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# An Argument for the Deletion of the Crime of Aggression from the Rome Statute of the International Criminal Court

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# AN ARGUMENT FOR THE DELETION OF THE CRIME OF AGGRESSION FROM THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Steven Nicholas Haskos\*

## I. INTRODUCTION

The Review Conference of the Assembly of the State Parties to the Rome Statute governing the International Criminal Court (“Rome Statute”) will commence on May 31<sup>st</sup>, 2010, and is scheduled to conclude on June 11, 2010, in Kampala, Uganda.<sup>1</sup> The primary objective of the Review Conference is twofold: to agree on a definition of the international crime of aggression, and to establish the conditions necessary for the exercise of jurisdiction over individuals charged with aggression.<sup>2</sup> In a world increasingly afflicted with large-scale displays of force which cloud the old conceptions of just war, the significance of the conference is paramount. Bill Pace, a member of the Coalition for the International Criminal Court, described the coming task of the Review Conference as “one of the most consequential endeavours in international law ever attempted.”<sup>3</sup>

On July 17, 1998, the final draft of the Rome Statute of the International Criminal Court was completed.<sup>4</sup> The drafters of the Rome Statute

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<sup>1</sup> Press Release, United Nations, Press Conference by President of Assembly of State Parties to Rome Statute of International Criminal Court (Dec. 3, 2009).

<sup>2</sup> *Id.*

<sup>3</sup> Andrew Gilligan, *International Criminal Court Proposes Powers to Try Politicians who Wage “Illegal Wars”*, THE DAILY TELEGRAPH, Jan. 30, 2010, available at <http://www.telegraph.co.uk/news/worldnews/7112241/International-Criminal-Court-proposes-powers-to-try-politicians-who-wage-illegal-wars.html>.

<sup>4</sup> *See generally* Rome Statute of the International Criminal Court, July 17, 1998 [hereinafter Rome Statute].

sought to provide the new court with jurisdiction over cases involving the most serious crimes of international concern. Article 5 of the Rome Statute lists the crime of genocide, crimes against humanity, war crimes, and the crime of aggression<sup>5</sup>, as the offenses sufficiently grave in nature as to warrant the court's attention. The Rome Statute defines each of these offenses with the exception of the crime of aggression. The elusiveness of the concept of aggression survives today, as more than ten years have passed since the Rome Statute's inception; yet, the crime is still undefined, and thus, no prosecution for this severe offense can be initiated in the International Criminal Court ("ICC").<sup>6</sup>

The struggles endured by the drafters of the Rome Statute in characterizing aggression are by no means coincidental; rather, it suggests an incompatibility between the enforcement of the offense and the aims of the court. Accordingly, the crime of aggression should be omitted from the Rome Statute.

This comment will address not only the problems in constructing a working definition, but also the substantial obstacles posed by other provisions of the Rome Statute. An overview of the history of the development and the prosecution of aggression will be included in section II of this comment, focusing on its evolution prior to, during, and after the Nuremberg and Tokyo Tribunals. Section III discusses the political overtones which permeate issues of aggression thereby rendering the ICC unsuitable to hear such cases. Section IV notes the problems of identifying and punishing individual criminal defendants for aggression; a crime which inherently requires state action. Section V analyzes article 25 of the Rome Statute, which deals with various forms of criminal liability, and suggests that aggression, as a "leadership crime," is inconsistent with the enumerated forms of liability recognized by the ICC. Lastly, defenses to aggression located both in and out of the Rome Statute are discussed in section VI.

## II. EVOLUTION OF THE CRIME OF AGGRESSION

### A. *The Crime of Aggression Prior to Nuremberg*

An analysis of the crime of aggression requires an understanding of the distinction between *jus ad bellum* and *jus in bello*, with the former

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<sup>5</sup> *Id.* art. 5.

<sup>6</sup> *Id.* art. 5(2).

2011] *An Argument for the Deletion of the Crime of Aggression From the Rome Statute of the International Criminal Court* 251

being the applicable doctrine. *Jus ad bellum* refers to the set of rules governing the decision to use force (i.e. aggression), while *jus in bello* is invoked once the decision to use force has been made, regulating the legality of the type of force used. This distinction dates back to ancient times, and was often couched in terms of “just war”. Distinctions between a just versus an unjust war were made in ancient India, Greece, China, and within the Islamic tradition.<sup>7</sup> Centuries later, St. Thomas Aquinas, in his *Summa Theologicae*, enumerated three requirements for a war to be deemed just: first, a legitimate sovereign power must have authorized it; second, the war must be commenced to obtain a just cause; and third, the force must not be aimed at furthering injustice, but rather, restoring order.<sup>8</sup>

