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The Crime of Aggression and the United Nations Security Council

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Abstract

This contribution is dedicated to Professor John Dugard. It discusses the most difficult issue to be resolved in the negotiations on the crime of aggression: the role of the Security Council in the exercise of jurisdiction over this crime by the International Criminal Court. The International Law Commission suggested a solution in the 1990s, but failing the required support and in the absence of subsequent agreement the 1998 Rome Conference could only prospectively give the Court jurisdiction over the crime of aggression. The post-Rome negotiations are characterized by, on the one hand, support from the five permanent members of the Security Council for the thesis that it should be exclusively for the Security Council to determine whether or not an act of aggression has been committed (as a precondition for the exercise of jurisdiction by the ICC) and, on the other hand, a rejection of this thesis combined with a search for alternatives by many other states. According to the analysis below, in relation to cases involving the crime of aggression the preferred way for the ICC to proceed is to exercise jurisdiction over this crime after a determination of state aggression has been made by the Security Council. Nevertheless, the view according to which such a determination could *exclusively* be made by the Council is rejected, on the basis of the rules of the Charter, the practice of the Security Council and the General Assembly, and decisions of the International Court of Justice. Finally, an alternative arrangement is suggested for the cases in which the Security Council is prevented from acting because of the use of the veto or because of lack of support from its members.

Key words

crime of aggression; First Review Conference on the Statute of the International Criminal Court; International Criminal Court; international criminal law; international law of the use of force; UN Security Council; veto power of the permanent members of the UN Security Council

1. Introduction

This contribution is dedicated to Professor John Dugard, on the occasion of his retirement from his position as professor of international law at Leiden University. During his Leiden years I have benefited from his wisdom and his thought-provoking and sometimes provocative comments, and I have enjoyed his sense of humour. As John Dugard is an authority not only on general international law, but also in the specific field of international criminal law, the crime of aggression is a suitable topic

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for a contribution dedicated to him. This topic is of course part of international criminal law, as is evidenced by the fact that even though the International Criminal Court (ICC) was not yet given the power to actually exercise jurisdiction over this crime, it was nevertheless considered necessary to include it in the list of most serious crimes of international concern mentioned in Article 5(1) of the Rome Statute. But this topic is not only part of international criminal law. It is equally part of the law of the United Nations, as is recognized by Article 5(2) of the Rome Statute. It is for the Security Council under Chapter VII of the UN Charter to determine whether a state has committed an act of aggression and to decide what measures shall be taken to maintain or restore international peace and security. It is in particular this role of the Security Council – and the high politics that come with it – that makes this crime more complex than the other Statute crimes. The purpose of this article is to analyse the role of the Security Council in the exercise of jurisdiction over this crime by the Court. This is generally seen as the most difficult issue in the negotiations on the crime of aggression. Attempts to link the role of the Security Council with that of the ICC in relation to aggression have so far failed. The current negotiations aim to reach an agreement at the Review Conference that will take place in 2009 or 2010 to consider amendments to the Rome Statute, in accordance with Article 123(1) of this Statute.

The crime of aggression is traditionally known as the worst of all international crimes. The Nuremberg Tribunal referred to it as the 'supreme international crime'.[1] In 1950 the General Assembly of the United Nations stated that it is 'the gravest of all crimes against peace and security throughout the world'.[2] Today it is less certain whether a hierarchy of international crimes exists in which the crime of aggression is placed highest – higher than, for example, genocide. The international community has become more oriented towards human security.[3] Nevertheless, when at the 1998 Rome Diplomatic Conference the time was finally ripe for the adoption of the Statute of the International Criminal Court, which covers 'the most serious crimes of concern to the international community as a whole',[4] it seemed only natural that the crime of aggression was included as one of the crimes over which the Court has jurisdiction, even though it was not given a status superior to that of the other Statute crimes.

However, as much as the international community has always been united in recognizing aggression as the supreme international crime or as one of the most serious international crimes, as much it has always been divided on the question of how to define it. As much as the international community is united in recognizing

1. Nuremberg Judgment, p. 186, as quoted in UN, *Historical Review of Developments Relating to Aggression* (2003), at 8.
2. UN Doc. A/RES/380 (V), para. 1.
3. As the 2004 Report of the High-Level Panel on Threats, Challenges and Change observes, present-day threats 'go far beyond States waging aggressive war. They extend to poverty, infectious disease and environmental degradation; war and violence within States; the spread and possible use of nuclear, radiological, chemical and biological weapons; terrorism; and transnational organized crime'. UN Doc. A/59/565 (2004), at 11 (synopsis).
4. Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (hereinafter ICC Statute), preambular para. 4 and Art. 5(1).

that there is a prohibition on *states* committing aggression (and, even broader, on using armed force), as much it is divided on the question of accepting a similarly broad prohibition, as an individual crime under international law, on the *key individuals* behind such a state crime.[5] Whereas it has been possible to define the other crimes included in the Rome Statute, partly because most of them were already defined in pre-existing treaties such as the 1948 Genocide Convention and the 1949 Geneva Conventions, the Rome Conference was not able to arrive at a definition of the crime of aggression. It could only agree on a compromise solution laid down in Article 5 of the Rome Statute. According to Article 5(1), the Court has jurisdiction with respect to four crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. But when on 1 July 2002 the Statute entered into force, the Court could exercise jurisdiction only in relation to the three first-mentioned crimes, not with respect to the crime of aggression. Article 5(2) stipulates:

> 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.

This provision lists two substantive requirements for the provision on aggression: it has to define the crime and it must set out the conditions under which the Court shall exercise jurisdiction with respect to this crime. The analysis below will mainly concentrate on the second substantive requirement ('conditions'). It is in relation to this requirement that the role of the UN Security Council comes into play. This is the most difficult hurdle to overcome on the road towards the adoption of the provision on aggression. The complexity of this issue is rooted in the fact that it brings together the highly political world of the Security Council, dominated by the rule of power, and the international criminal justice world of the ICC, governed by the rule of law.

Behind these two requirements lies a fundamental question: should the ICC exercise jurisdiction over the crime of aggression only in the most severe, 'Hitler-type' cases? Or should the scope of its jurisdiction over this crime be broader, extending to other areas, some or more, in which states resort to the use of armed force? The second point of view enjoys wide support, from pacifists and human rights activists to smaller or middle-sized states. It is backed by the moral case against aggression that is extremely strong. This moral case is well expressed in famous texts such as the first preambular paragraph of the UN Charter ('to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind') and the Nuremberg judgment (e.g. 'a war of aggression . . . contains within itself the accumulated evil of the whole').

At the same time the more powerful states, while subscribing to the view that the Hitler type of aggression should fall within the Court's jurisdiction, do not want to take the risk that this jurisdiction will also encompass 'just wars' – that is, cases

5. G. Gaja, 'The Long Journey towards Repressing Aggression', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (2002), 427, in particular at 427–30.

in which they think it is necessary to use armed force, such as the prevention of genocide or other humanitarian catastrophes, and pre-emptive self-defence. To be concrete, should the ICC have jurisdiction to try the former UK Prime Minister, Tony Blair, and US President George W. Bush for cases such as the 1999 air strikes against Serbia and Montenegro and the 2003 invasion of Iraq? These cases often are sources of huge international tension and of fierce disputes as to whether *jus ad bellum* is violated. Under these circumstances the more powerful states do not want to run the risk that their leaders may be mixed up in proceedings before the ICC.[6]

In the negotiations on the crime of aggression these fundamental questions relating to the future jurisdiction of the Court translate into a sophisticated search for appropriate 'filters' for such jurisdiction. The two main potential filters are to be laid down in the definition of the crime and in the 'conditions'. The definition may limit the Court's jurisdiction to cases above a certain threshold. This is a relative filter that is open to interpretation. For example, the use of armed force in a particular case may be in flagrant or manifest violation of the UN Charter (bringing it within the jurisdiction of the Court), or may only qualify as an 'ordinary' violation (excluding such jurisdiction). The second potential filter – the 'conditions' – could be of an absolute nature. It could involve the determination (yes or no) by the Security Council or another organ that an act of aggression has been committed by the state in question, as a precondition for the exercise of jurisdiction by the ICC.

Section 2 below will discuss some of the relevant preparatory work for the Rome Statute and will analyse why it was not possible to agree on a definition. It will also briefly pay attention to the negotiations subsequent to the Rome Conference. This analysis in section 2 will not focus on the negotiations as a whole, but mainly on the 'conditions' requirement. Section 3 will analyse in some detail the role the Security Council should play in relation to the crime of aggression. In particular, it will examine the view of the five permanent members of the Security Council that it should be exclusively for the Council to trigger the Court's jurisdiction with respect to this crime, by determining that a state has committed an act of aggression. A major criticism of this view is that the Council may not at all be able to decide that a state has committed an act of aggression, either because the required majority of nine affirmative votes is lacking or because the veto is used. A way out is proposed to deal with such inaction by the Security Council.

2. Preparing for the Rome Statute: the rise and fall of the ILC solution

2.1. The ILC solution

In 1994 a draft Statute for an International Criminal Court was prepared by the International Law Commission (ILC). It included the crime of aggression in the list

6. See R. E. Fife, 'Criminalizing Individuals for Acts of Aggression Committed by States', in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden – Essays in Honour of Asbjørn Eide* (2003), 54, at 71: 'When underlying assessments of international legality of use of armed force are still all too often politicised or perceived as such, establishing institutional mechanisms for attributing individual criminal responsibility in such cases is not obvious.'

