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THE DEFINITION OF THE CRIME OF AGGRESSION: LESSONS NOT-LEARNED

Oscar Solera *

Since the establishment of the League of Nations, the international community has sought to provide a legal definition of aggression in international law. These efforts partly succeed with the adoption of General Assembly Resolution 3314 and with the adoption of the crime of aggression within the Statute of the International Criminal Court. This article shows that despite the wealth of experience and legal discussions, efforts undertaken by States Parties to the ICC to provide a suitable definition of the crime of aggression have failed to take into account the lessons of history. It shows that current discussions, in most cases, are a repetition of past negotiations that led to Resolution 3314. The article further points to some of the weaknesses contained in the proposal on the definition of the crime of aggression that will be discussed in the ICC 2010 Review Conference and provides an alternative definition that addresses those weaknesses.

Certainly an American judge will then say, “Why did not you fellows define aggression when drawing up the agreement? It is not a clearly defined term of art—we find no body of law that clearly defines it.” The treaties that I have cited use different language and sometimes with quite different meaning, and I am sure that an American judge would say that, if you charge a man with making aggressive war, it is his privilege to show that the war he made was not aggressive, and it is his privilege to show, in defense or in mitigation, provocation, threats, economic strangulation, and that sort of thing.¹

—Justice Robert Jackson, 1945

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¹ U.S. DEP’T OF STATE, PUB. NO. 3080, REPORT OF ROBERT H. JACKSON UNITED REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 305 (1949), available at http://www.loc.gov/r/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf.

I. INTRODUCTION

The process of defining aggression in international law has been long and eventful. From the early negotiations in the context of the League of Nations, to the negotiations on the crimes to be pursued by the International Military Tribunal Sitting at Nuremberg, to the General Assembly definition of aggression, to the definition of the crime of aggression in the International Criminal Court (ICC) context, almost a century has gone by.

Two landmark events have indelibly marked this long process: (1) the inclusion in the Nuremberg Tribunal's jurisdiction of crimes against peace, the antecedent of what is known today as the crime of aggression; and (2) the adoption by the General Assembly of Resolution 3314 on the definition of aggression. The process of adopting these two toughly negotiated sets of norms has taught us, or at least should have taught us, a series of lessons that could be extremely useful in the context of the current negotiations on the definition of the crime of aggression that will hopefully be added to the ICC statute at the review conference to be held in 2010.

This article concentrates on the analysis of the substantive elements of the definition of the crime of aggression and will show that history has taught us very little. It argues that, for whatever reason, the Special Working Group on the Crime of Aggression (SWGCA) has chosen a definition that may create more substantive legal problems concerning the definition of the crime of aggression than it will solve. This article further proposes an alternative approach that, once submitted, may solve some of the shortcomings of the current definition proposed by the Chairman of the SWGCA.

II. THE SWGCA DEFINITION OF THE CRIME OF AGGRESSION: BACK TO THE FUTURE

In his February 2009 revision of the *Discussion Paper on the Crime of Aggression*, the Chairman of the SWGCA proposed the following definition:

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:

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- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.²

Interestingly, this definition of the crime of aggression is similar to the one proposed by Australia, Canada, Italy, Japan, the U.S., and the U.K.

² International Criminal Court, Assembly of States Parties, *Discussion Paper on the Crime of Aggression Proposed by the Chairman*, at 2–3, ICC-ASP/7/SWGCA/INF.1 (Feb. 19, 2009) [hereinafter 2009 Proposal]. It should be noted that, as regards the definition of the crime of aggression, the February 2009 revision of the Chairman’s paper does not introduce any change to the May 2008 Proposal. Compare *id.*, with International Criminal Court, *Discussion Paper on the Crime of Aggression Proposed by the Chairman*, at 2–3, ICC-ASP/6/SWGCA/2 (May 14, 2008). It should be recalled that during the June 2008 SWGCA meetings on the question of the definition of aggression, delegations raised a number of issues concerning the Chairman’s revised paper. For example, there were questions concerning the threshold element of the definition, i.e., “the character, gravity and scale” of the act constituting a manifest violation of the U.N. Charter. International Criminal Court, Special Working Group on the Crime of Aggression of the Assembly of States Parties, *Report of the Special Working Group on the Crime of Aggression*, Annex II, ¶ 23, ICC-ASP/6/20/Add.1 (2008) [hereinafter 2008 Annex II]. Concerning the reference to General Assembly Resolution 3314, some delegations indicated their preference not to see any direct reference to it. See *id.* ¶¶ 27–33. Similarly, the list of acts of aggression included in the Chairman’s proposal still created some concerns among a number of delegations. See International Criminal Court, Special Working Group on the Crime of Aggression of the Assembly of States Parties, *Report of the Special Working Group on the Crime of Aggression*, Annex III, ICC-ASP/7/20 (2008) [hereinafter 2008 Annex III].

in the 1969 General Assembly deliberations on the draft resolution on the definition of aggression.³ This definition was initially criticized in the General Assembly because the chapeau of the definition did not provide any real objective legal element against which to test alleged acts of aggression. For example, what is a “manifest violation” of the U.N. Charter? What magnitude is required? What are the necessary elements for the use of force to be “aggressive”? What is the legal threshold for qualifying a use of force as large-scale? It is precisely because no clear answers were given to these questions that States felt it was necessary at the time to add an open-ended list of aggressive acts that would set the standard to determine whether other types of use of force not included in the list would also amount to aggression.

After some years of back and forth between different committees in charge of drafting the 1974 definition of aggression, it soon became clear to States that they did not need to provide clearly established legal standards. The definition of aggression was for the exclusive use of the Security Council and was conceived to provide guidance to the Council when it had to deal with situations amounting to a breach of international peace and security or acts of aggression.⁴ In order to preserve the Council’s room to maneuver, Article 2 of Resolution 3314 provided that “the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.”⁵ In other words, despite whatever the definition said, the Council could decide not to make a determination according to its own interpretation of the facts. Furthermore, according to Article 4 of the resolution, the Security Council could also make a determination of aggression for acts that were not included in the definition.

It is clear today, as it was in 1974, that the actual value of the consensus reached to adopt Resolution 3314 should not be overestimated. At the time, the 1974 definition was indeed the closest we could get to an internationally agreed definition of aggression.⁶ The American representative

³ See General Assembly Official Records, U.N. Doc. A/AC.134/L.17, in U.N. Gen. Assembly, Special Comm. on the Question of Aggression, Sixth Comm., *Report of the Special Committee on the Question of Defining Aggression*, at 8, U.N. Doc. A/7620 (1969).