Despite these early ideas, the concept did not materially evolve until World War I. At the war’s conclusion in 1919, under article 227 of the Versailles Treaty of Peace, plans were made to hold Kaiser Wilhelm II criminally responsible for “a supreme offence against international morality and the sanctity of treaties.”<sup>9</sup> Further evidence of the international community’s recognition of criminality in an unjust war lies in the words of former English Prime Minister David Lloyd George’s memoirs. When commenting about the interwar period, Lloyd George describes “a growing feeling that war itself was a crime against humanity, and that it would never be finally eliminated until it was brought into the same category as all other crimes by the infliction of condign punishment on the perpetrators and instigators.”<sup>10</sup> The aftermath of World War I continued to promulgate anti-aggression legislation, including in 1924 when the League of Nations sponsored the Draft Treaty of Mutual Assistance which directly stated “aggressive war is an international crime.”<sup>11</sup> This sentiment reached its new pinnacle in 1928 with the signing of the Pact of Paris, or as it is more commonly known, the Kellogg-Briand Pact. This treaty was originally meant to alleviate tense relations between the United States and France, but was eventually opened to all nations.<sup>12</sup>

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<sup>7</sup> BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS 317 (2007).

<sup>8</sup> *Id.*

<sup>9</sup> Noah Weisbord, *Prosecuting Aggression*, 49 HARVARD INT’L L.J. 161, 162 (2008).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 163.

<sup>12</sup> Jonathan A. Bush, “*The Supreme...Crime*” and its Origins: *The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324, 2334 (2002).

The ambitious goal of the treaty was to outlaw war altogether, binding the parties to “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.”<sup>13</sup>

In the period between the signing of the Kellogg-Briand Pact and World War II, there was a relative lull regarding discussion of the crime of aggression. In 1938, in the wake of the Anschluss (the annexation of Austria), previous advancements in the prohibition of aggression appeared minimal. In 1945, the charter of the United Nations was signed,<sup>14</sup> bringing aggression back to the forefront. During its drafting, the question of whether aggressive war amounts to a criminal act, was deemed to be the most important substantive issue to be resolved.<sup>15</sup> The charter eventually imposed a duty on the signatory states to abstain from the use or threat of force<sup>16</sup>, though the ban is not absolute (discussed *infra*). The charter assigns the power to recognize and remedy acts of aggression, and to maintain international peace, to the Security Council.<sup>17</sup> The international significance of this document does not rest solely in its proclamations, but rather in its scope, as the reach of nations pulled within the ambit of this non-aggression pact greatly outnumbered those past. The charter’s substance would also prove influential, as the powers delegated to the Security Council bear greatly on the possible inclusion of the crime of aggression within the jurisdiction of the ICC.

### *B. The Crime of Aggression under the Nuremberg and Tokyo Tribunals*

The magnitude and the severity of the events which transpired during the Second World War tested the practicality of the previously abstract ideas of aggression. At the conclusion of the war a cosmic shift occurred, whereby the actual prosecution of aggression, as opposed to the construction of its definition, led to the prosecution of individuals responsible for the crime, rather than focusing on state liability. The allied powers recognized the need to not only punish German individuals for

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<sup>13</sup> *Id.*

<sup>14</sup> See generally Charter of the United Nations [hereinafter UN Charter], June 26, 1945.

<sup>15</sup> Weisbord, *supra* note 9, at 164 (quoting UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 180 (1948)).

<sup>16</sup> UN Charter, art. 2(4).

<sup>17</sup> UN Charter, art. 39-42.

2011] *An Argument for the Deletion of the Crime of Aggression From the Rome Statute of the International Criminal Court* 253

waging such a war, but also bringing the political, social, and economic institutions of the country into harmony with the rest of Europe to avoid future wars of aggression.<sup>18</sup> Thus, the decision was made to impose individual criminal liability.

The Agreement for the Prosecution and the Punishment of the Major War Criminals of the European Axis (known as the “London Agreement”), and the Charter of the International Military Tribunal (“Nuremberg Charter”) cemented this decision by stating, “crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>19</sup> The Nuremberg Charter further stipulates that representatives of a state may not be protected by their official positions when their individual acts are deemed criminal by international law.<sup>20</sup> These provisions rest on the Charter’s principle that “individuals have international duties which transcend the national obligations of obedience imposed by individual states.”<sup>21</sup>

In order to successfully prosecute the war criminals of the Axis powers, the delegates drafting the Nuremberg charter needed to circumvent the legality principles which prohibited retroactive legislation, namely, *nullum crimen sine lege* (“no crime without law”). Thus, the delegates were faced with the additional task of basing their prosecution on established international law. Justice Robert Jackson was the American representative involved in the formation of the Nuremberg Charter in London. Jackson was influential in defining the crime of aggression in a universal way, as opposed to the Soviet position which centered specifically on Nazi or Axis aggression.<sup>22</sup> This position was more compatible with previous efforts by the international community to outlaw aggression such as the Kellogg-Briand Pact and the Hague Conventions. Legislation stemming from these endeavors criminalized undertaking an aggressive war, yet they failed to provide individual criminal sanctions.<sup>23</sup>

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<sup>18</sup> Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression?*, 19 N.Y.L. SCH. J. INT’L & COMP. L. 413, 421-422 (2000).

