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The Working Group On Aggression At the Preparatory Commission For the International Criminal court

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Abstract

The Working Group on aggression has tackled both main issues referred to in article 5 of the Rome Statute and Resolution F, namely the definition of the crime and the conditions of exercise of jurisdiction by the Court. For some participants these two issues are closely interrelated to the point that one cannot be considered without the other. Without prejudice to the substance of this view, in practice, a separate debate has taken place to allow an orderly discussion of each aspect of the problem.

Discussions during and after Rome demonstrate that there is no easy solution to any of the problems raised. In light of the difficulties to be faced, some continue to argue that aggression should have never been included in the Statute in the first place. Whether they are right or wrong is irrelevant today. The Statute has been adopted and will soon enter into force. The international community needs now to act upon decisions that were made at the Rome Conference both to include the crime and to mandate the PrepCom to draft proposals with the view of implementing this inclusion at a review conference. All those who promote the establishment of a universal Court, regardless of their position with regard to the crime of aggression, are required to negotiate in good faith in order to seek an adequate answer to the problem. Failure to do so could undermine the credibility of the process and weaken support for the Court.

THE WORKING GROUP ON AGGRESSION AT THE PREPARATORY COMMISSION FOR THE INTERNATIONAL CRIMINAL COURT

*Silvia A. Fernández de Gurmendi**

INTRODUCTION

At the end of the Rome Conference, after extensive discussions, proponents and opponents of the inclusion of aggression within the jurisdiction of the Rome Statute of the International Criminal Court¹ (“Rome Statute”) had to admit that negotiations had ended in a tie and accepted a “codified impasse.”² Aggression would be included within the crimes of jurisdiction of the International Criminal Court (“ICC” or “Court”) but without immediate effect due to a provision stipulating that:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.³

As part of the compromise, the mandate of the Preparatory Commission (“PrepCom”) was enlarged to make sure that efforts on the subject would continue immediately after the end of the Conference. To that end, Resolution F adopted at the Conference on July 17, 1998 stated that:

The Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes

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1. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9* (1998), available at <http://www.un.org/law/icc/statute/rome fra.htm> [hereinafter Rome Statute].

2. M. Shuster, *The Rome Statute of an International Criminal Court and the Crime of Aggression: A Gordian Knot in Search of a Sword*, School of Legal Studies, University of Sussex, Summer 2001.

3. Rome Statute, *supra* note 1, art. 5, para. 2.

of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute.⁴

In fulfillment of this mandate, the PrepCom established a Working Group on aggression to deal with the matter.

I. *THE SUBSTANTIVE ISSUES*

The Working Group on aggression has tackled both main issues referred to in article 5 of the Rome Statute and Resolution F, namely the definition of the crime and the conditions of exercise of jurisdiction by the Court. For some participants these two issues are closely interrelated to the point that one cannot be considered without the other. Without prejudice to the substance of this view, in practice, a separate debate has taken place to allow an orderly discussion of each aspect of the problem.

The results of early discussions are reflected in the consolidated text that was produced by the former coordinator⁵ of the Working Group at the third session of the PrepCom in 1999.⁶ The text is a compilation of written and oral proposals and has numerous brackets and options to show disagreement. Since the elaboration of this document, additional proposals and working documents have been introduced by individual delegations that have fueled the debate and helped the Working Group to move forward in the understanding of the problems.

4. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Res. F, para. 7, U.N. Doc. A/CONF.183/10* (1998), available at <http://www.un.org/law/icc/statute/final.htm>.

5. Tuvako Manongi from Tanzania.

6. For the Proceedings of the Preparatory Commission at its first, second, and third sessions, see *Proceedings of the Preparatory Commission at its first, second and third sessions*, U.N. Doc. PCNICC/1999/L.5/Rev.1 (Dec. 22, 1999). For the most recent Consolidated Text of Proposals on the crime of aggression prepared by the coordinator, see *Proceedings of the Preparatory Commission at its eighth Session*, U.N. Doc. PCNICC/2001/L.3/Rev.1 (Oct. 11, 2001) [hereinafter *Consolidated Text by Coordinator*].