⁴ See G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/9631 (Dec. 14, 1974).

⁵ *Id.* art. 2.

⁶ For example, the Yugoslav representative stated that:

The text was not perfect in all its parts and contained formulations which his delegation would have preferred to see expressed differently. Nevertheless, it reflected the present stage of development of international relations. Its main significance lay in the fact that it was possible, for the first time, for a United Nations body to

clearly indicated that “he saw no objection to the draft text going forward to the General Assembly, even though it was by no means perfect.”⁷ He added that “even a legally perfect definition might do more harm than good if given too much emphasis. The text that had been produced was a recommendation of the General Assembly for use of the Security Council.”⁸ In other words, so long as the Security Council kept its prerogatives, a definition of aggression represented a simple bargained political statement that allowed for many different interpretations. As Canadian delegate Wang recognized, “the achievement of a consensus was due above all to a sense of realism in the Committee as to what could be demanded of a definition and the purposes that it might serve.”⁹ This basic premise was largely understood and shared by most delegations.

It is therefore striking that while the view of States in 1974 was that the General Assembly definition of aggression lacked sufficient legal value—as is demonstrated by the fact that the Security Council has never made reference to it in any of the situations in which it has made a determination of aggression—subsequent efforts to define aggression for criminal law purposes continued to focus on this definition. The International Law Commission (ILC) first, and then the Working Group on the Crime of Aggression (WGCA) and its successor, the SWGCA, have based their analyses on how to incorporate either Resolution 3314 as a whole, or at least parts of it, into a definition of the crime of aggression. The ILC desisted from such an approach before submitting the draft code of crimes against peace and security of mankind.¹⁰ The WGCA and the SWGCA have continued with this approach, despite the different alternatives proposed in the Ad-hoc Committee and in the Preparatory Commission (PrepCom) of the 1998 Rome Conference.

What is the problem with using Resolution 3314 as a point of departure for the definition of the crime of aggression? There are, in fact, a number of them. First, as has been already indicated, Resolution 3314 was adopted with the purpose of providing an international executive organ, the Security Council, with guidance in determining possible acts of aggres-

produce a text that might be acceptable to all Member States. That is why it had to be regarded as a success in spite of possible shortcomings.

U.N. Gen. Assembly, Special Comm. on the Question of Defining Aggression, Sixth Comm., *Report of the Special Committee on the Question of Defining Aggression*, at 25, U.N. Doc. A/9619 (1974).

⁷ *Id.* at 22.

⁸ *Id.*

⁹ *Id.* at 34.

¹⁰ See Draft Code of Crimes Against the Peace and Security of Mankind, [1996] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/48/10 (1996).

sion.¹¹ The resolution's purpose, and therefore its nature, is clearly political, not legal. Second, it is essential to recall that the definition of the crime of aggression falls within the sphere of international criminal law. Therefore, the definition's requirements are far more stringent than any other norm because it needs to respect a series of criminal law principles, not least of all the principle of *nullum crimen, nulla poena, sine previa lege penale*.¹² The principle of legality requires that the penal rule clearly describe the conduct that is considered unlawful. Thus, open-ended criminal norms may be considered as lacking the sufficient precision to be lawfully invoked for imposing a penalty. This issue was already highlighted in the discussions of the PrepCom in 1996.¹³ During the PrepCom negotiations, delegates could not agree on the value of the General Assembly definition of aggression, expressing concern that the resolution was inadequate for the strict requirements of criminal law since it lacked preciseness and clarity and did not consider procedural matters characteristic of criminal proceedings.¹⁴

The latest proposal by the Chairman of the SWGCA has improved the previous versions and has successfully dealt with some of the legal difficulties of defining aggression.¹⁵ However, the Chairman's proposed definition still presents a number of problems that, in all likelihood, will not be corrected before the 2010 Review Conference. These shortcomings relate, inter alia, to the structure of the core (or chapeau) of the definition, to the lack of clarity of the threshold test applicable to the use of force, and to the Chairman's reference to Resolution 3314.¹⁶

First, it should be noted that the Chairman's proposal does not define aggression, but instead suggests a definition of acts of aggression. These acts of aggression are described as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."¹⁷ Clearly, this drafting refers to the provision of Article 2.4 of the U.N. Charter. The problem is that neither Article 2.4 nor Article 39 of the Charter clarify what uses of force are actually acts of aggression, as distinct from breaches of peace. Indeed, the purpose of Article 2.4 is to prohi-

¹¹ G.A. Res. 3314, *supra* note 4, pmb1.

¹² "No crime, no punishment, without a previous penal law."

¹³ *See Report of the Preparatory Committee on the Establishment of an International Criminal Court: Vol. I, Proceedings of the Preparatory Committee During March–April and August 1996*, U.N. GAOR, 51st Sess., Supp. No. 22, ¶ 72, U.N. Doc. A/51/22 (1996).

¹⁴ *Id.* ¶ 68.

¹⁵ *See* 2009 Proposal, *supra* note 2.

¹⁶ It should be noted here that the definition proposed by the Chairman follows the structure of the mixed type definition proposed in the 1960s in the General Assembly. It consists of a general definition, followed by a non-exhaustive list of acts of aggression.

¹⁷ G.A. Res. 3314, *supra* note 4, art. 1.

bit all uses of force with the exception of self-defense and enforcement action carried out under the authority of U.N. Charter chapter 7.¹⁸ However, Article 2.4 should be read in conjunction with Article 39, which distinguishes between threats to the peace, breaches of the peace, and acts of aggression. It is up to the Security Council to decide on a case-by-case basis when it makes a determination of any of these three illegal uses of force.¹⁹

In view of this lack of clarity, one may be tempted to argue that all uses of force contrary to Article 2.4 are acts of aggression. Indeed, in the twenty-four years of the General Assembly discussion on the definition of aggression, as well as in the almost two decades of ILC work on the Draft Code of Crimes Against the Peace and Security of Mankind, this idea has been discussed at length. It was nevertheless agreed that such an approach found very little support in state practice and *opinio juris*. If aggression was to be considered as the supreme crime, then it had to be distinguished from use of force of a lesser magnitude.

