8
45 Bade & Brown 2003, pp. 167–168
49 Orwell, George, The Observer, March 10, 1946. George Orwell, the penname of Englishman Eric Blair, was the person to coin the term “Cold War” in his essay “You and the Atomic Bomb,” published October 19, 1945, in the British newspaper Tribune.
51 Id.
perspective, in the last 5,500 years the world has known only 300 years of peace.\textsuperscript{52} An estimated 90-95\% of societies throughout world history have engaged in warfare at some point during their existence;\textsuperscript{53} many of the aforementioned engaged in war regularly.\textsuperscript{54} Even genocide, although we have only put the label on the act relatively recently, is not a new phenomenon. According to Rubinstein, "Pre-literate societies, even those organized in a relatively advanced way, were renowned for their studied cruelty.\textsuperscript{55} In 1826 a group called the Shaka with an army of 50,000 destroyed the Ndwandwe, a rival tribe.\textsuperscript{56} Records of the time indicate that the Ndwandwe numbered at least 40,000, and “were all put to death”.\textsuperscript{57} In other words, exterminated in a genocide.

d. Aggression as Used to Conquer Non-Western Nations

While not typically characterized by the term ‘aggression,’ there are few events or trends in history that have shaped the world we live in today quite the way colonization did. Much of this colonization was at the hands of the Europeans.

The Stanford Encyclopedia of Philosophy\textsuperscript{58} "uses the term 'colonialism' to describe the process of European settlement and political control over the rest of the world, including Americas, Australia, and parts of Africa and Asia."\textsuperscript{59} It discusses the distinction between colonialism and imperialism, stating that "[g]iven the difficulty of consistently distinguishing between the two terms, this entry will use colonialism as a broad concept that refers to the

\textsuperscript{52} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{59} Id.
project of European political domination from the sixteenth to the twentieth centuries that ended with the national liberation movements of the 1960s.60

European colonialism, more accurately described as imperialism,61 began in the fifteenth century with the Age of Discovery,62 led by Spanish and Portuguese exploration of the Americas as well as Africa, the Middle East, India, and East Asia.63 During the sixteenth and seventeenth centuries, England,64 France and Holland established their own overseas empires in competition with one other.65 The end of the eighteenth and early nineteenth centuries brought the first era of decolonization66 when most of the European colonies in the Americas gained their independence. Great Britain,67 France and Holland turned their attention to the Old World, particularly South Africa, India68 and South East Asia,69 70 where coastal enclaves had already been established.71 Nineteenth century industrialization led to the era of New Imperialism,72 a time in which the pace of colonization greatly accelerated. During the twentieth century, the overseas colonies of the losers of World War I were distributed amongst the victors in the form of mandates. However, it was not until the end of

60 Id.
63 Id.
65 Id.
67 Supra note 64.
69 "Indian History – Important events: History of India. An overview". History of India. Indianchild.com. [Last retrieved May 4, 2011].
71 See Id.
World War II that the second phase of decolonization truly began.\textsuperscript{73} In 1999 England returned the last of Europe's colonies in Asia, Macau to China, ending a tradition of imperialism lasting five centuries.\textsuperscript{74, 75}

e. The Effect of Historical Wars of Aggression on the Contemporary World

What we now think of as the ‘developed’ or ‘first world,’ much of which makes up the permanent members of the U.N. Security Council,\textsuperscript{76} is largely responsible for the steering the United Nations and its sub-organizations including the International Criminal Court.\textsuperscript{77} These nations hold such a high status in the contemporary world order largely because of their history of imperialism; a concept that is now condemned as falling within the bounds of the “crime of aggression.”\textsuperscript{78}

The fact is that all nations throughout history have been involved in wars of aggression in one form or another.\textsuperscript{79} As aforementioned, 90-95\% of all nations have been involved in warfare of one kind or another.\textsuperscript{80} The nations that now dominate the United Nations and sit as permanent members of the Security Council have been the worst offenders of all, as well as the most successful in using their own crimes of aggression to subjugate the rest of the world.

\textsuperscript{74} Id.
\textsuperscript{76} See generally http://www.un.org/Docs/sc/ [last retrieved May 4, 2011].
\textsuperscript{77} See generally http://www.icc-cpi.int/Menus/ICC/ [last retrieved May 4, 2011].
\textsuperscript{78} Rome Statute of the International Criminal Court, Part 2, Article 5(1)(d).
\textsuperscript{79} Supra note 53.
\textsuperscript{80} Id.
Not only the most powerful nations in the world today fought their neighbors, as all
nations tend to do, but they have also engaged in wholesale colonialism and subjugation of
much of the world; parts of the world that largely remain poor and underdeveloped to this
day. The poverty and struggles of most of the underdeveloped world have been contributed
to in at least some way, if not mainly, due to what is now termed ‘crimes of aggression’\textsuperscript{81} at
the hands of the first-world. In other words, the nations that steer the United Nations and
International Criminal Court, including the development of the definition of the “crime of
aggression,”\textsuperscript{82} have gained the most from acts which they now include under the definition of
the “crime of aggression.”\textsuperscript{83} It is as if the aforementioned ‘leaders of the free world’ spent
centuries gaining control over the rest of the world, and now that they have seized control
they now say that enough is enough. They should keep what they gained, but no one else
should be able to play the ‘conquer and subjugate thy neighbor’ game.

II. International Criminal Court

In order to understand the significance of the review conference, and particularly to
grasp how the definition of the crime of aggression comes into play, it is important to first
understand the fundamentals of the International Criminal Court.