A. *The Definition*

The International Law Commission ("ILC") included aggression in its Draft Statute for an International Criminal Court, but, as was the case for the other crimes, did not provide a definition.⁷ In the commentary to the draft, the ILC acknowledged the special problem that was raised by this crime in that there was no treaty definition comparable to genocide.⁸ Furthermore, General Assembly Resolution 3314 of December 14, 1974 dealt with aggression by States, not with the crimes of individuals, and was designed as a guide for the Security Council not as a definition for judicial use.⁹ But, the ILC concluded:

[G]iven the provisions of Article 2(4) of the Charter of the United Nations, that resolution offers some guidance, and a court must, today, be in a better position to define the customary law crime of aggression than was the Nürnberg Tribunal in 1946. It would thus seem retrogressive to exclude individual criminal responsibility for aggression (in particular, acts directly associated with the waging of a war of aggression) 50 years after Nürnberg.¹⁰

During the negotiations of the Rome Statute many delegations quoted this ILC statement and shared the historical assessment of the Commission; that it would be retrogressive to exclude individual criminal responsibility for aggression fifty years after Nuremberg and the crime was indeed included at the end of the Diplomatic Conference.¹¹ Unfortunately, however, the international community was not in a better position to define the crime and all efforts to that effect failed in Rome.¹² Delegations continue to meet enormous difficulties at the PrepCom in find-

7. *Report of the International Law Commission on the Work of its Forty-sixth Session, Draft Statute for an International Criminal Court*, U.N. GAOR, 49th Sess., Supp. No. 10, at 70, art. 20(b), U.N. Doc. A/49/10 (1994) [hereinafter *Draft ILC Statute*].

8. *See id.* at 72, para. 6.

9. *See Definition of Aggression*, G.A. Res. 3314 (XXIX), U.N. GAOR, 6th Comm., 29th Sess., 2319th plen. mtg. (1974) [hereinafter *Definition*].

10. *Draft ILC Statute*, *supra* note 7, at 72, para. 6.

11. *See e.g., Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, Vol. I, para. 66, U.N. Doc. A/51/22 (1996).

12. For a story of the negotiations at the Rome Conference, see Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 79-127 (Roy S. Lee ed., 1999).

ing common ground and several options remained open at the time this paper was written.

1. The Precedents

Proposals introduced by delegations draw inspiration from existing precedents, namely the Charter of the International Military Tribunal of Nuremberg¹³ ("Charter") and General Assembly Resolution 3314.¹⁴

Article 6(a) of the Charter provided for the individual criminal responsibility for 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 the accomplishment of any of the foregoing."¹⁵

On the basis of this provision, the Tribunal found twelve defendants guilty of having committed crimes against peace and famously proclaimed:

The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity To initiate a war of aggression, therefore, 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.¹⁶

Efforts to sanction the crime on aggression were increased by the International Military Tribunal for the Far East ("Tokyo Tribunal"), which focused predominantly on the prosecution of perpetrators of the crime against peace. On this crime, the Tokyo Tribunal concluded that there had been a conspiracy to wage aggressive wars and that the conspiracy had led to aggressive wars against a number of countries.¹⁷ Like the Nuremberg Tribunal, the Tokyo Tribunal relied heavily on the Pact of Paris

13. Charter of the International Military Tribunal, Aug. 8, 1945, available at <http://www.yale.edu/lawweb/Avalon/imt/proc/imtconst.htm> [hereinafter Charter].

14. *Definition*, *supra* note 9.

15. Charter, *supra* note 13, art. 6(a).

16. *Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences, Oct. 1, 1946*, 41 AM. J. INT'L L. 172, 186 (1947).

17. *The Tokyo Judgment, Volume I, Findings on Counts of Indictment* (B.V.A. Röling & C.F. Rüter eds., 1977) [hereinafter *Findings*], reprinted in 1 BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARDS WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS 506 (1980) [hereinafter FERENCZ].

of 1928 for the legal basis for the crime against peace.¹⁸ A total of twenty-four persons were convicted of aggression. Among the separate and dissenting opinions, Judges Röling of the Netherlands and Pal from India objected that aggression had not been defined yet as crime under international law for the purposes of ensuring individual criminal responsibility.¹⁹ Both made a call to the international community to take the necessary legal measures in the future, in light of the horrors of the Second World War.²⁰