It is in the context of establishing a distinction between different forms of force that the idea sprung forth of setting a threshold test for determining what magnitude of armed force would be aggressive. For example, when the PrepCom met in 1998 for its final session before the opening of the Rome Conference, Germany submitted a definition proposal²⁰ that included a reference to threshold element. It proposed to define aggression as:

[A]n armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in [manifest] contravention of the Charter of the United Nations [with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.]²¹

¹⁸ See U.N. Charter art. 2, para. 4.

¹⁹ *Id.* art. 39.

²⁰ The German proposal was meant to be “food for thought.” *Proposal by Germany on Article 20: The Crime of Aggression—An Informal Discussion Paper*, U.N. Doc. A/AC.249/1997/WG.1/DP.20 (Dec. 11, 1997), reprinted in Preparatory Commission for the International Criminal Court [PCNICC], Working Group on Definitions of Crime, *Compilation of Proposals on the Crime of Aggression Submitted at the Preparatory Committee on the Establishment of an International Criminal Court (1996–1998), the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court (1999)*, at 5, U.N. Doc. PCNICC/1999/INF/2 (Aug. 2, 1999). Germany justified its approach in the necessity to build consensus around a generally accepted definition of aggression that would, nevertheless, “leave unimpaired the primary responsibility of the Security Council for the maintenance of international peace and security.” *Id.* at 6.

²¹ U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an*

This proposal did not find much support in the PrepCom and was not included in the final draft. The proposal, however, prompts two remarks. First, it tries to distinguish aggressive acts by qualifying them as manifest violations of the U.N. Charter. Second, for the first time in more than fifty years, a definition proposal included a timid reference to intent or purpose.

The Chairperson's proposal follows a pattern similar to the one contained in the German proposal when it suggests setting the threshold for the crime of aggression as acts "which, by [their] character, gravity and scale, constitute a manifest violation of the Charter of the United Nations."²² As with the German proposal, the weakness of this definition is that nowhere in the definition—or in the Rome Statute for that matter—is it possible to find a definition of "manifest violation of the Charter." It is unclear, for example, what constitutes a difference between a violation of the Charter and a "manifested" violation. The criteria of "gravity" and "scale" are, in my view, insufficient and inadequate. First, gravity and scale per se do not provide a threshold test for the use of force. Two persons may perceive the gravity of an act in very different ways. The Security Council, for example, has been inconsistent in its analysis of the gravity and the scale of aggressive acts. For instance, the Security Council labeled as an act of aggression the "provocative and aggressive acts, including military incursions, against the People's Republic of Mozambique by the illegal minority regime of Southern Rhodesia"²³ in 1976, two years after the adoption of the General Assembly definition of aggression. The Security Council, however, used this terminology in its different resolutions related to the Iraqi invasion of Kuwait in 1990.²⁴ Taking into account current discussions on the role the Security Council should play in triggering the jurisdiction of the ICC over crimes of aggression, this lack of consistency is worrying and should constitute a warning against incorporating such criteria into the definition of the crime of aggression.

Furthermore, according to the Chairman's proposal it is necessary that the alleged act be grave *and* large-scale in order to be considered aggressive.²⁵ There are, however, acts of great gravity that imply a low level of use of force. For example, if a commando of five men manages to enter a foreign country and kill its head of state with one single bullet, this would amount to a grave act, but certainly it would not amount to a large-scale attack. Similarly, a large-scale artillery attack against an empty military

International Criminal Court at 14, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998) (alterations in original).

²² 2009 Proposal, *supra* note 2, at 2.

²³ S.C. Res. 386, ¶ 2, U.N. Doc. S/RES/386 (Mar. 17, 1976).

²⁴ *See, e.g.*, S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).

²⁵ 2009 Proposal, *supra* note 2, at 2.

compound in the middle of the desert would certainly fulfill the scale criterion, but one may wonder whether it would be sufficiently “grave.” In these two examples the proposed definition would result in both acts not fulfilling the criteria required for the crime of aggression.

Finally, as I mentioned above, the referral in the Chairman’s proposal to Resolution 3314 may in fact be counterproductive and may be problematic vis-à-vis the principle of legality. Indeed, the principle of *nulla poena sine previa lege penale*²⁶ has as corollary that all criminal conduct must be clearly described in a criminal rule that precedes the commission of the alleged crime. A number of delegations in the SWGCA have raised this issue and have remarked with concern that a simple *renvoi* to Resolution 3314 would clearly violate the principle of legality.²⁷ The Chairman attempted to fill this gap by closing what appears to be an open-ended list of aggressive acts in Resolution 3314.²⁸ This solution would seemingly solve the problem—despite the fact that mixed type definitions tend to create more problems than solve them—except for the fact that the *chapeau* in the paragraph listing the aggressive acts still indicates that the acts listed shall, “in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression.”²⁹ Now, in accordance with Article 4 of Resolution 3314 “[t]he acts enumerated [in Article 3] are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.”³⁰ What would happen if the Security Council suddenly decided to add a new act of aggression to the list? The way the resolution is drafted it could be interpreted that the Council has the authority to alter it in the exercise of its Chapter 7 powers. Since the Chairman’s definition refers to the list in Resolution 3314, what would be the effect of such a determination of the Security Council on the ICC statute definition of aggression? Those defending the Chairman’s proposal would probably say that such a determination would have no impact on the Statute’s definition because the proposal explicitly refers only to a specific list of acts contained in Resolution 3314 and not to the entire resolution. Yet, if that were the case, what is the legal value of

²⁶ See *supra* note 12.

²⁷ See International Criminal Court, Assembly of States Parties, Nov. 30–Dec. 14, 2007, *Report of the Special Working Group on the Crime of Aggression*, ¶ 15, ICC-ASP/6/SWGCA/1 (Dec. 13, 2007).

²⁸ *Id.* ¶¶ 18–23.

²⁹ 2009 Proposal, *supra* note 2, at 2. There is little doubt that the Chairman’s proposal is an attempt to find a middle ground between those who reject mentioning Resolution 3314 because of the risks to the principle of legality and those who, on the contrary, think that the General Assembly resolution is the only existing definition of aggression and should, therefore, be the only test for aggressive criminal behavior.

³⁰ G.A. Res. 3314, *supra* note 4, art. 4.

referring to Resolution 3314, particularly when it indicates that the listed acts must be “in accordance with” the resolution?³¹ Strictly speaking, in accordance with Resolution 3314 the list of acts can be unilaterally modified by the Security Council, which would clearly violate the principle of legality, as well as the established procedure for amending the Statute.