<sup>19</sup> *Id.* at 422.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Bush, *supra* note 12, at 2369.

<sup>23</sup> Christoph Burchard, *The Nuremberg Trial and its Impact on Germany*, 4 J. INT’L CRIM. JUST. 800, 809 (2006).

Judgments rendered under the Nuremberg Tribunal rectified this discrepancy stating that such sanctions were implicit in the documents.<sup>24</sup> While this rationalization effectively ended the dispute regarding retroactive legislation, it did not stop the German detractors from commenting on its insufficiency. Georg Dahm, a prominent German attorney, stated that the Nuremberg Tribunal took “very many liberties”<sup>25</sup> in jumping from the concept that outlawing war suggested responsibility of the state aggressor, to a model targeting individual responsibility and punishment.

The efforts of the various representatives involved in the drafting of the Nuremberg Charter culminated in the inclusion of the crime of aggression in an umbrella category referred to as crimes against the peace. The charter defined crimes against the peace as follows:

The tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them, are crimes coming within the jurisdiction of the tribunal for which there shall be individual responsibility: 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.<sup>26</sup>

Once the statutory definition was finalized, the prosecutor indicted twenty-two defendants for crimes against the peace, and convicted eight.<sup>27</sup> Two of the cases, involving defendants Hermann Wilhelm Goering and Hjalmar Schact, illustrate the application of the statute by the Tribunal. Goering was the active agent of Hitler, largely responsible for bringing the Nazi party together, creating the first concentration camps, and as Luftwaffe chief, planned unnecessary air offensives.<sup>28</sup> As the second in command only to Hitler, Goering was instrumental in the German military effort, and was accordingly found guilty of crimes against the peace, or aggression. Conversely, Schact was not found criminally responsible for aggression. Schact was a pivotal figure in Ger-

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 809-10.

<sup>26</sup> Charter of the International Military Tribunal and Protocol of 6 October 1945 [hereinafter Nuremberg Charter], Aug. 8, 1945.

<sup>27</sup> Van Schaack, *supra* note 7, at 332.

<sup>28</sup> *Id.* at 329.

2011] *An Argument for the Deletion of the Crime of Aggression From the Rome Statute of the International Criminal Court* 255

many's rearmament program, but his motive was found to be strictly nationalistic, as he believed rearmament would place Germany on an equal basis with other European powers.<sup>29</sup> Evidence showed that Schact's efforts slowed once he discovered that the Nazis were rearming for aggressive purposes; also, Schact was not involved in any capacity in the planning of aggressive wars.<sup>30</sup>

This case clearly identifies a requisite mens rea, despite the statute's silence on the subject. Knowledge appears to be required, as Schact was clearly involved in many of the prescribed actus rea, including planning and preparation, yet his ignorance regarding the ultimate aims of the rearmament program led to his exculpation.

Despite using the same definition for crimes against the peace, one important distinction existed between the Nuremberg Tribunal and the International Military Tribunal for the Far East ("Tokyo Tribunal"). The prosecutors in Tokyo sought to superimpose the *jus ad bello* onto the *jus ad bellum*. The prosecution argued that the Japanese, in waging an aggressive war in violation of the *jus ad bellum*, lost their right to use violence permitted under *jus ad bello*.<sup>31</sup> The actions of the Japanese divested the Japanese defendants of the protection of the laws regulating the means used during war. Alternatively, did the restraining rules under *jus ad bello* apply to the allies should they be found to have been victims of an aggressive war? The Tokyo Tribunal did not adjudicate this matter however, as the guilt of the defendants was the sole issue.<sup>32</sup> The significance of this question should not be understated, as the answer may place the crime of aggression above other international crimes. A determination that an aggressive war was waged may either implicate or absolve both the aggressor and the victim of war crimes, crimes against humanity, or even genocide.

*C. The Crime of Aggression between Nuremberg and the International Criminal Court*

The prosecutions at the Nuremberg and Tokyo Tribunals were an

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<sup>29</sup> *Id.* at 331.

<sup>30</sup> *Id.*

<sup>31</sup> Allison Marston Danner, *Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism*, 46 VA. J. INT'L L. 83, 99 (2005).

<sup>32</sup> *Id.*

important step in the international community's prosecution of the crime of aggression. An equally important step came in 1974, via resolution number 3314, when the General Assembly of the United Nations issued its own definition of aggression in an attempt to help guide the Security Council in its determinations of what constitutes the offense.<sup>33</sup> The General Assembly defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the [U.N.] Charter of the United Nations, as set out in this Definition."<sup>34</sup> Article 2 of the same statute stipulates that the first sign of force constitutes prima facie evidence of aggression, although the Security Council may determine that such an act was justified.<sup>35</sup> Article 3 lists the substantive acts which may qualify as an act of aggression.

In enumerating various substantive acts, the General Assembly sought to assist the Security Council in its difficult determination of whether certain acts constitute aggression. However, each of the acts are subject to defenses listed or implied throughout the U.N. Charter, including self-defense, humanitarian intervention, and self-determination. Accordingly, a determination of aggression requires weighing the substantive act(s) against any possible defenses.