The efforts towards this end started immediately after the war in 1946. On December 11, 1946, the General Assembly of the United Nations adopted three Resolutions. By the first one, the General Assembly established the Committee on the Progressive Development of International Law and its Codification.²¹ By the second one, it directed the Committee:

to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.²²

The third resolution affirmed that genocide was a crime under international law and asked the Economic and Social Council to “undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide.”²³

Regarding the first two resolutions, the ILC met for the first time in 1949. On its agenda was, *inter alia*, the draft Code of

18. See generally FERENCZ, *supra* note 17, at 79.

19. See *The Tokyo Judgment, Volume II, Extracts of Opinion of Mr. Justice Röling and Mr. Justice Pal* (B.V.A. Röling & C.F. Rüter eds., 1977) [hereinafter *Extracts*], reprinted in FERENCZ, *supra* note 17, at 507-38; see also FERENCZ, *supra* note 17, at 80-83.

20. See *Extracts, supra* note 19, at 507-38.

21. *Progressive Development of International Law and Codification*, G.A. Res. 94 (I), U.N. GAOR, 1st Sess., 55th plen. mtg. (1946). A year later this Committee was transformed into the International Law Commission pursuant to General Assembly Resolution 174 (II) of November 21, 1947.

22. *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal*, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., 55th plen. mtg. (1946).

23. *The Crime of Genocide*, G.A. Res. 96 (I), U.N. GAOR, 1st Sess., 55th plen. mtg. (1946). The Economic and Social Council actively implemented its mandate to elaborate a Genocide Convention in less than two years. The Genocide Convention defines the crime of genocide and makes it clear that it is an international crime whether committed in time of war or time of peace.

Offences Against the Peace and Security of Mankind—including the formulation of the Nuremberg principles. On the basis of the reports of the Special Rapporteur, the Commission at its second session, in 1950, adopted a formulation of the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal and submitted these principles to the General Assembly. In 1954, it submitted a Draft Code of Offences Against the Peace and Security to the General Assembly. The General Assembly, considering that the Draft Code of Offences against the Peace and Security of Mankind as formulated by the Commission raised problems closely related to those of the definition of aggression and also considering that the General Assembly had entrusted a Special Committee with the task of preparing a report on a draft definition of aggression, decided to postpone consideration of the draft code until the Special Committee had submitted its report.²⁴

Discussions of the definition of aggression lingered on at successive Special Committees for twenty years. Finally, by resolution 3314 (XXIX) of December 14, 1974, the General Assembly managed to adopt by consensus a Definition of Aggression.²⁵ Article 1 contains a generic provision, partially drawn from article 2(4) of the Charter, which stipulates that:

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.²⁶

Article 2 stipulates that “[t]he 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 conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances.”²⁷

In article 3 of the Definition, a number of acts that constitute aggression are enumerated.²⁸ However, this list is not exhaustive, the Security Council is not bound by it, and the Secur-

24. For a history of the Draft Code of Crimes, see *ILC Report, supra* note 10, at 23.

25. *Definition, supra* note 9.

26. *Id.* Annex, art. 1.

27. *Id.* Annex, art. 2.

28. *See id.* Annex, art. 3. Article 3 provides in pertinent part:

Any of the following acts . . . qualify as an act of aggression:

ity Council may also consider any other act as an act of aggression under the provisions of the Charter.²⁹

Finally, article 5, paragraph 2, stipulates that: "A war of aggression is a crime against international peace. Aggression gives rise to international responsibility."³⁰

2. The Proposals

a. "Generic" vs. "List" Approach

Taking into account the precedents, there are two main schools of thoughts at the PrepCom: the "generic approach" that proposes a general or abstract definition and the "list approach," which enumerates the specific acts constituting aggression. Under the generic approach, there is a proposal that follows the Nuremberg Charter closely in that it criminalizes a "war of aggression."³¹ Its proponents underline the importance of the Nuremberg Charter, which they consider to be the only authoritative text in international law, being the only one that established and actually recognized individual criminal responsibility. An argument against the definition contained in the Nu-

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- (a) The invasion or attack by the armed forces of a State of a territory of another State;
 - (b) Bombardment by the armed forces of a State against the territory of another State;
 - (c) The blockade of the ports or coasts of a State by the armed forces of another State;
 - (d) An attack by the armed forces of a State on the land, sea or air forces of another State;
 - (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement;
 - (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
 - (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State.