Practically all these questions have been raised time and again by delegations in the context of the SWGCA discussions. For instance, in the June 2008 SWGCA meetings some delegations suggested deleting the threshold clause. They indicated, inter alia, that “*the threshold clause was too ambiguous in its wording and might be subject to broad interpretation.*”³² Concerning the question of the explicit reference to Resolution 3314 “[s]ome delegations stated that the purpose of General Assembly resolution 3314 (XXIX) was to provide guidance to the Security Council in its determination of acts of aggression and some therefore preferred not to refer to it specifically.”³³ It was further pointed out that including Articles 2 and 4 of Resolution 3314 into the definition would “*allow the Security Council to create new types of acts of aggression for the purpose of the Statute, thereby infringing on the prerogatives of States Parties.*”³⁴ Most of these problems remain unsolved, notwithstanding the positive spin given to the status of the discussions in the SWGCA’s report on its November 2008 meetings.³⁵

Subsequent efforts to clarify these questions through the elaboration of elements of the crime of aggression have not shed new light on the legal problems mentioned above.³⁶ In fact, the only new aspect that the elements

³¹ 2009 Proposal, *supra* note 2, at 2.

³² See 2008 Annex II, *supra* note 2, ¶ 26 (emphasis added).

³³ *Id.* ¶ 32 (emphasis added).

³⁴ *Id.* (emphasis added). It should be added that given the fact that Security Council can decide to adopt new acts of aggression, as provided for in Resolution 3314, this would violate the principle of *nullum crimen sine previa lege penale*. For example, delegations that supported the inclusion of the list of acts defined in Resolution 3314:

[E]xpressed their understanding that the list of crimes was, at least to a certain extent, open. Acts other than those listed could thus be considered acts of aggression, provided that they were of a similar nature and gravity to those listed and would satisfy the general criteria contained in the chapeau of paragraph 2.

Id. ¶ 34.

³⁵ The report indicates that:

In light of the considerable progress made on the definition of the “crime” and of the “act” of aggression, and given that the views of delegations on these issues are comprehensively reflected in paragraphs 17 to 36 of the Groups report of June 2008, the Chairman suggested to focus on new issues and ideas.

2008 Annex III, *supra* note 2, ¶ 27.

³⁶ See Chairman on the Elements of Crimes, *Informal Inter-Sessional Meeting on the Crime of Aggression*, ICC-ASP/8/INF.2 (May 28, 2009). See also International Criminal Court, Assembly of State Parties, *Informal Inter-Session Meeting on the Crime of Aggres-*

of the crime add is the initial analysis of the mental element, i.e., the perpetrator's knowledge that his acts constitute a violation of the U.N. Charter. Unfortunately, the Chairman's proposed analysis of the mental element of the crime of aggression falls short of the *mens rea* analysis that the crime of aggression would require.

These criticisms are certainly not new. As I have indicated elsewhere, if we analyze the discussions that took place within the ILC in the context of the Draft Code on Crimes Against the Peace and Security of Mankind, we would see that its members were confronted with the same questions.³⁷ After almost a century discussing the definition of aggression, the international community has shown very limited willingness to shift the debate to a different context. There are, certainly, many reasons for that, mainly geopolitical, historical, and economic. Nevertheless, we are confronted with an entirely new opportunity to hopefully change the course of international relations. As I stated above, we should start learning from history. We know that the approach followed over the last thirty years has not been very productive. The following section proposes an alternative approach to defining the crime of aggression. This approach is not itself novel—it was briefly suggested in a rather confusing manner in the context of the PrepCom³⁸—but it has not been fully explored. My proposed approach advantageously addresses many of the concerns expressed by different delegations regarding the elements of the definition of aggression, the role of judges, and, above all, concerns that certain uses of force are wrongly labeled as aggression.

III. SEEING THE DEFINITION OF AGGRESSION THROUGH THE LENS OF INTENT

I have indicated that, in my view, the 1974 General Assembly definition of aggression has failed to be fully implemented because, among other things, it did not adequately take into account political interests of the main players in the system. Any practical and plausible approach to defining aggression needs to take into account not merely the linguistic and theoretical aspects of this definition, but also the political interests and legal requirements of today's world of international relations. In terms of *opinio juris*, the ICC Statute process—before, during, and after Rome—sheds some light on States' legal understanding of aggression. Yet, as the post-Rome definitional process has shown, none of these precedents yield

sion, Hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School at the Princeton Club, ICC-ASP/8/INF.2 (July 10, 2009).

³⁷ See generally OSCAR SOLERA, *DEFINING THE CRIME OF AGGRESSION* (2007).

³⁸ *Id.* at 332.

sufficient precision in order to be seen as the cornerstone of the law on aggression.

The first question that needs to be addressed is: what is it that is being defined? I have stated elsewhere that efforts should be directed at determining what *aggression* is, not “wars of aggression,” “acts of aggression,” or similar notions. The reason is that all these concepts—wars, acts, etc.—always refer to or qualify the concept of aggression.

What are the common elements of aggression? How should they be put into a single definitional formula? In a discussion paper submitted to the Working Group on the Crime of Aggression on November 13, 2000,³⁹ the German delegation tried to draw some characteristics common to aggressive acts. It provided the following list:

- The use of force is usually of a particular magnitude and dimension and of a frightening gravity and intensity.
- The use of aggressive force regularly leads to the most serious consequences, such as extensive loss of life, extensive destruction, subjugation and exploitation of a population for a prolonged period of time.
- Such attacks regularly pursue objectives unacceptable to the international community as a whole, such as annexation, mass destruction, annihilation, deportation or forcible transfer of the population, or plundering of the attacked State, including its natural resources.⁴⁰

These characteristics are indeed essential to any discussion on aggression. Yet an adequate structure and an appropriate legal delimitation of the crime are also necessary. Finding this balanced formula is imperative, but, as a German delegate put it, the formulation of such a definition “*is the almost magical formula of a generally acceptable definition of the crime of aggression which we have so far been unable to find.*”⁴¹

Magical formula or not, a legal approach to defining the crime of aggression should concentrate on dissecting the notion of aggression into its constitutive elements and should then try to understand, if possible, whether there is a way to articulate and delimit these elements so that a definition covers all those acts that States consider “aggressive.” Such elements that need to be considered when defining the crime of aggression are the object of aggression, the objective conduct, and the subjective mindset.