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of crimes within the jurisdiction of the Court, without defining it.[7] The ILC noted that there was no treaty definition as in the case of genocide, but that the 1974 General Assembly definition of (state) aggression offered some guidance. Therefore

> a court must, at the present time, be in a better position to define the customary law crime of aggression than was the Nuremberg 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 Nuremberg.[8]

The 1994 ILC draft Statute was very clear about the role of the Security Council in relation to the crime of aggression. Article 23(2) provided that

> 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.[9]

According to the ILC commentary,

> the difficulties of definition and application, combined with the 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 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.[10]

In addition, the ILC commentary provides that

> Any criminal responsibility for an act or crime of aggression necessarily presupposes that a State has been held to have committed aggression, and such a finding would be for the Security Council acting in accordance with Chapter VII of the Charter of the United Nations to make. The consequential issues of whether an individual could be indicted, for example, because that individual acted on behalf of the State in such a capacity as to have played a part in the planning and waging of the aggression, would be for the court to decide.[11]

Why was this straightforward provision, requiring a prior determination of an act of aggression by the Security Council, not copied in the Rome Statute? Why was the ILC able to agree without much difficulty on an issue that in the subsequent negotiations became one of the two main hurdles? The answer to these questions is not only that it is easier for an organ composed of 34 individual experts to agree, as compared with a UN diplomatic conference. In addition, the above mentioned provisions in the ILC draft Statute and commentary must be seen in the context of how the ILC's work on the topic 'Draft Code of Crimes against the Peace and Security of Mankind' proceeded, and should not be read in isolation.

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7. The crimes within the jurisdiction of the Court are listed in Article 20 of the draft Statute; see 1994 *Yearbook of the International Law Commission*, Vol. II (Part 2), at 38.
8. 1994 *Yearbook of the International Law Commission*, Vol. II (Part 2), at 38–9. A number of members of the ILC were of the view that only the waging of a war of aggression was a crime under customary international law. They based this view on Art. 6, subpara. (a), of the Nuremberg Charter, and also referred to the 1970 Declaration of Principles (first principle) and to Art. 5(2), of the 1974 General Assembly definition of aggression. Ibid., at 39.
9. Article 23.2 of the draft Statute. See 1994 *Yearbook of the International Law Commission*, Vol. II (Part 2), at 43–5.
10. Ibid., at 39 (commentary to Art. 20 of the draft Statute). This shows how the two filters mentioned in the introduction are interrelated.
11. Ibid., at 44 (commentary to Art. 23 of the draft Statute).

The ILC started working on this topic of a draft Code immediately after its creation in 1947.[12] In 1954 it submitted a draft Code to the General Assembly. This draft Code only contained a list of 'offences against the peace and security of mankind, ... for which the responsible individuals shall be punished'.[13] The General Assembly considered that the draft Code raised problems closely related to that of the definition of aggression, created a special committee to prepare a draft definition of aggression, and decided to postpone further consideration of the draft Code.[14] Twenty years later the General Assembly adopted a definition of aggression,[15] and in 1981 it invited the ILC to resume its work on a draft Code.[16]

The 1954 draft Code did not foresee the creation of an international criminal court. Leaving aside early unsuccessful attempts,[17] only in the early 1990s did the General Assembly and the ILC really start to prepare for the creation of such a court. In 1994 the ILC completed its draft Statute for an International Criminal Court.[18] The draft Statute did not give specific definitions of the crimes mentioned (including the crime of aggression). It was seen by the ILC as 'primarily an adjectival and procedural instrument' that did not need to define in detail the crimes for which the Court would have jurisdiction.[19] At the time (1994) it was the ILC's intention to include definitions of a number of international crimes in the envisaged draft Code of Crimes against the Peace and Security of Mankind. This draft Code was completed in 1996.[20] It included the following definition of the crime of aggression: 'An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression.'[21] This definition is different from the definition that the ILC suggested

12. At the request of the General Assembly; see UN Doc. A/RES/177 (II). See 1949 *Yearbook of the International Law Commission*, at 282–3.
13. The text of the 1954 draft code is reproduced in 1985 *Yearbook of the International Law Commission*, Vol. II (Part 2), at 8. The list includes a very broad set of crimes, including 'any act of aggression ...', 'any threat ... to resort to an act of aggression', 'the preparation by the authorities of a State of the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations', and 'acts in violation of the laws or customs of war'.
14. UN Doc. A/RES/897 (IX).
15. UN Doc. A/RES/3314 (XXIX).
16. UN Doc. A/RES/36/106.
17. UN Docs. A/RES/260B (III) and A/RES/489 (V), and the two reports issued by the Ad Hoc Committee on International Criminal Jurisdiction (UN Docs. A/2136 (1951) and A/2645 (1953)).
18. See in more detail J. Crawford, 'The Work of the International Law Commission', in Cassese et al., *supra* note 5, at 23. As Crawford indicates (at 34), the ILC work on a draft Statute was 'an offshoot' of its work on a Code of Crimes and was characterized by a much more limited scope than the Rome Statute (e.g. the Prosecutor could not trigger the Court's jurisdiction; the Court would have jurisdiction over crimes under existing international law and treaties; its Statute would not contain extensive substantive criminal law provisions). In view of the prevailing doubt and scepticism when the ILC began its work on the Court, it 'thought and feared that the international community was only ready for a light and flexible structure'.
19. Ibid., at 36–8.
20. For the text of the draft Code and the ILC commentary, see 1996 *Yearbook of the International Law Commission*, Vol. II (Part 2), at 17–56.
21. Ibid., at 42–3. In contrast to the other crimes included in the draft Code, jurisdiction for the crime of aggression was reserved to a future international criminal court, while states would not be precluded from trying their own nationals for the crime of aggression (Art. 8 of the draft Code; ibid., at 27). This special regime was considered necessary because a crime of aggression is inextricably entwined with a state act of aggression. As stated in the commentary, 'The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law

in 1991, when the draft Code was adopted on first reading.[22] In its commentary to the 1996 draft Code the ILC again stated that such a crime could only be committed in connection with aggression committed by a state,[23] but it decided not to go again into the question of who was to decide whether or not state aggression had been committed, as its 1994 draft Statute already provided that this should be determined by the Security Council.[24]

Nevertheless, in spite of this particular context of how the ILC work in this area proceeded, it is noteworthy that the 1994 ILC draft Statute stated so straightforwardly that a prior determination of a state act of aggression by the Security Council is a *conditio sine qua non* for bringing a crime of aggression complaint before the Court. Nowadays, as will be discussed below, outside the five permanent members there is only limited support for the view that the Security Council alone can trigger the Court's jurisdiction in this way. The main explanation for this provision is probably – and the ILC alludes to this in its commentary – that in 1994 there was no generally agreed definition of the crime of aggression but only widely diverging views as to whether this definition should be narrow (limited to wars of aggression) or broad (including many other forms of the use of force). The high threshold of a prior Security Council determination of a state act of aggression would counterbalance so much uncertainty. It would imply that only in exceptional cases could the Court exercise its jurisdiction over this crime. As ILC member Bowett stated in 1994, 'Wild charges of aggression were often made against States and States would not want to expose their political leaders to a criminal indictment before the court without

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par in parem imperium non habet. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security.' The only cases in which these arguments against national jurisdiction would not apply are cases involving the exercise of jurisdiction over nationals of a state that has committed aggression by a national court of that state. See 1996 *Yearbook of the International Law Commission*, Vol. II (Part 2), at 30. See further R. van Alebeek, *The Immunity of States and their Officials in the Light of International Criminal Law and International Human Rights Law* (2006), at 143, 324; Fife, *supra* note 6, at 57–60. As Fife mentions (at 59), 'The crime of aggression is, nevertheless, by its very nature a deliberate and essential part of a foreign policy and national security planning. Any investigations and prosecutions would essentially and almost exclusively have to focus on business dealt with in places such as cabinet meeting rooms and the inner chambers of Defence High Command.'

22. See 1991 *Yearbook of the International Law Commission*, Vol. II (Part 2), at 95–6. This 1991 definition of aggression almost completely copied the text of the 1974 General Assembly definition of state aggression. During the ILC discussions that resulted in the 1991 version of the draft Code, the creation of an international criminal court was not yet foreseen; the draft Code was first of all intended to be applied by national courts. Interestingly, the bracketed paragraph 5 of the 1991 definition of aggression stipulated: 'Any determination by the Security Council as to the existence of an act of aggression is binding on national courts.' Within the ILC there was considerable difference of opinion on this paragraph 5. Some members were opposed to it ('to link the application of the code to the operation of the Security Council would render all the work of elaborating the code pointless'). Others were of the view that a Chapter VII determination of state aggression by the Security Council 'was binding on all Member States and *a fortiori* on their courts'. In addition, the Commentary stated that '[t]he question of the relationship between the decisions of an international criminal court and those of the Security Council has been left in abeyance'. See 1988 *Yearbook of the International Law Commission*, Vol. II (Part 2), at 73.

