

# **Aggression Supreme: International Offence still in Search of Definition**

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## **Abstract**

*The consequence of the state of lawlessness that permitted States to wage war even on flimsy reasons was not fully appreciated until World War I when primitive barbarism and modern technology came together to result in enormous bloodshed and massive atrocities. The deep impression on public opinion opened the door to vigorous condemnation of aggression and a move at the international level to outlaw it. Though aggression continues to pose one of the greatest threats in the efforts to create a peaceful and stable world public order, the definition of aggression steeped as it is in political and legal quagmire continues to prove elusive. Despite being at the centre of discussion in the development of international law for many decades, just as it eluded the League of Nations in the past, so the definition of aggression continues today to elude the United Nations. Progress is more marked by the volumes of international documents produced rather than any seeming linear progression towards a singular and generally accepted definition. Not even the overwhelming support for the international criminal court in 1998 proved sufficient to translate into a consensus amongst States on the issue of defining this crime.*

## **I. Introduction**

Prior to World War I, war was not generally prohibited in any practical way. In the essentially anarchic system of Westphalia, the right to resort to force (or the *jus ad bellum*) was limited only by the doctrine of the “just war”. Natural Law theory, as expounded by the Spanish

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theologians<sup>2</sup> and Grotius,<sup>3</sup> maintained that lawfulness of the use of force derived from the justness of its cause. Violations of Natural Law could be vindicated with force to the extent that justice permitted. However, as the State became supremely powerful in the Age of Absolutism, the demands of realpolitik, buttressed by legal positivist theories of State sovereignty, brushed aside Natural Law doctrines. The rise of State sovereignty and power made ideas of divine justice and its related set of criteria distinguishing lawful from unlawful war irrelevant. By the 19th century, *raison d'état* reigned supreme, as symbolised in the doctrines of Carl Von Clausewitz.<sup>4</sup> In the absence of an international mechanism for enforcing international law, war was a means of self-help for giving effect to claims based on international law. The legal and moral authority at the time had a notion of war as an arm of the law. In most cases in which war was resorted to in order to increase the power and possessions of a State at the expense of others, it was described by the States in question as undertaken for the defence of a legal right.<sup>5</sup> War was in effect a sanction looked upon as a legal remedy of self-help.<sup>6</sup> This conception of war was intimately connected with the distinction which was established in the formative period of international law and which later become entirely extinct between just and unjust wars.<sup>7</sup> So long as war

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<sup>2</sup> See Vitoria F, *De Indis et De Jure Belli Relectiones* (1557) the work of the very celebrated Spanish theologian in *Classics of International Law*, Washington, D.C., The Carnegie Institution of Washington, 1917, No 7; Ayala B *De Jure et Officiis et Discipline Militari Libri Tres* (1582) in *Classics of International Law*, Carnegie Institution of Washington, Washington, D.C., 1912, No 2. See further Haggemacher P, *Grotius et al Doctrine de la Guerre Juste*, Presses Universitaires de France, Paris 1983; Scott J B, *The Spanish Conception of International Law and of Sanctions*, Carnegie endowment for international Peace, Washington, D.C, 1934 and Scott J B, *The Spanish Origin of International Law*, Clarendon Press, Oxford, 1928.

<sup>3</sup> Grotius H, *De Jure Belli ac Pacis*, Bk 11, ch 11 (1625) in *Classics of International Law*, Carnegie Institution of Washington, Washington, D.C., 1913-25, No 3.

<sup>4</sup> The Prussian General Von Clausewitz (1780-1831) wrote *Vom Kriege* (On War) between 1816 and 1830, advocating "absolute war". To Clausewitz, war was a natural expression of the competition between States and its value lay in sorting out the weak from the strong. Clausewitz C, *On War* (1832) (Howard M, & Paret P, eds and trans, Princeton, N.J., Princeton University Press, 1976.

<sup>5</sup> See e.g. Lauterpacht H, *The Function of Law in the International Community*, Archon Books, Hamden, Connecticut, 1966, pp 364-365.

<sup>6</sup> Herscht Lauterpacht (ed), *Oppenheim's International Law: Disputes, War and Neutrality*, Longmans, London, 1952, Vol II, p 202.

<sup>7</sup> Lauterpacht, note 5, pp 217-222.

was a recognised instrument of national policy both for giving effect to existing rights and for changing the law, the justice or otherwise of the causes of war was not of legal relevance.<sup>8</sup>

Though war was viewed in international law as a natural function of the State and a prerogative of its unrestricted sovereignty, the European settlement of 1814 and 1815 and the Final Act of the Congress of Vienna<sup>9</sup> re-established the notion of public order in Europe and the principle of Balance of Power. In the later part of the 19<sup>th</sup> Century, there appeared a view of war as a judicial procedure, a means of last resort after recourse to all available means of peaceful settlement had failed.<sup>10</sup> The concert of Europe and the Congress system raised a strong presumption against unilateral changes in the status quo, with territorial changes through war depending upon collective recognition for their permanence and validity.<sup>11</sup> However, the essentially bilateral character of international rights and obligations meant States incurred little risk of collective sanction for launching an aggressive war. The lack of collective sanctions and the intensified technical capacity of States to inflict widespread destruction against an enemy magnified the need for open avenues of peaceful dispute resolution so that opportunities to avoid war at least could be available. The Hague Peace Conferences of 1899 and 1907, through a number of rules on the means and methods of warfare, established regular means for the pacific settlement of disputes to allow parties to step back from the brink of war, applicable if and when war broke out.<sup>12</sup> The Hague Conferences and their movement towards pacific settlement of disputes marked the beginning of the attempts to limit the right of war both as an instrument of law and as a legally recognised

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<sup>8</sup> Lauterpacht, note 5, p 223.

<sup>9</sup> Webster C K, *The Congress of Vienna, 1814-1815*, 2nd ed, G Bell, London, 1934; Nicolson H, *The Congress of Vienna: A Study in Allied Unity; 1812-1822*, Methuen, London, 1961.

<sup>10</sup> Brownlie I, *International Law and the Use of Force By States*, Clarendon Press, Oxford, 1963, p 21.

<sup>11</sup> Brownlie, note 9, pp 19-20.

<sup>12</sup> See the Hague Conventions of 1899 and 1907 on the Pacific Settlement of Disputes. The texts are reproduced in Scott J B (ed), *Texts of The Peace Conferences at The Hague, 1899 and 1907*, Clarendon Press, Oxford, 1908. For reports on the proceedings, see Scott, J B (ed), *The Reports to The Hague Conferences of 1899 and 1907* Clarendon Press, Oxford, 1917.

means for changing legal rights.<sup>13</sup> With this endeavour, “aggression” as a term of art made an appearance on the international scene.

The term “aggression” has a long history, going back to the diplomatic exchanges and the utterances of British statesmen during the war with revolutionary France and appeared as the *casus foederis* in many treaties of defensive alliance in the 19<sup>th</sup> Century.<sup>14</sup> Its basic meaning was military attack by the forces of a State against the territory or vessels of another State. In this sense it was a neutral term relating to military tactics and it was often used in conjunction with other terms which imported a moral or legal element.<sup>15</sup> It is estimated that the word acquired a pejorative meaning as a result of the contexts in which it was used probably before 1914.<sup>16</sup> During the discussions of the Allied Supreme Council in 1919 it was employed to connote an unlawful resort to force.<sup>17</sup>

The greatest irony is that to date aggression obviously both a *jus cogens* norm and *erga omnes* obligation, remains without any clear-cut definition in international circles, which renders it not subject to objective legal determination despite its unchallenged status as an international crime.<sup>18</sup> This Article sets out to trace the evolution of the definition of the crime of aggression which was first attempted within the auspices of the League of Nations. Later the efforts were picked up by the United Nations (UN), the League’s successor. Despite the search for definition spanning more than seven decades, States were still unable to agree to a definition of aggression in the summer of

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<sup>13</sup> Lauterpacht, note 5, p 179.

<sup>14</sup> Brownlie, note 9, p 351.

<sup>15</sup> As noted by Brownlie, the terms “unjust aggression”, “unprovoked aggression and even “defensive aggression” occur in a number of the 19<sup>th</sup> Century treaties of defensive alliance. Brownlie, note 9, pp 351.

<sup>16</sup> Brownlie note 9, p 351.

<sup>17</sup> Brownlie note 9, p 351.

<sup>18</sup> Most States today would recognise the prohibition against aggression as variously a norm, *jus cogens* or *obligatio erga omnes*. See Bassiouni M C, “International Crimes Jus Cogens and Obligatio Erga Omnes” (1996) 59 *Law & Contemporary Problems* 63, p 68. The norms on aggression have developed subsequent to the Nuremberg Judgment, largely through: the *UN Charter’s* comprehensive prohibition of the use of force in international relations which admits only self-defence as an exception, the Judgement of the Nuremberg Tribunal itself; United Nations affirmation of the Nuremberg principles as principles of international law as well as resolutions of the General Assembly, most notably, General Assembly Resolution 3314 (XXIX), note 77.

1998 during negotiations for the Rome Statute for the establishment of a permanent International Criminal Court.<sup>19</sup> Part II of the Article discusses the efforts at definition within the umbrella of the League of Nations and later during the negotiations that led to the development of the United Nations Charter and the foundation of the United Nations. Part III reviews the Nuremberg and Tokyo Charters and Judgments which were to prove the most important development for the implementation of individual criminal responsibility for aggression. Part IV covers the efforts within the United Nations towards a definition, reviewing both the role of the UN General Assembly and the International Law Commission and finally concluding with the negotiations that produced the Rome Statute.

