The crime of aggression: is it amenable to judicial determination?

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In the decades since the Nuremberg Tribunal found the German leadership guilty of the crime of waging aggressive war, much ink has been spilled on the ‘supreme’ international crime. This river of ink has become a torrent since the Rome Conference adopted the Statute of the International Criminal Court1 (ICC) and included a provision that brought aggression within the jurisdiction of the Court, but deferred until the First Review Conference of the Assembly of States Parties2 the decision on the definition of the crime and the conditions under which it could be prosecuted. This provision was a compromise between those who believed that the ICC Statute would not be complete unless it included the crime of aggression and those who argued that the determination of aggression was too political an issue to put before a court.

This chapter of the Handbook will analyze the various lines of debate about the International Criminal Court and the crime of aggression using, as a functional lens, the issue of whether the crime of aggression is susceptible to judicial determination. In other words, is a court such as the ICC equipped to decide whether a particular use of force constitutes the crime of aggression?

To develop criteria regarding how to address this question, the first section of this chapter will look at situations where it has been asserted – in both domestic and international courts – that certain questions are by their nature too political to be judged by a court. As will be discussed later in the chapter, this is essentially the argument made by states that oppose the inclusion of aggression within the jurisdiction of the ICC or argue that the threshold determination of the state act should be made by the United Nations Security Council.3 This section will conclude that while the political question doctrine has not gained much acceptance in the context of international cases, it nonetheless provides useful criteria in a priori deciding on institutional arrangements such as the exercise of jurisdiction over aggression by the ICC.

The second section of the chapter is a brief history of the negotiations leading up to the ICC Statute and those that followed. The chapter will then turn to an analysis of the nature of the crime of aggression: its elements and its unique twofold nature which requires a characterization of state action before a finding of individual criminal responsibility. This section will show that the elements of the crime of aggression, including the attribution issue, present

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2 The Assembly of States Parties is composed of all states parties to the ICC Statute. The Statute provides that seven years after its entry into force, a Review Conference will be convened to review the Statute and consider amendments thereto. It is anticipated that this Review Conference, which is scheduled to take place in 2010, will consider the definition of aggression. ICC Statute, arts 112, 121, 123.
3 See text accompanying notes 98–105 infra.
questions of international criminal law of the type that are typically decided by courts so that there should be no qualms about entrusting them to the ICC. The fourth section of this chapter will examine the issue of how the ICC’s jurisdiction would be triggered in aggression cases. This issue is still very much open to negotiation and the various options on the table will be analyzed using the criteria derived from the political question doctrine. The final section presents the conclusion that the crime of aggression is certainly amenable to judicial determination.

**PRUDENTIAL CONSTRAINTS ON ADJUDICATION**

One of the best-known doctrines constraining courts from exercising judicial power is the political question doctrine set out by the US Supreme Court in *Baker v. Carr.* While there are many nuances of the doctrine as it is articulated in American case law, the basic principle is that a court may conclude that it is incompetent to decide a particular matter either because such matter has been confided to the superior authority of another branch, or because the court believes that judicial procedures and abilities are not adequate to the task of decision. The basis of the doctrine is the separation of powers that underlies the constitutional order of the United States. While a survey of national legislation is beyond the scope of this chapter, it is worth noting that similar doctrines exist in other domestic systems.

Political question-type objections are frequently raised to resist the jurisdiction of the International Court of Justice (ICJ) in cases concerning allegations of the illegal use of force. In the jurisdiction phase of the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)* ('Nicaragua Jurisdiction Decision'), Nicaragua argued that the United States’ backing of anti-Sandinista rebels (the Contras) and its mining of Nicaraguan harbors violated international law. The US raised a wide range of challenges to jurisdiction and admissibility, many of which were resonant of the political question doctrine. These included the following:

(a) the claim that the United States was engaged in an unlawful use of armed force, or breach of the peace, or act of aggression against Nicaragua was a matter which was committed

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5 Ibid. 217. Other aspects of the doctrine that were emphasized in *Baker v. Carr* are: the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; an unusual need for unquestioning adherence to a political decision already made; and the potential of embarrassment from multifarious pronouncements by various departments on one question.
6 Ibid.
by the Charter of the United Nations and the practice of the United Nations to the competence of other organs; 

(b) the ICJ should decline to hear the case because it would affect the United States’ ongoing exercise of the right to individual or collective self-defense under article 51 of the UN Charter; 

(c) the ICJ, as a judicial organ, was unable to deal with situations involving ongoing armed conflict because it did not have available to it a fixed pattern of ascertainable facts. 

The ICJ firmly rejected all of these arguments. With respect to the first two arguments (based essentially on the role of the UN Security Council in cases involving the use of force), the Court found that there was no doctrine of separation of powers that prevented it from hearing a case at the same time it was being considered by the Council. Indeed, the ICJ emphasized that it was not in the habit of shying away from cases because of political implications or because they involved the use of force. With respect to the difficulty of establishing legally relevant facts, the ICJ held that this was not unusual with respect to the cases that it heard and was, in any event, the responsibility of the litigants. 