23. As stated in para. 4 of the commentary, '[i]ndividual responsibility for such a crime is intrinsically and inextricably linked to the commission of aggression by a State', and '"aggression by a State" is a *sine qua non* condition for the possible attribution to an individual of responsibility for a crime of aggression'. 1996 *Yearbook of the International Law Commission*, Vol. II (Part 2), at 43.

24. As stated in para. 1 of the commentary, 'the article does not address the question of the definition of aggression by a State which is beyond the scope of the Code'. 1996 *Yearbook of the International Law Commission*, Vol. II (Part 2), at 43.

adequate safeguards.'[25] It is not surprising that the Security Council was selected for providing this threshold, in view of its essential role under the Charter of the United Nations for the maintenance of international peace and security and for the determination of the existence of acts of aggression. An inherent characteristic of this threshold was its political nature. The Security Council would not provide a legal filter; it is a political body that would decide for its own reasons in each specific case whether or not a state act of aggression had been committed.

2.2. No agreement in Rome

Therefore in the years 1994 and 1996 the ILC managed to formulate solutions to the two key outstanding problems in this area: how to define this crime and which institution(s) would determine whether or not aggression had been committed by a state. However, these proposed solutions did not obtain the necessary support in the subsequent negotiations that led to the adoption of the Rome Statute.

Before the Rome Conference, these negotiations took place within two committees established by the General Assembly – the Ad Hoc Committee on the Establishment of an International Criminal Court and the Preparatory Committee on the Establishment of an International Criminal Court.[26] It appeared that some states supported the inclusion of aggression in the Statute as one of the crimes over which the Court would have jurisdiction, but that other states opposed such inclusion, *inter alia* because in their view the time needed to agree on a definition of this crime could hamper the early finalization of the Statute. The definition of the crime of aggression as proposed by the ILC did not receive sufficient support. Furthermore, there was considerable opposition to the provision in the ILC draft Statute requiring a prior determination by the Security Council that a state has committed an act of aggression. This would give rise to problems of due process and would deprive the Court of its independence.[27] Moreover, the use of the veto would make it impossible for the Security Council to trigger the Court's jurisdiction.[28]

These outstanding problems could not be solved during the Rome Conference.[29] As far as the definition problem was concerned, Arab and African states in particular favoured a broad definition inspired by the 1974 General Assembly definition of aggression. Many European states, in particular Germany, supported a narrow

25. 1994 *Yearbook of the International Law Commission*, Vol. I, at 4.
26. The Ad Hoc Committee was created by UN Doc. A/RES/49/53, the Preparatory Committee by UN Doc. A/RES/50/46. On the work of these committees see A. Bos, 'From the International Law Commission to the Rome Conference (1994–1998)', in Cassese et al., *supra* note 5, at 35.
27. Report of the Ad Hoc Committee, UN Doc. A/50/22, at 15; Report of the Preparatory Committee, UN Doc. A/51/22, at 30–1. Such criticism was also voiced by the International Criminal Tribunal for the former Yugoslavia (ICTY) in its comments on the draft Statute: 'It does not seem necessary to provide that the court defer to the Security Council on the subject of aggression, the effect of which would be to give the Security Council, and in particular the permanent members, exclusive rights of definition over the term "aggression", making it the "mouth of the oracle" for this category of crimes. The Tribunal's judges respectfully suggest that this would be an undesirable outcome.' UN Doc. A/AC.244/1, 20 March 1995, at 30.
28. Report of the Ad Hoc Committee, *supra* note 27, at 28. Report of the Preparatory Committee, *supra* note 27, at 19, 33.
29. See for an analysis of the crime of aggression negotiations during the Rome Conference H. von Hebel and D. Robinson, 'Crimes within the Jurisdiction of the Court', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (1999), 79, in particular at 81–5.

definition, limited to the most extreme cases of aggression such as invasion of foreign territory. As far as the requirement of a prior determination of state aggression by the Security Council was concerned, the opposition to an exclusive role for the Council remained considerable. A number of states completely rejected Security Council involvement in relation to the exercise of jurisdiction over the crime of aggression by the Court. Only some states wanted the Court to exercise jurisdiction over the crime of aggression *exclusively* in cases where the Security Council had made a prior determination of state aggression. At the Rome Conference Cameroon presented the following proposal: 'The Security Council shall determine the existence of aggression in accordance with the pertinent provisions of the Charter of the United Nations before any proceedings take place in regard to a crime of aggression.'[30] If the Security Council were not able to make such a determination within a reasonable time, the Court would be entitled to commence an investigation. This proposal was not discussed in detail.[31] When it became clear that the Rome Conference could not find solutions to these problems, the somewhat paradoxical compromise solution was found to have the crime of aggression in the Statute, but to allow the Court to exercise jurisdiction over this crime only when final agreement is reached on the definition and on 'the conditions under which the Court shall exercise jurisdiction with respect to this crime'. This last mentioned condition refers to the possible role the Security Council should play in this context, but the explicit mention of the Security Council was unacceptable for those delegations in Rome who opposed such a role.[32]

2.3. No agreement after Rome

The Rome Conference created a Preparatory Commission. One of the tasks of this PrepCom was to prepare an agreement on the crime of aggression. This agreement would need to cover three parts:

a definition of the crime of aggression;

the conditions under which the Court shall exercise jurisdiction with respect to this crime; and

the elements of this crime.

The PrepCom spent considerable time and effort on these three parts. No agreement was reached, but a number of options were thoroughly discussed. The result of this was laid down in a so-called Discussion Paper (hereinafter Discussion Paper 2002), prepared by the Co-ordinator of the PrepCom's Working Group on the Crime of Aggression, Silvia Fernández de Gurmendi.[33]

30. UN Doc. A/CONF.183/C.1/L.39; quoted in Gaja, *supra* note 5, at 433.
31. A. Zimmermann, 'Article 5', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), 97 at 105.
32. See S. A. Fernández de Gurmendi, 'The Working Group on Aggression at the Preparatory Commission for the International Criminal Court', (2002) 25 *Fordham International Law Journal* 589, at 599.
33. See UN Doc. PCNICC/2002/2/Add.2, at 3–5. See for an excellent analysis R. S. Clark, 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the

Soon after the Rome Statute entered into force the PrepCom ceased to exist. A new framework had to be created for continuing the work on the crime of aggression. For this purpose, the first meeting of the ICC's Assembly of States Parties (ASP) in September 2002 created the Special Working Group on the Crime of Aggression.[34] This is indeed a *Special* Working Group, since even a state that is not party to the Rome Statute or a member of the ASP is entitled to participate in it as a full member. It has taken a long time for this Special Working Group to get up steam. Until early 2007, substantive work took place only in three informal intersessional meetings of the group.[35] The results of these meetings were reflected in another Discussion Paper (hereinafter Discussion Paper 2007) proposed by the chairman, Christian Wenaweser (the Liechtenstein ambassador to the United Nations).[36] The Discussion Paper 2007 follows the structure of the Discussion Paper 2002 and does not demonstrate a radical change of approach towards the key issues to be decided. It provided the basis for a round of formal negotiations that took place between 27 January and 1 February 2007. While some progress was made during this round of negotiations, the key issues remained unresolved.[37]

The remainder of this article will not give a factual description of what happened during the PrepCom and in the Special Working Group. Instead, the article will focus on the most difficult issue, namely the one that is described in Article 5(2) of the Rome Statute as 'the conditions under which the Court shall exercise jurisdiction with respect to this crime'.

3. Defining the role of the Security Council

3.1. Balancing the powers and spheres of operation of the Court and the Security Council

The negotiations with regard to the 'conditions' requirement in Article 5(2) of the Statute demonstrate that the disagreement on this issue during the Rome Conference reflected fundamentally opposed views. At the same time, the PrepCom and the Special Working Group have usefully explored options that could, in the long run, assist in reaching a compromise solution. The two most extreme options relate to the consequences for the ICC of the absence of a Security Council determination as to the existence of an act of aggression by a state: the Court may either proceed or not proceed with the case.[38]

But even the first extreme option, according to which the Court may proceed if there is no Security Council determination, accepts that this may only happen

International Criminal Court', (2002) 15 LJIL 859; and Clark, 'The Crime of Aggression and the International Criminal Court', in J. Doria, H.-P. Gasser, and M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court: Essays in Honor of Professor Igor Pavlovich Blishchenko* (forthcoming).