## **II. The Law Prior to the Nuremberg and Tokyo Charters**

### **2.1. Efforts to Define Aggression within the Umbrella of the League of Nations**

World War I was especially brutal in view of the use of trench warfare and poison gas and confirmed the fears of those who had campaigned for effective pacific resolution of disputes, and impelled the international community to create centralised international mechanisms to avoid such carnage in future. The development of pacific avenues for the resolution of disputes figured as a key element of the League of Nations, created after the end of World War I.<sup>20</sup>

The primary purpose of the League of Nations was to maintain international peace and security. Articles 11, 12, 13 and 15 of the League of Nations Covenant imposed certain limitations on the right of a State to wage war. Before launching a war, the parties were obliged to refer the dispute to the League for arbitration, judicial settlement, or to the League Council. Once one of these methods had

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<sup>19</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 37 ILM (*Rome Statute*), adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998. The final vote recorded was 120 in favour, seven against and 20 abstentions.

<sup>20</sup> *The Covenant of the League of Nations* was incorporated in the *Treaty of Peace Between the Allied and Associated Powers and Germany, Peace Treaty of Versailles*, concluded at Versailles, 28 June 1919, 2 Bevans 43.

been tried, Members of the League were required not to go to war until three months after one of these adjudicative bodies submitted their report. The idea was to provide the parties an opportunity to resort to other means of solving the dispute between them according to pacific means. Where one or other party violated one of these provisions, that State “shall *ipso facto* be deemed to have committed an act of war against all other members of the League”. The offending State could then be made subject to economic or even military sanctions from the other Members pursuant to Article 16. Article 10 of the Covenant enjoined Members of the League from according recognition to the ill-gotten gains of aggression. However, under the League of Nations Covenant, war was not prohibited. It was only subject to certain procedural restrictions—the three months delay. These defects of the League of Nations Covenant, against the backdrop of advances in the technical capability to inflict mass suffering, made it all the more imperative to outlaw war in international relations.

On 27 September 1922, the Third Assembly of the League of Nations requested that the Permanent Advisory Commission examine the question of aggression and propose a draft treaty on the matter. The culmination of the Commission’s work was its Draft Treaty of Mutual Assistance, completed on 8 June 1923.<sup>21</sup> Article 1 of the Draft Treaty of Mutual Assistance stated: “The High Contracting Parties affirm that war of aggression constitutes an international crime and assume a solemn obligation not to commit this crime.” The draft put the spotlight on the question of the definition of aggression at the international level, although it was never adopted, owing to a lack of consensus on its content.

Another attempt to elucidate the question was made in connection with efforts to consolidate international obligations to resolve disputes peacefully. The preamble of the Geneva Protocol for the Pacific Settlement of International Disputes was adopted unanimously by the Assembly of the League of Nations and signed by 19 States in 1924.<sup>22</sup> However, the Protocol never received the ratifications

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<sup>21</sup> The Draft Treaty is reproduced in Ferencz B B, *Defining International Aggression, The Search For World Peace: A Documentary History And Analysis*, Oceana Publications, Dobbs Ferry, N.Y., 1975, Vol I, pp 70-6.

<sup>22</sup> It declares that the signatory States were:  
Animated by the firm desire to ensure the maintenance of general peace and the security of nations whose existence, independence or territories may be threatened;  
Recognising the solidarity of the members of the international community;

necessary to enter into force. It was in connection with the failure in the ratification of the Geneva Protocol that the League of Nations Sixth Assembly took up the question of outlawing aggressive war and aggression a year later. On 25 September 1925, the Assembly adopted a resolution which declared that “a war of aggression should be regarded as an international crime”.<sup>23</sup> Two years later, at the League of Nations Eighth Assembly in 1927, the legal prohibition of aggression was revisited. On 9 September 1927, the delegate of Poland submitted that aggressive war should be outlawed and argued that effective prohibition of aggression could not be carried out unless it was first clearly defined. The League of Nations unanimously adopted the Declaration on Aggressive Wars on 24 September 1927.<sup>24</sup> This resolution, although not legally binding, was an important step towards the prohibition of war formalised less than a year later in the 1928 Paris Pact (International Treaty for the Renunciation of War as an Instrument of National Policy).<sup>25</sup> It was

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Asserting that a war of aggression constitutes a violation of this solidarity and an international crime;

Desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between States and of ensuring the repression of international crimes; ...

For the text of the Protocol and other documents associated with it, see Ferencz, note 20, pp 124-31. For literature on the Geneva Protocol, see Miller D H, *Geneva Protocol*, The Macmillan Company, New York, 1925.

<sup>23</sup> League of Nations, *Resolutions of the Sixth Assembly*, New York City, Carnegie Endowment for International Peace, 1925, p 21.

<sup>24</sup> The resolution that was adopted by the Assembly read:

The Assembly ...

Being convinced that a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime;

Considering that a solemn renunciation of all wars of aggression would tend to create an atmosphere of general confidence calculated to facilitate the progress of the work undertaken with a view to disarmament;

Declares:

(1) That all wars of aggression are, and shall always be, prohibited.

(2) That every pacific means must be employed to settle disputes, of every description, which may arise between States.

Records of the Eight Assembly, Plenary Meetings at 84 reproduced in Ferencz, note 20, p 151.

<sup>25</sup> Signed initially on 27 August 1928 by the representatives of 15 States, entered into force 24 July 1929, 94 LNTS 57, 46 Stat 2343, TS No 796. By the time it entered into force, the *Kellogg-Briand Pact* had been signed and ratified/acceded to by a total of 59 States (including all the States (major and minor) that were subsequently to comprise the Axis Powers, almost all the States comprising the international community at that time. A list of the signatory countries as at 24 July 1929 is set out in Ferencz, note 20, pp 190-192.

hoped that the Paris Pact would correct some of the defects in the League of Nations Covenant provisions on the settlement of disputes. The Paris Pact commonly known as the Kellogg-Briand Pact provides that:

The Signatory States:

[P]ersuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty ...

Have decided to conclude a Treaty;

Article I: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article II: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.<sup>26</sup>

The Kellogg-Briand Pact signalled that the international community considered war to be an unacceptable means by which to further domestic priorities. However, the Pact proved ineffective with respect to Italian aggression against Ethiopia, and Japanese aggression against Manchuria. Neither could it prevent Nazi aggression or the outbreak of World War II. Several serious shortcomings in the Pact weakened its effectiveness. It has never been clear as to whether or not the Pact prohibits resort to the use of force short of war, particularly since the term “war”, as construed in its classic sense, denotes a traditional situation of inter-State armed belligerency. Moreover, the absence of

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<sup>26</sup> *Kellogg-Briand Pact*, above note 24.



any mention of the right to self-defence left the scope of the legitimate use of force ambiguous. Furthermore, there is no sanction in the Treaty, over and above that the parties that resort to war “shall be denied the benefits furnished by the Treaty”. This phrase is in itself probably circular and seems to entail no legal consequences for a State that breaches the Treaty. Despite its shortcomings as a legal instrument, the Kellogg-Briand Pact represented a symbolic step taken by the international community to prohibit the illegitimate use of force in international relations and was accorded great importance by the Nuremberg and Tokyo Tribunals, indeed probably much more than it warranted.

Other instruments, adopted in the inter-war years, declare aggression an international crime. Significantly, many of these instruments employed the term “aggression” rather than “war”, thereby side-stepping one of the important pitfalls of the Kellogg-Briand Pact. For example, in February 1928, the Sixth Pan-American Conference adopted a resolution which declared that: “war of aggression constitutes an international crime against the human species ... all aggression is illicit and as such is declared prohibited.”<sup>27</sup> The Treaty of Non-Aggression and Conciliation of 1933, a regional instrument for the Americas similarly condemned “wars of aggression”.

The meaning and scope of “aggression” was raised in the context of the 1933 Disarmament Conference, by the Soviet representative thereto, Mr. Litvinoff, who argued that a clear distinction had to be drawn between the defensive and offensive use of force in international relations. In this connection, the Soviet Union submitted a comprehensive draft proposal to the General Commission of the Disarmament Conference which offered a definition of aggression.<sup>28</sup> The three-part Soviet draft was a bid to present judicial organs with an objective basis to apply the Kellogg-Briand Pact by furnishing

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<sup>27</sup> The text of the Resolution is reproduced in Rifaat A M, *International Aggression: A Study of the Legal Concept : Its Development and Definition in International Law*, Almqvist & Wiksell International, Stockholm, Sweden, 1979. This provision is also reflected in the *Buenos Aires Convention* of 1936, which was ratified by many States of Latin America and by the United States. See Lukashuk, I, “International Illegality and Criminality of Aggression” in Ginsburgs G, and Kudriavtsev V N (eds), *The Nuremberg Trial and International Law*, Martinus Nijhoff, Dordrecht, Boston, 1990, p 127.

<sup>28</sup> The definition is included in the *Report of the Secretary-General on the Question of Defining Aggression*, UN. Doc A/221 1, GAOR, VII, Annexes, Agenda item 54 at 17 et seq.

guidelines that would forestall fallacious justifications of aggression.<sup>29</sup> The core of the Soviet definition is contained in Article 1 which provided that:

The aggressor in an international conflict shall be considered that State which is the first to take any of the following actions:

- (a) Declaration of war against another State;
- (b) The invasion by its armed forces of the territory of another State without the declaration of war;
- (c) Bombarding the territory of another State by its land, naval or air forces or knowingly attacking the naval or air forces of another State;
- (d) The landing in or introduction within the frontiers of another State of land, naval or air forces without the permission of the Government of such a State, or the infringement of the conditions of such permission, particularly as regards the duration of sojourn or extension of area;
- (e) The establishment of a naval blockade of the coast or ports of another State.<sup>30</sup>

Article 2 of the draft precluded any justification of attack based on considerations of a political, strategic or economic nature. Article 3 of the draft aimed at providing practical mechanisms for the peaceful solution of international controversies in the event of mobilisation or concentration of armed forces to a considerable extent in the vicinity of a State's frontiers. While not providing for self-defence, the second portion of Article 3 gave leeway to the mobilisation and concentration by the Victim State of its forces, but stopped short of stating whether the Victim State would be entitled to respond militarily, thus leaving the matter open. A lack of consensus prevented the draft Soviet definition from being adopted by the Disarmament Conference in 1934. Nonetheless, its provisions were to exert some influence and

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<sup>29</sup> See League of Nations, *The Monthly Summary of the League of Nations* (1933), Vol XIII, No 2, Annex Doc Conf D/C.G.38. The Soviet draft is also reproduced in Ferencz, note 20, pp 202-203.