\textsuperscript{81} Supra note 14.
\textsuperscript{82} Supra note 14.
\textsuperscript{83} See Id.
a. A Background

The roots of the movement that ultimately led to the formation of the International Criminal Court can be traced back to 1948, when following the Nuremberg and Tokyo trials after the Second World War, the United Nations General Assembly first realized the need for an international court to adjudicate the type of atrocities that occurred during the war. The idea for such a court was discussed sporadically by the UN. Shortly thereafter, in the 1950s, the International Commission began work on potential statutes to form such a court. This work was ultimately short lived as the state of global politics during the height of the Cold War made the international cooperation necessary for the institution of such a court a political impossibility.

The idea for an international court made its way back onto the world stage in the late 1980s when the then Minister of Trinidad and Tobago, Arthur Napoleon Raymond Robinson, revived the idea as a possible means of dealing with the thriving international drug trade. Minister Robinson’s idea gained credence when the international community had to rely on ad hoc tribunals to try war crimes committed in Rwanda and the former Yugoslavia, thus highlighting the need for a permanent international court. This idea became a reality in July 1998 when the General Assembly overwhelmingly adopted the Rome Statute.

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85 See Id.
87 Id.
88 See International Criminal Court (ICC), Election of Mr. Arthur N.R. Robinson to the Board of Directors of the Victims Trust Fund (June, 20 2006); see also Reasonable Doubt, supra note 3.
90 Supra note 88.
establishing the International Criminal Court.\textsuperscript{91} The Rome Statute subsequently became binding in April 2002 when it had been ratified by the required 60 countries, and came into legal force on July 1 of the same year.\textsuperscript{92} Unfortunately for Minister Robinson, to this day the ICC lacks jurisdiction over the drug trade.\textsuperscript{93}

\textbf{b. Limits on the Scope of Jurisdiction}

While the scope of the International Criminal Court’s jurisdiction is far reaching, it is by no means universal.\textsuperscript{94} In general, the Court is designed to be used only as a last resort where a state is either unwilling or unable to conduct genuine proceedings under domestic law.\textsuperscript{95} Beyond being a court of last resort, the scope of jurisdiction of the ICC is further limited in a number of ways. These limitations fall into the three categories of temporal jurisdiction, jurisdiction of states, and jurisdiction of crimes.

\textbf{i. Temporal Jurisdiction}

The Court is limited temporally by Article 11 of the Rome Statute, regarding “\textit{Jurisdiction ratione temporis}.”\textsuperscript{96} Article 11 provides that the Court’s jurisdiction is limited to crimes committed after the Rome Statute entered into force for states parties that had

\textsuperscript{93} See U.N. Dept. of Public Info, supra note 1.
\textsuperscript{96} \textit{Id.} at Article 11.
ratified by the time the Statue came into force on July 1, 2002. For states parties that ratified after the Rome Statute was already in force, temporal jurisdiction is limited to crimes that transpired after the state party had ratified the Statute.

ii. Jurisdiction of States

Where the crimes at issue meet the requirements of temporal jurisdiction, they still must meet the jurisdictional requirements of states and category of crimes before they can be tried by the International Criminal Court. In regards to states, while the International Criminal Court maintains a cooperative relationship with the United Nations, it remains an independent institution. The consequence is that not all parties to the United Nations are parties to the Rome Statute and therefore the International Criminal Court. All states parties to the Rome Statute, as the founding document of the International Criminal Court, implicitly accept the jurisdiction of the Court. Consequentially, the Court meets its jurisdictional requirement in regards to states where the situation falls under the purview of Article 12 of the Rome Statute regarding preconditions to the exercise of jurisdiction of states. Article 12 extends the jurisdiction of the Court where crimes transpired on the territory of a state party to the Rome Statute, the person accused of committing the crime

97 Id. at Article 11(1).
99 Rome Statute, supra note 11, Article 11(2).
103 See Rome Statute, supra note 11.
104 See Id. at Article 12.
105 Id. at Article 12(2)(a).
is a national of a state party, or if a state which is not a party accepts the exercise of jurisdiction by the Court.

iii. Jurisdiction of Crimes

Even where the ICC meets the Rome State Article 11 preconditions for time and Article 12 preconditions for exercise of jurisdiction over States parties, the Court’s jurisdiction is limited to four crimes considered to be “the most serious crimes of concern to the international community as a whole.” These four crimes include genocide, crimes against humanity, war crimes, and the crime of aggression. Up through 2010, these already narrow four sets of crimes were further narrowed to three sets as the Court, pursuant to the Rome Charter, never officially defined the crime of aggression. As such, since the formation of the ICC it has been unable to exercise jurisdiction over the crime of aggression.

III. 2010 Review Conference

A Review Conference of the Rome Statute took place in Kampala, Uganda from May 31 through June 11, 2010. The primary purpose was to consider amendments to the

\[\text{References:} \]

106 Id. at Article 12(2)(b).
107 Id. at Article 12(3).
108 Id. at Article 11.
109 Id. at Article 12.
110 Id. at Article 5(1).
111 Id. at Article 5(1)(a); see also Id. at Article 6 (defining “genocide” as any of a number of acts committed with intent to destroy, in whole or in part, a national, ethничal, racial or religious group).
112 Id. at Article 5(1)(b); see also Id. at Article 7 (defining “crimes against humanity” as any of a number of acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack).
113 Id. at Article 5(1)(c); see also Id. at Article 8 (defining “war crimes” as any of a number of acts committed as part of a plan or policy or as part of a large-scale commission of such crimes).
114 Id. at Article 5(1)(d).
116 Id.
treaty that founded the International Criminal Court. A significant goal of the review conference was to define the crime of aggression, a feat the drafters of the statute failed to perform at the founding of the organization and original ratification of the charter. As mentioned briefly above, the Court was established in 2002 by the Rome Statute as a permanent tribunal to prosecute individuals accused of the most serious crimes of international concern. The Rome Statute provided that a review conference be held seven years after the entry into force, which happened in July 2002.