Id.

29. *See id.* Annex, art. 4.

30. *Id.* Annex, art. 5, para. 2.

31. The Proposal incorporated in the Consolidated Text of Proposals on the crime of aggression prepared by the coordinator as Option 2 is the closest one to the Nuremberg Charter. *See Consolidated Text by Coordinator, supra* note 6, at 14, Option 2. It states: "For the purposes of the present Statute and subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating, carrying out a war of aggression." *Id.*

remberg Charter is that the concept of "war of aggression" relates to a past war and does not apply to most forms of contemporary violence. From a more technical point of view, there have been objections that this definition is a circular one, a "non-definition" that would hardly satisfy today's more stringent standards of legality. Consequently, within the same generic approach, other proposals contemplate definitions that draw their inspiration from Article 1 of Resolution 3314 and Article 2(4) of the U.N. Charter in order to expand the concept of the definition to other types of illicit uses of force.³²

Opposing or supplementing the generic approach, other delegations insist on the need of having a definition that would enumerate the list of acts constituting aggression.³³ This list, they claim, should reproduce the one contained in Resolution 3314 which was adopted by consensus after many years of extensive negotiations and reflect customary international law. Those who object maintain that this Resolution was aimed at acts of States and not crimes of individuals. This is, they argue, demonstrated not only by the legislative history, but by the text of the resolution itself, including Article 5(2), which draws a distinction between the war of aggression qualified as a "*crime against international peace*" and the act of aggression which "*gives rise to international responsibility.*"³⁴

Taking into account this seemingly irreconcilable division, during the discussions, the possibility of combining these alternative approaches in a single definition that would contain both an introductory paragraph of general nature followed by a list of specific acts that constitute the offense has been proposed. Obviously, even if this compromise were to be accepted, it would not in itself constitute a sufficient response to the real challenge of agreeing on the content of each part of the text.

32. See, e.g., *Consolidated Text by Coordinator*, *supra* note 6, at 13, Option 1. Option 1 states:

For the purposes of the present Statute, [and subject to the determination of the Security Council regarding the act of a State,] the crime of aggression means [the use of armed force, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action of a State, against the sovereignty, territorial integrity or political independence of a State in violation of the Charter of the United Nations.]

Id. (brackets in original).

33. See *id.* Option 1, Variation 3.

34. *Definition*, *supra* note 9, art. 5, para. 2 (emphasis added).

b. Crime of Aggression vs. Act of Aggression

Regardless of the approach taken, during discussions there seemed to be a common understanding that finding a solution to the problem required taking account of two different types of responsibilities, that of the State for the commission of an act of aggression and the responsibility of an individual for committing the crime of aggression. Drawing on this common understanding, a proposal was introduced at the last session of the PrepCom that distinguished both concepts in the definition itself. The proposal contained two paragraphs; one defining the act of aggression and the other defining the crime, both for the purposes of the Rome Statute.³⁵ This proposal was welcomed by many as an important step forward, at least from a methodological point of view. However, some delegations expressed the opinion that the Working Group should focus exclusively on drafting a definition of the crime of aggression.

c. The “Threshold”

Despite the fundamental disagreement among delegations surrounding the definition, all have recognized that to fall under the definition of aggression the use of force should be of a certain magnitude or gravity. Uses of force of lesser magnitude that continue to occur, sometimes even quite frequently, such as border skirmishes, cross-border artillery, armed incursions, and similar situations should not fall under the definition of aggression. In this context, it has been argued that the Charter itself does not consider any act of force contrary to its provisions as an act of aggression. Furthermore, acts of force of lesser gravity would not fall within the jurisdiction of the ICC, which only applies to the “most serious crimes of concern to the international

35. *Proposal Submitted by Bosnia and Herzegovina, New Zealand and Romania, Definition of the crime of aggression*, U.N. Doc. PCNICC/2001/WGCA/DP.2 (Aug. 27, 2001) [hereinafter *Bosnia Proposal*]. The definition is divided as follows:

1. A person commits the crime of aggression who, being in a position to exercise control over or direct the political or military action of a State, intentionally and knowingly orders or participates actively in the planning, preparation, initiation or waging of aggression committed by that State.
2. For the purposes of the exercise of jurisdiction by the Court over the crime of aggression under the Statute, aggression committed by a State means the use of armed force to attack the territorial integrity or political independence or another State in violation of the Charter of the United Nations.