### III. THE POLITICAL NATURE OF THE CRIME OF AGGRESSION

One of the ways in which the ICC can exercise jurisdiction over those designated crimes is through a referral to the prosecutor by a state party.<sup>36</sup> The ICC's critics have frequently cited this provision as being susceptible to abuse. A principle concept in both international and domestic law (within the United States), is that issues which are political in nature are not justiciable. Allowing such referral permits masking a politically motivated agenda with the appearance of a criminal prosecution. Both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda omitted the crime of ag-

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<sup>33</sup> See generally Sergey Sayapin, *The Definition of the Crime of Aggression for the Purpose of the International Criminal Court: Problems and Perspectives*, 13 J. CONFLICT & SECURITY L. 333 (2008).

<sup>34</sup> G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31 at 143, U.N. Doc. A/9631 (Dec. 14, 1974).

<sup>35</sup> *Id.* §3314(2).

<sup>36</sup> Rome Statute, art. 13(a).

2011] *An Argument for the Deletion of the Crime of Aggression From the Rome Statute of the International Criminal Court* 257

gression<sup>37</sup> fearing that the courts would be adjudicating political matters, which is both contrary to the court's purpose and incapable of a solution via judicial measures.

The crime of aggression is often deeply entwined with concepts such as territorial disputes, arms control, and other matters of foreign policy. The problem is twofold. First, states will likely take advantage of the court's jurisdiction over aggression, seeking favorable resolutions to matters regarding foreign relations. This would inevitably force the ICC to exhaust its resources in an attempt to understand the causes and motives of war, as opposed to prosecuting those individuals committing international crimes. This threat of abuse is also harmful in that it may serve as a deterrent to a state contemplating becoming a party to the Rome Statute. A signatory state may refer acts which they deem as crimes of aggression to the ICC<sup>38</sup>, despite the accused party's feeling that they are acting within the applicable *jus ad bellum*. Individuals from the accused state may then be subject to criminal liability based on a singular court's perception of a just war. Article 12(2)(a) of the Rome Statute allows for jurisdiction over cases in which the conduct in question occurred on the territory of a state party.<sup>39</sup> Therefore, should a state decide that the use of force is necessary and legal, by entering the territory of a signatory state, such a legal determination is ceded to the ICC without ever consenting to the jurisdiction of the court. Accordingly, even without signing the Rome Statute, parties may be criminally liable to a statute criminalizing aggression.

Jurisdiction based on article 12(2)(a) remains a primary reason for the United States' opposition to the ICC. The objection is that, by binding non-state party's to jurisdiction, the Rome Statute, and more particularly article 12(2)(a), violates basic treaty principles.<sup>40</sup> Article 34 of the Vienna Convention on the Law of Treaties states that a "treaty does not

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<sup>37</sup> James Nicholas Boevig, *Aggression, International Law, and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute*, 43 COLUM. J. TRANSNAT'L L. 557, 582-3 (2005).

<sup>38</sup> Rome Statute, art. 14.

<sup>39</sup> *Id.* art. 12(2)(a).

<sup>40</sup> Corrina Heyder, *The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status*, 24 BERKELEY J. INT'L L. 650, 665 (2006).

create either obligations or rights for a third State without its consent.”<sup>41</sup> The crime of aggression inherently involves action taken by individuals in foreign territories; thus, the potential for conflict stemming from non-state parties being bound to jurisdiction is greater than in cases involving the other crimes enumerated in the Rome Statute.

The second major problem with adjudicating cases tangled with political issues is that the integrity of the court will be compromised, as political matters can hardly be rectified by the prosecution of individuals. Differences amongst states will persevere through an individual prosecution, as it is increasingly rare that an aggressive war is waged by one person. Outside of an absolute dictatorship, the prosecution of one individual is neither a solution nor a deterrent to states pursuing their interests via aggressive means.

The difficulty of adjudicating cases with political overtones was seen in the International Court of Justice (“ICJ”), in a case involving the United States and Nicaragua. The United States opposed the Sandinista government of Nicaragua and was accused of efforts to undermine the regime, including cutting off aid, supporting the Contras (a counter-revolutionary force), and using unilaterally-controlled Latino assets (“UCLA’s”)<sup>42</sup> to engage in covert actions.<sup>43</sup> The Nicaraguan government claimed that the Contras and UCLA’s were acting as agents of the United States<sup>44</sup>, thus the latter was accused of aggression under article 2(4) of the UN Charter. The ICJ agreed with Nicaragua, ignoring the United States claim that they were acting in collective self-defense on behalf of El Salvador, Honduras, and Costa Rica pursuant to the Inter-American Treaty of Reciprocal Assistance.<sup>45</sup>

The relevance of the case stems not only from the merits, but also the reaction of the United States. Along with their defense, the United States also challenged the jurisdiction of the ICJ by renouncing their

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<sup>41</sup> Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331.