a. Significance of the Definition Used

While the Court accomplished a number of feats at the review conference, this paper focuses primarily on the Court’s defining of the crime of aggression. It is important to note the significance of the precise wording the revisionists chose to use in drafting the definition. Bear in mind that the Court operates in a world-system composed of an interconnection of sovereign states. While the concept of state sovereignty is intensely complex and this paper by no means does justice to the depth of the topic, for much of history an aspect of state sovereignty has been the right of states to hold a monopoly on the legitimate use of force, as well as to create and maintain standing armies. It is also an aspect of state sovereignty established throughout history that when it suits a sovereign nation to do so, they may use their armies against one another. Such used is discussed above. For much of history there have been no rules or regulations on how one sovereign may use force against another sovereign, and since the founding of the International Criminal Court in 2002, the only

117 See Id.
118 Id.
119 Supra note 88.
120 See The Rome Statute, International Criminal Court, Article 123.
regulations on a sovereign’s use of force is in regards to genocide, crimes against humanity, and war crimes. In other words, a sovereign’s use of force has been minimally limited.

b. Definition Ultimately Incorporated as an Amendment to the Rome Statute

The “crime of aggression” was defined pursuant to Resolution 6. Resolution 6 defines the crime of aggression in full as follows:

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

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122 See Id.
123 Resolution RC/Res.6, adopted at the 13th plenary meeting on June 11, 2010. Available at http://www2.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf [last retrieved May 4, 2011].
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.\footnote{Id.}
c. Intended Effects of the Resolution 6 Definition on the Crime of Aggression

Only those who actually drafted Resolution 6 in Uganda truly know their own objectives. However, it would be congruent with previous statements and the stated objectives of the Court that the purpose of drawing such a broad definition was the consummation of an attempt to discontinue the use of force between states as a *legitimate* means of conflict resolution.

As was discussed previously, nearly all nations have used force against one another at some point in time.\(^\text{125}\) For most nations still in existence today, one need not look far back at all in search of the last time they engaged in violent hostilities in what would now qualify as “crimes of aggression.”\(^\text{127}\) However, the definition pursuant to Resolution 6 is drawn so broadly as to essentially prohibit entirely the use of force by one sovereign against another. Note that because of the ‘jurisdiction of states’\(^\text{128}\) as mentioned in section II(b)(ii) above, Resolution 6 applies only to those states that signed and ratified the Rome Statute. However, this includes a majority of states in existence today.\(^\text{129}\) Out of the 193 recognized countries\(^\text{130}\) in existence today, currently 139 have signed and 111 have ratified the Rome Statute.\(^\text{131}\)

\(^{125}\) *Supra* note 53, stating that 90-95% of all societies throughout history have engaged in warfare at some point during their existence.

\(^{126}\) *Supra* note 54, stating that many societies engaged in wars on a regular, if not constant basis.

\(^{127}\) *Supra* note 121.

\(^{128}\) *Supra* note 99.

\(^{129}\) See https://www.iccnow.org/?mod=romesignatures [last retrieved May 5, 2011].


\(^{134}\) Ratification and Signature Agreement on the Privileges and Immunities of the Court (APIC), by region. Available at http://www.iccnow.org/?mod=download&doc=4151 [last retrieved May 5, 2011].
d. **To What Activity the Crime of Aggression Now Applies**

The “crime of aggression” as defined above applies to “the planning, preparation, initiation or execution”\(^{135}\) of what essentially constitutes all forms of interstate hostilities effected through the use of force.\(^{136}\) This includes invasion or attack,\(^{137}\) bombardment,\(^{138}\) blockade,\(^{139}\) attack by land, sea, or air,\(^{140}\) the use of armed forces of one State which are within the territory of another State in a variety of circumstances,\(^{141}\) the act of a State allowing its territory to be used by another State in any way that constitutes the perpetration of an act of aggression against a third State,\(^{142}\) and the use of irregulars or mercenaries to do what a state cannot itself do through its own armed forces.\(^{143}\) In short, everything that 90-95% of societies through history have done on a regular basis.\(^{144}\) As aforementioned, what the Court has defined as crimes of aggression have been committed through all but 300 of the past 5,500 years.\(^{145}\)

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135 *Supra* note 122.  
136 See generally *Id.*  
144 *Supra* note 53.  
145 *Supra* note 50.
i. Application to State Actors

It is important to note that as discussed in section II(b)(ii) above, only states can sign and ratify the Rome Statute. The effect of only state actors being able to sign and ratify the Rome Statute is that the Resolution 6 definition of the crime of aggression applies only to states, and more particularly to the 111 states that have signed and ratified the Rome Statute. This is a majority of the approximately 193 countries currently in existence.

ii. Application to Non-State Actors

As the Rome Statute may only be signed and ratified by states, it would seem that only those 111 states that have signed and ratified the Rome Statute would be bound by the Resolution 6 definition of the crime of aggression. Note however that the drafters of Resolution 6 also included in its definition of the crime of aggression section (2)(g), which prohibits the use 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.” In other words, the drafters of Resolution 6 drafted their definition so broadly as to apply not only to states, but also to non-state actors acting in connection with state parties.