The ICJ’s opinion in the Nicaragua Jurisdiction Decision reflects its consistent jurisprudence up to that point. Since then, the Court has seen a large increase in contentious cases relating to the use of force; to date, however, the ICJ has not declined jurisdiction in a case on grounds such as those described above.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) has gone even further than the ICJ and explicitly held that the political question doctrine is no longer part of ‘the horizon of contemporary international law’. The ICTY specifically held that the polit-

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9 Ibid. paras 89–90. 
10 Ibid. paras 91–8. 
11 Ibid. para. 99. 
12 Nicaragua Jurisdiction Decision, note 8 supra, paras 94–5. 
13 Ibid. para. 96. 
14 Ibid. para. 101. 
17 Prosecutor v. Tadic, ICTY Appeals Chamber, 2 October 1995, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 24–25 (hereinafter ‘Tadic Jurisdiction
ical question doctrine was no bar to its examination of the Security Council’s Chapter VII establishment of the Tribunal as a measure to restore international peace and security.\textsuperscript{18}

It has been argued that one of the key reasons for the diminished applicability of the political question doctrine in cases before international courts is the differences between the UN Charter and national constitutions. Specifically, the United Nations is a system of overlapping – rather than exclusive – spheres of responsibility so that the separation of powers rationale underlying the doctrine is not relevant in the international sphere.\textsuperscript{19} It is also argued that the highly politicized nature of all decision-making in the international sphere means that if the ICJ were to avoid taking cases on the basis of the political question doctrine, it would soon have an empty docket.\textsuperscript{20}

Even though the political question doctrine has basically been rejected by international tribunals as a basis of justiciability, it is nonetheless a useful lens for considering \textit{a priori} whether a court should exercise jurisdiction over a particular type of crime. While the UN Charter may not provide for a strict separation of powers (unlike, say, the US Constitution), it does allocate responsibilities to the various organs of the United Nations. At the time of making international institutional arrangements, it is certainly relevant to ask whether a certain type of adjudication would appropriately be carried out by courts in light of the competencies of other UN organs. Indeed, this is precisely the type of argument that has been made by opponents of including aggression within the jurisdiction of the ICC.\textsuperscript{21}

The part of the political question doctrine that relates to whether standards for deciding the case are either available to or discoverable by a court is also useful in considering whether the crime of aggression is susceptible to judicial determination. For example, even though the crime of aggression was prosecuted immediately after the Second World War, some states and commentators have argued that it is insufficiently defined to allow the exercise of jurisdiction by the ICC. This issue will presumably be settled once a definition is adopted by the Assembly of States Parties. Nonetheless, in deciding an aggression case, the ICC will undoubtedly face a number of novel issues of both criminal law and international law. Some of these issues can already be identified and this chapter will consider whether the ICC will be able to draw upon existing methods of inquiry to decide upon them.

A related issue is the Court’s ability to make determinations of fact in cases involving the use of force. As is demonstrated in the discussion below, international courts have been increasingly faced with the task of fact-finding in cases involving armed conflict or other sensitive security matters and have demonstrated the capability to do so.\textsuperscript{22}

Thus, in examining the question of whether the crime of aggression is \textit{ab initio} susceptible to judicial determination, this chapter will consider whether any aspects of the adjudication of aggression would raise questions that are committed solely to another organ of the United Nations. It will also consider whether there are manageable standards for resolving the

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\textsuperscript{18} Ibid., para. 22.

\textsuperscript{19} Lara M. Pair, \textit{Note and Comment: Judicial Activism in the ICJ Charter Interpretation}, 8 ILSA J INT’L & COMP. L 181, 198 (2001).

\textsuperscript{20} Ibid.

\textsuperscript{21} See text accompanying notes 98–102 infra.

\textsuperscript{22} See text accompanying notes 72–82 infra.
issue, both from a legal and a factual perspective. Before turning to this analysis, however, it will briefly review the history of the negotiations leading up to the ICC Statute.

FROM ROME TO THE REVIEW CONFERENCE

The ICC Statute defines the jurisdiction of the Court as being ‘limited to the most serious crimes of concern to the international community as a whole’. These are: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and (d) the crime of aggression. While the first three of these are defined in articles 6 to 8 of the Statute, the crime of aggression is left for future delineation. Article 5(2) provides as follows:

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.

The negotiations in Rome that led to the inclusion of article 5(2), essentially as a compromise, have been explained in a number of articles and books about the ICC. The basic divisions have, by and large, been characterized as follows: the first group consisted of some countries, like the United States and the United Kingdom, that were ‘hesitant about accepting new legal restraints that would hamper their freedom of military or humanitarian intervention’; the second group comprised several Arab states that were keen to include aggression in the ICC Statute based on the General Assembly’s 1974 definition of aggression; and the third and largest group was composed of ‘many others, including the European Union and about thirty “non-aligned” countries, [that] argued that, without jurisdiction over aggression, the ICC would be unacceptable’.

The position of each of these groups on the desirability of including aggression within the mandate of the ICC is directly linked to their view of the definition of the crime of aggression. The United States, for example, took the position that the crime of aggression was not sufficiently criminalized and therefore not susceptible to definition. As noted above, the members of the Arab League were, by and large, pushing to include the crime of aggression within the ICC’s Statute and to base the definition of aggression on General Assembly

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23 ICC Statute, art. 5(1).
25 Ferencz, note 24 supra, at 558.
26 Ambassador Bill Richardson stated on 17 June 1998 that the Rome Conference should avoid defining ‘crimes that are not yet clearly criminalized under international law’, and for that reason ‘it remains premature to attempt to define a crime of aggression for purposes of individual criminal responsibility’. Quoted in Pietro Gargiulo, The Controversial Relationship Between the International Criminal Court and the Security Council, in 1 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (F. Lattanzi and W.A. Schabas (eds), 1999).
Resolution 3314. Finally, the objective of the European Union and remaining non-aligned countries was to include a definition of aggression that met the requirements of legality and practicality. The link between the definitional and policy positions of the three groups will be further explored later in this chapter.

Since no definition of aggression was agreed upon in Rome, the issue was referred to the Preparatory Commission for the ICC (‘ICC PrepCom’). The mandate of the ICC PrepCom lasted until 2002, when the ICC Statute came into force and the Court itself was constituted. At that time, the coordinator for the ICC PrepCom Working Group on the Crime of Aggression issued a discussion paper that reflected the proposals that had garnered the most support amongst delegates, as well as the options that were on the table with regard to the main areas of disagreement. The paper identified three main issues as requiring resolution: (1) the entity that would decide whether the threshold of state-level aggression had been met; (2) the contours of the crime of aggression; and (3) the requisite linkage between state-level aggression and individual responsibility for the crime of aggression.