³⁹ Preparatory Comm’n for the Int’l Court, Nov. 27–Dec. 8, 2000, *Proposal Submitted by Germany*, U.N. Doc. PCNICC/2000/WGCA/DP.4 (Nov. 13, 2000) [hereinafter *German Proposal*].

⁴⁰ *See id.* ¶ 10 (emphasis omitted) (footnote omitted).

⁴¹ Hans-Peter Kaul, *The Crime of Aggression: Definitional Options for the Way Forward*, in *THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION* 99 (Mauro Politi & Giuseppe Nesi eds., 2004) (emphasis added).

What is the material element of aggression in modern international law? There is little doubt that the central element of aggression refers to the use of armed force. It should be noted that I refer here to *armed* force and not to other uses of force—whatever type of coercion, whether economic, political, or otherwise. This approach is in line with the current general understanding of aggression as the gravest type of force, meaning the employment of armed force and not (as was proposed in the 1950s and 1960s) other forms of aggression such as “economic aggression.”

As I have stated elsewhere, in my view, not all violations of Charter Article 2.4 constitute aggression.⁴² The problem is, however, determining which forcible acts amount to aggression and which do not. I submit that in theory all uses of force could constitute aggression. The determinant factor to distinguish between aggressive acts and other uses of force is not the material element but, as I will explain later, the subjective element. In that respect, there is no way to distinguish armed aggression from uses of force falling short of aggression based solely on the material element. Even an analysis of the intensity of force used and the consequences of the act are inadequate to establish the existence of aggression.

The second element of the definition deals with the values against which an aggression is directed. In this respect, three notions are often mentioned as core components of this element: territorial integrity, political independence, and sovereignty. Are all these possibilities adequate to be included as those values to be protected against aggression? Would it not be better to find a notion that comprises all these aspects in order to avoid the diverging interpretations that have been raised concerning the interrelationship of these three elements? As may be recalled from the drafting history of the U.N. Charter, the notions of territorial integrity and political independence derive essentially from developing States’ insistence during the drafting of the U.N. Charter that these terms be included in the provision of Charter Article 2.4. The idea was to indicate clearly the drafters’ intention to outlaw all uses of armed force by a State directed against another State. Subsequently, different interpretations of this formulation have been offered indicating exactly the opposite, namely, that Article 2.4 forbids only those uses of force that violate the territorial integrity or political independence of another State. According to this view, the use of force that does not aim at annexing or affecting the political stability of another State is permitted. This view has not found large support in the international community or in legal scholarship. U.N. General Assembly Resolution 2625 (XXV) reaffirms that the provision of Charter Article 2.4 should be understood as com-

⁴² Indeed, there are many forms of the use of force that, while violating the general prohibition of use of force in Article 2.4, do not amount to an act of aggression. This fact is acknowledged in the SWGCA proposed definition of aggression through the introduction of the required threshold. See 2009 Proposal, *supra* note 2, at 2.

prising all uses of force against another State.⁴³ Judge Bruno Simma recalls that the intention of the U.N. Charter drafters was to avoid the possibility of States offering a more restrictive view of the ban on the use of force.⁴⁴

Without entering into the debate on the correct interpretation of Charter Article 2.4, it seems clear that the initial objective of the drafters of the Charter has been somewhat obscured by the use of the notions of territorial integrity and political independence. It would have sufficed to leave that provision as initially drafted—the use of force against a State—because the idea of statehood implies these elements: territory, independence, and sovereignty.

In a similar sense, it seems unnecessary in a definition of aggression to state explicitly that aggression is the use of armed force against the territorial integrity, political independence, or sovereignty of a State. Instead, simply indicating that aggression is “the use of force against another State” furnishes all the necessary elements in terms of the value to be protected against aggression. Whether it is the territory, the political independence, the sovereignty, the armed forces, the population, the air space, etc., of a State, trying to enumerate all the characteristics of a State only leads to further confusion. In that respect, reference to territorial independence, sovereignty, or political independence is unnecessary insofar as the object of aggression is designated to be “another State.”⁴⁵ None of these elements of statehood exist independently because they are inevitably linked to the concept of “State.”

The choice of limiting the scope of aggression to actions carried out against a State has other implications. By definition, if reference were made to the State it would imply that other entities, which have not attained statehood, would fall outside the purview of aggression.

Some may argue that restricting the definition to the notion of “State” would ignore the problem of self-determination. For example, what

⁴³ Resolution 2625 (XXV) states:

Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues.

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

⁴⁴ Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1, 2–3 (1999).

⁴⁵ A similar discussion took place during the 1951 ILC debates on the definition of aggression. On that occasion, some members wished to follow the pattern of Charter Article 2, paragraph four, while others insisted that it was unnecessary because the word “State” covers all the other aspects. See *Summary Records of the Third Session*, [1951] 1 Y.B. Int'l L. Comm'n 107, ¶ 73, U.N. Doc. A/CN.4/SER.A/1951.

would happen if a State carries out an attack against its own population to quell a separatist movement in violation of the right to self-determination? This is a case of civil strife to which a rule on the crime of aggression would not apply. A similar situation would be that in which a State requests the help of another State to stop a secession movement within its own territory. Again, this issue would fall within a different category of international law, rather than that on aggression. Yet, if the guest State violates the terms of the invitation against the will of the host State, this may turn into a case of aggression.

Would other attacks, such as those carried out against civil aircraft, foreigners living abroad, the blockade of ports, etc., qualify as possible acts of aggression? There is nothing in the proposed definition so far that would *a priori* exclude them. Indeed, by using the concept of State the definition could be applied to a wide range of situations in which a State is victim of a use of armed force. This aspect may appear unattractive to those powers which are interested in giving aggression the most limited scope possible. Yet, this risk—a risk that cannot be ignored—is countered by the subjective element test which differentiates aggression from other uses of force by referring to specific elements listed in relevant Charter articles.