IV. International Courts: The New Form of International Dispute Resolution?

As mentioned briefly above, it is the opinion of the author that the overarching intention of not only the existence of the International Criminal Court and the Rome Statute

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146 See generally supra note 131.  
147 See Id.  
148 Id.  
149 Supra note 130.  
150 See generally Supra note 131.  
151 Supra note 122.  
152 Supra note 141.
generally, but particularly pursuant to the sweeping definition of Resolution 6, is the cessation of the legitimate use of force between states as a form of international dispute resolution. Note that *intrastate* dispute resolution is not restricted in nearly the same manner as *interstate* dispute resolution. When a state has problems within its own borders, even if it has signed and ratified the Rome Statute, the only acts that the state is prevented from taking are genocide, crimes against humanity, and war crimes.\(^\text{153}\) In other words, it can put down uprisings through the use of force so long as it does not engage in wholesale genocide. Such is not a particularly stifling restriction, particularly when considered within the context of the general norms and mores of the contemporary international order.

a. Extra-Judicial Remedies for Sovereign States

With what essentially entails a delegitimization of all uses of force to resolve conflicts, the question thus becomes: what recourse may states take in order to resolve their differences? When we consider that nearly all societies to have existed have resorted to armed conflict to resolve their problems,\(^\text{154}\) it is unlikely that even in this day and age, which does not appear to be any less hostile than any other day and age apart possibly from the crusades and the two World Wars, states will cease to fall into disagreement with one another.

The main recourse for states, at least those that have signed and ratified the Rome Charter, is the International Court of Justice, conveniently located in close proximity to the International Criminal Court in the city of the Hague in the Netherlands. While this paper does not delve into the jurisdictional issues of the International Court of Justice, which would...
be a paper in of itself, suffice it to say that states have standing to bring actions against other states. To the credit of both the International Criminal Court and the International Court of Justice, such has been done a great number of times in previous years, indicating a general trend away from the use of force as a means of interstate resolution and towards judicial remedies.

b. How State Sovereignty is Impacted Now

For as long as there have been states, and particularly since the origination of the concept of state sovereignty, a fundamental aspect of state sovereignty has been the right of states to hold a monopoly on the use of force within its own territory. What has come along with monopoly of power is the right to exercise this force against other states. It would be inaccurate to say that state sovereignty has necessarily been eroded by Resolution 6, as the only states that Resolution 6 directly affects are those that chose to sign and ratify the Rome Statute in the first place. At the same time, considering the world’s history of conflict, it would also be inaccurate to say that state sovereignty has not been eroded, in some way, by the sweeping definition of Resolution 6.

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155 “Sovereignty (politics)”. Britannica Online Encyclopedia.
157 See Id.
158 Supra note 153.
159 Id.
c. How State Sovereignty Might be Impacted in the Future

International human rights instruments can be classified into two general categories, those being declarations\textsuperscript{160} and conventions.\textsuperscript{161} Conventions may also be referred to as covenants.\textsuperscript{162} Declarations, such as those adopted by bodies such as the United Nations General Assembly, are generally not legally binding, but may be politically persuasive. Conventions are legally binding instruments concluded under international law and signed by states. Both international treaties and declarations can, over time, obtain the status of customary international law.\textsuperscript{163} Under customary international law, both treaties and declarations can gradually become applicable to all states worldwide, regardless of whether or not they have signed and ratified the document themselves.

Herein lies the real problem for state sovereignty in the future. Where 111 states have already signed and ratified the Rome Statute,\textsuperscript{164} the Rome Statute is already applicable to a majority of the states in the contemporary international order. It is not altogether unlikely that at some point in the foreseeable future the Rome Statute will become a document of customary international law.

Should the Rome Statute become a document of customary international law, it would be applicable to all states, regardless of whether or not they signed and ratified the Rome Statute. In order words, it is possible that the entirety of the Rome Statute, and particularly the sweeping prohibitions on historical state actions pursuant to their exercise of sovereignty,

\textsuperscript{161} For example, see Convention for the Protection of Human Rights and Fundamental Freedoms, available at http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG [last retrieved May 7, 2011].
\textsuperscript{162} Id.
\textsuperscript{164} Supra note 132.
could become universally applicable to all states regardless of ratification status. In short, no state in the world could ever use force against another state except in instances where they are acting on their own soil and in a purely defensive manner, as such action falls outside of the scope of Resolution 6’s definition of crimes of aggression. The consequences of failure to abide by such restrictions is that the commander of the armed forces, which in the United States is the President, can be subpoenaed and tried before the International Criminal Court as a war criminal.

d. Intrusion into Areas of States’ Rights

The sweeping scope of the Resolution 6 definition of crimes of aggression is an intrusion into the traditional areas of states’ rights. While the Court’s new definition of crimes of aggression does not preclude a member state of the Court, that being a state that has both signed and ratified the statute, from defending itself within its own territorial boundaries, it does preclude defensive measures in other ways.

A pertinent example is the use of the preemptive strike. Under the principles of customary international law described above, preemptive strikes, while considered to be a “crime of aggression” pursuant to Resolution 6, are considered to be a defensive maneuver under customary international law. As such, not only would the Rome Statute becoming a document of customary international law impede significantly a number of long-established rights of state sovereignty. It also could, and most likely would, create a conflict of laws. Wherein this conflict lies between two pieces of customary international law, there is no equivalent to the United States constitutional concept of the supremacy doctrine. The end

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165 Supra note 15.
166 Supra note 163.
167 Supra note 15.
effect is that there is no clear law regarding whether a state action is legitimate or not, as customary international law could say both that an action, and here the paper takes the example of preemptive strikes, is both simultaneously lawful and unlawful. As international law is already one of most amorphous and complex areas of law, the last thing it needs is more complications and self-contradictions. It is the opinion of the author that it has more than enough of these already.

V. Application of the Crime of Aggression to Recent and Contemporary Conflict: The War on Terror

In order to demonstrate just how broad the Resolution 6 definition is, this paper applies its definition of crimes of aggression to contemporary international conflict. The purpose is to demonstrate that current conflicts, even those that do not necessarily strike many as ‘criminal,’ are made into criminal acts pursuant to the Resolution 6 definition of crimes of aggression.