The ICC PrepCom was followed by the Special Working Group on the Crime of Aggression (the ‘Aggression Working Group’), which was established by the Assembly of States Parties of the ICC. This Group, which included interested UN member states, specialized agencies and accredited legal experts, was charged with submitting a proposal to the Assembly of States Parties for consideration by the first Review Conference for the Rome Statute. The Aggression Working Group took the PrepCom’s 2002 discussion paper as its starting point and the Group’s chairman in turn produced three discussion papers. The first such paper, which was circulated in early 2007, showed several options for resolving each of the three issues outstanding from the ICC PrepCom. This paper was followed by extensive negotiations, both informal ones that were held at Princeton University and formal sessions of the Aggression Working Group in New York. The results of these discussions were reflected in the second paper issued by the chairman in the summer of 2008. The last chairman’s paper

27 For a discussion of General Assembly Res. 3314, see text accompanying notes 59–60 infra.
that was part of the formal working group process was issued in 2009 (‘Chairman’s 2009 Paper’). This paper (which did not differ greatly from the 2008 version) reflected the progress made by the Aggression Working Group up until its final meeting in February 2009 and forms the primary basis for the following discussion.

The Chairman’s 2009 Paper and the most recent report of the Aggression Working Group indicate that there is a considerable degree of consensus on the definition of both the crime and the nexus between the state and the individual. But significant differences remain on which entity should make the initial determination of state aggression.

WHAT IS AGGRESSION?

The Chairman’s 2009 Paper proposes a definition of aggression that would parallel the definitions of genocide, crimes against humanity and the crime of aggression contained in articles 6 to 8 of the ICC Statute. The text of the proposed definition is as follows.

Article 8bis Crime of aggression
1. For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

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2. For the purpose of paragraph 1, ‘act of aggression’ means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) the blockade of the ports or coasts of a State by the armed forces of another State;

(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.36

This proposal incorporates many choices and compromises regarding the definition of the crime of aggression and deserves careful attention.

Individual Conduct

Paragraph 1 quoted above addresses the definition of the individual’s conduct – in other words it describes the ‘crime’ of aggression of which an individual may be convicted. This is in contrast to paragraph 2 of the definition, which describes the state ‘act’ of aggression.

The first issue in regard to the individual crime of aggression is the form of participation in the crime that should be criminalized. The Chairman’s 2009 Paper posits that the ‘planning, preparation, initiation or execution’ of an ‘act of aggression’37 would, under certain circumstances, be a crime. The conduct verbs selected for the definition, which seem to have garnered broad support from the beginning of negotiations, follow the Nuremberg precedent.38 The wide definition of activity that is punishable as a crime is,
however, offset by the limited category of persons who can be prosecuted and the require-
ment of a level of gravity.

According to article 8bis proposed in the Chairman’s 2009 Paper, the crime of aggression
may only be committed by ‘a person [who is] in a position effectively to exercise control over
or to direct the political or military action of a State’. This text makes clear that the leader-
ship position of the person being prosecuted is an element of the crime of aggression rather
than a separate requirement. This was considered necessary by several states in order to
ensure that the ICC would not have jurisdiction over secondary perpetrators. It is also
notable that the leadership element of the crime focuses on the position of the defendant. The
defendant must be in a ‘position’ to control or direct the political or military action of a state.
This could be read to suggest that the defendant must have some formal leadership position
and that persons such as advisers could not be convicted of aggression regardless of the extent
of their influence. This ambiguity was recognized in the inter-sessional discussions. It
appears, however, that those who argued that broadening the wording of the leadership clause
‘would cause more problems than it would solve’ won the day. Finally, the text makes clear
that position alone is not sufficient to allow conviction for aggression; the defendant’s posi-
tion must give him or her ‘effective control’ or the authority to ‘direct’ the political or mili-
tary apparatus of a state. This ensures that people in primarily ceremonial leadership positions
(for example, a monarch in a constitutional monarchy or a president in some parliamentary
systems) would not be subject to prosecution solely because of position.

In selecting the formulation discussed above, the Chairman’s 2009 Paper maintains the
In particular, article 25 of this section, the relevant portion of which is reproduced below,
continues to apply:

Article 25 Individual criminal responsibility
In accordance with this Statute, a person shall be criminally responsible and liable for punishment
for a crime within the jurisdiction of the Court if that person:
(a) commits such a crime, whether as an individual, jointly with another or through another person,
regardless of whether that other person is criminally responsible;
(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists
in its commission or its attempted commission, including providing the means for its commis-
sion;
(d) in any other way contributes to the commission or attempted commission of such a crime by a
group of persons acting with a common purpose. Such contribution shall be intentional and
shall either:
   (i) be made with the aim of furthering the criminal activity or criminal purpose of the group,
       where such activity or purpose involves the commission of a crime within the jurisdiction
       of the Court; or
   (ii) be made in the knowledge of the intention of the group to commit the crime;
(e) in respect of the crime of genocide, directly and publicly incites others to commit genocide;
(f) attempts to commit such a crime by taking action that commences its execution by means of a
   substantial step, but the crime does not occur because of circumstances independent of the
   person’s intentions. However, a person who abandons the effort to commit the crime or other-

Woodrow Wilson School, Princeton University, United States, from 11 to 14 June 2007, ICC-
ASP/6/SWGCA/INF.1, 2 (25 July 2007) (hereinafter ‘Princeton Meetings Report’).

39 Ibid. 3.
wise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit the crime if that person completely and voluntarily gave up the criminal purpose.\textsuperscript{41}

Articles 8\textit{bis} and 25(3) must be read together in order to determine the individual conduct that leads to criminal responsibility for aggression.