Id.

community as a whole.”³⁶ Consequently, delegations have increasingly focused on the issue of the “threshold,” or, in other words, the scale, magnitude, or gravity required for an act of use of force to amount to aggression. In this respect, some formulations have been proposed. Some delegations suggest that the threshold requirement can be created by qualifying the violation of the norm (e.g., use of force in “manifest” violation of the U.N. Charter).³⁷ Others suggest qualifying the acts by their consequences or goals (e.g., only acts of force that have the object or the result in an annexations or occupation of territories would be covered).³⁸ Finally, some delegations refer back to the Nuremberg Charter, arguing that the “war of aggression” has a threshold built in the concept that indicates the scale of violence that is required.

The legislative history of the definitions of other crimes within the jurisdiction of the Court demonstrates the fundamental importance of finding the right “threshold” in order to reach agreement,³⁹ and it will probably be instrumental to the definition of aggression as well.

d. A Leadership Crime

The proposals introduced so far seem to share a common assumption that only leaders of a State can be criminally held responsible of the crime of aggression. However, for some, this common understanding needs to be accounted for either in the definition itself or in the elements. A list of the category of persons involved should be agreed upon to satisfy the principle of legality. Individuals need to know *ex ante* whether they actually belong to a category of persons that could be individually responsible of the crime of aggression. It could be very difficult to draw the line between policy makers and mere executioners, in particular in a democratic society, where a large number of persons belonging to different agencies of the Executive and of Par-

36. Rome Statute, *supra* note 1, pmbl.

37. See *Consolidated Text by Coordinator*, *supra* note 6, at 13, Option 1, Variation 2.

38. See *id.*

39. See generally von Hebel & Robinson, *supra* note 12, at 79-126. The *chapeau* of Article 7 of the Rome Statute contains the “threshold” for crimes against humanity while the *chapeau* of Article 8 contains a non-mandatory “threshold” for war crimes. See Rome Statute, *supra* note 1, arts. 7-8.

liament (or even to key economic sectors of a State), could be involved in preparing and shaping a decision.

II. *THE CONDITIONS OF EXERCISE OF JURISDICTION BY THE COURT*

Although it is not expressly said either in article 5 of the Rome Statute or in Resolution F, it is clear that the conditions of exercise of jurisdiction require discussing the links, if any, between the Court and the Security Council. The articulation of an adequate relationship with the Security Council was one the most sensitive issues during the drafting of the Rome Statute. The relevant provisions, in particular article 16 of the Statute, continue to elicit controversy and criticism today.⁴⁰ The choice of an elliptical construction in Article 5 to describe the problem with regard to aggression, shows in itself the degree of disagreement that existed on this matter at the end of the Diplomatic Conference. For those who opposed recognizing any role of the Security Council, any express mention to the Council in Article 5 would have been unacceptable. Therefore, Article 5 only refers to the need for: "setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such provisions shall be consistent with the relevant provisions of the Charter of the United Nations."⁴¹

Quite obviously, all delegations agree that the conditions of exercise of jurisdiction by the Court should be consistent with the Charter of the United Nations. But the interpretations of the Charter vary dramatically and its provisions have been invoked to sustain opposite views.

A. *The Provisions of the U.N. Charter: A Brief Overview*

The U.N. Charter prohibits the use of force, with a few exceptions, notably self-defense and authorizations by the Security Council. Article 2(4) states that: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any

40. For a discussion of the role of the Security Council, see Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 143-52 (Roy S. Lee ed., 1999).

41. Rome Statute, *supra* note 1, art. 5, para. 2.

state or in any other manner inconsistent with the purposes of the United Nations.”⁴²

This article creates a duty to refrain from the threat or use of force and, consequently, implies that there is international responsibility if the State does not comply with it. It does not give guidance as to the type of international responsibility that would apply to the individuals who perpetrated the acts leading to aggression.