Concerning the mental element of the definition, it is interesting to recall that the German delegation proposed to include a similar element in its definition to the PrepCom. The 1998 German proposal to the Committee spoke of the object or result of aggression. There may be some confusion between the two terms because they do not belong to the same category: objective means intent; result implies material consequences. The German informal discussion paper from November 2000 further discusses the objectives of aggression. In particular, this paper argues that “such attacks regularly pursue *objectives unacceptable to the international community as a whole.*”⁴⁶ The May 2009 non-paper by the Chairman on elements of crimes includes a rudimentary notion of the subjective element by requiring that the actor knew that the act constituted a manifest violation of the U.N. Charter.⁴⁷

The analysis of the subjective element of the act of aggression should focus on the active party’s *intention* and not just on the simple *knowledge* of the illegality of the act. In other words, the subjective analysis

⁴⁶ *German Proposal, supra* note 39, ¶ 10 (emphasis in original). In footnote four the German paper states further: “It is understood that these objectives need not to be openly acknowledged by the attacking State, but can be inferred from the relevant facts and circumstances.” *Id.* n.4.

⁴⁷ See *Informal Inter-Sessional Meeting on the Crime of Aggression 8–10 June 2009: Non-Paper by the Chairman on the Elements of Crimes*, at 14 (May 28, 2009), reprinted in Donald M. Ferencz, *Bringing the Crime of Aggression Within the Jurisdiction of the ICC*, 42 CASE W. RES. J. INT’L L. 531 (2009).

should ask whether the alleged aggressor was aware of the unlawfulness of the act *and* was also aware and willing to achieve a specific objective, irrespective of the consequences. Common law systems usually refer to the notion of *mens rea*.⁴⁸ The ICC Statute includes in Article 30 the basic understanding of the mental element. The process of proving intent and knowledge is directed at establishing that the given conduct is carried out willfully and with consciousness of the possible results. This provision refers to the kind of intent which a judge can easily infer or presume from the act itself. There is no need for the prosecution to establish why the crime occurred. It must be shown, however, that the alleged aggressor had an awareness of a criminal act being committed.

Yet the crime of aggression requires a further test. The analysis of the alleged conduct cannot stop at the establishment of general intent. Aggression requires a further test, one that goes beyond the objective situation and tries to answer the “why?” and the “what for?” questions. The first question relates to the motives of the act, whereas the second refers to the act’s object and purpose. These questions are important because they aim at discarding any possibility of error, duress, or necessity. This could be the case, for example, in situations known as friendly fire. In this type of situation there is an armed attack against the armed forces of another State, yet there is no true qualified intent to carry out such an attack.

Moreover, it is particularly evident that the analysis of the subjective element of aggression cannot stop at the basic question of: “Did you know what you were doing?” Despite international law’s prohibition on the use of force, and apart from the idea of error, there is still the possibility in the international legal system to lawfully engage in a war or armed conflict. This lawful use of armed force exists in several situations, such as when a State exercises the right to self-defense or obtains Security Council authorization to use force. For example, imagine that country A, participating in a military alliance, shoots down a military plane from country B, also an alliance member. Is this an act of aggression? An analysis based on general intent—intent and knowledge—is insufficient to attribute culpability. A further test of intent is required in order to ascertain a case of aggression.

⁴⁸ The notion of *mens rea* can be found in ancient Roman law, but has been essentially developed in common law systems. See Paul Robinson, *Mens Rea* 3 (Univ. Penn. Law Sch. Scholarship at Penn Law, Paper No. 35, 1999), available at <http://lsr.nellco.org/upenn/wps/papers/35/>.

The phrase “mens rea” appears in the Leges Henrici description of perjury—*reum non facit nisi mens rea*—which was taken from a sermon by St. Augustine concerning that crime. The sermon is also thought to be the source of the similar maxim in Coke’s *Third Institutes*, the first major study of English Criminal law: “*actus non facit reum nisi mens sit rea*” (the act is not guilty unless the mind is guilty).

Id.

This qualified threshold for the subjective element of the crime of aggression is known in common law systems as specific intent. In the case of aggression, specific intent would require establishing the particular purpose of armed force in a particular situation. This possibility was already considered in the drafting process of the ICC Statute. Indeed, in 1996 the PrepCom indicated that while a general provision on *mens rea* was necessary, “there was no need . . . to distinguish between general and specific intention, because any specific intent should be included as one of the elements of the definition of the crime.”⁴⁹ That specific intent was considered, for instance, in the definition of the crime of genocide in Article 6 of the Statute.

Some ideas have been developed concerning the purposes that would qualify a use of armed force as aggression. Nicholas Nyiri, for instance, holds that aggression can only be committed when the main purpose of the armed use of force is “domination” over other States.⁵⁰ Grant Dawson, on the other hand, follows a different pattern when discussing the question of the subjective element. Instead of proposing a wide range plan aimed at domination, Dawson recognizes that the aim of aggressive war is “destabilization, rather than preservation of regional or international order”⁵¹ based on an interpretation of the Nuremberg decision. He goes on to explain that “such destabilization is often manifested in the form of territorial expansion.”⁵² Dawson does not, however, develop this aspect any further, thus leaving it unclear as to what “destabilization” of the legal system may mean.

What is the purpose that every potential international aggressor seeks to achieve through the use of armed force? It could be argued that, in general, an aggressor is seeking to obtain a strategic advantage over its opponent, be it a military, political, or economic. However, this idea only partly covers the possibilities for justifying aggressive action. In a situation of symmetry, where State A and State B have similar firepower, there could be an incentive for one of them to strike first in order to obtain a comparative advantage. Yet aggression does not necessarily take place only in symmetrical situations, nor does it necessarily imply that a stronger State may be tempted to impose its views by force on weaker States. In fact, in asymmetrical situations it is also possible that the weaker party may try, for exam-

⁴⁹ General Assembly Preparatory Comm. on the Establishment of an Int’l Criminal Court, *Summary of the Proceedings of the Preparatory Committee During the Period 25 March–12 April 1996*, ¶ 96, U.N. Doc. A/AC.249/1 (May 7, 1996).

⁵⁰ See NICOLAS NYIRI, *THE UNITED NATIONS’ SEARCH FOR A DEFINITION OF AGGRESSION* 51 (1989).

⁵¹ Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression?*, 19 N.Y.L. SCH. J. INT’L & COMP. L. 413, 428 (2000).

⁵² *Id.* (footnote omitted).

ple, to reduce the military power gap by preemptively using armed force. In this hypothetical situation the attacking State is not seeking an advantage over its victim, but instead it is trying to alter the status quo through the use of armed force.