<sup>30</sup> Soviet Draft, note 27.

were subsequently incorporated in several treaties between the Soviet Union and a number of satellite and neighbouring States.<sup>31</sup>

Perhaps the most important element in the Soviet draft is that it equates aggression with the first use of armed force in a specific instance.<sup>32</sup> The Soviet Draft Definition of Aggression appears to facilitate identification of the aggressor because in principle the first use of armed force is unambiguous. However, in practice, it may be very difficult to determine which State first resorted to armed force, particularly in situations where relations between States have deteriorated to the point that armed force has been used. In such cases, it cannot be assumed that either side can be trusted to report the facts faithfully. It was for this reason that the Government of Great Britain, as well as a number of other Governments, opposed the Soviet draft. It was argued that in many cases, a rigid definition whose principal criterion was the first use of armed force, could lead to an unrealistic and unfair appreciation of which State is in fact the aggressor, i.e. which State intended to take offensive armed or invasive action, coupled with the actual use of armed force.

The efforts to define aggression in the era of the League of Nations ground to a halt after efforts to transform the League's collective security regime into a working reality failed. The incompetence of the League of Nations in performing its functions and its practical termination was brought about by the series of aggressive acts carried out by the Axis Powers during the 1930's and 1940's, which resulted in the World War II. Later this would move the Allied Governments towards an effort to establish a new international organisation in order to maintain world peace and security and to prevent aggression. As war raged in Europe, on 14 August 1941, President Roosevelt and Prime Minister Churchill issued "The Atlantic Charter"<sup>33</sup> with the hope that at the end of the war, a just social order would be created in which man could live in freedom from fear of aggression and the horrifying bloodshed and large scale atrocities that had become the indelible hallmarks of modern warfare. The joint declaration expressed the idea of establishing a permanent system of general security against any future aggression. In 1942 the Allies met in

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<sup>31</sup> Rifaat, note 26, p 91.

<sup>32</sup> See the chapeau to Art I of the Soviet Draft, note 28.

<sup>33</sup> Russell R B, *A History of the United Nations Charter*, Brookings Institution, Washington, D.C., 1958 Appendix B, p 975.

Washington and concluded a joint declaration subscribing and reaffirming the purposes and principles of the Atlantic Charter, which was known as the Declaration by the United Nations.<sup>34</sup> The Declaration marked the adoption of the terminology “United Nations”. Two weeks after the Declaration, the Allies decided to bring before the bar of justice those who had been responsible for the crimes committed in the course of World War II. This was reflected in the 1942 Declaration of St. James.<sup>35</sup> This Declaration was supplemented by other official statements of President Roosevelt, Prime Minister Churchill, representatives of the Soviet Union, and other Allied Governments, indicating their intention to prosecute and punish authors of war crimes, crimes against humanity and crimes against peace. This was followed up in October 1943 when representatives of the Allied Powers convened in London and established the United Nations War Crimes Commission, empowering it with advisory and investigatory functions, including the preparation of lists of war criminal suspects and examination of procedures by which prosecution and punishment could be enforced.<sup>36</sup>

## **2.2. The Definition of Aggression and the Development of the United Nations Charter**

Proposals for the structure of the new international organisation envisaged in the Atlantic Charter were considered by the United States, Great Britain, Russia and China when they met at Dumbarton Oaks, in Washington, D.C. in 1944. The negotiations in the Dumbarton Oaks lasted from 21 August to 7 October 1944, and resulted in a basic agreement between the four participants on all major basic points. The American proposals which were submitted in

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<sup>34</sup> Russell, note 32, Appendix C, p 976.

<sup>35</sup> Punishment for War Crimes--the Inter-Allied Declaration, signed 13 January 1942 by representatives of the Governments of Belgium, Czechoslovakia, France, Greece, Luxembourg, Norway, The Netherlands, Poland and Yugoslavia. See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of Laws of War*, HMSO, London, 1948, pp 89-92.

<sup>36</sup> See Smith B, *Reaching Judgment at Nuremberg*, Basic Books, New York, 1977 for a history of the political events leading up to the Nuremberg Trial.

Dumbarton Oaks did not include any reference to the term “aggression”.<sup>37</sup>

The final step in making the United Nations Charter was taken at Yalta, in 1945, by the “Big Three” with victory in World War II in sight. All the allied States, great and small, were invited to the United Nations Conference on International Organisation which met at San Francisco on 25 April 1945 to prepare the final instrument for the new international organisation.<sup>38</sup> The “Dumbarton Oaks Proposals” were taken as the basis for the discussions which were to lead to the United Nations Charter. The primary purpose of the new organisation was “to maintain international peace and security; and to that end to take effective collective measures for the prevention and removal of threats to the peace and the suppression of acts of aggression or other breaches of the peace.”<sup>39</sup>

At the San Francisco Conference the effort in the task of determining the criteria of aggression was renewed. The appearance of the expression “acts of aggression” in Dumbarton Oaks Proposals,<sup>40</sup> as an act that the proposed organisation primarily had to prevent and suppress, and also the large authority which was given to the Security Council in this respect, encouraged many delegations to demand specificity in the meaning of “acts of aggression”.<sup>41</sup> When the question was considered by the Third Committee of the Third

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<sup>37</sup> The Soviet Union, which had a leading position in the issue of defining aggression during the League’s life, reopened the subject and required that the expression “acts of aggression” should be inserted in the proposals and be defined as well as “breaches of the peace”. Great Britain and China were however against this motion with the United States arguing that the concept of aggression was covered in the general outline of its proposal on enforcement powers of the envisaged world body. Finally, it was agreed by the parties to the Conversation that the expression “acts of aggression” be included in the Proposals but without any definition. Points of disagreement, notably the matter of aggression were left to be discussed and decided in the future with other allied nations in an open conference. Rifaat, note 26, pp 105-107. For the text of the Dumbarton Oaks Proposals for an International General Organisation, see Ferencz, note 20, pp 285-306

<sup>38</sup> Leland G M and others, *Charter of the United Nations*, Columbia University Press, New York, 1969, pp 4-8.

<sup>39</sup> See Proposals of the Delegation of the Republic of Bolivia for the Organisation of a System of Peace and Security, Doc 2, G/14, 5 May 1945, para 7 reproduced in Ferencz, note 20, p 313.

<sup>40</sup> For the text of the Dumbarton Oaks Proposals for an International General Organisation, see Ferencz, note 20, pp 285-306.

<sup>41</sup> Rifaat, note 26, pp 107-108.

Commission, many delegations supported the idea of inserting a definition of aggression in the Charter's provisions; meanwhile other delegations took an effective attitude by submitting definitions as models to be used, if agreed upon, in this respect. Other delegations, however, were opposed to any such definition.<sup>42</sup>

Czechoslovakia was in favour of a clarification of what constitutes an act of aggression within the Charter's provisions. It was suggested by the Czech delegation that a definition of what constitutes an act of aggression should be reached as a guidance to the Security Council in making its decision. In this connection the Czech delegation referred to Article 2 of the Convention for the Definition of Aggression of 1933 as a model which might help in this respect.<sup>43</sup> The Czechoslovak proposal's importance lay in the fact that it reopened the subject in the San Francisco Conference and stressed the necessity of defining aggression in the Charter

Bolivia favouring the more radical position of inserting a definition of aggression in the Charter's provisions submitted to the Third Committee of the Third Commission, a draft definition of aggression.<sup>44</sup> The motive behind this proposal was that the security of the world is founded on the principle that aggression is a policy that contradicts the good principles of a lasting peace laid down by all the nations participating in the international organisation and should be faced immediately by collective measures.<sup>45</sup> The proposal based itself on the principle of enumeration, listing the acts that would amount to aggression.<sup>46</sup> The Philippines proposal for defining aggression was

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<sup>42</sup> Rifaat, note 26, p 108.

<sup>43</sup> United Nations, *United Nations Commission in International Organisation*, United Nations, New York, 1948, Vol 3, p 469

<sup>44</sup> United Nations, note 42, p 577.

<sup>45</sup> United Nations, note 42, p 578.

<sup>46</sup> The aggressor from the Bolivia's point of view was that a State which commits any of the following list of acts against another State. These acts are:

- (a) Invasion of another State's territory by armed forces.
- (b) Declaration of war.
- (c) Attack by land, sea, or air forces, with or without declaration of war, on another State's territory, shipping, or aircraft.
- (d) Support given to armed bands for the purpose of invasion.
- (e) Intervention in another State's internal or foreign affairs.
- (f) Refusal to submit the matter which has caused a dispute to the peaceful means provided for its settlement.
- (g) Refusal to comply with a judicial decision lawfully pronounced by an International Court.

based largely on that of Bolivia in enumerating acts but differed only in the fact that it sought to prioritise the acts and did not require collective sanctions to be automatically applied against the Aggressor State.<sup>47</sup>

While the above-mentioned proposals received considerable support by many delegations at the San Francisco Conference the Sponsoring Governments successfully resisted them and no definition was accepted.<sup>48</sup> The arguments developed against defining aggression were set forth, by Mr. Paul-Boncour, Rapporteur, in his report to the Third Committee of the Third Commission.<sup>49</sup> Accordingly, it was decided not to define aggression in the Charter and to adopt the text of the Dumbarton Oaks Proposals, which does not specify acts of aggression but gives the Council the entire freedom in determining what constitutes an act of aggression, when it has taken place, and what measures to be taken for its suppression.<sup>50</sup> The decision taken in San Francisco ended the debate on the question of defining aggression at that stage and the Charter was signed on 26 June 1945 and entered into force on 24 October 1945.<sup>51</sup>

The debate at San Francisco Conference on the issue of defining aggression was ended with the refusal to adopt any definition for the term “aggression”. The Security Council was given the authority to make its findings, in cases which the peace and security of the world was in danger, as to whether or not aggression had taken place and what measures should be taken in that regard. Thus, in Article 39 of

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United Nations, note 42, p 585.