<sup>42</sup> UCLA was a term coined by the CIA. It referred to special operatives, many of whom were from Central America, used by the CIA during the American effort to assist in overthrowing the socialist Sandinista government. These UCLA’s would sabotage ports, refineries, and other locations critical to the Nicaraguan government.

<sup>43</sup> Davis B. Tyner, *Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia’s Folly in Tadic*, 18 FLA. J. INT’L L. 843, 850 (2006).

<sup>44</sup> *Id.* at 851.

<sup>45</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

2011] *An Argument for the Deletion of the Crime of Aggression From the Rome Statute of the International Criminal Court* 259

consent to jurisdiction.<sup>46</sup> The court issued its decision anyway, yet the United States refused to comply, and could not be compelled to do so by virtue of their position as a P-5 member of the Security Council.<sup>47</sup> This case represents an example of a state circumventing a judicial decision which carries political reverberations. While the ICJ does not require convictions of individuals, the disconnect between political policy and judicial determination of aggression is clear. These complexities will be magnified when the ICC adjudicates such a case, particularly because a preliminary determination would need to be made to determine which individuals are “most responsible” for carrying out the alleged aggression.

The role of the U.N. Security Council in preventing aggression may also force the ICC to gravitate towards rendering political decisions. Section 5(2) of the Rome Statute explicitly states that jurisdiction over the crime of aggression, once a definition is accepted, “shall be consistent with the relevant provisions of the Charter of the United Nations.”<sup>48</sup> The Security Council determines acts of aggression by a state, and such individual acts which the ICC may have jurisdiction over are linked to the state aggression. Thus, the ICC will be dependent on the Security Council, a political body, to enforce its aims. Were the Security Council to determine that non-involvement in a particular matter would best serve the peace effort, this political decision would block the ICC’s efforts in prosecution. Similarly, a political agenda may motivate the Security Council to act, thereby forcing the hand of the ICC to initiate prosecutions, even if they would not have prosecuted otherwise.

#### IV. THE CRIME OF AGGRESSION IS PREDICATED ON STATE LIABILITY

##### *A. The Problem of Determining “effective control”*

Regardless of which judicial or political body constructed the statute, all inquiries into alleged acts of aggression begin with an investigation of the actions of a state challenging the sovereignty of another. The

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<sup>46</sup> *See id.*

<sup>47</sup> *Id.* P5 stands for the permanent five members of the U.N. Security Council. Each member of the P5 has the power to veto any substantive resolution. Along with the United States, Russia, China, France, and Great Britain make up the group.

<sup>48</sup> Rome Statute, art. 5(2).

ultimate question is whether specific instances of armed force reach the requisite level of criminal aggression. The Special Working Group for the Crime of Aggression (“Special Working Group”) has been working to create a definition of the crime of aggression which would ultimately be adopted by the ICC. One of their proposed statutes defines the crime as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”<sup>49</sup> Section 2 of the statute defines an act of aggression as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.”<sup>50</sup>

The Special Working Group has defined the crime of aggression as “a leadership crime that can only be committed by individuals in a position to ‘exercise control over or to direct the political or military action of a State.’”<sup>51</sup> This requirement is always included by any group defining aggression yet it presents a discernible problem for future prosecutions in the ICC. Determining which individuals are most responsible for the actions of an entire state are not as clear as one may presume. For example, private economic actors may be directly involved in the planning, preparation or initiation of waging aggressive wars, and may even be involved in the enumerated actus rea, yet proving that such an actor has effective control over the political or military operations is very difficult. Accordingly, should the ICC be unable to satisfy this requirement of effective control, it may target the head of state by default, a decision which may not be appropriate. Prosecuting a default individual, for arguably the most serious offense in international law, severely damages the credibility of the ICC.

Similarly, actions by parties who are nationals of a third state may pose a significant burden on the ICC’s ability to prosecute. Though the third party may be intimately involved in the waging of the crime of aggression, demonstrating that he or she had effective control over a sove-

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<sup>49</sup> Report of the Special Working Group for the Crime of Aggression, ICC-ASP/8/Res.6 (Nov. 26, 2009), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.6-ENG.pdf), at 4.

<sup>50</sup> *Id.*

<sup>51</sup> Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT’L L. 477, 478 (2007).

2011] *An Argument for the Deletion of the Crime of Aggression From the Rome Statute of the International Criminal Court* 261

reign state of which they are not a national would be difficult. Supporters of the crime of aggression's inclusion in the Rome Statute may point out that third parties can exercise control over another state through coercion. This seems unlikely however, as acts of aggression are usually the means by which coercion is employed, rather than its object.