Beginning in 2001, the War on Terror is a war with which the entire world is at least somewhat familiar, if not directly involved. One must note from the outset that while the United States certainly plays a tremendous role in the War on Terror, it is far from the only actor. The question posed by this paper is: is the War on Terror a violation of the International Criminal Court’s prohibition against crimes of aggression? By applying the law to the facts as law students are trained to do, the following section answers the aforementioned question. In so doing, it predicts whether the Court could theoretically exercise its jurisdiction and subpoena President Barak Obama for criminal prosecution. It is important to note from the outset that the United States has not signed and ratified the Rome

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Statute. However, said question remains worthwhile for purposes of academic inquiry, as well as for purposes of practical inquiry should the Rome Statute ever fall into the category of customary international law.

a. **Facts: Conflict and Actions Taken by the United States and its Allies**

Although anyone reading this paper is almost certainly aware to some extent of the existence of the War on Terror, this section provides a bit of background on the conflict and also clears up a few often misunderstood points.

The War on Terror is not, as many believe, a war being waged solely by the United States.\(^{169}\) Rather, it is an international military campaign led primarily by the United States and the United Kingdom.\(^{170}\) The United States and United Kingdom have for the most part been acting with the support of other North Atlantic Treaty Organization members\(^{171}\) as well as a number of non-NATO countries.\(^{172}\) Some of this support has been purely political, and some has been in the form of the contribution of tangible assets including soldiers and supplies.\(^{173}\) What is now a ‘global War on Terror’\(^{174}\) originated as a campaign against the now notorious terrorist organization known as al-Qaeda,\(^{175}\) led by the recently deceased Osama Bin Laden\(^{176}\) in response to the attacks occurring on American soil on September 11, 2001.\(^{177}\)

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\(^{170}\) Id.

\(^{171}\) Id.

\(^{172}\) Id.

\(^{173}\) Id.

\(^{174}\) Id.

\(^{175}\) Id.

\(^{176}\) Id.

\(^{177}\) Id.
For purposes of brevity, a skill that both this author and academics in general lack, this paper discusses the facts of the War on Terror in extremely general terms. The War on Terror is a multi-faceted war with very little in the way of clear boundaries and military fronts, although some do exist. Under the general banner of ‘War on Terror’ exists a number of military operations led by the United States, United Kingdom, and other NATO and non-NATO countries.

i. **Operation Active Endeavour**

Operation Active Endeavour is a largely NATO, minimally United States/United Kingdom operation commencing in October 2001 in response to the September 11 attacks. Its operational parameters are limited in geographic scope to the Mediterranean Sea. The stated purpose of Operation Active Endeavour is to prevent the movement of militants and weapons of mass destruction, and to enhance the security of shipping in general.

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178 "Operation Active Endeavour," NATO. November 10, 2010 [last retrieved May 6, 2011].
179 Id.
180 Id.
181 "Biological Weapons Program – Japan". Fas.org [last retrieved May 6, 2011].
183 "Weapons of Mass Destruction: State Department Oversight of Science Centers Program"(PDF). [Last retrieved May 6, 2011].
185 Supra note 153, "Operation Active Endeavour," NATO.
ii. Operation Enduring Freedom: The Afghanistan Front

The most well-known, or at least well-publicized front in Operation Enduring Freedom is the Afghanistan Front. The offensive into Afghanistan commenced in the weeks following the September 11, 2001 attacks. Then-President of the United States George W. Bush contacted the de facto government of Afghanistan, the notorious Taliban, and demanded that it turn over Osama bin Laden to the United States.

Following the Taliban’s shocking rejection of American demands, in October of the same year, American forces along with British and coalition allies attacked Afghanistan in an attempt to remove the Taliban and its influence from the region; a feat that to this day has not been fully accomplished.

Attacks commenced with American and British forces conducting a massive series of airstrikes. The Taliban, a third-world regime lacking in funding, medical supplies, training, and weapons made after the 1980s proved to be little match against the weight of the full military force of the two most militarized nations in the world. Kabul, the capital of Afghanistan, fell in a matter of weeks. The Taliban survivors of American and British bombardment left the cities of Afghanistan and took refuge in the mountainous areas of eastern Afghanistan. Subsequently, the United States and British, now joined by NATO allies, brought the fight to that region.

Unfortunately for the Americans, Osama bin-Laden escaped into Pakistan where he was able to avoid capture and make a general mockery of the United States for the following:

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186 Supra note 169.
188 See Id.
189 Id.
190 Supra note 169.
decade. Fortunately for the United States, a team of Navy SEALs eventually found Osama Bin Laden’s compound, killing Bin Laden and seizing five computers, ten hard drives, and more than 100 thumb drives, DVDs, and other digital media. One American official put the seizure aptly when he asked rhetorically, "Can you imagine what's on Osama bin Laden's hard drive?"