The approach selected in the Chairman’s 2009 Paper is the so-called ‘differentiated’ approach which details the type of actions that could be prosecuted under the ICC Statute by allowing article 25(3) to apply to the crime of aggression. This approach can be contrasted with the ‘monistic’ approach, which was included in the PrepCom 2002 Discussion Paper. Under the latter, all aspects of the conduct element of the crime of aggression would have been contained in article 8\textit{bis}, and article 25(c) would not have been applicable. Article 8\textit{bis} would therefore have read something like the following:

For the purpose of the present Statute, a person commits a ‘crime of aggression’ when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person orders or participates actively in the planning, preparation, initiation or execution of an act of aggression.\textsuperscript{42}

The words ‘orders or participates actively’ contained in the monistic text would have replaced the forms of participation articulated in article 25(3) of the ICC Statute. This would certainly have been a clear and coherent definition but would have lacked the detail and specificity of the differentiated approach. The differentiated approach also has the advantage of treating aggression in the same way that the other crimes within the ICC’s jurisdiction are treated.

A few points bear mention with respect to the selection of the differentiated approach as the currently preferred option. First, as one commentator has pointed out, the key political factor in defining the scope of the crime of aggression is that some states prefer a narrower definition while others would like to see a wider jurisdiction for the ICC. ‘The problem in terms of choosing a monistic or differentiated approach based on scope is that it is far from clear which approach is more restricted.’\textsuperscript{43} Aside from the political issue, it should be noted that article 25(3) covers a variety of conduct that is not necessarily compatible with a leadership crime like aggression. Article 25(3) criminalizes the following types of individual conduct: committing; ordering, soliciting or inducing; aiding, abetting or otherwise assisting, including by providing the means for commission; in any other way contributing to the commission of the crime by a group of persons acting with a common purpose; and attempt. In particular, the latter four categories of individual action (which correspond to article 25(3)(c) to (f)) seem unsuited to the crime of aggression.

\textsuperscript{41} ICC Statute, art. 25. The Chairman’s 2009 Paper also suggests including a provision clarifying the ‘leadership’ element of the crime of aggression at the end of this provision. Chairman’s 2009 Paper, note 34 \textit{supra}, Annex, at 5. For a discussion of this proposal, see text accompanying notes 49–50 \textit{infra}.

\textsuperscript{42} Chairman’s 2007 Paper, note 31 \textit{supra}, para. 1, variant (b). This approach is similar to the one advocated by the International Law Commission. See \textit{Draft Code of Crimes against the Peace and Security of Mankind}, II \textit{YB Int’l Comm’n} 15 (Pt 2) (1996), art. 16.

\textsuperscript{43} Weisboard, note 24 \textit{supra}, at 193.
To understand this issue it is necessary to hearken back to the essential nature of the crime of aggression; it is, at its heart, the criminalization of conduct by a leader. In the other crimes under the jurisdiction of the ICC, the focus is generally on holding commanders and leaders liable for the conduct of those for whom they are responsible. Given the difficulty of proving this type of responsibility, particularly in the context of armed conflicts involving irregular forces (which have been most often seen in recent years) criminal statutes are designed to bring a wide range of associational conduct within their purview. Aggression, on the other hand, necessarily starts from the opposite premise: a conscious decision at the top echelons of government to follow a particular policy. Accordingly, it is difficult to fit individual conduct criminalized for other types of offenses to the crime of aggression. For example, one might ask how a top echelon political or military leader aids or abets in the decision to launch an aggressive war. If such a prosecution is brought, it is evident that it would not be against the key decision-makers but against a wider circle of persons who may or may not have been involved in the decision-making process. The circle of liability could be even larger in the case of a prosecution for conduct criminalized under article 25(3)(d), that is, contributing to the commission of the crime.

Another difficulty with maintaining the applicability of article 25(3) to the crime of aggression is that sub-paragraph (f) permits the prosecution of attempted crimes. In the case of aggression, a precondition of the individual crime is the existence of state-level aggression. It is therefore difficult to envisage a scenario where the individual conduct described in article 25(f) would be prosecuted in the context of aggression.

The Chairman’s 2009 Paper attempts to ameliorate this problem by the insertion of a new article 25(3)bis which would provide that ‘[i]n respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State’. This provision does not add anything new to the Statute because the leadership requirement is itself part of the definition of the crime as set out in article 8bis. At most it serves as a reminder that, despite the broad range of actions criminalized by article 25(3), only the actions that are committed by the leaders of a country constitute the crime of aggression. Its insertion suggests that much of article 25(3) is not, in fact, applicable to the crime of aggression.

Another element of the ICC Statute that does not apply to the crime of aggression and could explicitly be excluded is article 28, which is titled ‘Responsibility of commanders and other superiors’. As discussed above, most crimes under the jurisdiction of the ICC require the establishment of command responsibility. Article 28 establishes specific standards for imposition of criminal liability based on a superior-subordinate relationship that are in addition to the conduct criminalized under article 25(3). Since this type of responsibility is clearly not relevant to the crime of aggression, the Statute could explicitly provide that this article does not apply to aggression.

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44 Chairman’s 2009 Paper, note 34 supra, Annex, at 5.

45 The current form of the draft elements of the crime of aggression that are being developed may also be relevant to this issue. The current draft provides that an element of the crime of aggression is that ‘[t]he perpetrator planned, prepared, initiated or executed an act of aggression’. Informal Meeting June 2009 Report, note 35 supra, App. I, at 14.