These issues highlight the blanket problem that exists by bifurcating the prosecution of crimes of aggression. The crime of aggression is the sole offense within the jurisdiction of the ICC that does not govern *jus in bello*, or the legality of the *means* of force. Requiring an initial determination of state aggression by a political body (Security Council or the General Assembly), followed by a finding of individual liability in the court, forces the two entities to correlate. This is not necessary however, as the protection afforded to individuals under the crime of genocide, crimes of humanity, and war crimes is comprehensive. The relationship between *jus ad bellum* and *jus in bello* is meant to be complementary. The legality of the decision to use force (*jus ad bellum*) necessitates an inquiry into state action, and often involves foreign policy best left outside the court. Eliminating the ICC's jurisdiction over such a crime will not lead to criminals evading prosecution. This is evidenced by the Nuremberg Tribunal, where "all but one of the defendants who were convicted of crimes against peace were also convicted of other offenses, such as crimes against humanity or genocide."<sup>52</sup> Should the Security Council find a state to be guilty of aggressive war, the ICC then has the ability to prosecute the likely offenders which ordinarily permeate an aggressive war. It is possible that an aggressive war yields no war crimes, yet the Security Council has ample authority to handle the violation of *jus ad bellum*. Involving the ICC would simply complicate the matter.

*B. The Crime of Aggression Deviates from the Court's Emphasis on Protecting the Victim*

The increasingly common prosecution of individuals under international criminal law has been matched by a parallel trend; a trend which has seen the focus of the international community shift from the perpetrators to the victims. This trend began with the promulgation of the United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power ("Declaration on Victims Rights") in

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<sup>52</sup> Boeving, *supra* note 37, at 594.

1985.<sup>53</sup> This document, referred to as the “Magna Carta” of victims rights<sup>54</sup>, defines who qualifies as a victim, and provides four means of redress for victims.<sup>55</sup> While this is not a binding document, it was influential in shaping the focus of the various international criminal tribunals. Criminal prosecutions, and thus prosecutors, became mindful of victim’s rights, as opposed to strictly concentrating on the guilt of the perpetrator. Both the ICTY and the ICTR took note of the Declaration, enacting provisions guaranteeing a fair trial, “with . . . due regard for the protection of victims.”<sup>56</sup>

The ICC implemented similar provisions, demonstrating a recognizable effort to both support and vindicate victims of international crimes. Article 68 of the Rome Statute requires the court to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”<sup>57</sup> The Rome Statute goes beyond mere protection, and even encourages the participation of victims in proceedings. The ICC’s Rules of Procedure permit a victim to represent his or her own interests before the court.<sup>58</sup> Further, victims are allowed to submit observations to the court regarding the admissibility of matters<sup>59</sup>, and if their interests are affected by the case, they may present their views and concerns during the proceeding.<sup>60</sup> Victims’ rights in the ICC extend beyond their contributions within the courtroom. Rule 16 of the ICC’s Rules of Procedure and Evidence requires the Registrar of the court to assist the victims in obtaining legal advice, as well as providing the legal representation with support, including necessary facilities.<sup>61</sup>

Jurisdiction by the ICC over the crime of aggression is inconsistent with the court’s increasing focus on the victim throughout the judicial

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<sup>53</sup> Symposium, Michael Bachrach, *The Protection and Rights of Victims under International Criminal Law*, 34 INT’L L. 7, 9 (2000).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Boevig, *supra* note 37, at 584 (*quoting* Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (1994), *available at* <http://www.ictor.org/ENGLISH/basicdocs/statute.html>).

<sup>57</sup> Rome Statute, art. 68(1).

<sup>58</sup> Boevig, *supra* note 37, at 586 (*citing* Rome Statute, art. 15(3)).

<sup>59</sup> Rome Statute, art. 19(3).

<sup>60</sup> *Id.* art. 68(3).

<sup>61</sup> Rules of Procedure and Evidence, Rule 16(1)(b), ICC Doc. ICC-ASP/1/3 (Sept. 2002), *available at* [http://www.amicc.org/docs/Rules\\_of\\_Proc\\_and\\_Ev-id\\_070704-EN.pdf](http://www.amicc.org/docs/Rules_of_Proc_and_Ev-id_070704-EN.pdf), at 25.

2011] *An Argument for the Deletion of the Crime of Aggression From the Rome Statute of the International Criminal Court* 263

process. Much as the problem of state criminality obscures individual prosecution of aggression, states as victims pose a similar obstacle. While it can be argued that there are countless individual victims of an aggressive war, it is usually the weakened position of the attacked state's status within world affairs which suffers most. Often, the individual victims of an aggressive war are designated as such because of the occurrence of war crimes, crimes against humanity, or the crime of genocide which flow from the state act of aggression. The act of aggression itself will have one victim, the state entity. The Rome Statute itself, in article 25, states that the court will have jurisdiction over "natural persons,"<sup>62</sup> not legal persons, which is often the designation for states.

In addition to this incompatibility, the role of the victim in the prosecution of aggression is often severely skewed, invalidating any future court opinion regarding the matter. The issue of victor's justice, whereby the militarily successful state in a conflict prosecutes the vanquished, was one of the great criticisms of both the Nuremberg and the Tokyo Tribunals. While the ICC's justices are presumably neutral, history has taught us that those charged with the crime of aggression are only those aggressive parties who were defeated in the conflict (victor's justice). In this respect, prosecution is punishment not simply for violating the law, but violating the law and suffering military defeat, thus subjecting oneself to the power of another state. This obscures the traditional notion of a victim and a perpetrator. For example, should two states wage aggressive war against each other, the losing party may be both criminally liable, as well as the victim of aggression. Therefore, a state may not be deterred by criminal sanctions, so long as they are confident in the success of their operation. A court seeking credibility, such as the ICC, should not hear cases which base liability on factors other than the criminality of the actions of the accused.