While many Americans and the country’s supporters celebrate, apparently Pakistan is less than thrilled about the raid. While the raid did in fact take place on Pakistan’s soil, it seems rather ironic that a country whose entire corrupt government relies on what can be considered little more than the charity of the American government, would criticize American forces eliminating the world’s most renown terrorist, who was living on their soil. Such a reaction raises questions about the loyalties of the Islamic Republic of Pakistan, if any such questions may exist.

iii. Operation Enduring Freedom: The Philippines Front

At the beginning of 2002, the United States Special Operations Command, Pacific deployed to the Philippines with a two-part mission involving the advising of the

194 Id.
195 Id.
196 Id.
197 Id.
198 Id.
Philippine army in combating Filipino Islamist groups.\textsuperscript{201} The first part of the operation centered on removing the Abu Sayyaf Group and Jemaah Islamiyah from their stronghold on a small island called Basilan.\textsuperscript{202} The second portion of the operation was more of a humanitarian mission appropriately entitled Operation Smiles. The goal of Operation Smiles was to provide medical care and services to the region of Basilan as part of a "Hearts and Minds" program.\textsuperscript{203 204} Fortunately for the Americans, the hearts and minds operation in the Philippines was far more successful than the similarly named operations in Iraq and Afghanistan. Apparently civilians are more willing to open their hearts and minds when they are not still suffering from “shock and awe.”\textsuperscript{205 206 207 208 209 210 211 212}

iv. Operation Iraqi Freedom

After the astounding success in Afghanistan, the United States invaded Iraq in March of 2003. The offensive began with aerial bombardment, followed by a full-scale multinational ground invasion.


\textsuperscript{202} "Joint Special Operations Task Force – Philippines (JSOTF-P)". GlobalSecurity.org.


\textsuperscript{205} See generally Harlan K. Ullman and James P. Wade, Shock And Awe: Achieving Rapid Dominance (National Defense University, 1996), XXIV.

\textsuperscript{206} See generally David J. Gibson, Shock and Awe: A Sufficient Condition for Victory? (Newport: United States Naval War College, 2001), 17.


\textsuperscript{208} See generally "Iraq and the Future of Warfare: Implications for Army and Defense Policy", presentation by the United States Army War College to United States House Committee on Armed Services, October 21, 2003.

\textsuperscript{209} See generally Bijal Trivedi, "Inside Shock and Awe." February 14, 2005, National Geographic Channel.


\textsuperscript{211} See generally "Iraq war takes heavy toll on civilians". Reuters/MSNBC.com. July 19, 2005.

\textsuperscript{212} For the sake of pure humor, see Agnes Cusack, "US companies battle over 'shock and awe' copyright". May 16, 2003. The World Today.
Similar to the events in Afghanistan two years prior, the capital city of Iraq, Baghdad, fell. The Iraqi government under the leadership of Saddam Hussein lasted for approximately the same duration of Taliban leadership in Afghanistan discussed above after American and coalition forces moved in. At the beginning of 2003, then President George W. Bush declared that the mission in Iraq had been accomplished and that combat operations in Iraq had ended. To this day, it remains a mystery to academics and modern historians worldwide how a cessation of combat operations in 2003 meshes with continued operations in 2011.

Fortunately for the Americans, Saddam Hussein proved far easier to capture than Osama bin Laden. After catching Saddam in 2003 and a completely fair and impartial trial involving no kinds of prejudice whatsoever, Saddam Hussein, a head of state, was executed in 2006. To quash any doubts that Saddam really is dead, the website youtube, owned by the American comply Google, maintains on its cite a video recording of the execution.

b. Applying the law to the facts: Application of the crime of aggression to the facts of the conflict

Applying the law to the facts, this paper uses Resolution 6 as what is heretofore and hereinafter referred to simply as ‘the law.’ Bearing in mind that the nexus of the definition provided by Resolution 6 is contained in Annex 1, part 2 (a)-(g), these are the sections applied below.

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214 Saddam Hussein Execution, YouTube. Available at http://www.youtube.com/watch?v=4JUL-I6ov10 [last retrieved May 6, 2011].
Where subsection (a) includes as a crime of aggression “[t]he invasion or attack by the armed forces of a State of the territory of another State,” it appears that America, Britain, and their NATO and non-NATO allies have violated the International Criminal Court’s prohibition on crimes of aggression pursuant to Resolution 6, Annex 1, part 2(a) when they invaded and attacked Afghanistan, the Philippines and Iraq.\textsuperscript{215} While the actions taking place in the Philippines is a debatable issue as it seems that permission was granted by the Philippine government, there is little debate where Afghanistan and Iraq were both sovereign nations, and neither gave their permission, either express or implied, than America and its allies were invited.

Annex 1, part 2(b) includes as falling under the crime of aggression the “[b]ombardment 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.”\textsuperscript{216} Wherein America, Britain, and their NATO and non-NATO allies have engaged in the bombardment of a number of aforementioned cities, including the heavily populated capital cities of Afghanistan and Iraq, it appears that they have violated part 2(b) as well.\textsuperscript{217}

Annex 1, part 2(c) of the law includes as falling under the crime of aggression “[t]he blockade of the ports or coasts of a State by the armed forces of another State.”\textsuperscript{218} While this was not discussed to any great extent above, mainly because it pales in comparison to aerial bombardment, extensive blockades have been set up around both Afghanistan and Iraq. As

\begin{footnotes}
\item[216] Id.
\item[217] See Id.
\item[218] Supra note 191.
\end{footnotes}
such, it appears that America, Britain, and their NATO and non-NATO allies have also violated Resolution 6 part 2(c). 219

Annex 1, part 2(d) includes as falling under the crime of aggression “[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State.” 220 Wherein America, Britain, and their NATO and non-NATO allies have engaged in the attack by armed force against a State, it appears that America, Britain, and their NATO and non-NATO allies have also violated Resolution 6 part 2(c).

Annex 1, part 2(e) includes as falling under the crime of aggression “[t]he 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.” 221 Although America’s allies do not seem to have violated this provision, America did in fact violate it when it raided Osama bin Laden’s compound in Pakistan, 222 as it did so without the express permission of the Pakistani government.