34. Res. ICC-ASP/1/Res.1.
35. Held in Princeton, in June 2004 (2½ days), June 2005 (2½ days) and June 2006 (3½ days). For the reports of these meetings, see ASP, 3rd Session, Official Records, Annex II; ASP, 4th Session, Official Records, Annex IIA; ASP, 5th Session, Official Records, Annex II. A final Princeton meeting took place in June 2007 (31/2 days); for the report of this meeting see Doc. ICC-ASP/6/SWGCA/INF.1.
36. Doc. ICC-ASP/5/SWGCA/2.
37. For the report of this meeting, see Doc. ICC-ASP/5/SWGCA/3.
38. 2002 and 2007 Discussion Papers, paras. 4 and 5.

after the Security Council has been given ample opportunity to make a prior determination of state aggression. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the starting point is always that the Court 'shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned'.[39] Subsequently, if the Council has not made such a determination, 'the Court shall notify the Security Council of the situation before the Court so that the Security Council may take action, as appropriate'.[40] It is therefore recognized that the preferred way for the Court to proceed is to exercise jurisdiction over the crime of aggression after a determination of state aggression has been made by the Security Council.[41]

The rationale of this preference is the Council's important responsibility for maintaining international peace and security, laid down in the UN Charter. While in practice, certainly in the Cold War era, these Charter words could often not be translated into deeds, at a *normative* level it has never really been questioned that this Security Council responsibility is an indispensable constituent element of the present international order. The most recent authoritative confirmation of this responsibility is the 2005 World Summit Outcome, adopted by the General Assembly.[42] This confirmation followed the earlier reports by the High-Level Panel on Threats, Challenges and Change and by the UN Secretary-General, which both found that 'the task is not to find alternatives to the Security Council as a source of authority but to make it work better'.[43]

The Security Council's important responsibility for maintaining international peace and security is recognized in the Rome Statute. While the Court is established as an independent judicial institution, it is also created as an integral part of the international legal and political order that does not operate in isolation from the outside world. The Statute reaffirms the purposes and principles of the UN Charter and states that the Court is established in relationship with the UN system.[44] More specifically it empowers the Security Council to trigger the Court's jurisdiction by referring to the Prosecutor a situation in which one or more Statute crimes appear to have been committed ('referral'), and to defer an investigation or prosecution for a (renewable) period of one year ('deferral').[45] These powers of referral and deferral allow the Security Council to call in or to suspend action by the Court where this is considered opportune or necessary. The referral and deferral provisions of the Statute constitute a delicate balance between the powers and spheres of operation

39. 2002 and 2007 Discussion Papers, para. 4.
40. Ibid.
41. In the view of Fernández de Gurmendi (the Co-ordinator of the Working Group on Aggression of the PrepCom in the period 2000–2), most of the proposals made in the Working Group seemed to accept the premise 'that the Security Council has the right to be the organ that acts in the first place'. *Supra* note 32, at 603.
42. UN Doc. A/RES/60/1, paras. 79, 80, and 152.
43. 'In Larger Freedom: Towards Development, Security and Human Rights for All', Report of the Secretary-General, UN Doc. A/59/2005, para. 126. Almost identical language is used in 'A More Secure World: Our Shared Responsibility', the December 2004 Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (High-Level Panel Report), para. 198, and earlier in 'The Responsibility to Protect', the December 2001 Report of the International Commission on Intervention and State Sovereignty, at 49 (para. 6.14).
44. ICC Statute, Preamble and Art. 2.
45. ICC Statute, Arts. 13(b) (referral) and 16 (deferral).

of the Court and the Security Council.[46] In the first years of existence of the Court this balance has already been tested and pressurized.[47] Therefore the work on the crime of aggression is not an isolated area where this balance has to be found, and the Statute reminds the negotiators that the result of their work 'shall be consistent with the relevant provisions of the Charter of the United Nations'.[48]

As has been shown above, the important responsibility of the Security Council is fully recognized in the 2002 and 2007 Discussion Papers. The preferred way for the Court to proceed is to exercise jurisdiction over the crime of aggression after a determination of state aggression has been made by the Security Council. While this was generally agreed, a key disputed issue in the crime of aggression negotiations continues to be the view expressed by the five permanent members of the Security Council that it is *exclusively* for the Security Council to trigger the Court's jurisdiction by determining that a state has committed an act of aggression (the 'exclusivity thesis'). This issue will now be discussed. Next, this article will focus on a major criticism of the exclusivity thesis. This criticism originates from the fear that the Council may not be able to decide that a state has committed an act of aggression, either because the required majority of nine affirmative votes is lacking or because the veto is used.

3.2. The exclusivity thesis analysed from a UN Charter perspective

3.2.1. The relevant law of the Charter

The exclusivity thesis is based on Article 39 of the UN Charter. Article 39 reads as follows:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security.

It is indeed clear from this provision that the Security Council has the power to determine whether or not an act of aggression exists. However, Article 39 does not state that this is an *exclusive* power of the Council. Neither can such a conclusion be drawn on the basis of other Charter provisions. On the contrary, there are strong arguments for the view that this is not an exclusive power of the Security Council.

The key provision in the Charter on the role and task of the Security Council is Article 24, entitled 'Functions and Powers'. According to paragraph 1 of this article, the Security Council has the 'primary responsibility for the maintenance of

46. See further G. H. Oosthuizen, 'Some Preliminary Remarks on the Relationship between the Envisaged International Criminal Court and the UN Security Council', (1999) 46 *Netherlands International Law Review* 313; L. Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16', in Lee, *supra* note 29, at 143; L. Condorelli and S. Villalpando, 'Referral and Deferral by the Security Council', in Cassese et al., *supra* note 5, at 627.

47. The first referral was made in UN Doc. S/RES/1593 (the situation in Darfur). The Security Council has twice adopted resolutions (UN Docs. S/RES/1422 and S/RES/1487) that it did not explicitly consider to be invocations of Art. 16 of the Statute, but that it explicitly found to be 'consistent with the provisions of Article 16 of the Rome Statute' (operational para. 1 of these resolutions). The adoption by the Security Council of these two resolutions has been severely criticized. See for an analysis Z. Deen-Racsmány, 'The ICC, Peacekeepers and Resolution 1422: Will the Court Defer to the Council?', (2002) 49 *Netherlands International Law Review* 353.

48. ICC Statute, Art. 5.2.

international peace and security'. 'Primary' is not 'exclusive'. On various occasions the International Court of Justice has confirmed this interpretation. In the *Certain Expenses* Advisory Opinion (1962) the Court for the first time examined the division of competences between the Security Council and the General Assembly. It quoted Article 24(1) of the Charter and straightforwardly concluded that '[t]he responsibility conferred is "primary", not "exclusive"'.[49] The Court observed that '[t]he Charter makes it abundantly clear, however, that the General Assembly is also to be concerned with international peace and security'.[50] This reading of Article 24(1) in *Certain Expenses* has been repeated by the Court in subsequent cases.[51] The Assembly's general competence in the area of peace and security does not only cover the competence to issue recommendations, but also includes the specific competence to determine whether or not a state has committed an act of aggression. As the Court has stated, 'it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design'.[52]

Apart from the General Assembly, the ICJ also has the competence to determine whether or not a state has committed an act of aggression. This concerns a legal determination, by the principal judicial organ of the United Nations, in contrast to determinations by the Security Council and the General Assembly, which are the central political organs of the United Nations. Nowadays this competence is not really disputed, but in the past states have sometimes argued that a finding of aggression would be a task of the Security Council, not of the ICJ. The United States took this position in the *Nicaragua* case, but the Court has rejected it, as it did in other cases, emphasizing the political nature of the functions of the Security Council and the judicial functions of the Court. 'Both organs can therefore perform their separate but complementary functions with respect to the same events.'[53] The Court may find that a state has committed an act of aggression first of all within the context of a dispute between states that has been referred to it.[54] The Court has to settle such disputes 'by discovering the better legal position of the parties before it, drawing upon the accepted sources of international law'.[55] In addition, the ICJ may give advisory opinions on any legal question at the request of bodies authorized

49. *Certain Expenses of the United Nations (Article 17(2), of the Charter)*, Advisory Opinion, 20 July 1962, [1962] ICJ Rep. 151, at 163.
50. Ibid.
51. E.g. *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, 26 November 1984, [1984] ICJ Rep. 392, in particular at 434–5; *Legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion, 9 July 2004, [2004] ICJ Rep. 136, para. 26.
52. *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Order, 29 January 1971, [1971] ICJ Rep. 50.
53. *Nicaragua* (Admissibility), *supra* note 51, at 435. See also, e.g., *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Request for the Indication of Provisional Measures, Order, 1 July 2000, [2000] ICJ Rep. 111, at 126–7.
54. ICJ Statute, Art. 36. As stated in Art. 38.1, it is the function of the Court to decide such disputes in accordance with international law.
55. R. Higgins, 'The Place of International Law in the Settlement of Disputes by the Security Council', (1970) 64 AJIL 1, at 16.

to do so.[56] There can be no doubt that the question of whether or not a state has committed an act of aggression is not only a political but also a legal question.

What *is* exclusive to the Security Council, however, is its power to impose binding enforcement measures under Chapter VII of the Charter.[57] As the ICJ stated in *Certain Expenses*, '[i]t is only the Security Council which can require enforcement by coercive action against an aggressor'.[58] The General Assembly and the ICJ do not have this power. However, the determination as such of whether or not an act of aggression exists is not a binding enforcement measure against an aggressor. It comes prior to possible coercive action and purely concerns a finding that a certain state act qualifies as an act of aggression.

The next step is to see if this analysis of the exclusivity thesis on the basis of the law of the Charter is supported by practice. The law of international organizations may be interpreted, substantially further developed, and even revised through its practice, as is generally recognized in decisions of the ICJ and in doctrine.[59] The remainder of this section will therefore examine whether the practice of the Security Council and the General Assembly, and decisions of the ICJ, are in accordance with the above analysis, or give more support for the exclusivity thesis.