<sup>47</sup> Although the Soviet draft of 1933 was greatly considered in the Philippines proposal, an important addition was included for the first time in a definition of what constitutes an act of aggression, that is the interference with the internal affairs of another nation by, *inter alia*, establishing agencies in that nation to conduct propaganda subversive to the institutions of that nation.

<sup>48</sup> Rifaat, note 26, p 115.

<sup>49</sup> United Nations, note 42, Vol 12, p 505.

<sup>50</sup> Rifaat, note 26, p 116.

<sup>51</sup> Rifaat note 26, p117 where he notes:

The drafters at San Francisco, aware of the League lessons, did not use the term “war” in the Charter’s provisions. Instead, they used such expressions as “threat to the peace”, “breach of the peace”, “threat or use of force” or “act of aggression”. The use of such general expressions was deliberately made to avoid semantic controversy over the interpretation of the term ‘war’ and whether or not it includes other acts of force short of war.

the United Nations Charter, by offering the alternative of defining aggression, it was stated that: “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.” The content of Article 39 not only left the expression “act of aggression” undefined but also the other two expressions “threat to the peace” and “breach of the peace”, though the determination of the Council must depend upon the meaning which may be attributed to them. Although the Charter completely prohibited the States from resorting to force, an exception to this general prohibition was self-defence, explicitly provided for in Article 51.<sup>52</sup>

Even as the victorious States were busy at San Francisco, preparations were being made for the trial of the major war criminals. The United States had prepared a plan which was accepted in principle by the Foreign Ministers of Britain, the Soviet Union and France which urged that the “[l]aunching a war of aggression should be charged as a criminal act, along with invasion by force or threat of force . . . or initiation of war in violation of international law or treaties.”<sup>53</sup> A few weeks after the San Francisco Conference that gave birth to the UN, representatives of the four Major Allied Powers (Great Britain, France, the Soviet Union and the United States) met in London on 26 June 1945 to further amplify the law and procedures according to which the Nazi leaders ought to be prosecuted, tried and punished. The negotiations leading to the Nuremberg Charter reflected in the Nuremberg and Tokyo Charters and Judgments were to prove to be the most important development for the implementation of individual criminal responsibility for aggression.

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<sup>52</sup> The right of self-defence included in Art 51 is usually discussed in connection with aggression. Although the provision of Art 51 does not include any reference to aggression, the words “armed attack” are used to indicate armed aggression. However, since the concept of aggression was developing during the Second World War to include forms other than armed force, namely economic and ideological aggression, it seems that the expression “armed attack” has been used intentionally in drafting Art 51 to limit the scope of self-defence to the armed aggression.

<sup>53</sup> American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945 reproduced in Ferencz, note 20, pp 362-371.



### **III. The Nuremberg and Tokyo Charters**

The four Allied Powers met in London for the purpose of drawing up a Charter setting forth the law and the procedures to be applied by the planned International Military Tribunal. Despite the 1942 St. James Declaration and the establishment of the United Nations War Crimes Commission in 1943, by early 1945, no consensus had been attained on the question as to what acts fall within the scope of a “crime against peace” or an act of “aggression”. Indeed, the legal category of “crimes against peace” was new law. Consequently, criminal responsibility for “crimes against peace” was considered to be much more controversial than criminal responsibility for war crimes, the roots of which extend back to the Middle Ages. Lack of consensus over the meaning of “crimes against peace” meant prosecution and punishment therefore risked appearing highly subjective and arbitrary. This risk was exacerbated by the fact that the putative norm prohibiting “crimes against peace” was enforced only by the Allied Powers, rather than by Neutral Powers or representatives, and only against Axis Power defendants. For these reasons, there was considerable disagreement among the Allies during the drafting of the Nuremberg Charter as to whether “crimes against peace” should be prosecuted at all. However, upon the insistence of the United States delegation, the Conference decided that individuals should also be tried for “crimes against peace”, in addition to war crimes and crimes against humanity.

The Allies recognised that their collective decision to prosecute (crimes against peace) was insufficient, in and of itself, to lend “crimes against peace” or “aggression” clear and precise legal meaning. To remedy this problem, the US representative proposed that “the launching of aggressive war” should be inserted in the Charter as a separate crime, distinct from war crimes and crimes against humanity, and that it should be clearly defined in the Charter. The US representative felt that with a clear Charter definition of “aggression”, the defence would be deprived of the argument that “crimes against peace” lacked precise normative content and therefore could not be enforced. It would also prevent the defence from making purely semantic arguments that might lead the prosecution astray. Moreover, the United States and United Kingdom representatives sought to foreclose a possible defence argument that resort to the use of force by the Nazi Government constituted a legitimate act of self-defence, thus equating the moral and legal responsibility of the Axis

Powers with that of the Allies. For example, the Soviet Union had signed a mutual non-aggression pact<sup>54</sup> with Nazi Germany, which in effect assured Hitler that his forces could invade Poland unimpeded by interference from the Soviet Union. Even worse, secret supplementary provisions to the pact established the respective spheres of influence of the two parties.<sup>55</sup>

The position of the United Kingdom was also problematic with regard to its plans to invade Norway (officially neutral), which had been elaborated even before the Nazis invaded Norway in 1940.<sup>56</sup> The Soviet Union strongly resisted the proposal to insert a definition of aggression in the Charter. It cited the grounds that the question of the meaning of aggression in international law lay beyond the competence of the Conference, which had been convened to devote its attention to an enumeration of the acts for which the European Axis leaders were to be held criminally responsible.<sup>57</sup>

The Soviet position found support from the French representative, who doubted whether any established norm of international law prescribed individual criminal responsibility for aggressive war. The French representative argued that the prosecution of war through unlawful means and methods of warfare did not necessarily mean that the launching of war itself was unlawful, or that its initiation necessarily gave rise to individual criminal responsibility for it.<sup>58</sup> According to the French representative, violations of the *jus in bello* might involve State responsibility for the breach of treaty obligations or individual responsibility for war crimes, but the planners and instigators of the war could not be held criminally responsible for having started the war itself.

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<sup>54</sup> Signed on 23 August 1939 in Moscow.

<sup>55</sup> Smith, note 35, pp 147-148 where he notes [o]nce the secret clauses of that pact appeared in evidence, even in summary form, it was difficult not to reach the conclusion that Stalin, like some of the defendants in the dock, had continued to ‘cooperate’ with Hitler after he knew of the Nazi attack plans. If this kind of conduct would earn defendants such as Wilhelm Frick prison sentences or death, what was the Court to say about the actions of the Soviet Union? The difficulty was compounded by the fact that, when it was Russia’s turn to be an invasion victim in 1941, the Germans justified their assault on the grounds Stalin was preparing to tear up the Nazi-Soviet agreement and was about to launch his own attack on them.

<sup>56</sup> Smith, note 35.

<sup>57</sup> Rifaat, note 26, p 148.

<sup>58</sup> Rifaat, note 26, p 145.

The French, opposing any insertion of a definition of aggression, found in the American suggestion more support for their view. Introducing the case on the policy of aggression rather than in aggressive war avoided any insertion of a definition in the charter, which would be problematic and uncertain. This shut the door to the defence to raise arguments in that respect. The French Professor Gros added that defining aggression in the charter would invite other issues to be treated in the same manner, such as, “launching of war contrary to international law”, which would involve more difficulties in the work of the Commission.<sup>59</sup> The definition of aggression, he maintained, should be left to the United Nations through its competent organs, because defining who the aggressor is in international relations is not a matter to be decided between four individual delegations.<sup>60</sup>

Consequently, it was resolved that no definition of aggression would be inserted in the charter; instead a reference to “violations of treaties, agreements and assurances”, would cover the issue, avoid controversy on a definition agreeable to all parties and get the same results.<sup>61</sup> Ultimately, no definition on aggression was inserted in the Nuremberg Charter. Finally, on 8 August 1945, the Four Major Powers reached an agreement on the establishment of an International Military Tribunal for the trial of the German Major War Criminals whose offences had no geographical location. In this agreement the constitution, jurisdiction and functions of the Tribunal were set out in the Charter annexed to it. Article 6(a) of the Nuremberg Charter<sup>62</sup> provides that:

The following acts or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

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<sup>59</sup> Jackson, Robert H, *United States Representative to the International Conference on Military Trials*, HMSO, London, 1945, p 305.

<sup>60</sup> Jackson, note 58, pp 304, 307.

<sup>61</sup> Rifaat, note 26, p 148.

<sup>62</sup> On 8 August 1945, Great Britain, France, the United States and the Soviet Union signed the London Agreement, Cmd. Paper 6903, HMSO, London, 1945 which provides that “there shall be established after consultation with the Control Council for Germany an international military tribunal for the trial of war criminals whose offences have no particular geographical location.” The *Nuremberg Charter* is annexed to the London Agreement.

- (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for any of the foregoing ...<sup>63</sup>

The concept of “crimes against peace” is thus broader than the concept of “war of aggression”, the latter being only one element of crimes against peace. In this way, the Allies could maintain the principle of individual criminal responsibility for the planning and starting of war, without actually having to define “war of aggression” in categorical terms--a difficult and highly political task that was to take many years of negotiation and drafting in the United Nations General Assembly.

The lack of a definition of “crimes against peace” threatened to undermine the legitimacy of the Nuremberg proceeding. Relying on the Kellogg-Briand Pact, the prosecution argued that the use of war as an instrument of national policy had been outlawed in 1928 and that this meant the individuals who planned and instigated the launching of aggressive war were criminally responsible under the rules of international law. The prosecution could not deny that the lack of any definition of “crimes against peace” was a serious defect in the Charter and it had to acknowledge this in the opening speeches.<sup>64</sup> However, it was argued that the 1933 Convention on Aggression, which was never adopted by the League of Nations and therefore did not create

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<sup>63</sup> Arts (b) and (c) define “war crimes” and “crimes against humanity”. If Art 6(a) of the *Nuremberg Charter* had been interpreted broadly, it could have been used to indict a large portion of the German population on the ground that the German population participated, however slightly, in a common plan or conspiracy to commit war crimes or crimes against humanity. See Dinstein Y, “International Criminal Law” (1985) 20 *Israel Law Review* 210, arguing along these lines. However, in the 1948 cases of *German High Command Trial*, and *L.G. Farben Trial* (15 *International Legal Materials* (1948) pp 376), the US Military Tribunal at Nuremberg limited culpability to officers at levels of responsibility for the setting and enforcement of policy.