Annex 1, part 2(f) of the law includes as falling under the crime of aggression “[t]he 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.” 223 While the United States, Britain, and their NATO and non-NATO allies are for the most part free from violation of this provision, Pakistan has certainly violated it wherein it has

219 Id.
220 Id.
221 Id.
222 Supra note 175 and 176.
223 Supra note 191.
permitted America, Britain, and their NATO and non-NATO allies to use their territory for the staging of acts of aggression pursuant to Annex 1, part 2 (a), (b), (c), (d), and (g). 224

Annex 1, part 2(g) of the law includes as falling under the crime of aggression “[t]he 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.” While this fact is relatively unknown, America, Britain, and their NATO and non-NATO allies have used ‘hired guns’ throughout the Afghanistan and Iraqi campaigns, primarily to fill the gaps in the ranks left by a combination of slowed military recruitment and implemented explosive devices. 225

Having applied the law to the facts, it appears that the actions taken by the United States, Britain, and their NATO and non-NATO allies during the War on Terror have violated every single provision of the Resolution 6 definition of “crimes of aggression.” 226

While the United States is not a signatory to the Rome Statute, as has been mentioned a number of times, a number of its NATO and non-NATO allies, including the United Kingdom. 227 The question that remains is whether the International Criminal Court would actually exercise its new-found jurisdiction pursuant to Article 6. 228

VI. Predictions for the future

While the very nature of the human experience and the concept of free choice renders human behavior unpredictable, he best predictor of future behavior is part behavior.

224 Id.
225 Id.
226 Id.
228 Supra note 191.
a. Where has the International Criminal Court exercised its jurisdiction in the past?

As discussed above, the actions of the United States, Britain, and its NATO and non-NATO allies in the War on Terror clearly violate Resolution 6 and therefore the Rome Statute. A logical question to ask is whether the International Criminal Court would ever exercise its jurisdiction to subpoena the most powerful man [or in the future possibly woman] in the world: the President of the United States of America. To answer this question, this paper reviews the Court’s current docket to see where, in a world full of violations of the Rome Statute, the Court chooses to exercise its jurisdiction.

Restricted in the ways described above, the Court nonetheless has a number of cases currently on its docket. Its current caseload involves the prosecution of the leaders of some widely publicized criminal offenses falling under the Court’s Article 5 jurisdiction of crimes.229 These include crimes occurring during situations in Uganda, the Democratic Republic of the Congo, Sudan, and the Central African Republic.230

i. Uganda

The ongoing ICC case in Uganda231 is focused on the prosecution of what were once the top five members of the Lord’s Resistance Army232 in the case The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen.233 This case was reduced to the top four members as a result of the death of one of the original defendants, Raska

229 Id. at Article 5.
232 Situations and Cases, supra note 32.
233 Id.
Lukwiya, whom the Pre-trial chamber decided to remove from the case. The currently
named defendants include Joseph Kony, alleged Commander-in-Chief, Vincent Otti, alleged Vice-Chairman and Second-in-Command, Okot Odhiambo, Alleged Deputy Army Commander, and Dominic Ongwen, alleged Brigade Commander of the Sinia Brigade, all of the Lord’s Resistance Army.

ii. The Democratic Republic of the Congo

The ongoing case regarding the Democratic Republic of the Congo was originally referred to the prosecutor of the ICC, Luis Moreno Ocampo, by the President of the Democratic Republic of Congo in regards to crimes committed within the territory of the state. Charges were filed following an investigation by the Office of the Prosecutor, particularly in regards to the jurisdiction and admissibility requirements of the Rome

234 Pre-Trial Chamber II, Warrant of Arrest for Raska Lukwiya (July 8, 2005), ICC-02/04-01/05-55, available at http://www2.icc-cpi.int/iccdocs/doc/doc97193.PDF.
235 Pre-Trial Chamber II, Decision to Terminate the Proceedings Against Raska Lukwiya (July 11, 2007), ICC-02/04-01/05-248, available at http://www2.icc-cpi.int/iccdocs/doc/doc297945.PDF.
239 Pre-Trial Chamber II, Warrant of Arrest for Okot Odhiambo (July 8, 2005), ICC-02/04-01/05-56, available at http://www.icc-cpi.int/iccdocs/doc/doc97197.PDF.
Statute.\textsuperscript{245} The prosecution was ultimately broken up into three separate cases including The Prosecutor v. Thomas Lubanga Dyilo, The Prosecutor v. Bosco Ntaganda, and The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui.\textsuperscript{246}

The Prosecutor v. Thomas Lubanga Dyilo is currently in trial as of January 26, 2009.\textsuperscript{247} Lubanga Dyilo is the alleged founder of \textit{Union des Patriotes Congolais} (UPC) and \textit{the Forces patriotiques pour la libération du Congo} (FPLC) and alleged former Commander-in-Chief of the FPLC.\textsuperscript{248} Specifically, Mr. Lubanga Dyilo is allegedly responsible for war crimes including the enlistment and conscription of children under the age of 15 years.\textsuperscript{249}

The case of The Prosecutor v. Bosco Ntaganda is at the pre-trial stage\textsuperscript{250} as Ntaganda remains at large.\textsuperscript{251} Ntaganda is the alleged Deputy Chief of the General Staff of the \textit{Forces Patriotiques pour la Libération du Congo} (FPLC) and alleged Chief of Staff of \textit{the Congrès national pour la défense du people} (CNDP) armed group, active in North Kivu in the DRC.\textsuperscript{252} Similarly to Mr. Lubanga Dyilo, Mr. Ntaganda is accused of conscripting and using in combat children under the age of 15.\textsuperscript{253}

\begin{itemize}
\item \textsuperscript{246} \textit{Situations and Cases}, supra note 32.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} Pre-Trial Chamber I, \textit{Warrant of Arrest for Thomas Lubanga Dyilo} (February 10, 2006), ICC-01/04-01/06, available at http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF.
\item \textsuperscript{251} \textit{Situations and Cases}, supra note 32.
\item \textsuperscript{253} Pre-Trial Chamber I, \textit{Warrant of Arrest for Bosco Ntaganda} (August 22, 2006), ICC-01/04-02/06, available at http://www.icc-cpi.int/iccdocs/doc/doc305330.PDF.
\end{itemize}
The case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui began trial on November 24, 2009. Germain Katanga is an alleged commander of the Force de résistance patriotique en Ituri (FRPI), and Mathieu Ngudjolo Chui is the alleged former leader of the Front des nationalistes et intégrationnistes (FNI). The defendants are alleged to have jointly committed a number of both war crimes and crimes against humanity.