Indeed, many attackers in potentially aggressive situations aim at changing or modifying a given situation in order to make it more favorable to them. Aggression is used as a means to challenge a situation that the attacking State finds inconvenient or unsatisfactory. Instead of choosing legal means, the aggressor prefers to use military power in order to change that undesirable situation. Whether it is a powerful or a weak State, the attacker sees the choice of arms over other legal means as the best policy option to transform the situation. This modification of the status quo may be aimed at exercising hegemonic power, or at dominating another State. It may also be directed at altering the prevailing power distribution, whether military, political, or economic, by increasing an advantage or by reducing the gap between the attacker and the victim through the use of armed force.

Furthermore, if specific intent to question the status quo is necessary in order for an act to constitute aggression, then such a definition would exclude military action of lesser gravity because the action would not, by itself, be sufficient to challenge the status quo. In that respect, border skirmishes and other forms of small-scale military action would fall outside the scope of aggression insofar as their purpose would generally not be to challenge the prevailing political or military situation. These acts may well be directed at provoking or threatening another State and could be unlawful in terms of Article 2.4 of the Charter. But, as I have already explained, not all illegal uses of force constitute aggression.

On the other hand, it is necessary to consider the link that must exist between the act and the specific intent. It could be argued, for example, that border skirmishes or low-level exchange of fire could be indirectly linked to the specific intent insofar as they are part of a general plan of aggression. In other words, the question is whether lesser forms of use of force, with no direct purpose of challenging the status quo (their purpose could be to escalate a situation into a full-fledged conflict), but that prove to be part of a wider plan to pursue a change of status, would be considered acts of aggression.

The answer to this question is closely related to the analysis of the subjective element of an aggressive act. I have indicated that the objective framework of the definition of aggression does not take into consideration the gravity of the use of armed force. What matters is that armed force has been used against another State. The decisive test will be the analysis of the *mens rea*. In a situation where the object and the material element have been established, the identification of the purpose of the attacker to challenge the status quo will determine the existence of aggression. Whether the means chosen by the aggressor were inadequate or insufficient is irrelevant for the

determination of the existence of aggression. The presence of the three elements of the definition—(1) the use of force; (2) against another State; and (3) with the purpose of challenging the status quo—should determine the existence of aggression.⁵³

Thus, the specific intent of the crime of aggression could be described as the intentional use of military force with the purpose of altering the political, military, or economic status quo in another State. For example, attacks on the military structure directed at limiting a State's ability to react may constitute an aggression. In addition, the use of military force to overthrow the government in another State would fall in this category. Carrying out large-scale armed attacks to weaken the economic infrastructure of another State—factories, fields, etc., but also, in certain cases, bridges and other types of infrastructure—could be considered as aggression as well. Clearly, what matters is the *intention* to undermine the power of a State in order to induce changes in the prevailing objective situation.

As I have proposed elsewhere,⁵⁴ taking into account the structure and composition explained above, an alternative formulation of the definition of aggression could look as follows:

Aggression is the use of armed force by a State against another State with the purpose of imposing [forcing] a change in [of changing] the prevailing political, military or economic objective situation [status quo] in that other State.

This formulation conveys the idea that aggression is, first, an act—the use of armed force—carried out by a State, with the knowledge, the will, and the purpose of changing the status quo in another State by attacking its military, governmental, or economic structures. Is it necessary to take into account other elements in the definition, such as the gravity or the intensity of the attack, or its consequences on the ground? I suggest that by including the subjective element such variables are unnecessary. Indeed, reference to gravity or intensity or material consequences would only lead to further confusion and uncertainty, as it would be extremely difficult to establish an objective threshold in terms of the amount of firepower or material damages necessary to establish aggression. Finding a proper formula to quantify

⁵³ It could be argued that in the situation being examined the distinction between “aggression” and “acts of aggression” should receive further attention. I would argue that even in this case such a distinction is irrelevant. What needs to be determined is the existence of aggression. Evidently, aggression takes place through acts, which are deemed aggressive. Thus, aggressive acts are not a different category, but simply the way through which the crime of aggression is carried out. Whether the number and the gravity of the “aggressive acts” amount to a “war of aggression” is important for the establishment of the sanction to be imposed, but not for the determination of commission of aggression.

⁵⁴ SOLERA, *supra* note 37, at 427.

these issues would make the definition more rigid and would restrict judges' power of discretion. Moreover, in certain circumstances it would be possible to imagine a low-level military strike causing very little material damage on the ground, but greatly affecting the correct functioning of the military or the government of another State. In this hypothetical situation, the quantitative and qualitative variables would do little to help an international criminal judge justify aggression.

Is the definition I propose infallible? Will it always be possible to determine with certainty the true intentions of a State? If establishing the State's *mens rea* is not possible, is it reasonable to stick to the idea of including the mental element in the definition of aggression and leave the door open to possible abuses by potential aggressors? It seems evident that no answer the legal system provides—be it domestic or international—will ever be exempt from potential shortcomings. I submit that any final decision should at least take into account two considerations. The first is the element of trust: is there a justice system that is efficient, i.e., that can be trusted to make correct calls? The answer to this question will determine whether the ICC will have more or less space for maneuvering when interpreting the law and applying it to the facts. If there is trust in the system, then the judge should be able to look beyond the material facts for intent of action. If trust is not achievable, then States may tend to make the judge's actions more mechanical, limited to indicating almost automatically that certain facts have taken place, and without any attempt to look at the reasons for action.

The second element is our perception of justice: it may be unfair to let the guilty go unpunished, but is it fair to punish the innocent? In this respect we have to take into consideration that, when dealing with aggression, we are talking about punishing individuals for acts committed as a State leader, not about establishing a pecuniary sanction in accordance with the rules of state responsibility. This ethical question will be permanently present in the aggression debate. However, I suggest that this is not the correct angle from which to approach the question. In my view, it is again a matter of trust and of adequate means: if the system works properly, and the judge has the necessary means to do so, we should neither see a guilty party go unpunished, nor an innocent party sanctioned. Including the subjective element in the definition of aggression would give international criminal judges—in those situations in which they can exercise jurisdiction over the case—sufficient room to maneuver in order to establish the facts and to impose penalties when they are applicable in accordance with the general principles of criminal law. There may be situations, as could be the case in the ICC context, that certain crimes may go unpunished because a State has not agreed to the Court's jurisdiction or because it has tried to pressure others into not surrendering that State's nationals to the Court's jurisdiction. Those are limitations that are intrinsic to the international legal system. The principle of consent cannot be ignored and should not be underestimated.

Notwithstanding the weaknesses of the system, it is important to provide the judge with adequate tools for those cases in which the Court will be able to assert its jurisdiction.