<sup>64</sup> Mr. Justice Jackson, Chief Prosecutor for the United States stated that: it is perhaps a weakness in this Charter that it fails to define a war of aggression. Abstractly, the subject is full of difficulty, and all kinds of troublesome hypothetical cases can be conjured up. It is a subject which if the defence should be permitted to go afield beyond the very narrow charge in the Indictment, would prolong the trial and involve the Tribunal in insoluble political issues.  
See Opening Speeches of 21 November 1945 of the Nuremberg Trial, p 40.

legal obligations, was nonetheless a valuable aid by which to interpret “crimes against peace”.<sup>65</sup>

The defence answered that nowhere in the provisions of the Kellogg-Briand Pact is it stated that a war of aggression is a crime. Moreover, the Pact does not confer authority upon any State or tribunal to try individuals. The defence attacked the competence of the Nuremberg Tribunal on the grounds that the entire category of “crimes against peace” was not established law and that, in breach of fundamental principles of justice, it was being applied retroactively by an organ without any jurisdiction to do so. The defence arguments on aggression were rejected. The Tribunal stated that the “... Charter makes the planning of waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement.”<sup>66</sup>

The Tribunal acknowledged that neither the Kellogg-Briand Pact nor the 1907 Hague Conventions provide expressly for individual criminal responsibility, but then held that “[i]n the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.”<sup>67</sup> The Tribunal thereby dismissed the defence argument that the Tribunal was applying criminal law retroactively and held that to apply standards of individual criminal responsibility did not breach the principles of *nullum crimen sine lege*, and *nulla poena sine lege*.

The judgment of the Nuremberg Tribunal separated the issues of aggression and individual responsibility, and aggressive war was subsumed under the larger heading of crimes against peace.<sup>68</sup> The Nuremberg Tribunal characterised the waging of an aggressive war as

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<sup>65</sup> Rifaat, note 26, p 151.

<sup>66</sup> “International Military Tribunal (Nuremberg): Judgment and Sentences, 1 October 1946” (1947) 41 *American Journal of International Law* 217.

<sup>67</sup> Judgment and Sentences, note 65, p 218.

<sup>68</sup> The Tribunal states, “It will be convenient to consider the question of the existence of a common plan and the question of aggressive war together, and to deal later in this judgment with the question of the individual responsibility of the defendants.” Office of The United States Chief of Counsel For Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, U. S. G.P.O., Washington D.C., 1946, Vol I, p 16.

“essentially an evil thing.... To initiate a war of aggression ... is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”<sup>69</sup> In addition, conspiracy to initiate and/or wage aggressive war was established as a cognisable crime, separate from the crime of actually initiating and/or waging aggressive war.<sup>70</sup> Given the common consensus that, whatever the general definition of initiating and/or waging aggressive war the acts of Nazi Germany definitely qualified, the Nuremberg Tribunal may be said to have skirted the issue as to the actual definition. Furthermore, to guard against any charge that the Nuremberg Charter was an *ex post facto* restraint placed upon the Nuremberg defendants, the Nuremberg Tribunal proclaimed to do nothing more than codify the law of nations up to that point in history.

The Nuremberg Judgment remains controversial not only because it failed to establish that norms prohibiting “aggression” were grounded in the *lex lata*, but because it also construed norms providing for individual criminal responsibility from instruments that made no mention at all of it, in fact offending the principles of *nullum crimen sine lege* and *nulla poena sine lege*. At the same time, the Tribunal asserted that the principles of *nullum crimen sine lege* and *nulla poena sine lege* were at any rate general principles of justice which should not apply where the defendants ought to have known that the acts they committed, or ordered to be committed, were wrong.<sup>71</sup>

The question of the meaning of “aggression” was also raised before the International Military Tribunal for the Far East.<sup>72</sup> The Tokyo Charter was almost identical to that of the Nuremberg Charter, except for a few variations. Article 5(a) of the Tokyo Charter defines “crimes against peace” as “... the planning, preparation, initiation or waging of declared or undeclared war of aggression or war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” This varies slightly from the Article 6(a) definition of “crimes against peace” in the Nuremberg Charter. The insertion of the

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<sup>69</sup> *Nazi Conspiracy and Aggression*, note 67.

<sup>70</sup> Harris W R, *Tyranny on Trial: The Evidence at Nuremberg*, Southern Methodist University Press, Dallas, Texas, 1954, pp 555-556.

<sup>71</sup> Harris, note 69, p 217.

<sup>72</sup> Established on 9 January 1946 in Tokyo to bring to trial, sentence and punish the major Japanese war criminals.

words “declared or undeclared” before the words “war of aggression”, foreclosed possible defence arguments that Japan was not technically at war because it had not made any formal declaration to that effect.

The defence arguments raised before the Tokyo Tribunal were similar to those made before the Nuremberg Tribunal. However, the Tokyo Judgement is particularly interesting because several judges filed dissenting judgements, most notably, Justice Pal of India. Justice Pal agreed with the defence argument that aggression had never been outlawed in international law, and moreover, that it was not clear what acts constituted “aggression”. Justice Pal also assailed the majority Judgment of the Tribunal for applying one standard to Japan and another to the Allies. In particular, he argued that the Allied action against Japan in connection with Japan’s attack on Manchuria violated laws of neutrality and therefore that Allied action immediately preceding the opening of hostilities, directly between the Allies and Japan, could not be ignored. Justice Pal further called into question the objectivity of the Majority Judgement, arguing that it confused moral wrong with legal wrong. Justice Pal also noted that moral wrongfulness does not necessarily give rise to legal responsibility or criminal responsibility, even where there may exist a general consensus on what is morally wrong.<sup>73</sup> Justice Pal’s contention was that neither the Kellogg-Briand Pact nor other pre-Nuremberg Charter sources of international law provided for individual criminal responsibility with regard to “crimes against peace”.

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<sup>73</sup> As Justice Pal noted:

One of the most essential attributes of law is its predictability. It is perhaps this predictability which makes justice according to law preferable to justice without law, legislative or executive justice. The excellence of justice according to law rests upon the fact that judges are not free to render decision based purely on their personal predilections and peculiar dispositions, no matter how good or wise they may be. To leave the aggressive character of war to be determined according to ‘the popular sense’ or ‘the general moral sense of humanity’ is to rob the law of its predictability.

From Justice Pal’s dissent, quoted in Kopelman E S, “Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial” (1991) 23(2) *New York University Journal of International Law and Politics* 413.

## **IV. Content and Legal Status of the Norms on Aggression Since 1946**

### **4.1. The Role of the United Nations System**

The validity of the Nuremberg Charter and Judgment was unanimously affirmed by the General Assembly of the United Nations in 1946. During the first session of the General Assembly in 1946, the United States sponsored Resolution 95(I) which affirmed “the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the [IMT] Tribunal.”<sup>74</sup> UN Committees were appointed to prepare both a code of international crimes based on the Nuremberg principles and to draft the statute for a new international criminal tribunal that could enforce the penal code.<sup>75</sup> It soon became apparent that political rivalries between the major powers made consensus agreements impossible. It was argued that without a clear definition of the crime of aggression, no criminal code would be complete, and as long as there was no code, there was no need for a court to enforce it. Thus everything was linked, and progress was stymied, with the weak excuse that the time was not yet ripe. In the meanwhile, war and atrocity, continued to be prevalent in inter-state relations.

The definition of aggression followed a long and arduous course. The General Assembly appointed a first Special Committee on the Question of Defining Aggression of fifteen members (1952-1954), then a second Special Committee of nineteen members (1954-1957), and then a third Special Committee of twenty-one members (1959-1967), and lastly a fourth Special Committee of thirty-five members (1967-1974).<sup>76</sup> These four committees submitted various reports which were debated and discussed at length in committees and by the General Assembly. The last of the special committees finally

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<sup>74</sup> GA Res 95(I), UN GAOR, 1st Sess, at 188, UN Doc A/Res/95 (1946).

<sup>75</sup> GA Res 95(I), note 72. For a history of the Draft Code of Crimes and the Statute of an International Criminal Court, see Bassiouni M C, “The History of the Draft Code of Crimes Against the Peace and Security of Mankind” (1993) 27 *Israel Law Review* 247; Gross L, “Some Observations on the Draft Code of Offences Against the Peace and Security of Mankind” (1983) 13 *Israel Year Book of Human Rights* 9, p 10; Williams S, “The Draft Code of Offences Against the Peace and Security of Mankind” in Bassiouni M C (ed), *International Criminal Law*, Transnational Publishers, Dobbs Ferry, N.Y. , 1986, Vol I, p 109.

<sup>76</sup> For a history and documents relating to these committees, see Ferencz, note 20.



completed its task in 1974 and tabled its work before the General Assembly.<sup>77</sup>

After more than a quarter-of-a-century of fruitless wrangling, a definition of aggression was reached by consensus in 1974. It is noteworthy that the definition of aggression, which took more than twenty years to define, was neither included in a multilateral convention nor even voted upon in the resolution that adopted it. On 14th December 1974 the General Assembly approved Resolution 3314 (XXIX) (definition of Aggression).<sup>78</sup> Article 5(2) of Resolution 3314 states that: “a war of aggression is a crime against international peace. Aggression gives rise to international responsibility.”<sup>79</sup> It condemned the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State and, after listing several illustrations of prohibited actions, concluded that whether the crime of aggression had been committed had to be considered “in the light of all the circumstances of each particular case.”<sup>80</sup> The final decision was left to the Security Council since, under the UN Charter, the Council bore primary responsibility for determining whether aggression by a State had occurred.<sup>81</sup> As with many UN resolutions, in order to reach agreement, it became necessary to include several ambiguous phrases that nations might interpret for their own advantage.<sup>82</sup>

The Resolution contains seven provisions defined as aggression:

- First use of arms in contravention of the Charter is prima facie evidence of aggression, unless the Security Council

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<sup>77</sup> For a comparison of the various committee reports and alternative drafts until 1971, see Bassiouni M C, “The Definition of Aggression in International Law: The Crime Against Peace” in Bassiouni M C & Nanda V P (eds), *A Treatise on International Criminal Law*, Thomas, Springfield, Illinois, 1973) Vol 1, p 159.