46 Chairman’s 2008 Paper, note 33 supra, at 2. Although this issue was raised in the Chairman’s 2008 Paper, no discussion of the matter is reflected in subsequent records of discussions.
As is evident from the discussion above, the types of legal and factual issues that arise in determining whether individual conduct relating to a state act of aggression is sufficient to impose liability are typical of those that international criminal judges are called upon to decide. For example, determining the level of participation necessary to consider a defendant guilty of a particular crime is an issue that courts are faced with in any case involving a joint criminal enterprise or command responsibility. Indeed, the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have had occasion to consider this very issue in a number of cases.\(^{47}\) These types of issues have also been considered by the ICJ in determining state responsibility for armed actions.\(^{48}\) Ensuring that the leadership requirement is met would require the ICC to consider issues relating to lines of responsibility within government and military institutions that are well within its competence. Indeed, such an analysis can be seen as a reverse engineering of the analysis that the ICC will be required to conduct with respect to command responsibility for other crimes under its jurisdiction. All-in-all, one can conclude that, with regard to this aspect of the crime of aggression, there is nothing to suggest that it is not amenable to judicial determination.

**State Conduct**

The Chairman’s 2009 Paper proposes that only the most serious instances of aggression would result in individual criminal responsibility. It punishes the commission of ‘an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’. The inclusion of a severity threshold in article 8bis as a filter for frivolous cases reflects an approach similar to that used with respect to the leadership element.\(^{49}\) In terms of consistency with other parts of the Statute, the severity threshold for aggression is at variance with article 6 on genocide, which contains no qualifier.

The form of the qualifier is itself of great significance. By requiring that the act of aggression constitute a ‘manifest violation’ of the UN Charter, the provision would exclude acts that might appear to be aggression but are not obviously in violation of the Charter.\(^{50}\) The qualifier seems aimed at providing a way to ensure that armed interventions of a humanitarian character (or otherwise in furtherance of Charter goals) could not be prosecuted as the crime of aggression. Two recent examples illustrate this point: the intervention of the North Atlantic Treaty Organization (NATO) in Kosovo and the US-led invasion of Iraq. In 1999, NATO,

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\(^{48}\) See, *Genocide* case, note 16 supra.

\(^{49}\) See text accompanying note 43 supra.

\(^{50}\) The current version of the draft elements of the crime of aggression makes clear that it is necessary only to establish that the ‘perpetrator was aware of the factual circumstances establishing the inconsistency of the use of armed force by the State with the Charter of the United Nations’. It does not require knowledge of law or a legal analysis. *Informal Meeting June 2009 Report*, note 35 supra, App. I, at 14, 17.
without the authorization of the Security Council, commenced a 78-day bombing campaign against the Federal Republic of Yugoslavia on humanitarian grounds. Several commentators characterized the intervention as a breach of UN Charter provisions prohibiting the use of armed force, but did not identify it as an act of international aggression.\textsuperscript{51} Prior to the invasion of Iraq in 2002, the United States and its allies advanced arguments before the Security Council as to the need to take military action to ensure that Iraq had in fact relinquished its weapons of mass destruction as had been required by Security Council Resolution 640. The question remains whether the justifications put forward in both cases – which were based on enforcement of elements of the Charter – would be considered sufficient to remove these actions from the ambit of the crime of aggression.\textsuperscript{52}

The severity threshold serves as a counterbalance to the relatively wide definition of the state act of aggression included in paragraph 2 of article 8\textsuperscript{bis}. The delineation of this definition has been a controversial and highly political process. As one commentator has noted, ‘The finished crime would require a detailed description of the prohibited State/collective act – a contemporary answer to the historic debate over what constitutes an illegal or unjust war.’\textsuperscript{53} Thus, while the Chairman’s 2009 Paper contains a proposal that seems to steer a middle road between the various positions articulated by states, there is no certainty that it will be adopted by the Assembly of States Parties.

The basis for the definition of aggression has been UN General Assembly Resolution 3314. While Resolution 3314 has been criticized by the International Law Commission, powerful states and well-known scholars,\textsuperscript{54} the ICJ found that at least part of the Resolution reflects customary international law,\textsuperscript{55} and it is at the heart of the definition put forward in the Chairman’s 2008 Paper. The Resolution begins as follows:

\begin{verbatim}
1974 Definition of Aggression: United Nations General Assembly Resolution 3314 (XXIX)

Article 1
Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.

Article 2
The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned or their consequences are not of sufficient gravity.
\end{verbatim}


\textsuperscript{53} Weisbord, note 24 supra, at 175.


Article 3
Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of Article 2, qualify as an act of aggression:
(a) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
(b) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
(c) the blockade of the ports or coasts of a State by the armed forces of another State;
(d) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
(e) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
(f) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
(g) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.\(^\text{56}\)

The remaining provisions of Resolution 3314 indicate that (1) the list contained in article 3 is not exhaustive and that the Security Council may decide that other acts constitute aggression; (2) there is no justification for aggression which is a crime giving rise to international responsibility; (3) no territorial or other advantages resulting from aggression are lawful; (4) the definition is without prejudice to the provisions of the Charter; (5) it is without prejudice to rights of people dominated by colonial, racist or alien regimes to struggle for self-determination; and (6) the provisions of the Resolution are interrelated and should be so construed.