3.2.2. Security Council practice

Since 1945 the Security Council has in five situations qualified certain acts as 'aggressive acts', 'acts of aggression', or 'aggression':

1. acts committed by Southern Rhodesia against other countries, including Angola, Botswana, Mozambique, and Zambia (Resolution 326 (1973) and subsequent resolutions, 1973–9);
2. acts committed by South Africa against other countries in southern Africa (Resolution 387 (1976) and subsequent resolutions, 1976–87);
3. acts committed by mercenaries against Benin (Resolution 405 (1977));
4. acts committed by Israel against Tunisia (Resolutions 573 (1985) and 611 (1988));
5. acts committed by Iraq against diplomatic premises and personnel in Kuwait (Resolution 667 (1990)).[60]

The following two observations may be made. First of all the legal basis of the resolutions adopted in these five situations may be analysed. The view could be

56. ICJ Statute, Art. 65.1.
57. See also the analysis by J. Delbrück, 'Art. 24', in B. Simma (ed.), *The Charter of the United Nations* (2002), 447.
58. *Certain Expenses*, *supra* note 49, at 163.
59. ICJ decisions: see in particular *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, [1971] ICJ Rep. 16, at 22; and also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 8 July 1996, [1996] ICJ Rep. 66. Legal doctrine: see in particular E. Lauterpacht, 'The Development of the Law of International Organization by the Decisions of International Tribunals', (1976) 152 RCADI 379, at 460. See for further discussion and references N. M. Blokker, 'Beyond "Dili": On the Powers and Practice of International Organizations', in G. Kreijen (ed.), *State, Sovereignty, and International Governance* (2002), 299.
60. UN, *Historical Review of Developments relating to Aggression* (2003), at 225–36. This study correctly notes that, following the invasion of Kuwait by Iraq on 2 August 1990, the Security Council did not qualify this invasion as an act of aggression, but as a 'breach of the peace' (UN Doc. S/RES/660).

taken that these resolutions have to be based on Chapter VII of the Charter, since Article 39 explicitly refers to the power of the Security Council to determine that an act of aggression has been committed. However, the above mentioned resolutions offer support for a broader view. Only Resolution 667 explicitly refers to Chapter VII. Some of the other resolutions (those adopted under no. 1 and no. 4 above) contain direct or indirect references to the existence of a threat to the peace and could therefore also be considered to be based on Chapter VII. But there are also resolutions (most of those adopted under no. 2 and Resolution 405 adopted under no. 3) containing no indication that they were adopted under Chapter VII. The legal basis of these resolutions could be within Chapter VI of the Charter.

Second, although the conclusion that the Security Council has never determined particular acts as acts of aggression is not justified, it is true that the Council has been very reluctant to do so. Since 1945 military force has been used in a number of situations in such a way that the Security Council could easily have found that aggression was committed, even if a very strict definition would have been used. It is perhaps noteworthy that the five situations mentioned above all date from the period before 1990, when the Council was frequently prevented from acting as a result of the absence of agreement amongst its permanent members. Since 1990 the Council has become much more active, but apart from Resolution 667 it never decided that aggression had been committed, even in cases where the facts would have warranted such a decision (e.g. the 1990 invasion of Kuwait by Iraq).

3.2.3. General Assembly practice

The General Assembly has in six situations qualified certain acts as 'aggressive acts', 'acts of aggression', or 'aggression':

1. acts committed by China in Korea (Resolution 498(V) (1951) and subsequent resolutions);
2. the occupation of Namibia by South Africa (Resolution 1899(XVIII) (1963) and subsequent resolutions);
3. acts committed by South Africa against other African states (Resolution 2508 (XXIV) (1969), Resolution 36/172 A (1981), and a number of other resolutions);
4. acts committed by Portugal against Guinea-Bissau and Cape Verde (Resolution 2795(XXVI) (1971) and subsequent resolutions);
5. acts committed by Israel against Iran (Resolutions 36/27 (1981) and 37/18 (1982), against Lebanon (Resolutions 36/226 A (1981) and 37/3 (1982)), and against the Palestinian people (Resolution 36/226 A (1981) and subsequent resolutions), and its occupation of the Golan heights (Resolution ES-9/1 (1982) and subsequent resolutions);
6. acts by Serbia and Montenegro against Bosnia and Herzegovina (Resolution 46/242 (1992) and subsequent resolutions).[61]

61. Ibid., at 237–51.

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The above list first of all shows that the General Assembly considers itself competent to determine whether or not a state has committed an act of aggression. There is no indication in the practice of the General Assembly that it considers this to be a matter which belongs to the exclusive competence of the Security Council. Early support for this conclusion can already be found in the Assembly's Uniting for Peace Resolution, on the basis of which the Assembly may make 'appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force'.[62] Such recommendations can only be made following a prior determination that a breach of the peace or act of aggression has been committed.

In addition, the list also shows that the General Assembly may consider itself competent to deal with an issue that is also discussed by the Security Council. In particular in relation to acts committed by South Africa, the Assembly and the Council have exercised their powers partly simultaneously. It may be questioned whether this is lawful in view of the Charter provisions that give priority to the Security Council in the maintenance of peace and security. This Security Council priority follows from Article 24(1) of the Charter. It is further elaborated in Article 12(1) (the Assembly shall not make recommendations in relation to a case while the Council is exercising its functions in that case), and in Article 11(2) (if action is necessary the Assembly shall refer a case to the Council). These priority provisions are an improvement on the relevant provisions of the Covenant of the League of Nations, which attributed literally the same power to the Assembly and the Council of the League.[63] In UN practice, this Charter distinction between the roles in this field of the General Assembly and the Security Council was originally followed, but gradually has become less strict. In the 2004 proceedings in the *Case concerning the Israeli Wall*, Israel alleged that, 'given the active engagement of the Security Council with the situation in the Middle East, including the Palestinian question, the General Assembly acted *ultra vires* under the Charter' when it requested the advisory opinion.[64] However, the Court noted 'that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security'.[65] The Court considered that this 'accepted practice of the General Assembly, as it has evolved, is consistent with Article 12(1) of the Charter'.[66]

General Assembly practice therefore confirms that, while it is true that the Security Council has a priority power to determine whether or not an act of aggression has been committed, this is not an exclusive power of the Security Council that would preclude the General Assembly from making aggression determinations.

In addition, it is necessary to examine whether this General Assembly practice has been generally supported by the members of the Assembly. Many of the relevant

62. UN Doc. A/RES/377A (V), para. 1.
63. Both the Assembly (Art. 3(3)) and the Council (Art. 4(4)) had the power to deal at their meetings with 'any matter within the sphere of action of the League or affecting the peace of the world'.
64. *Legal consequences of the construction of a wall in the occupied Palestinian territory*, *supra* note 51, para. 24.
65. Ibid., para. 27.
66. Ibid., para. 28.

resolutions were not adopted unanimously or by consensus, but with one or more votes against, or abstentions. In these cases did members vote against or abstain from voting because they did not agree with the specific resolution, or did they do so because they took the view, as a matter of principle, that the Assembly did not have the power to make any aggression determination? The records of the relevant meetings of the Assembly show that the competence of the Assembly to determine whether or not a state has committed an act of aggression has not been questioned. The relevant resolutions obtained broad support, and in most cases most permanent members of the Security Council voted in favour. Where these permanent members voted against, this was in almost all cases because they rejected the substance of the resolution in the specific case at hand.[67] In the few cases in which the exercise of powers by the General Assembly was questioned, the criticism was related to other issues, either very specific or much more general.[68] Criticism relating to the role of the Assembly in the early years of the United Nations came in particular from the Soviet Union (when the Assembly was dominated by Western and pro-Western countries), and since the 1970s from the United States and other Western countries (when developing countries increasingly dominated the Assembly).

3.2.4. Decisions of the International Court of Justice

As mentioned above, the ICJ has the power to determine whether or not a state has committed an act of aggression, both in judgments relating to disputes between states and in advisory opinions to international organizations. In practice this question has only exceptionally been put before the Court. More often, in particular in recent years, the Court was asked to find that a state has violated the prohibition of the use of force.[69] Earlier, it was in particular in the *Nicaragua* case that the ICJ considered issues relating to the use of force and, to a very limited extent, to aggression.[70] In the *Nicaragua* case, Nicaragua did not request the Court to find that acts of aggression had been committed by the United States, and the Court's judgment does not contain such findings. In the dictum of the judgment, the Court *inter alia* decided that the United States, by certain specified attacks on Nicaraguan territory and by laying mines in Nicaraguan waters, had acted in breach of its obligation under customary international law not to use force against another state.[71] The Court's considerations concerning aggression were made in the context of its examination of whether the United States could invoke the right of self-defence. In particular, the Court examined whether certain acts (the sending by or on behalf of a state of armed bands, groups

67. See e.g. UN Doc. A/PV.2158, at 6–8 (statement by the United Kingdom, 29 October 1973); UN Doc. A/ES-9/PV.12, at 127–8 (statement by the United States, 5 February 1982); UN Doc. A/37/PV.70, at 1179 (statement by the United States, 17 November 1982).
68. See e.g. UN Doc. A/PV.330, at 31–45 (statement by the USSR, 18 May 1951).
69. E.g. the ten 'use of force' cases brought in 1999 by the then Federal Republic of Yugoslavia against NATO member states.
70. *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, [1986] ICJ Rep. 14.
71. Ibid., dictum, points (4) and (6).