Articles 10, 11, and 12 regulate the powers of the General Assembly to discuss and make recommendations concerning the threat or use of force. Article 10 states that the General Assembly may “discuss any questions or any matters within the scope of the present Charter.”⁴³ Article 11 states that the General Assembly may “discuss any questions relating to the maintenance of international peace and security . . . and, except as provided in Article 12, may make recommendations with regard to any such questions.”⁴⁴ Finally, Article 12(1) provides that “[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”⁴⁵ Therefore, these provisions assign responsibilities to the General Assembly for discussing and making recommendations concerning the maintenance of international peace and security except when the Security Council is exercising its powers concerning that dispute.

With respect to the Security Council, Article 24 states that “[i]n order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of international peace and security”⁴⁶ and that “[i]n discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII and XII.”⁴⁷

42. U.N. CHARTER art. 2, para. 4.

43. *Id.* art. 10.

44. *Id.* art. 11, para. 2.

45. *Id.* art. 12, para. 1.

46. *Id.* art. 24, para. 1.

47. *Id.* art. 24, para. 2.

Further on, the U.N. Charter addresses this issue in Chapter VII under the title, "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression."⁴⁸ The U.N. Charter states in Article 39 that "[t]he 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."⁴⁹

Finally, the U.N. Charter assigns both contentious and consultative functions to the International Court of Justice ("ICJ").⁵⁰ The Statute of the ICJ considers the Court competent for any legal disputes between parties which have accepted its jurisdiction, concerning: "a) the interpretation of a treaty, b) any question of international law, c) the existence of any fact which, if established, would constitute a breach of an international obligation, [and] d) the nature or extent of the reparation to be made for the breach of an international obligation."⁵¹

As for the consultative competence, Article 96 states that both the General Assembly and the Security Council may request an advisory opinion from the ICJ on any legal question and that the other organs and specialized agencies, with previous authorization by the General Assembly, may request advisory opinions of the ICJ on legal questions arising within the scope of their activities.⁵²

B. *Positions in the Working Group*

Faced with these provisions of the U.N. Charter, the arguments and proposals in the Working Group of the Preparatory Commission have covered a wide range of positions.

On the one hand there are those who assert that the Security Council has the exclusive power to determine an act of aggression by a State, which, in their view, is an indispensable precondition for the determination of individual criminal responsi-

48. *Id.* ch. VII.

49. *Id.* art. 39.

50. *See id.* art. 94, 96.

51. Statute of the International Court of Justice, June 26, 1945, art. 36, para. 2, 59 Stat. 1055, 3 Bevens 1179, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstatute.htm>.

52. U.N. CHARTER art. 96.

bility by the Court.⁵³ This position is mainly based on Article 39 of the U.N. Charter, which assigns responsibilities to the Security Council in determining when a State has committed aggression.⁵⁴ This position was also held by the ILC, which considered that the Security Council's special responsibilities under Chapter VII of the Charter, mean "that special provision should be made to ensure that prosecutions are brought for aggression only if the Security Council first determines that the State in question has committed aggression in circumstances involving the crime of aggression which is the subject of the charge."⁵⁵

The ILC Draft Statute contained a provision to that effect stating: "A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint."⁵⁶

The exclusivity of the Security Council to determine an act of aggression is contested by those who underline the fact that the U.N. Charter assigns competence in the area of the maintenance of peace and security to several organs. They add that the Security Council's exclusivity lies solely in the capacity of taking "action" through the imposition of sanctions, be they of an armed or non-armed character.⁵⁷ Finally, they argue that the Security Council has no role at all in this matter since their competencies relate exclusively to States and not to individual criminal responsibility, and because the determination of aggression of a State is a legal question that was assigned to the Council by the U.N. Charter only for the purposes of applying sanctions. There is, they conclude, no competence on individual criminal responsibility assigned to the Security Council by the Charter and, therefore, the conditions for the exercise of this jurisdiction lie solely in the ICC. From a practical perspective they emphasize that practice has shown that the record of the Security Council in stating that a situation is one of aggression is, at best, sporadic. The Security Council, they argue, has shown over the years its resistance to determine the existence of an act of aggression for several reasons, including the paralyzing effect of the veto power

53. See *Consolidated Text by Coordinator*, *supra* note 6, at 15-16, Option 1, 3.

54. U.N. CHARTER art. 39.

55. *Draft Statute*, *supra* note 7, at 72.

56. *Id.* at 84.