The text proposed in the Chairman’s 2009 Paper for inclusion in the ICC Statute includes only paragraphs 1 and 3 of General Assembly Resolution 3314.\(^\text{57}\) This formulation is an attempt at a compromise between those who wanted the full text of the Resolution incorporated into the Statute and those who wished to have only articles 1 and 3 incorporated. The rationale behind of each of these positions is aptly summarized in the Report of the Princeton Meetings:

- Resolution 3314 should be included in its entirety: because its provisions were interrelated, as evidenced by its article 8; this would underline that the list of acts in the definition is not exhaustive; and elements in addition to articles 1 and 3 were important aspects of the definition.
- The Statute should contain a reference to articles 1 and 3 of Resolution 3314 only: this would avoid the possibility of a person being convicted of aggression on the basis of state acts that the Security Council found to be aggression at a later date under article 4 of the Resolution.\(^\text{58}\)

\(^{56}\) General Assembly Res. 3314 (XXIX), 14 December 19074, UN Doc. A/RES/3314 (1974).
\(^{57}\) The Chairman’s 2008 Paper had also called for the inclusion of the full text of the Resolution as an annex to the ICC Statute. Chairman’s 2008 Paper, note 33 supra, at 2. No similar exhortation is found in the 2009 version of paper. Since the ICC Statute does not currently include any Annexes or a provision on the status of Annexes to the Treaty, the effect of adding the entire resolution as an Annex to the Statute was, in any event, unclear.
\(^{58}\) Princeton Meetings Report, note 43 supra, at 8–9.
It is clear that articles 1 and 3 of Resolution 3314 form its core in terms of the legal definition of aggression and should be part of the ICC Statute.

Thus, if the chairman’s proposal were adopted, the ICC Statute would not include the presumption that the first use of armed force by a state in contravention of the Charter constituted *prima facie* evidence of an act of aggression. It also would not include a provision allowing the Security Council to override this presumption. The removal of such an explicit presumption undoubtedly provides some comfort to the states that have expressed concern that the potential for charges of aggression would unduly hamper their ability to intervene militarily to advance Charter purposes.

Turning to the text of paragraph 2 of article 8bis, a few points bear emphasis. First, this provision states that, ‘for the purpose of paragraph 1’ (that is, for the purpose of defining a crime of aggression under the ICC Statute), the term ‘act of aggression’ means ‘the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations’. Paragraph 2 is explicitly tied to the definition of the crime of aggression to clarify that it is not intended to be used for other purposes, such as determining state liability.

Second, as noted earlier, the Chairman’s 2009 Paper describes the prohibited state act which would trigger individual criminal liability as an ‘act of aggression’. In earlier discussions, there was considerable disagreement amongst delegations as to whether ‘act of aggression’ or ‘armed attack’ was the appropriate characterization of the state conduct.59 Although both terms are drawn from the UN Charter, the term ‘act of aggression’ has the stronger connection to the Charter60 and has a richer history of enforcement that provides it with texture and meaning. The debate about which term to use to describe the prohibited state act related primarily to the appropriate scope of the crime of aggression and the related issue of the acceptability of incorporating General Assembly Resolution 3314. ‘Armed attack’ is generally perceived as narrower than the term ‘aggression’. It is one of the forms of aggression listed in Resolution 3314. Using the term ‘armed attack’ would also disengage the crime of aggression from the 1974 definition of the ‘state act’.61 However, as early as 2007, there was broad support for the use of the term ‘act of aggression’62 and this was incorporated in the Chairman’s 2009 Paper.

Third, the Chairman’s 2009 Paper does not fully settle the debate about whether the ICC Statute should include an exhaustive or illustrative list of acts that would qualify as acts of aggression.63 The chapeau of the list of acts tracks the language of Resolution 3314 in that it provides that ‘[a]ny of the following acts, regardless of a declaration of war, shall, in accordance with United Nation’s General Assembly Resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression’. The use of this type of formulation was clarified in

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59 Ibid. 8.
60 The term ‘act of aggression’ is used in art. 39 of the UN Charter and is the titular provision in Chapter VII (‘Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression’). The term ‘armed attack’, in contrast, is used only in art. 51 in the context of self-defense (‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.’).
61 Weisbord, note 24 supra, at 184.
Resolution 3314 by the inclusion of article 4, which states that ‘the acts enumerated … are not exhaustive’. However, since the latter is not included in the ICC Statute, the connection to that portion of Resolution 3314 is indirect (through the reference in the chapeau).

Fourth, the list of acts included in the Chairman’s 2009 Paper exactly matches the list in Resolution 3314. This is an important step forward in that it suggests a consensus that all of these acts could potentially qualify as aggression and does away with the long-standing attempt of certain states to cherry-pick parts of the list for inclusion in the ICC Statute. Moreover, the expansiveness of the list offsets to a great degree the ambiguity regarding whether it is exhaustive.

There should be little concern that the list would allow a de minimus use of force to be considered as aggression within the purview of the ICC. The definition of the crime of aggression included in paragraph 1 of article 8bis clearly provides that it is only subject to prosecution when the ‘act of aggression’ on which it is premised ‘by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’. Moreover, the jurisdictional trigger for prosecutions of the crime of aggression serves an additional protective barrier to the bringing of cases where the underlying state act is of insufficient gravity.

The ICC Role in Deciding State-Level Aggression

The following section will consider issues relating to whether and how the Security Council, the General Assembly, the ICJ and the ICC should be involved in determining that state aggression exists at a level that allows the initiation of an individual criminal prosecution. Nonetheless, it is clear from the proposal contained in the Chairman’s 2009 Paper that any such initial determination would be subject to challenge by the defendant at the trial stage.

The ICC would therefore be called upon to decide whether a state used armed force against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations. The list of acts currently listed in article 8bis will no doubt serve as its guide on this issue.

The aftermath of the Second World War was the last occasion where courts made findings of aggression. Both the Nuremberg Tribunal and the International Military Tribunal for the Far East convicted the German and Japanese leadership of the international crime of aggression. Since then, there have been no international prosecutions of aggression. Nonetheless, in the 50-odd years since the Nuremberg and Far East Tribunals rendered their judgments, international courts have applied the rules regarding the use of force contained in the UN Charter, international treaties and customary law to make determinations relating to armed conflicts. These decisions suggest that a court such as the ICC, which includes judges with expertise in both criminal law and international law, would be in a position to identify standards of fact-finding and legal principles that would allow it to decide whether particular state actions constitute aggression for purposes of its Statute.