etc., assistance to rebels in the form of the provision of weapons or logistical or other support) should be considered as armed attacks justifying self-defence.[72]

The only cases in which the Court was requested to find that aggression was committed were disputes between the Democratic Republic of the Congo (DRC) and three of its neighbouring countries.[73] In its applications in these cases brought in 1999, the DRC claimed that Burundi, Uganda, and Rwanda had unlawfully invaded the DRC, and it asked the Court, *inter alia*, to declare that these states were guilty of acts of aggression. The cases against Burundi and Rwanda were discontinued at the request of the DRC,[74] but the case against Uganda ended in a judgment on the merits that is relevant for the issues discussed here.[75]

As far as the issue of aggression is concerned, the most important aspect of this judgment is the absence of a finding by the Court that Uganda had committed acts of aggression. The Court examined the facts of the military action by Uganda and established that a considerable number of cities and villages in the DRC were taken by Uganda in 1998 and 1999, often hundreds of kilometres from the DRC–Uganda border.[76] It concluded that Ugandan forces 'traversed vast areas of the DRC, violating the sovereignty of that country', and that 'it has been presented with probative evidence as to military intervention'.[77] It also concluded that '[t]he unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter'.[78] In the dictum of the judgment, the Court's first finding is that Uganda had violated the principle of non-use of force in international relations and the principle of non-intervention. But the Court nowhere in its judgment qualified the intervention by Uganda as aggression and nowhere in its judgment indicated why it did not make such a qualification, as was requested by the DRC, even though the facts as established by the Court seemed fully to justify such a qualification. In the *Nicaragua* case the Court stated that '[t]here appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks', and it accepted one element of the 1974 definition of aggression as being part of customary international law, even though Nicaragua had not requested the Court to find that aggression had been committed by the United States.[79] However, in this case, in which the Court *was* requested to find that

72. Ibid., at 103–4.
73. In a subsequent case brought by the DRC against Rwanda, the DRC did not request the Court to find that Rwanda had committed aggression, but to adjudge and declare, *inter alia*, that Rwanda had violated Art. 2(4) of the Charter. The DRC application only referred to aggression where it asked the Court to adjudge and declare that 'all Rwandan armed forces responsible for the aggression shall forthwith quit the territory of the Democratic Republic of the Congo'. *Case concerning armed activities on the territory of the Congo (new application: 2002 (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the court and admissibility of the application, Judgment, 3 February 2006, [2006] ICJ Rep. (not yet published), para. 11. In its judgment of 3 February 2006, the Court found that it had no jurisdiction to entertain the application.
74. Orders of the Court of 30 January 2001.
75. *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, [2005] ICJ Rep. (not yet published).
76. Ibid., paras. 72–91.
77. Ibid., paras. 153, 164.
78. Ibid., para. 165; see also para. 153.
79. *Nicaragua* (Merits), *supra* note 70, at 103.

aggression had been committed, it did not use the 1974 definition of aggression and limited itself to the more general prohibition of the use of force.

In their Separate Opinions Judge Elaraby and Judge Simma criticized the judgment because it did not make the finding that aggression had been committed. Judge Simma observed that 'Uganda invaded a part of the territory of the DRC of the size of Germany' and concluded:

> If there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC. Compared to its scale and impact, the military adventures the Court had to deal with in earlier cases, as in *Corfu Channel*, *Nicaragua*, or *Oil Platforms*, border on the insignificant.[80]

Judge Elaraby also quoted from the Nuremberg judgment where it stated that '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'.[81] In his view the Court should have found that Uganda had committed aggression, 'given the centrality of the claim of aggression to the Democratic Republic of the Congo's Application as well as the seriousness of the violation of the use of force in the present case and the broader importance of repressing aggression in international relations'.[82]

The limited number of decisions of the ICJ in the field of the use of force and aggression does not justify firm and definite conclusions. It can be concluded, however, that the Court does not shy away from performing its judicial role in this sensitive area.[83] As far as it has considered substantive issues in this field, it has emphasized that the prohibition of the use of force 'is a cornerstone of the United Nations Charter',[84] and that exceptions to this prohibition have to be interpreted strictly. It has also stated that it is necessary 'to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms'.[85] In the *Nicaragua* case the Court found that assistance to rebels by providing weapons, or logistical or other support, may be regarded as a threat or use of force, but not as an armed attack.[86] However, when it *was* confronted with facts that it would be difficult not to qualify as acts of aggression and the applicant state requested a finding of aggression, the Court did not make such a finding and confined itself to qualifying these facts as 'a grave violation of the prohibition on the use of force'.[87] There is no indication why the Court followed this approach. '[W]hy not call a spade a spade?', as Judge Simma commented in criticizing this judgment.[88] While the Security Council

80. *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, [2005] ICJ Rep. (not yet published), (Judge Simma, Separate Opinion), para. 2.
81. *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, [2005] ICJ Rep. (not yet published), (Judge Elaraby, Separate Opinion), para. 10.
82. Ibid., para. 20.
83. As the Court itself stressed, see *Nicaragua* (Admissibility), *supra* note 51, at 435.
84. *Congo v. Uganda*, *supra* note 75, para. 148.
85. *Nicaragua* (Merits), *supra* note 70, at 101. See also *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, [2003] ICJ Rep. 161, paras. 51, 64.
86. Ibid., at 104.
87. *Congo v. Uganda*, *supra* note 75, para. 165.
88. Separate opinion of Judge Simma, *supra* note 80, para. 2.

could for political reasons decide not to find that Uganda had committed aggression, the Court,

> as the principal *judicial* organ of the United Nations, does not have to follow that course. Its very *raison d'être* is to arrive at decisions based on law and nothing but the law, keeping the political context of the cases before it in mind, of course, but not desisting from stating what is manifest out of regard for such non-legal considerations.[89]

Perhaps the Court has been reluctant in this respect because it wants to operate carefully in a sensitive area such as this one, and more specifically because, since the Security Council had *not* made a finding that aggression had been committed by Uganda, it would not want to take the lead in this and risk thwarting the work of the Council.[90] Such reluctance would match the view, once expressed by Judge Lachs, that

> [I]t is important for the purposes and principles of the United Nations that the two main organs with specific powers of binding decision act in harmony – though not, of course, in concert – and that each should perform its functions with respect to a situation or dispute, different aspects of which appear on the agenda of each, without prejudicing the exercise of the other's powers.[91]

There is a balance between 'acting in harmony with the Security Council' and 'acting independently as the principal judicial organ of the UN'. In this case the Court has implicitly chosen to follow the 'harmony' approach.

3.2.5. Implications for the crime of aggression negotiations

It must be concluded that the limited relevant practice of the Security Council, the General Assembly, and the ICJ supports the preceding analysis of the exclusivity thesis. In practice determinations of state aggression have not only been made by the Security Council, but also by the General Assembly. The ICJ has so far never found that a state has committed aggression, but it is beyond doubt that it has the competence to do so. The conclusion of this section is therefore that the exclusivity thesis must be rejected.

It can now be determined what this means for a future agreement on the crime of aggression, in the light of the Rome Statute requirement of consistency with the relevant provisions of the UN Charter. A future agreement that would include a

89. Ibid., para. 3.

90. In its judgment the Court refers to the 'carefully balanced' resolutions adopted by the Council in this dispute, and recalls that the Security Council 'determined the conflict to constitute a threat to the peace, security and stability in the region' (not an act of aggression). Judgment, paras. 150–2. As Gray has observed, in such cases it is possible for the Court to make its own finding and conclude that aggression has been committed, but 'in cases involving ongoing armed conflict it is conceivable that such a determination by the Court would be unhelpful to the political settlement process being pursued by the Security Council'. Gray also notes that in the inverse situation, 'the Court would almost certainly accept as authoritative a determination of aggression by the Security Council, even if it is less likely expressly to acknowledge that the Security Council's power is exclusive'. C. Gray, 'The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after *Nicaragua*', (2003) 14 EJIL 867, at 898–9.

91. *Case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom),* Request for the indication of provisional measures, Order, 14 April 1992, [1992] ICJ Rep. 3, at 27. Judge Higgins referred to this 'wise dictum' in her separate opinion in the eight Use of Force Cases, ICJ Reports 2004, para. 20.

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trigger power not only for the Security Council, but also for the General Assembly and/or the ICJ, would be consistent with this requirement. This requirement does not oblige the negotiators to limit this trigger power exclusively to the Security Council.

However, this does not mean that a future agreement *must* allow the ICC to exercise jurisdiction over this crime once the Security Council, the General Assembly, or the ICJ have found that a state has committed aggression. It only means that from a legal point of view it is not excluded that each of these three UN organs may make a finding of state aggression which can trigger the ICC's jurisdiction. But it is also open to the negotiators to give such a role exclusively to the Security Council. This would not take away an existing power of the General Assembly and/or the ICJ and it would not in any other way be inconsistent with the UN Charter. In particular, these organs would continue to have the power to determine that a state has committed aggression. But it would imply that no *new* dimension – the power to determine for the specific purpose of triggering the ICC's jurisdiction that a state has committed aggression – would be given to this.