57. U.N. CHARTER ch. VII.

of the permanent members. They conclude that the Security Council has no role in the determination of individual criminal responsibility or at best only primary, but not exclusive, competence in this field as is expressly stated in Article 24. From a practical perspective they insist that a failure of this organ to fulfill its responsibility cannot render the jurisdiction of the ICC inoperative and nonexistent in practice.

The view that the Security Council has a primary, but not exclusive, role in the matter has prompted several proposals which have a common point of departure, but radically different solutions. Most of these proposals seem to accept at least two premises. Firstly, that a determination of an act of aggression is a precondition for the Court to exercise its functions over the crime of aggression. Secondly, that the Security Council has the right to be the organ that acts in the first place, providing for other alternatives only as a remedy when the Council fails to act after a certain period of time or does not use the faculty already recognized in Article 16 to suspend proceedings by the Court.

As to the remedies for Council inaction, the proposals provide for a wide range of options leaving the determination of an act of aggression either to the International Criminal Court itself,⁵⁸ to the General Assembly⁵⁹ or to a mix of judicial and political organs, namely the General Assembly and the International Court of Justice acting within its consultative jurisdiction.⁶⁰

CONCLUSION

Discussions during and after Rome demonstrate that there is no easy solution to any of the problems raised. In light of the difficulties to be faced, some continue to argue that aggression should have never been included in the Statute in the first place. Whether they are right or wrong is irrelevant today. The Statute has been adopted and will soon enter into force. The international community needs now to act upon decisions that were made at the Rome Conference both to include the crime and to mandate the PrepCom to draft proposals with the view of implementing this inclusion at a review conference. All those who

58. See *Consolidated Text by Coordinator, supra* note 6, at 15-16, Option 1, Variation 1, and Option 2.

59. See *id.* at 15-16, Option 1, Variation 2.

60. See *Bosnia Proposal, supra* note 35.

promote the establishment of a universal Court, regardless of their position with regard to the crime of aggression, are required to negotiate in good faith in order to seek an adequate answer to the problem. Failure to do so could undermine the credibility of the process and weaken support for the Court.

It should be quite clear by now that there will be no quick "fix" to the issues involved, since it will be essential for any solution to be very widely accepted. This is a political must that has been transformed into a legal obligation by Article 5, which requires a provision on aggression to be adopted in accordance with Articles 121 and 123.⁶¹ These Articles provide for a cumbersome amendment process. An amendment would have to be voted in favor by a two-third majority of States Parties at a review conference to be convened seven years after the entry into force of the Statute.⁶² This amendment will enter into force only if it is ratified by seven-eighths of them, but, even then, it will not enter into force in respect of those who have not accepted the amendment.⁶³ Taking into account this procedure it is clear that for a formulation to see the light, delegations will need to deploy all efforts to persuade and convince. The constructive atmosphere that has started to prevail during discussions at the Preparatory Commission should be maintained if any progress is to be made in this matter.

Despite the fact that debates generate at times a frustrating sense of *déjà vu*, the analysis is far from being exhausted and some technical issues need to be explored further. There is no justification to abandon, with respect to the crime of aggression, the stringent standards of legality that were applied to the definition of other crimes within the jurisdiction of the Court. The crime of aggression should not be treated differently than any other crime and regardless of the approach finally pursued—generic, list, or mixed approach—the definition will need to identify both the *actus reus* and the *mens rea* with adequate precision. Precisely because of the political nature of the issues involved, every effort should be made not to depart from the principle of legality, which should be perceived not only as a safe-

61. See Rome Statute, *supra* note 1, art. 5, para. 2.

62. See *id.* art. 121.

63. See *id.*

guard for the rights of the accused but the best protection for the credibility of the Court as well.

The conditions for exercise of jurisdiction over the crime of aggression raise not only thorny political difficulties, but also technical problems that need to be addressed. From the latter perspective, it is important to recognize that a predetermination of an act of aggression—by whatever organ—could have a tremendous impact on the criminal proceedings. The impact and the consequences for the ICC itself and for the rights of the accused need to be discussed further, in particular the defenses that that person could invoke in light of a predetermination of the act, and taking into account that the person would not only be linked to the State, but be considered, by definition, one of its leaders.

In conclusion, it should be remembered that proposals on aggression are to be drafted only for the purposes of the ICC, an institution created with the important but sole objective of determining the individual criminal responsibility of perpetrators of grave crimes of international concern.