The ICJ has had occasion to consider whether actions by a state constituted a use of armed force and the character of such use on a number of occasions in recent years. The Court’s
decision in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* is perhaps the seminal decision in this area. In that case, Nicaragua argued that US backing of anti-Sandinista rebels (the Contras) and the mining of Nicaraguan harbors violated international law. The United States countered that it was assisting third countries (Honduras, El Salvador and Costa Rica) in exercising their right to self-defense against attacks by the Sandinista government of Nicaragua.

The *Nicaragua* case demonstrates that the ICJ is not easily swayed by arguments relating to the difficulty of ascertaining facts in the context of an ongoing conflict. Although it was apparent in the *Nicaragua* case that disputed factual evidence would pose a challenge, the ICJ rejected this argument. Indeed, in its decision on the merits, it explained and justified at length the system used to deal with factual issues. Moreover, the ICJ made substantive decisions with regard to the characterization of aspects of the ongoing conflict. In the *Nicaragua* case, the ICJ was not asked to find that acts of aggression had been committed by the United States. It did, however, conclude that certain actions by the United states on the territory of Nicaragua and its laying of mines in Nicaraguan waters were a breach of its obligation not to use force against another state. In the context of the US claims of self-defense, the ICJ explained the meaning of the term ‘armed attack’, holding that in order to meet this definition (thereby triggering the right to self-defense), acts of force had to meet a certain threshold of gravity.

These two themes, evident in the *Nicaragua* case, have marked the jurisprudence of the ICJ. The ICJ has the willingness to make factual findings relating to difficult situations involving ongoing armed conflict and security issues and the ability to find legal standards that allow for the analysis of such situations. For example, in the *Case Concerning the Legality of the Threat or Use of Nuclear Weapons*, the Court rejected the argument that it should decline jurisdiction because the case would require it to ‘study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information’. In the *Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Israel argued that the ICJ should not take jurisdiction because it did not ‘have at its disposal the requisite facts and evidence’ and would have to make difficult and indeterminate enquiries, ‘first, into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response, and, second, into the impact of the construction for the Palestinians’. The Court nonetheless took jurisdiction and made the necessary factual determinations to render its opinion.

Two recent ICJ cases have evaluated facts of the sort that the ICC would be required to consider in an aggression case. The first such case arose in the context of disputes between the Democratic Republic of the Congo (DRC) and its neighbors, Burundi, Rwanda and Uganda. The DRC brought cases against these three states alleging that their unlawful invasion of its territory constituted aggression. At the request of the DRC, the cases against

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Burundi and Rwanda were discontinued. The case against Uganda, however, proceeded to a judgment on the merits. The ICJ found that Uganda had conducted military operations inside the territory of the DRC, miles from their common border. The Court characterized Uganda’s activities as an ‘unlawful military intervention … of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter’. Despite the scale of illegal armed intervention, the Court did not qualify Uganda’s intervention as aggression. While the ICJ did not find aggression in this particular case, there was no suggestion from the Court that it lacked the competence to make such a determination. Rather, the lack of an ICJ finding of aggression may most likely be attributed to the Court’s desire to tread carefully in this sensitive area.

In the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (‘Genocide case’), the ICJ considered in great detail the factual record relating to alleged acts of genocide by the Republika Srpska against Bosnian civilians. It also examined the issue of whether the actions of the Republika Srpska could be attributed to the State of Serbia and Montenegro.

Two points that have arisen in relation to the ICJ’s fact-finding in armed conflict cases illuminate issues that may arise when the ICC is called upon to make a finding of state-level aggression. The first relates to the standard of proof required to show that the state-level aggression took place. In the Genocide case, the ICJ considered, in the context of state responsibility, the burden of proof, the standard of proof, and methods of proof with regard to genocide. The burden of proof was held to be on the applicant state, regardless of the fact that certain documentary evidence would be solely in the possession of the respondent state, which was not ready to provide it to the ICJ. With regard to the standard of proof, the applicant had argued for the standard to be the normal ‘balance of probabilities, inasmuch as what is alleged is breach of a treaty obligation’. The respondent, not surprisingly, argued that a charge of such exceptional gravity against a state required proof ‘such as to leave no room for reasonable doubt’. The ICJ chose a path apparently in between the two contentions holding that any ‘claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive’. In cases before the ICC, the burden of proof is on the Prosecutor and, as an element of the crime, it would appear that the state act of aggression would be required to be proved beyond a reasonable doubt.

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73 Ibid. paras 153, 165.
74 Its failure to do so was roundly criticized in the Separate Opinions of Judges Elaraby and Simma. Ibid. Judge Simma, Separate Opinion, para. 2; Judge Elaraby, Separate Opinion, para. 20.
75 See Blokker, note 24 supra, at 886.
76 Genocide case, note 16 supra, paras 377–450.
77 Ibid. paras 204–8.
78 Ibid. para. 208.
79 Ibid.
80 Genocide case, note 16 supra, para. 209.
81 ICC Statute, art. 66.
With regard to the method of proof, in the Genocide case the ICJ catalogued the vast array of material provided to the Court by way of evidence. In addition to witness and expert testimony, the ICJ considered:

(a) reports, resolutions and findings by various UN organs, such as the Secretary-General, the General Assembly, the Security Council and its Commission of Experts, the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and the Special Rapporteur on Human Rights in the former Yugoslavia;
(b) documents from other intergovernmental organizations, such as the Conference for Security and Cooperation in Europe;
(c) documents, evidence and decisions from the ICTY;
(d) publications from governments;
(e) documents from non-governmental organizations, media reports, articles and books.\(^82\)

This listing gives an idea of the types of evidence that could be submitted by the ICC Prosecutor and any defendant in an aggression prosecution. It demonstrates that while factual issues relating to aggression may be challenging, there are means available for a court to decide these matters.