#### V. APPLICATION OF ROME STATUTE ARTICLE 25(3) TO THE CRIME OF AGGRESSION

Article 25 of the Rome Statute prescribes the guidelines for individual criminal responsibility.<sup>63</sup> In particular, article 25(3) enumerates forms of criminal liability in addition to that of the principal perpetrator.

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<sup>62</sup> Rome Statute, art. 25(1).

<sup>63</sup> See Rome Statute, art. 25.

These forms of liability include involvement in a joint enterprise,<sup>64</sup> ordering, soliciting, or inducing another to commit a crime,<sup>65</sup> aiding, abetting, or otherwise assisting in the commission of a crime,<sup>66</sup> contributing to the commission of a crime,<sup>67</sup> and finally, attempt to commit a crime.<sup>68</sup> The question is whether the crime of aggression, as a leadership crime, fits into the ICC's framework for liability. Article 25(3) is applicable to all of the crimes over which the ICC has jurisdiction. Accordingly, should the crime of aggression prove inconsistent with secondary liability, logic suggests removing the crime of aggression, rather than drastically amending article 25(3), which would have ramifications on the prosecution of all crimes in the Rome Statute.

The Coordinator for the Special Working Group has recognized the potential issues, claiming that the group's proposed definition of aggression, which criminalizes the planning, preparation, initiation, or waging a war of aggression,<sup>69</sup> overrides the provisions in article 25 of the ICC.<sup>70</sup> This position is convincing, as the other crimes prosecuted in the ICC stipulate a mens rea, and then list substantive acts which satisfy the actus reus. The crime of aggression, should the final draft resemble the current proposition, defines alternate forms of liability within the statute.

The first problem with the proposed definition to the ICC is that the itemized forms of liability in the draft are inconsistent with the idea of a "leadership crime." The proposed draft retains the clause requiring that the person planning, preparing, initiating, etc., must have effective control over the political or military actions of a state, but this only compounds the problem. Can one reconcile the claim that an individual have effective control over the military when his sole contribution was assistance in the preparation of a military campaign? Would preparation include the general who prepared his troops in a manner consistent with his job regardless of the legality of their eventual military objective? What about a government official who reallocates funds to assist a war effort, again regardless of the campaign's motive? The problem is that by including the actus reus, the statute stretches the concept of effective con-

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<sup>64</sup> *Id.* art. 25(3)(a).

<sup>65</sup> *Id.* art. 25(3)(b).

<sup>66</sup> *Id.* art. 25(3)(c).

<sup>67</sup> *Id.* art. 25(3)(d).

<sup>68</sup> *Id.* art. 25(3)(f).

<sup>69</sup> See Special Working Group for the Crime of Aggression, *supra* note 49.

<sup>70</sup> Nicolaos Strapatsas, *Is Article 25(3) of the ICC Statute "Compatible with the Crime of Aggression"*, 19 FLA. J. INT'L L. 155, 160 (2007).

2011] *An Argument for the Deletion of the Crime of Aggression From the Rome Statute of the International Criminal Court* 265

trol. Acts of preparation may not ordinarily be suggestive of effective control over the actual campaign, yet by including the word preparation, the ICC's justices may be tempted to deem remote acts of preparation as indicative of the effective control of the actor. Perhaps the statute would be more useful if it were general in its terms, requiring only that an actor uses his effective control to wage aggressive war, thereby not predisposing the court to a particular decision.

The second problem is that the prescribed actus reus in article 25 have a similar incompatibility with the concept of effective control, much in the way the proposed statute of the Special Working Group does. Section 3(b) criminalizes the ordering, soliciting, or inducing the commission of a crime.<sup>71</sup> Ordering and soliciting are consistent with effective control, and the concept of a leadership crime, yet inducement is not. Inducement requires the conscious objective of an intermediary, albeit one pursued partially due to the persuasion from another. If person A were to lead or persuade person B to commit the crime of aggression, person A's effective control is nullified by the will of person B. It must not be said to be effective control if it is subject to the actions of an intermediary. In the event that person A forced the hand of person B, the ICC would protect person B either through the defense of duress in article 31<sup>72</sup> or the defense of superior orders under article 33.<sup>73</sup> The Rome Statute also permits criminalizing aiding and abetting and, in any other way, contributing to the commission of a crime.<sup>74</sup> This form of liability would certainly produce adverse results in the prosecution of aggression. The statute only requires that the contribution to the criminal effort be intentional and made "with the aim of furthering the criminal activity."<sup>75</sup> This would implicate a wide range of people, in a crime designed to prosecute a select few. The various ways in which an individual may contribute to an aggressive war necessarily leads to the conclusion that the crime of aggression would no longer revolve around leadership or control, if the ICC were to prosecute it under its current statutes. Not only would it be impractical for the ICC to prosecute so many individuals, but it would create a dangerous "slippery slope," whereby the cutoff for

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<sup>71</sup> Rome Statute, art. 25(3)(b).