iii. Darfur, Sudan

The ongoing cases regarding Darfur, Sudan were referred to Prosecutor Ocampo by the UN Security Council pursuant to Security Council resolution 1593 (2005). Charges were then filed following an investigation by the Office of the Prosecutor considering issues of jurisdiction, admissibility, and interests of justice. The prosecution was broken up into the three separate cases of The Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), The Prosecutor v. Omar Hassan Ahmad Al Bashir, and The Prosecutor v. Bahr Idriss Abu Garda.

The Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”) remain in the pre-trial stage as both defendants remain at large. Ahmad Harun is the former Minister of State for the Interior of the Government

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255 Id.
256 Id.
259 Situations and Cases, supra note 32.
260 Id.
of Sudan, as well as Minister of State for Humanitarian Affairs of Sudan, and Ali Kushayb is the alleged leader of the Janjaweed Militia. The defendants are alleged to have acted together, as part of a counter-insurgency campaign, in carrying out a number of attacks on civilian populations devoid of any rebel activities and not taking part in the hostilities.

*The Prosecutor v. Omar Hassan Ahmad Al Bashir* remains in the pre-trial stage as Bashir is still at large. Al Bashir is currently the President of the Republic of Sudan and is accused of seven criminal counts on the basis of his individual criminal responsibility including five counts of crimes against humanity and two counts of war crimes.

*In the case of The Prosecutor v. Bahr Idriss Abu Garda, the defendant voluntarily appeared for a confirmation hearing from October 19-29, 2009, and is not currently in custody.* Abu Garda is the Chairman and General Coordinator of Military Operations of the United Resistance Front, and is criminally responsible as a co-perpetrator or as an indirect co-perpetrator for three war crimes under including murder, directing attacks against a peacekeeping mission, and pillaging.

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265 Id.
iv. The Central African Republic

The final case in the ICC’s current docket regards the situation in the Central African Republic. The case was referred to the Court by the sitting government of the Central African Republic. After reviewing information provided by the government in its referral, NGOs, international organizations, and other highly knowledgeable sources, the Office of the Prosecutor ultimately filed charges in the case of The Prosecutor v. Jean-Pierre Bemba Gombo.

The case The Prosecutor v. Jean-Pierre Bemba Gombo underwent a confirmation of charges hearing from January 12-15, 2009, with the decision on the confirmation of charges announced on January 15. Bemba Gombo is the alleged President and Commander-in-chief of the Mouvement de libération du Congo (Movement for the Liberation of Congo), and is being charged with two counts of crimes against humanity and three counts of war crimes.

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271 Pre-Trial Chamber III, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, available at http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf.

v. Conclusions to be drawn from the International Criminal Court’s Current Docket

The Court’s current docket indicates that while it focuses on some of the worst atrocities to take place in recent years, some of which are currently ongoing, its attention is drawn to the African continent. Note that all four cases on the Court’s docket come from the African continent, without a single exception. This is not to downplay the seriousness of the offenses committed in Uganda, the Congo, Sudan, and the Central African Republic. Rather, it is to highlight the fact that to the Court’s credit it has remained, at least up to this point, a court of last resort. In other words, it does not prosecute anything close to all the crimes falling under its jurisdiction. Rather, it prosecutes only those crimes occurring in countries where legal systems are not just imperfect, but rather nonexistent.

Remember that the purpose of the Court is not to take all cases that technically fall within its jurisdiction, but rather to take the most serious cases where a country is unable or unwilling to try a case. Judging from the Court’s actions in choosing its docket, it also exercised a great deal of discretion by choosing to prosecute only those cases involving the worst kinds of human tragedies, and particularly where such tragedies are likely to continue unabated should the Court fail to step in to intervene.

Conclusion

At this point it should be apparent that the International Criminal Court’s Resolution 6 definition of the crime of aggression is extraordinarily broad. It applies to a tremendous array of state actions in an attempt to delegitimize acts that states have historically undertaken since the origination of the existence of the state. The author would not go so far as to say that the ending of crimes of aggression as defined by the Court would be an
altogether bad thing. However, it is a historical fact that war makes the world go around, and has for quite some time.

Violence, like hunger and thirst, is part of the human experience. One of the major points of departure, if not the most significant point of departure between the global north and global south, is that the global north has historically been far more successful in using its superior force to subjugate weaker societies, i.e. the global south. While much of this exists in history, the effects of history are still with us today. To put it bluntly, the reason the global north scores so much higher on human development index than the global south is closely related to the global north’s historical tendency to commit ‘crimes of aggression’ against the global south.

The states that make up the global north largely steer the direction of the United Nations and its affiliates, including the International Criminal Court. The fact that the Court now chooses to implicitly declare pursuant to its Resolution 6 definition of crimes of aggression that the acts historically undertaken so successfully by the global north against the global south are now no longer legitimate is a hyperbolic anachronism. The fact that the aforementioned definition was made at a review conference in Uganda of all places is just downright ironic.