<sup>78</sup> GA Res 3314 (XXIX), UN GAOR, 29th Sess, Supp No 31, pp 142- 43, UN Doc A/9631 (1974). This Resolution has been severely criticised by a number of scholars for leaving too many loopholes. See e.g. Carpenter A, “The International Criminal Court and the Crime of Aggression” (1995) 64(2) *Nordic Journal of International Law-Acta Scandinavica Juris Gentium* 223, p 242.

<sup>79</sup> Art 5(2), GA Res 3314 (XXIX), note 77.

<sup>80</sup> GA Res 3314 (XXIX), note 77, Annex para 10.

<sup>81</sup> See *UN Charter*, Art 39.

<sup>82</sup> See generally Ferencz B B, “The UN Consensus Definition of Aggression: Sieve or Substance?” (1975) 10 *Journal of International Law and Economy* 701.

finds otherwise, including that the acts committed are not grave enough to constitute aggression.

- Invasion or attack by armed forces of one State upon another State, occupation or annexation resulting from this.
- Bombardment or the use of any weapons by one State against another State.
- Blockade of ports or coasts of one State by armed forces of another State.
- Attack on armed forces of one State by armed forces of another State.
- Using a State's armed forces within another State, when this presence is with the agreement of the receiving State, but when the usage is contrary to the terms agreed upon or the presence is for a longer time period than agreed upon.
- One State allowing another State to use its territory for perpetrating acts of aggression against a third State.
- Sending armed bands, groups, irregulars or mercenaries into another State to carry out acts of force amounting to acts of aggression as they are defined above, or substantial involvement therein.<sup>83</sup>

According to the resolution, this list is not exhaustive in that the Security Council may determine that other acts are aggression under the Charter. Further, it is stated that there is no justification for aggression, whatsoever; wars of aggression are a crime against international peace and shall lead to international responsibility and whatever gained from the aggression shall be recognised as unlawfully gained. This definition has been criticised for not being clear. For example, it is silent on whether it includes indirect aggression such as fomenting civil unrest in another country. Furthermore what is still open is whether armed force is a requirement for aggression. Economic coercion such as boycott, trade restrictions,

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<sup>83</sup> GA Res 3314 (XXIX), above note 77.

tariffs, quotas, blacklisting, or navicerts could arguably be considered aggression, and the definition in the 1974 does not include or exclude such questions. The resolution opens for the Security Council the possibility of defining any of these acts as aggression. This will be a political decision, and a tribunal would have difficulties adjudicating on such a question as long as the decision lies with--and might be changed anytime by the Security Council.<sup>84</sup> The most frequently voiced objection to accepting the 1974 definition of aggression now is that it was intended only as a non-binding guide to the Security Council (that paid practically no attention to it thereafter) and that it is not suitable in a criminal statute that, in fairness, must specify the elements of the crime.

The Article now turns directly to the next attempt to define aggression, the 1991 Draft Code on Crimes Against Peace and the Security of Mankind. Its provisions on aggression were largely drawn from General Assembly Resolution 3314.

#### **4.2. 1991 ILC Draft Code on Crimes against the Peace and the Security of Mankind**

The work on a draft code of international offences began in 1947.<sup>85</sup> Between 1947 and 1996, the United Nations' efforts to codify certain international crimes and to establish an international criminal court were carefully separated, though always intertwined.<sup>86</sup> The idea of a Draft Code of Crimes to complement an international criminal court had been mooted back in 1947.<sup>87</sup> Though the Cold War hindered the

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<sup>84</sup> Carpenter, note 74.

<sup>85</sup> In 1947, the General Assembly directed the Committee on the Codification of International Law, the International Law Commission's (ILC) predecessor, to formulate a general codification of offences against the peace and security of mankind. The Resolution mandated the ILC to: (a) formulate the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, and (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in sub-paragraph (a) above. GA Res 177, UN GAOR, 2d Sess., at 9, UN Doc A/CN.4/4 (1947).

<sup>86</sup> See note 73.

<sup>87</sup> In compliance with the General Assembly Resolution 177 of 1947 the ILC in 1949 started to "(formulate) the principles recognised in the Charter of the Nuremberg Tribunal" and to "(prepare) a draft code of the offences against the peace and security of mankind." A subcommittee was formed and a special rapporteur was appointed to

codification process, progress occurred beginning in 1990. With the idea of an international criminal court seizing the imagination of States, in 1989,<sup>88</sup> it became necessary to include a definition of aggression in the 1991 Draft Code <sup>89</sup> and thus seal the lacuna left by Article 2 of the first Draft Code in 1954 that mentioned aggression without defining it.<sup>90</sup>

Aggression is defined and elaborated on in Article 15 of the 1991 Draft Code. The Article provides in part:

2. Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations
3. The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although 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.

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prepare a Draft Code of Offences Against the Peace and Security of Mankind. That title was changed in 1988 to Draft Code of Crimes Against the Peace and Security of Mankind. Concurrently, the task of formulating a Draft Statute for the Establishment of an International Criminal Court was assigned to another special rapporteur, who submitted his first report to the ILC in March 1950. That report argued that a substantive criminal code and a statute for an international criminal court should complement one another.

<sup>88</sup> GA Res 43/164, UN GAOR, 43d Sess, Supp No 49, at 280, UN Doc A/43/49 (1988); GA Res 44/39 UN GAOR, 44th Sess, SuppNo49, at 310, UN Doc A/44/49 (1989). This recommendation was the consequence of a resolution adopted by the Special Session of the General Assembly of that year on the question of illicit traffic in drugs. Its sponsor was Trinidad and Tobago, whose former Prime Minister Arthur N.R. Robinson was the moving force behind it. Robinson deserves much credit for his untiring efforts to promote an international criminal court.

<sup>89</sup> Report of the International Law Commission, UN GAOR, 46th Sess. Supp No 10, UN Doc A/46/10 (1991).

<sup>90</sup> See Third Report Relating to a Draft Code of Offences Against the Peace and Security of Mankind, UN GAOR, 6th Sess, UN Doc A/CN.4/85 (1954).

5. Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.<sup>91</sup>

Much of Article 15 of the Draft Code is taken from Resolution 3314 and it therefore carried over weaknesses in the resolution's content.<sup>92</sup> It is not clear, for example, whether economic pressure could be considered a "relevant circumstance" in the determination of aggression by the Security Council within the meaning of Article 15(3) of the Draft Code. If it may, the next question is whether the first use of armed force would be excusable were it resorted to in response to extreme economic aggression. This issue was left open under the 1991 Draft Code. Further, Article 5 of Resolution 3314, which reads: "No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression", was left out of the 1991 Draft Code. The absence of a similar clause in the 1991 Draft Code might be taken to suggest that the first use of force by a State in response to extreme economic or political provocation from any other State (not covered in the Article 15 definition of "aggression") is permitted under the Draft Code. Suppose a State exercised its right to respond to extreme economic pressure under Article 15(3) with the first use of force. The acute question would then become: who is to judge when there exists economic pressure of sufficient extremity to justify the first use of force?

Under the 1991 Draft Code, consideration by the permanent International Criminal Court of individual criminal responsibility for aggression would be subject to the determination of the Security Council that aggression has been committed in a particular instance.

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<sup>91</sup> ILC Third Report, note 88. Art 15(1) provides for individual criminal responsibility for acts of aggression while Art 15(4) mirrors many of the provisions in General Assembly Resolution 3314 (XXIX) as to what acts amount to aggression (the Resolution provisions are set out in Section 4.1 of this work). Art 15(6) acknowledges the legal use of force as provided for under the *UN Charter* while Art 15(7) provides for the right to self-determination, freedom and independence, thus seemingly removing use of force that may be undertaken within this rubric from the ambit of aggression.

<sup>92</sup> See generally Stone J, "Hopes and Loopholes in the 1974 Definition of Aggression" (1977) 71 *American Journal of International Law* 11 for a critique of resolution 3314. See also Nyiri N, *The United Nations' Search for a Definition of Aggression*, P Lang, New York, 1989 and further, Rifaat, note 26.

Though the wording of Article 15 of the Draft Code preserved the role of the UN Security Council, as provided for in the UN Charter, to determine cases of aggression,<sup>93</sup> it did not clarify sufficiently the role of the International Criminal Court in the determination of aggression. If the International Criminal Court were conferred concurrent jurisdiction to determine whether aggression has been committed, the UN's capability to respond to breaches of international peace and security could be seriously hindered where the Security Council's determination conflicted with the finding of the International Criminal Court. The Security Council might find there was aggression, but the International Criminal Court might determine aggression had not been perpetrated, or vice versa. In such cases, the legitimacy of the United Nations to maintain international peace and security on a collective basis would likely be undermined, since decisions even of UN organs would be inconsistent or even contradictory.<sup>94</sup>

Article 15 seemingly meant that it would confer authority upon the International Criminal Court to determine whether there has been aggression, but that the UN Security Council has higher authority to make such a ruling. Even if this were the case, the legitimacy of the International Criminal Court would be undermined as its authority to make a legal determination on a critical matter of fact-whether aggression had been committed-would be subordinate to the Security Council's political judgement. This problem is not unique to the relationship between the Security Council and the International Criminal Court. There is already some ambiguity in the role of the International Court of Justice (ICJ) relative to that of the Security Council. In the *Lockerbie Case*,<sup>95</sup> the International Court of Justice

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<sup>93</sup> The Art 15(2) definition of "aggression" follows Art 1 of General Assembly Resolution 3314 which itself is based on Art 2(4) of the *UN Charter*. See GA Res 3314, note 77.