<sup>72</sup> *Id.* art. 31(1)(d).

<sup>73</sup> *Id.* art. 33.

<sup>74</sup> *Id.* art 25(3)(c).

<sup>75</sup> *Id.* art. 25(3)(d)(i).

liability would be indefinite.

## VI. DEFENSES TO THE CRIME OF AGGRESSION UNDER THE U.N. CHARTER

The current draft proposals by the Special Working Group require an initial factual finding by an outside body (usually the Security Council or another U.N. body) of state acts of aggression.<sup>76</sup> Accordingly, an analysis of the validity of the ICC's jurisdiction over aggression should involve an inquiry into the U.N. Charter. Of particular importance here, are the defenses put forth in the charter, which are not present in the Rome Statute. This begs the question if the inclusion of aggression under the ICC's jurisdiction necessitates an adoption of such defenses. Article 31 of the Rome Statute provides a provision which does not limit the defenses available to defendants to those enumerated in the statute.<sup>77</sup> Article 21 gives the court the power to apply defenses provided for in applicable treaties and rules of international law.<sup>78</sup> Presumably, this provision eradicates the discrepancy in the two documents. However, the relevant inquiries necessary to reviewing a defense are best suited to be made by a political body, rather than a judicial one. The Security Council has the right to authorize the use of force by a state pursuant to chapter VII of the U.N. Charter.<sup>79</sup> The Security Council's review is often criticized as being laced with biases and political motives (particularly when attacking the strength of the P-5), yet it is precisely the task that the council was created for. The Security Council's job is to protect and maintain peace. It seems redundant for the Security Council to have the power to review and correct acts of aggression, only to pass it on to the ICC for further review. This system once again implicates the interplay between *jus ad bellum* and *jus in bello*. Decisions regarding *jus ad bellum*, regardless of whether the defendant is a state or an individual, are laced with political issues and should remain with the U.N. Should the Council after determining the former issue then refer violations of *jus in bello* to the ICC, that would be appropriate. Only in this regard is the complementary relationship between *jus ad bellum* and *jus in bello* kept

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<sup>76</sup> Keith A. Petty, *Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict*, 33 SEATTLE U. L. REV. 105,107 (2009).

<sup>77</sup> Rome Statute, art. 31(3).

<sup>78</sup> *Id.* art 21(1)(b).

<sup>79</sup> U.N. Charter, ch. VII.

2011] *An Argument for the Deletion of the Crime of Aggression From the Rome Statute of the International Criminal Court* 267

intact.

Article 51 of the U.N. charter allows a state to use force to defend itself against an armed attack.<sup>80</sup> The Rome Statute does employ a self-defense statute, yet it is strictly applied to individuals.<sup>81</sup> This right of self-defense is expansive, and allows for anticipatory defense, giving a state the right to use force before actually being invaded.<sup>82</sup> Similarly, states are allowed to use force for the protection of human rights where the territorial state is abusing its residents, a defense known as humanitarian intervention (though it is not explicitly stated in the charter).<sup>83</sup> Both self-defense and humanitarian intervention are defenses afforded to the state. To apply the defense to individual persons would dilute its meaning. For example, a state may have the right to use force if another state wages aggressive war against it, however, in the ICC, the justification of self-defense would require additional inquiries into the nexus between the individual's act of force and its impact on the defense effort. Otherwise, individuals would be permitted to wage solo missions of destruction against aggressive states. Accordingly, should the ICC gain jurisdiction over aggression, an accompanying self-defense statute would need to be adopted. Or, in my opinion, exclude the crime of aggression from the ICC's jurisdiction, which is the preferential alternative.

## VII. CONCLUSION

Withdrawal of the crime of aggression from the jurisdiction of the ICC requires an alternative method of punishing those who commit said crime. The complementary relationship between *jus ad bellum* and *jus in bello* necessitates a separation in review. The determination of the crime of aggression should remain with a body which is equipped to understand all the complexities which permeate issues of foreign relations. Determining whether that body is the Security Council or the General Assembly is not as critical as separating the rules guiding the decisions to use force with the rules guiding the means of force. The latter is compatible with the principles of the ICC, i.e. individual prosecution, victim-centered, and politically neutral. War crimes, genocide, and crimes

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<sup>80</sup> *Id.* art. 51.

<sup>81</sup> Rome Statute, art 31(1)(c).

<sup>82</sup> Van Schaack, *supra* note 7, at 336.

<sup>83</sup> *Id.* at 337.

against humanity provide a sufficiently comprehensive body of law to prosecute all violators of *jus in bello*. Conversely, *jus ad bellum*, the crime of aggression, is best left outside the ICC's domain.