Another important element to consider in relation to the proposed definition is how legal defenses reconcile with the definition of aggression I have proposed. First, we should consider the right to individual and collective self-defense. Second, we must analyze the question of military action taken pursuant to a Security Council authorization.

The main element that has worried many developed countries concerning the adoption of a definition of aggression is the risk of constraining the inherent right to individual or collective self-defense. In these countries' views, certain approaches to aggression, particularly those based on the "first use" principle,⁵⁵ do not give full consideration to situations in which a State uses military force in self-defense, in accordance with the U.N. Charter.

A first answer to this question seems to be already implicit in the current regulation on the use of force established in the U.N. Charter. Article 2.4 of the Charter bans the use of force; Articles 39 and 42 authorize the Security Council to approve coercive measures against a State considered to be threatening or breaching international peace or committing an act of aggression; Article 51 reaffirms the inherent right of individual and collective self-defense to repel an armed attack. Thus, the two traditional legal exceptions to the prohibition on the use of armed force seem solidly established in the U.N. Charter framework. The right to self-defense also finds a legal basis in customary international law.⁵⁶ In the *Nicaragua* case, for instance, the ICJ reaffirmed the customary nature of the right to individual and collective self-defense, which is in no way limited by the Charter provision, nor by customary rules, on the non-use of force.⁵⁷ Similarly, it seems clear that the binding character of Security Council decisions that impose sanctions would legitimize military action taken in conformity with such decisions. Therefore, it is clear that a definition of aggression does not, in any way, add any additional constraints to the exercise of the right to self-defense or the carrying out of enforcement action authorized by the Security Council.

⁵⁵ This principle, proposed by the Soviet delegation in the 1933 Disarmament Conference, aims at determining that the aggressor is that State that uses first military force against another State.

⁵⁶ See for instance the ICJ judgment in the *Nicaragua Case (Merits)*, in which the Court observes that the U.N. Charter, on the point of the use of force "refers to pre-existing customary international law; this reference to customary law is contained in the actual text of Article 51, which mentions the 'inherent right' (in the French text the 'droit naturel') of individual or collective self-defense, which 'nothing in the present Charter shall impair.'" *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 94 ¶ 176 (June 27).

⁵⁷ *Id.*

There is a further question that needs to be addressed. Some may argue that allowing for legal excuses in the definition of aggression creates the risk of permitting aggressive States to justify their otherwise aggressive actions by claiming to have acted in the exercise of one of these two exceptions. For example, a State carrying out a large-scale armed attack could simply argue that it was acting in self-defense, even if the facts do not correspond to the alleged situation. The answer to this question is closely related to the discussion on the subjective element I proposed above. Indeed, the advantage of including this specific subjective element in the definition of aggression becomes clearer when dealing with these two exceptions. For example, in a given case the material conditions and the facts of the situation may fall within the description of self-defense, therefore excluding the possibility of aggression. The analysis of intent would act as a safeguard to prevent a party from abusing of the right to self-defense in order to disguise an act of aggression. A person having ordered the commission of an act of military force would need to prove to the criminal judge that he did so in order to stop an armed attack by another State, in other words, that it had a defensive intent.

Thus, the analysis of the subjective element could give the judge an important margin of discretion to establish with more accuracy the facts of a given case and to assign the respective legal consequences to these facts. The adoption of a definition of aggression does not impose any extra limitation on the exercise of the right of self-defense, nor on the actions taken in pursuance of an authorization of the Security Council to use force. These two defenses remain valid against charges of aggression. Yet self-defense and authorized action are legal excuses which need to be justified and explained in order to avoid criminal responsibility for acts of aggression.

Fears that any aggressor would declare its actions to be in the exercise of legitimate self-defense are not justified in the context of the proposed definition of aggression. While such a claim could be made in all criminal cases—such as murder cases in domestic criminal jurisdictions—the advantage of allowing the judge to examine all constitutive elements of the crime of aggression, material and subjective, is that he or she would be able to make an in-depth analysis of all the available information in order to establish the legitimacy of such a defense. In certain cases, the study of the material element may lead to the conclusion that no legal defense is applicable. In other situations, examination of the subjective element may clarify the relevant circumstances of the case.

In sum, neither a legal definition of aggression, nor any of its constitutive elements should have adverse effects on legal defenses aimed at excluding criminal responsibility for aggression. The definition of aggression proposed above does not impose any further constraint on such a right. Similarly, authority to undertake action sanctioned by the Security Council is firmly based on the U.N. Charter. The articulation of the definition of

aggression in the ICC Statute would require—as is the case in domestic criminal law systems—that legal defenses aimed at excluding responsibility be demonstrated. A criminal judge should, therefore, be entitled to examine whether those defenses are appropriate under the facts of the case. In order to do so, the judge will need to assess whether the intentions of the alleged aggressor coincide with the general purposes of self-defense and enforcement action authorized by the Security Council.

IV. CONCLUSION: WHERE TO GO FROM HERE AND HOW?

Clearly, the biggest challenge defying the adoption of a legally sound definition of aggression comes from the political unwillingness of the different actors to accept not only the idea of a workable definition of aggression, but of having a definition of the crime aggression tout court. Some States, both developing and developed, feel uneasy about further limiting their ability to wage war when the circumstances, domestic or international, so require. Whether pushing for the acceptance of a right to humanitarian intervention, or questioning the legal limits to the exercise of self-defense, some States have shown that the existing system of collective security does not respond to their national agendas and they are therefore unwilling to bind themselves with further rules limiting their ability to impose, even by force, those principles that they consider as universal.

The SWGCA, particularly through its Chairman, has managed through intelligent diplomacy to engage positively many of those States whose support will be essential for adopting a definition of the crime of aggression in the ICC Statute. Clearly, in the current political context, with a strong foreign military presence in Iraq and in Afghanistan, one may wonder whether world powers are genuinely willing to engage in a productive discussion on the definition of aggression. In this respect, part of the keys to success in the SWGCA depends on how it manages expectations.

With the Review Conference looming there is still time to identify a series of problems for further discussion during the Review Conference. Furthermore, it is essential that all of those who have been actively involved in the SWGCA continue to be engaged throughout the entire Review Conference. This is a unique opportunity that we have in front of us. As Benjamin Ferencz has strongly advocated, we have to seize this opportunity now because we may not have another chance. Let us hope that this time we have learned our lessons from history.