<sup>94</sup> It should be noted though that Art 16 of the *Rome Statute*, note 18, on deferral and investigation provides that: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." This in effect means that the Court will be precluded from assuming jurisdiction over a matter on the Security Council's agenda, whether the Court was seized of the matter before or after the Security Council. This is aimed at avoiding a blinkered parallelism between the work of the two organs that would have the damaging effect of undermining each their authority.

<sup>95</sup> (*Libya v. UK*) 1992 ICJ Reports 3.

followed the Nicaragua Case in opining that “[t]he Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.”<sup>96</sup> An interesting proposition in this context is Judge Lauterpacht’s position in the Bosnia Genocide Case<sup>97</sup> in which he noted that: “the Court, as the principal judicial organ of the United Nations, is entitled, indeed bound, to ensure the rule of law within the United Nations system and, in cases properly brought before it, to insist on adherence by all United Nations organs to the rules governing their operation.”<sup>98</sup> He added: “The concept of jus cogens operates as a concept superior to both customary international law and treaty [law]...” The question arises whether the ICJ as “the principal judicial organ of the United Nations,”<sup>99</sup> can rule on a question of aggression in a relevant case or in an advisory opinion, considering that the prohibition of aggressive force under Article 2(4) of the Charter is a customary norm jus cogens. Such a ruling it would appear, could prevail over inconsistent treaty provisions. It seems therefore, that jus cogens prohibitions of aggression might condition Security Council actions under Chapter VII of the Charter allowing

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<sup>96</sup> 1992 ICJ Reports at 22, quoting the dicta of the *Nicaragua Case* 1984 ICJ Reports 27 pp 434-435. See also Vicuña F O, “The Settlement of Disputes and Conflict Resolution in the Context of the Revitalized Role for the United Nations Security Council” in Dupuy R (ed), *The Development of the Role of the Security Council: Peace-Keeping and Peace-Building*, Martinus Nijhoff, Dordrecht, 1993, p 47, who states:

A possible approach regarding the harmonisation of these colliding jurisdictions would be that within the overall framework of coordination for a new security system under the United Nations, both the Security Council and the International Court of Justice might be empowered to refer to each other such matters that can be considered strictly political or strictly legal within the process of preventive action. This approach would be of particular interest in cases such as this, in which each organ was seized by an opposite party to the same dispute, a situation which was arisen often between regional organisations and the Security Council. However, besides the necessary coordination there would be a need for both organs to proceed to the same time limit in order that their respective decisions might be integrated into the same process of settlement of dispute and conflict prevention.

<sup>97</sup> See *Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, 13 September 1993 ICJ p 325.

<sup>98</sup> Further Requests for the Indication of Provisional Measures, 13 September 1993 ICJ (Separate Opinion of Judge Lauterpacht) p 99.

<sup>99</sup> *UN Charter*, Chapter XIV, Art 92, states that the ICJ is the “principal judicial organ” of the United Nations thus the primary judicial body of the UN.

the ICJ to apply jus cogens prohibitions as a restraint even against actions of the Security Council. Though this presents a strong proposition, the text of the ICJ statute does not mention the term judicial review and the Court does not require UN organs to seek judicial advice when confronted with a legal issue.<sup>100</sup> Though the creators of the ICJ predicted that it would be a “world supreme court”, experience has proven that analogy inappropriate owing to the nature of the international system.<sup>101</sup>

The International Criminal Court with its lack of a clear-cut relationship with the UN system wouldn't have fared any better in the matter of judicial determination influencing or conditioning the Security Council's freedom of action in issues relating to aggression. What would be the International Criminal Court's role were the Security Council to do nothing at all in respect of a possible case of aggression? Would the court be barred from trying a national leader who allegedly had perpetrated aggression where the Security Council had taken no action at all on the matter? Were the court authorised to seize jurisdiction over the matter where the Security Council took no action, at precisely what point in time would it be clear that the Security Council did not act? All these questions were left open in the 1991 Draft Code.

The definition of aggression in the 1991 Draft Code was very lengthy and was controversial in a number of other aspects. It was not well received, drawing criticism from both governments and scholars. There was a need for a serious revision of the entire Code more so in the light of the establishment of the two ad hoc international criminal tribunals in the early 1990s and the need to incorporate their jurisprudence.<sup>102</sup>

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<sup>100</sup> See *UN Charter*, Chapter XIV. Coupled with this, the ICJ is powerless to act without the grant of compulsory jurisdiction by States and in any case UN organs and agencies have typically undertaken their own interpretations of international law and treaties.

<sup>101</sup> See: e.g. Bellot H, *Texts Illustrating The Constitution of The Supreme Court of The United States and The Permanent Court of International Justice*, Sweet & Maxwell, London, 1921 (drawing on the success of the Supreme Court to predict the success of the Permanent Court); See also Scott J B, “The Judicial Settlement of International Disputes” (1926) 15 *Georgia Law Journal* 35, p 37; (using the model of the Supreme Court to predict that the “force suit” would give place to the “law suit” in the international arena).

<sup>102</sup> See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704 of 3 May 1993. The Statute of the



### 4.3. 1996 Draft Code of Crimes against Mankind

Prodded by the UN General Assembly, the ILC, in 1996 finally completed revising the Draft Code of Crimes<sup>103</sup> to supplement the Statutes that had been drafted two years earlier for an International Criminal Court.<sup>104</sup> The statute describes “the crime of aggression” as a “customary law crime.” The distinguished lawyers on the ILC described aggression as a peremptory norm binding on all States and, without specifying any more detailed definition, advised that it should be left to practice to determine the exact contours of the crime.<sup>105</sup> The Code upheld the Nuremberg principles and confirmed that crimes against peace were punishable under international law.<sup>106</sup>

The ILC Commentary to the Draft Code deals in considerable detail with the crime of aggression for purposes of individual criminal responsibility. It notes that “[a] State can commit aggression only with the active participation of the individuals who have the necessary authority or power to plan, prepare, initiate or wage aggression.”<sup>107</sup> Aggression by a State was stated to be a *sine qua non* condition for the attribution of individual criminal responsibility for the crime of aggression.<sup>108</sup> Since Article 39 of the UN Charter vested the Security

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International Criminal Tribunal for the Former Yugoslavia formed the appendix to the Secretary-General’s report. On 8 November 1994, the Security Council adopted resolution 955 creating the International Criminal Tribunal for Rwanda, with its Statute as the resolution’s annex.

103 Draft Code of Crimes Against Peace and Security of Mankind: Titles and Arts on the Draft Code of Crimes Against Peace and Security of Mankind adopted by the International Law Commission on its forty-eight session, UN GAOR, 51st Sess, UN Doc A/CN.4L.532 (1996), revised by UN Doc A/CN.4L.532/Corr. 1 and UN Doc A/CN.4L.532/Corr.3. Draft Code of Crimes Against Peace and Security of Mankind: Titles and Articles on the Draft Code of Crimes Against Peace and Security of Mankind adopted by the International Law Commission on its forty-eight session, UN GAOR, 51st Sess, UN Doc A/CN.4L.532 (1996), revised by UN Doc A/CN.4L.532/Corr. 1 and UN Doc A/CN.4L.532/Corr.3.

104 Draft Statute: International Criminal Tribunal, UN GAOR, 45th Sess, UN Doc A/Conf 144/NGO.7 (1990) and Report of the International Law Commission, UN GAOR, 49th Sess, Supp No 10, UN Doc A/49/10 (1994)

105 See Report of the ILC, UN GAOR, 51st Sess, Supp No 10, at 15, UN Doc A/51/10 (1996).

106 The other crimes, including War crimes, crimes against humanity and certain transnational crimes widely condemned by international treaties.

107 Report of the ILC, note 103, p 84.

108 Report of the ILC, note 103, p 85. See also Report of the ILC, UN GAOR, 49th Sess, Supp No 10, UN Doc A/49/10 (1994).

Council with primary authority to determine the existence of an act of aggression, the ILC Draft Statute made plain that no complaint of aggression could be brought unless the Security Council first determined that a State had committed the act of aggression which was the subject of the complaint. The absence of a more specific definition of aggression and the reference to the Security Council in the ILC recommendations was supportive of the Nuremberg Charter and Judgment that had been affirmed by the entire General Assembly in 1946. Nevertheless, those two points gave rise to major differences when nations convened to consider a permanent international criminal court.

Article 16 of the 1996 Draft Code sort to remedy the lengthy provisions of the 1991 Draft that were drawn from the General Assembly Resolution on Aggression of 1974 by replacing it with a formulation drawn from Article 6(a) of the Nuremberg Charter. This was meant to replace the politically biased 1991 provision, with the more legal based provision of the Charter as the General Assembly had recommended that the Draft Codes form the basis for consideration by open-ended UN Committees preparing the foundation the establishment of the permanent International Criminal Court.

Article 16 of the Draft Code concerning the crime of aggression states that “[a]n individual who, as leader or organiser, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for crime of aggression.” Article 16 basically deletes the entire body of Article 15 of the 1991 Draft Code, replacing it with a reformulation drawn from article 6(a) of the Nuremberg Charter.

First, the advantage of this approach is that the International Criminal Court would not be bound to interpret the lengthy provisions drawn from the General Assembly resolution on aggression of 1974.<sup>109</sup> It must be recalled that Resolution 3314 had been drafted for political purposes and not specifically for the purpose of enforcing individual criminal responsibility.<sup>110</sup> This does not mean, however, that the

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<sup>109</sup> GA Res 3314 (XXIX), note 77.

<sup>110</sup> The Governments of Switzerland, the United Kingdom and the United States were of the view that Resolution 3314 should not form the basis of the Draft Code provisions on aggression since it was not designed for the purposes of international criminal law, See Comments and Observations of Governments on the Draft Code of Crimes against the Peace and Security of Mankind adopted on

International Criminal Court could avoid the issue as to whether aggression had been committed within the meaning of Article 2(4) of the UN Charter.