To choose how the ICC's jurisdiction may be triggered with respect to this crime will be a political decision, if it is agreed that this cannot be done by the ICC itself: via a prior determination of state aggression by the Security Council (as in the 1994 ILC Draft), or also through a determination of aggression by the General Assembly and/or the ICJ. From a legal point of view, each of these options is open and consistent with the UN Charter. In a future agreement on the crime of aggression each of these three organs could fulfil this trigger function. From a legal point of view, there is a clear preference for the view that *at least* the Security Council should have this role, in view of its key role under the Charter in the maintenance of international peace and security, and more specifically its Article 39 competence to determine whether or not a state has committed an act of aggression. However, it is the conclusion of this section that it is not excluded that the General Assembly and the ICJ play such a role as well.[92]

3.3. Inaction by the Security Council

A major criticism of the exclusivity thesis emanates from the fear that the Council may not be able to decide that a state has committed aggression, either because the required majority of nine affirmative votes is lacking or because the veto is used. If this were to happen, the Court would not be able to exercise jurisdiction over this crime. Subsections 3.3 and 3.4 of this article will focus on these two scenarios.

The reason for the Council's inability to act is often not the use of the veto, but the lack of sufficient support (i.e. less than nine affirmative votes) for a decision. Well-known examples are the inaction by the Council in the cases of the genocide

92. As is recognized in the 2002 and 2007 Discussion Papers (*supra* notes 33 and 36).

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in Rwanda in 1994,[93] the Kosovo crisis,[94] and the use of force against Iraq in 2003.[95] In such cases the members of the Council are divided on the question of whether military action should be taken. Too many members oppose the proposed action. Normally there should be nothing wrong or unfair in this. It is daily practice in international organizations, in which powers have been attributed to international organs and decisions are taken on the basis of these powers in accordance with the relevant decision-making rules. But in the case of the Security Council there is at least one institutional and one substantive reason why this *is* sometimes perceived as wrong or unfair.

First, the composition of the Security Council is generally considered as not representative of UN membership as a whole. If the Council were not to come to a finding that aggression had been committed, such a conclusion might therefore lack the necessary authority. Negotiations to adjust the composition of the Council so far have not led to any results. The most recent unsuccessful attempt to come to an agreement was the 2005 UN reform debate.[96] Only if such agreement were to be reached and the composition of the Council made more representative should this reason for criticizing Council inaction no longer apply.

The second reason is more of a substantive nature. Even if the composition of the Council is adjusted, it may happen that decisions cannot be taken although the need to do so is deeply felt by many UN members. The 2001 Responsibility to Protect Report refers to this as 'a conscience-shocking situation crying out for action'.[97] If such cases occur, it will be difficult for the international community to reconcile itself to inaction by the Council. States may not consider this inaction to be conclusive, and may even decide to take unilateral action. In doing so, they may try to maximize political support and legitimacy for their bypassing of the Security Council, for example by seeking endorsement for their initiatives by the UN General Assembly or by a regional organization.

However, this course of action would apply in particular in cases of mass violations of human rights where authorizations to use force are sought from the Council. The case of a predetermination of an act of aggression to enable the ICC to

93. See High-Level Panel Report, *supra* note 43, at 23 (para. 41); 'The Responsibility to Protect', *supra* note 43, at 1, and the supplementary volume ('research, bibliography, background') to this report, at 97–102.

94. There appeared to be insufficient support for an explicit authorization of the use of force (NATO members feared that a draft resolution providing for such authorization would not get the required support, and did not table such a draft resolution) and there was insufficient support for a Russian draft resolution tabled in March 1999, stating that the use of force by NATO against Yugoslavia was a flagrant violation of the UN Charter (UN Doc. S/PV.3989, at 6; 3 votes in favour, 12 against). See P. van Walsum, 'The Security Council and the Use of Force: The Cases of Kosovo, East Timor and Iraq', in N. Blokker and N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality – A Need for Change?* (2005), 65.

95. A draft resolution implicitly authorizing the use of force against Iraq was presented by Spain, the United Kingdom, and the United States on 24 February 2003, but it was not put to a vote when it became clear that it lacked sufficient support. The draft resolution is available from http://www.un.org/News/dh/iraq/res-iraq-07mar03-en-rev.pdf (last accessed 21 August 2007). See further the report of the Security Council meeting of 19 March 2003, UN Doc. S/PV.4721.

96. See the 2005 World Summit Outcome, UN Doc. A/RES/60/1, para. 153: 'We support early reform of the Security Council as an essential element of our overall effort to reform the United Nations in order to make it more broadly representative, efficient and transparent and thus to further enhance its effectiveness and the legitimacy and implementation of its decisions.'

97. 'The Responsibility to Protect', *supra* note 43, at 55.

exercise jurisdiction is somewhat different. This case concerns the prosecution of one or a few leaders, when impunity would also be 'conscience-shocking', but where such prosecution would not serve to prevent an impending humanitarian tragedy. Moreover, while in cases of humanitarian intervention or responsibility to protect a grey zone exists, where the use of armed force may be considered legitimate although it is strictly seen as not lawful, it is different for determinations of aggression. The ICC cannot exercise jurisdiction on the basis of a 'grey-zone trigger' but requires a solid predetermination of the act of aggression that will stand the test of judicial scrutiny. In short, the action required from the Security Council is not to protect a population from impending catastrophes, but to enable the prosecution of perpetrators of the crime of aggression after it has been committed. Essentially, in the first case the Security Council has to look forward (calculate the probability of a human tragedy), in the second case it has to look backward (decide whether certain facts that have taken place would qualify as an act of aggression).

Where does this leave us? If it is deeply felt that a crime of aggression has been committed but the Security Council does not come to a finding that the state in question has committed aggression, the international community faces a choice. For these situations it may either follow a restrictive or a somewhat broader approach.

According to the restrictive approach, the exercise of jurisdiction by the ICC over this crime may be limited to cases where this has the agreement of the Security Council, accepting that in other cases the conscience-shock in itself cannot be sufficient for the ICC to exercise jurisdiction over this crime. If this approach is chosen, it does not appear difficult to reflect this in amendments to the Statute. Article 13 refers to three types of case in which the Court may exercise its jurisdiction over the Statute crimes mentioned in Article 5: referral by a state party, referral by the Security Council, and the initiation of an investigation by the Prosecutor. The exercise of jurisdiction over the crime of aggression may be linked exclusively to the second type of case. As a result, a *lex specialis* would have to be introduced into the Statute that would read more or less as follows:

> The Court may only exercise jurisdiction over the crime of aggression if a situation in which such a crime appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.[98]

While such a solution would be far from perfect – the exercise of jurisdiction by the Court over the crime of aggression would be made much more restricted than that over the other Statute crimes – it would at least bring this crime effectively within the jurisdiction of the Court, in a way that fits both into the Statute and into the UN Charter. Rome was not built in a day; the same is true for the Rome Statute. According to the 'incremental approach', at a later stage in time the exercise of jurisdiction by the Court over the crime of aggression could be extended to the other types of cases mentioned in Article 13. Moreover, an advantage of this approach would be that the Security Council would not need to determine explicitly that an act of aggression

98. In the light of the Security Council practice examined in section 3.2 above, however, it would perhaps not be necessary to refer to Chapter VII, since the relevant decision of the Security Council could in principle also be adopted under Chapter VI.

had been committed by the state concerned. Therefore the most difficult questions concerning the scope for review by the ICC of this Security Council determination would be avoided.

Alternatively, if the international community preferred to take a somewhat broader approach, it should in the conscience-shock cases provide for a way out, an emergency exit, a safety valve. This would necessarily come down to the involvement of another organ to substitute for the Security Council's authority in cases where a political stalemate prevents the latter from converting a deeply felt conscience-shock into a determination that a state has committed aggression. At least in theory, the General Assembly and the International Court of Justice would qualify to perform such a substitute function, as discussed in section 3.2. One specific alternative way out will be elaborated below.

3.4. The applicability of the veto

The Council may also be unable to reach a decision that a state has committed aggression because the veto is used, allowing one single permanent member to prevent the Security Council from acting. This is different from the situation discussed in section 3.3, where opposition to Security Council action is broader and not restricted to one member.

The right of veto has always been controversial. It was opposed by most states during the *travaux préparatoires* for the UN Charter, but accepted in the end when those who claimed this right indicated that they would not join the UN without such a privileged position.[99] In UN practice the application of the right of veto has often been criticized and calls have frequently been made for its use to be limited as much as possible. The 1950 Uniting for Peace Resolution of the General Assembly states that 'it is the duty of the permanent members to seek unanimity and to exercise restraint in the use of the veto'.[100] More recently the High-Level Panel on Threats, Challenges and Change in its December 2004 report found that

> the institution of the veto has an anachronistic character that is unsuitable for the institution in an increasingly democratic age and we would urge that its use be limited to matters where vital interests are genuinely at stake. We also ask the permanent members, in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses.[101]

There can be no doubt that normally the veto applies when it comes to aggression determinations by the Council, since these decisions are clearly not 'decisions on procedural matters' in the sense of Article 27 of the UN Charter. However, there are no legal reasons that would stand in the way of an agreement (laid down in a

99. See for an account of the San Francisco Conference debate relating to the right of veto S. C. Schlesinger, *Act of Creation – The Founding of the United Nations* (2003), at 193–225.