Second, the resemblance between Article 16 of the 1996 Draft Code and the relevant provisions of the Nuremberg and Tokyo Charters would render the jurisprudence arising from these Tribunals, as well as that arising from cases decided pursuant to Control Council Law No. 10, more valuable as guidance for an International Criminal Court.

Third, Article 16 of the 1996 Draft Code introduces an improvement over the corresponding provisions of the 1991 Draft Code by including specific reference to individual responsibility for aggression committed by a State. Thus, individual criminal responsibility for aggression would not be incurred unless the international legal norm that prohibits States from committing aggression was first breached.

Fourth, the wording of Article 16, like Article 15 of the 1991 Draft Code and Article 6 of the Nuremberg Charter, focuses on those individuals in the top level of the command structure i.e. leaders and organisers. However, it must be noted that Article 16 extends beyond the ambit *ratione personae* of Article 15 of the 1991 Draft Code through its inclusion of those who have “actively participated” in the crime of aggression. How the International Criminal Court would interpret the scope of this term is unclear. “Active participation” does not connote a specific level of participation and would have to be decided on a case-by-case basis by the Court. As the commentary to Article 16 points out, the provision should be interpreted narrowly to apply to persons having the authority to make decisions at a policy level, rather than persons at lower echelons of authority, such as lower-ranking army officers or soldiers.

#### **4.4. The Rome Statute**

On 22 September 1997, the then United States President, William Clinton appeared before the General Assembly of the UN to call for the establishment of a permanent international criminal court before the end of the 20<sup>th</sup> Century. He had earlier publicly pledged support

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First Reading by the International Law Commission at its 43rd Session, A/CN.4/448 of 1 March 1993.

for the principles of Nuremberg, and the then Secretary of State Madeleine Albright had made many similar statements. But the United States, often called upon for military interventions that it perceived to be justifiable on humanitarian grounds, showed little enthusiasm for including the crime of aggression within the jurisdiction of the planned new court. Smaller nations ever resentful of the privileged veto power reserved to the five permanent members of the Security Council opposed any dependence of the International Criminal Court on a Council that many regard as politicised and self-serving.

When the final plenipotentiary negotiating sessions began in Rome in the summer of 1998, most States, including the European Union and about 30 nations united in the Non-Aligned Movement, insisted that without the inclusion of aggression as a crime they would be unable to support the new court. Many Arab States wanted the 1974 consensus definition, with possibly some improvements in their favour, included in the Rome Statute. Germany's delegate, Dr. Hans-Peter Kaul, pressed various compromise solutions. India and Pakistan, busy testing new nuclear weapons, were not inclined to subject themselves to possible charges of aggression. China stressed the protection of its national sovereignty. The U.S., mindful of military and political considerations, remained aloof on the question of including aggression and insisted on preserving the Security Council's veto rights as guaranteed by the UN Charter. A host of real or politically motivated concerns about including aggression that had been voiced during earlier meetings remained unaltered.<sup>111</sup>

In the draft statute considered during the Rome Conference, three different definitions of the crime of aggression, each proposed definition including several variations, were submitted for consideration.<sup>112</sup> The fact that none was adopted may be in part a reflection of the varying degrees of deference afforded the Security Council in each definition. The first option advanced language designed to preserve the roles of the United Nations and the Security Council in matters related to threats to international peace and

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<sup>111</sup> See ICC Preparatory Commission Reports August 1996, Vol 1 (21 February 1997).

<sup>112</sup> See Report of the Preparatory Committee on the Establishment of an International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 14 April 1998, UN Doc A/Conf 183/2/add.1 (1998) (Draft Statute) (containing the Draft Statute for the International Criminal Court).

security.<sup>113</sup> In its most benign form the variations denominated “Option 1” deemed the crime of aggression to be the planning, preparation, ordering, initiation, or carrying out of “an armed attack ... against the ... territorial integrity ... of another State.”<sup>114</sup> In its most extreme variant, this definition condemned only “war[s] of aggression ... in contravention of the Charter of the United Nations as determined by the Security Council,”<sup>115</sup> thereby rendering the Court subject to the authority of the Council for the purposes of trying cases in which aggression has been alleged. Like the Nuremberg Charter which it resembles, Option 1 focused on generally accepted principles of international law, eschewing specific definitions in favour of broad prohibitions.<sup>116</sup>

The second proposed definition, Option 2, focused instead on certain acts “of sufficient gravity,” which, when measured against an objective scale, constitute aggression.<sup>117</sup> This formulation consequently includes a non-exclusive list of potentially illegal acts which “threaten or violate the sovereignty, territorial integrity, or political independence of a State;”<sup>118</sup> included in this list is invasion, bombardment, occupation, blockades, and other recognised belligerent acts. In relying on these objective indicators, Option 2 borrowed heavily from the past UN attempt to define aggression, General Assembly Resolution 3314, Resolution on the Definition of Aggression. An important consequence of defining aggression objectively is that it permits a measure of independence from Security Council determinations.

The third proposed definition, like Option 2, targeted actions threatening to the sovereignty, territorial integrity, or political independence of the State. Like proposed Option 1, Option 3 in its most extreme version defers to the determinations of the Security Council. However, Option 3 takes a more subjective approach to

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<sup>113</sup> See Draft Statute, note 111, pp 12-14. The text of the proposed definitions of “aggression” are found as an appendix to this article.

<sup>114</sup> Draft Statute, note 111, p 12; see Option 1 of Appendix A.

<sup>115</sup> Draft Statute, note 111, p 12. An intermediate variant would have left the determination of what constitutes a violation of the Charter up to the Court.

<sup>116</sup> The *Nuremberg Charter* defined crimes against peace as aggression “in violation of international treaties, agreements or assurances.”

<sup>117</sup> Draft Statute, note 111, p 13; see Option 2 of Appendix A.

<sup>118</sup> Draft Statute, note 111, p 13.

defining aggression by looking to the motives behind the attack and condemning “armed attack . . . undertaken in . . . 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.”<sup>119</sup> There simply was not enough time in Rome to reach agreement on these sensitive questions. In the end, the agile and adroit Chairman Philippe Kirsch of Canada found the only compromise possible: the resolution of the differences was postponed to a later day.

When, despite U.S. objections on many points, the Rome Statute was overwhelmingly endorsed by a vote of 120 to 7 with 21 abstentions, all that could be agreed upon concerning the inclusion of the crime of aggression was that it was recognised as an international crime subject to the Court’s jurisdiction. But that was only the first step. The second step, allowing the Court to act, could only be taken after certain conditions were met. There will have to be a near-consensus agreement on a definition of aggression and the relationship between the International Criminal Court and the Security Council will have to be clarified, consistent with the UN Charter. As a third and final step, the proposed new definition and clarification will only be considered for adoption at an amendment conference that will not take place until more than seven years have elapsed after the Statute goes into effect by being ratified by at least sixty nations.<sup>120</sup> When, and if, all of these conditions will be met is rather uncertain.

It should be noted that the relationship between the International Criminal Court and Security Council remains problematic. It is difficult to resolve as one body is political, the other legal. Thus, their

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<sup>119</sup> Draft Statute, note 111, p 14; see Option 3 of Appendix A. Though opponents of Option 3 see it as overly subjective, proponents point to its realistic contours in application based on the fact that aggression can only be effectively dealt with by laying down guidelines for judicial organs that would provide the basis for an objective assessment of facts rather than hard and fast rules that may not be amenable to complex scenarios. Arguably, it is improbable that there can ever be an absolute definition of aggression. Motive lies at the heart of aggression, a robust regional orchestrated peacekeeping mission with the aim of humanitarian assistance for instance may at first glance appear to be an act of aggression owing to the nature of military action, but this is negated by the motive behind the military action. Similarly, an error or failure in an electronic weapons management system that results in a missile landing in a neutral State (whether during a unilateral or multilateral action) cannot realistically be termed an act of aggression.

<sup>120</sup> See *Rome Statute*, note 18, Arts 5, 121, 123, 126.

activities are governed by very different criteria. It is the UN Charter that determines the role and authority of the Council. All members of the UN are legally bound by the Charter they have freely accepted. The Charter cannot be altered by any criminal statute. It can be changed only by amendment of the Charter itself, in accordance with its terms. Since the five permanent members would have to consent to any amendment, that possibility is clearly not in the cards at this time. True, the Charter provisions giving only five nations special veto rights are manifestly unfair, but they were accepted for vital political reasons without which the UN probably would not have come into existence. The time may come when privileged members will recognise the value of voluntarily restraining their unjust veto power, but whatever the eventual definition of aggression, the Rome Statute cannot diminish the Council's authority nor its Charter obligation to determine when aggression by a State has occurred. The concerns that the Council will act unfairly may perhaps be met by other means.

## **VI. Conclusion**

International law is slowly evolving as nations crawl toward a more humane world order. Notions of absolute State sovereignty and traditional prohibitions against interference in a country's internal affairs are still heard as justification for massive violations of human rights. The line between aggression and humanitarian intervention has not yet been clearly drawn. Nor are the parameters of self-defence sharply defined. Lawful goals can only be sought by lawful means, but where the law itself is unclear, it is understandable that nations both large and small will continue to benefit and/or suffer from the uncertainties of the substantive content of the crime of aggression.

Nations must decide which of the listed alternatives they prefer. Surely small nations and those who do not contemplate acts of aggression have much to gain by creating an international system to help curb a terrible crime that is the breeding ground for the most atrocious crimes against humanity. Whether law can deter aggression depends upon the willingness of States to change their way of thinking and acting. No one expects perfection but the enforcement of criminal law is still regarded as a useful tool for the benefit of humankind.

The war-ethic that steeped past generations in wasted human blood and misery must be replaced by a law-ethic, in which aggression is not only condemned as the supreme international crime, but also properly defined so that those who are responsible for incalculable harm to innocent victims of aggression must know that they will answer for their evil deeds before the bar of international justice.