100. UN Doc. A/RES/377A (V), preambular para. 5.

101. High-Level Panel Report, *supra* note 43, para. 256. Cf. also the 2001 'Responsibility to Protect' report, *supra* note 43, at 51, where reference is made to a proposal by a senior representative of one of the five permanent members, 'that there be agreed by the Permanent Five a "code of conduct" for the use of the veto with respect to actions that are needed to stop or avert a significant humanitarian crisis. The idea essentially is that a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution'.

declaration or other instrument) – by the Security Council or by the five permanent members of the Council – that the veto will not be used to prevent the adoption of a resolution in which the Security Council determines that a state has committed an act of aggression, for the purpose of triggering the ICC's jurisdiction.

If this were not possible, an alternative arrangement by way of emergency exit could be agreed upon and could be laid down in a general resolution of the Security Council that could be named the 'Uniting against Aggression' Resolution. Such an arrangement could include the following.

As discussed above, under the UN Charter, apart from the Security Council, the General Assembly and the International Court of Justice are empowered to make determinations that aggression has been committed. In view of the special responsibilities and powers of the Security Council, it would seem preferable to leave to the Council the decision to activate the General Assembly or the ICJ. To prevent the permanent member that blocked earlier decision-making on the matter in the Council from also blocking the involvement of the Assembly or the ICJ, it is an essential element of this emergency exit that the veto would not apply to such 'activation decisions'. This could be achieved either by an agreement in advance to this effect, or by an agreement in advance that the activation decision would be considered a procedural matter. The choice between the General Assembly and the ICJ could either be made in advance (and laid down in the 'Uniting against Aggression' Resolution) or be left open, so that the Council would have flexibility and could decide on an ad hoc basis which road to take.

There are advantages and disadvantages to both the General Assembly and the ICJ as alternatives for the Security Council when it comes to determinations of whether state aggression has been committed. The 'General Assembly road' would provide for a political backing for the subsequent ICC procedure, if necessary within a very brief period of time. Inherent in this option is the fact that a decision would be taken on the basis of purely political considerations depending on the political climate and majorities of the day. For example, in the early days of the United Nations it would have been unthinkable for the Assembly to determine that the United States had committed an act of aggression in a particular case, whereas this does not seem to be so unthinkable now. It would depend on the strictness of the decision-making requirements in the General Assembly how easy or difficult it would be for the Assembly to make such a determination. Alternatively, reasons of objectivity and consistency would favour taking the 'ICJ road'. The ICJ would draw its conclusion on the basis of legal considerations, but would obviously need much more time for this than the General Assembly. The question of whether or not an act of aggression has occurred is also a legal question. When the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case compared the three situations justifying resort by the Security Council to the powers in Chapter VII of the UN Charter, it observed, 'While the "act of aggression" is more amenable to legal determination, the "threat to the peace" is more of a political concept.'[102] The fact that the Court always has on

102. *Prosecutor v. Tadić*, Case No. IT-94–1-AR72, Appeals Chamber, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, para. 29.

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its bench nationals of each of the five permanent members of the Security Council may increase the attractiveness of this option for these five states, even though they have no right of veto.

There are several advantages to such an arrangement. First, of course, it would provide a solution to the veto problem. This problem must be solved, as retaining the veto would always – in conscience-shocking situations also – place nationals of the five permanent members above the law. This would fly 'in the face of the principle of equality before international criminal law'.[103] Second, it would fully respect the specific responsibility and powers of the Security Council, because the substitute role of the Assembly or the ICJ could only be triggered by a Security Council decision. This would not even contradict the five permanent members' exclusivity thesis, since the decision to open this window and call in the Assembly or the ICJ would be an exclusive competence of the Security Council. The only difference with the exclusivity thesis would be that an organ other than the Security Council could decide that a state has committed aggression.

Two further observations on this arrangement are the following. First of all, both a decision by the Assembly and an advisory opinion by the ICJ should be considered authoritative determinations as far as the existence (or not) of a state act of aggression is concerned, necessary and sufficient to trigger the jurisdiction of the ICC for the crime of aggression. Nevertheless, in the subsequent procedure before the ICC, the accused could of course oppose the conclusions of the General Assembly or the ICJ and claim that his or her state did not commit aggression, and the ICC would have to scrutinize the earlier external findings of state aggression. During the 2005 Princeton meeting of the Special Working Group on the Crime of Aggression, there was general agreement that a predetermination of a state act of aggression by another organ would not bind the ICC.[104]

Second, this solution resembles to some extent the Uniting for Peace Resolution adopted in 1950 by the General Assembly. Under that resolution, the Security Council may call for an emergency special session of the General Assembly through a procedural vote, if the use of the right of veto prevents the Council from exercising its responsibilities. However, under the Uniting for Peace Resolution a majority of the members of the United Nations could also call for such a session of the Assembly, even if all members of the Security Council were against. In the decision proposed here in relation to the crime of aggression, the 'activation decision' would remain exclusively in the hands of the Security Council.

Not only could this arrangement be used in cases where a draft resolution cannot be adopted because the veto is used; it could also be applied in the situation discussed above in section 3.3, where the Council does not act because the required number of

103. C. Kress, 'Versailles – Nuremberg – The Hague: Germany and International Criminal Law', (2006) 40 *The International Lawyer* 15, at 38.

104. See the report of this meeting, published in the Official Records of the Fourth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC-ASP/4/32), at 357–75, in particular at 366–7. As mentioned in this report, 'A contrary approach would not be consistent with article 67(1(i), of the Statute or with human rights law, especially article 14 of the International Covenant on Civil and Political Rights' (ibid., at 366–7).

votes there is lacking. It is unlikely, however, although not excluded, that the Council would be able in such cases to adopt a resolution requesting the Court to give an advisory opinion. If there are not nine votes in favour of a resolution determining that a state has committed aggression, why should there subsequently be nine votes to refer the matter to the General Assembly or the ICJ?

Such an arrangement laid down in a 'Uniting against Aggression' Resolution by the Security Council would be a modest compromise solution. It is a realistic arrangement to the extent that it is based on Security Council involvement and therefore recognizes the special position of the five permanent members. At the same time, it is far from perfect and can be criticized on a number of grounds. First of all, it is certainly not an ideal solution seen from a purely international criminal justice perspective, as the ICC will only be able to exercise jurisdiction over the crime of aggression following a prior determination of an act of aggression through a rather complex external procedure. In addition, it might be considered cumbersome to involve yet another organ before the ICC can exercise jurisdiction over the crime of aggression. Furthermore, there may be questions relating to the quality of aggression determinations by the Assembly or the ICJ, even though such determinations would be reviewable by the ICC. Finally, it might not be considered a realistic option, as it could appear unlikely that the five permanent members would agree to relinquish their right of veto. From their perspective, an inherent disadvantage of the arrangement proposed is that it cannot be guaranteed that it will *only* be activated in exceptional circumstances. Even though this may not be intended, it may also be used in other cases, such as an alleged humanitarian intervention by one of the permanent members and a subsequent veto of a proposal to determine that aggression has occurred. The question is therefore how the proposed arrangement can be restricted as much as possible to the 'exceptional cases scenario'. Probably a substitute role for the ICJ would offer better guarantees in this regard than a role for the General Assembly. Approaching the issue from a legal, not political, perspective means that relevant rules of international law are used as a standard of reference.

However, notwithstanding these disadvantages, time does not seem to be ripe for more ideal solutions. If this assessment is correct, the choice is between a less-than-ideal solution and no solution at all. The ICC Statute has given the ICC jurisdiction over the most serious crimes. It stipulates that the ICC shall have jurisdiction over the crime of aggression in the future. It would depend on the collective political will to make this possible. At present, the five permanent members are unwilling to give up their veto for aggression determinations by the Security Council. On the other hand, many other states find it unacceptable to depend on a predetermination of a state act of aggression that could only be given by the Security Council. The arrangement outlined above would both provide for the necessary emergency exit or safety valve in conscience-shocking situations and take into account as much as possible the specific responsibility and powers of the Council, thereby creating the necessary filter. From a legal point of view, this is a possible solution.

Part of the above arrangement has been discussed in the crime of aggression negotiations after the conclusion of the Rome Statute, but there has been only limited

support for it.[105] It remains to be seen if, at the end of the road of these negotiations, during or shortly before the Review Conference, compromise arrangements such as the one outlined above will turn out to be generally acceptable. Many negotiators and observers consider it unlikely that an agreement on the crime of aggression will be reached within the next few years. However, thirty, twenty, or even only fifteen years ago many did not believe it would be possible to create an ICC. Eight years ago, after the Rome Conference, no one expected the Statute to enter into force in less than four years. And early in 2005 there were not many who expected that it would be possible for the Security Council to adopt the Darfur resolution.[106] In the past few years, a number of things that generally were considered impossible *have* become possible. However, given the differences of opinion that must be overcome, it is true that it will be hard to come to an agreement on the crime of aggression within the next few years.

105. See the report of the third informal intersessional meeting of the Special Working Group on the Crime of Aggression (June 2006), ICC-ASP/5/SWGCA/INF.1, paras. 77–83.
106. UN Doc. S/RES/1593, adopted on 31 March 2005.