Like the ICJ, the ICTY has not shied away from factual and legal determinations relating to the use of force. The ICTY encountered challenges to its jurisdiction in its very first case on the grounds that there was no armed conflict and that the character of the conflict prevented prosecution of the defendant. With regard to the first challenge, the ICTY ruled that the fact that there were purportedly no armed activities in the particular areas where the alleged crimes had occurred did not mean that the crimes had not occurred in the context of a broader armed conflict. By reference to the Geneva Conventions and Protocols thereto, the Tribunal derived a means for determining the geographical and temporal scope of an armed conflict and applied this test to the factual record before it.\(^83\) The ICTY addressed whether the conflict was international or internal and found a sufficient factual record (including Security Council resolutions relating to the conflict in the former Yugoslavia and various agreements entered into by the parties to the conflict with regard to the applicability of international humanitarian law) to find that the conflict was a mixed international-internal one.\(^84\) It was also able to reach the legal conclusion that different provisions of its Statute were applicable with regard to different aspects of the conflict. For example, article 2 of the ICTY Statute referring to grave breaches of the Geneva Conventions was applicable only to crimes committed in the course of international hostilities,\(^85\) while article 3 of the Statute covering violations of the laws and customs of war was held to be applicable in both internal and international conflicts.\(^86\)

In sum, it is evident that international courts today are well able to decide upon both factual and legal questions relating to the use of force. With respect to an allegation of aggres-

\(^82\) Genocide case, note 16 supra, para. 211.
\(^83\) Tadic Jurisdiction Decision, note 117 supra, para. 70.
\(^84\) Ibid. paras 71–8.
\(^85\) Ibid. paras 80–2.
\(^86\) Ibid. para. 89
tion, the ICC would be called upon to determine whether the factual record established that activities of the sort listed in the definition of the state act of aggression had taken place. While developing the factual record would no doubt be a challenge for the Prosecutor, all courts addressing issues relating to conflict situations face these issues, and the record of the ICJ and the ICTY demonstrates that such factual evidence can and has been developed. Like the ICJ in the Genocide case, the ICC would have to consider what weight to give the findings of any other UN organ that is authorized (either as part of the jurisdictional trigger discussed below or otherwise) to make findings with regard to the state act of aggression. To some extent, this will depend on the nature of the organ that is finally selected to make the decision and the actual form the decision takes. Here again, however, the practice of the ICJ and the ICTY in relying on UN documentation could serve as an example for the ICC.

With respect to the legal characterization, the ICC would have to decide whether a particular use of force meets the legal threshold of aggression and, if the proposal contained in the Chairman’s 2009 Paper is accepted, whether the state act of aggression ‘constitutes a manifest violation of the Charter of the United Nations’. In this context, the Court would no doubt be required to weigh any justifications put forward by the state accused of aggression and to decide whether they were justified or were pretexts for the use of force.

WHO MAKES THE THRESHOLD DETERMINATION OF THE STATE ACT OF AGGRESSION THAT TRIGGERS THE ICC’S JURISDICTION?

The most politically divisive issue relating to the crime of aggression is which UN organ should decide whether the prerequisite state act of aggression took place and how such a determination should trigger the ICC’s jurisdiction? The proposal contained in the Chairman’s 2009 Paper reflects some progress on this thorny issue, but still includes several alternatives with regard to which there is little consensus. This proposal is reproduced below:

Article 15bis Exercise of jurisdiction over the crime of aggression
1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.
2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
4. (Alternative 1) In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression [Option 1: end the paragraph here][Option 2: add: unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.]
4. (Alternative 2) Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression [Option 1: end the paragraph here][Option 2: add: provided that the Pre-Trial Chamber has authorized the

See text accompanying notes 94–105 infra.
commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15. [Option 3: add: provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 bis.] [Option 4: add: provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis.]

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court’s determination of an act of aggression under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.88

This critical issue relates, of course, to the powers of various UN organs under the Charter with regard to the maintenance of peace and security in general, and determining the existence of state aggression in particular.

Alternative 1: The Security Council

The principal argument for allocating this function to the Security Council is that, under article 24 of the UN Charter, the Security Council has ‘primary responsibility for the maintenance of international peace and security’, and that under article 39 of the Charter:

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

The primacy of the Council with respect to these matters was no doubt the impetus behind article 23(2) of the International Law Commission’s draft Statute (which provided that a complaint relating to aggression ‘may not be brought under this Statute unless the Security Council has first determined that the State has committed the act of aggression which is the subject of the complaint’),89 and crucial for the proponents of alternative 1 set out in the Chairman’s 2009 Paper.

Alternative 1 itself contains two options The first would completely prevent the Prosecutor from moving forward with an investigation in the absence of a finding of aggression by the Security Council; the second would allow an investigation to proceed if ‘the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression’. As explained by the chairman, ‘Alternative 1 makes the proceeding of an investigation into a crime of aggression conditional upon an active decision of the Security Council, namely either a substantive determination of aggression by the Council (option 1), or merely procedural authorization (option 2).’90

The first option under alternative 1, that is, requiring a specific determination of aggression, can be criticized on several grounds. The obvious difficulty is that it would prevent the ICC from proceeding unless there was the political will in the Security Council to make a

89 Draft Statute for an International Criminal Court, II YB INT’L L COMM’N (Pt 2), (1994) at art. 23(2).
90 Chairman’s 2008 Paper, note 33 supra, at 1.
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finding of aggression. Advocates of a strong role for the Security Council tend to favor such an arrangement, arguing that the Council’s ‘[f]ailure to act in a particular case need not be proof of failure; it may be evidence of statesmanship’. While this will certainly be the case in some situations, the possibility of an aggression prosecution by the ICC could also create reverse pressure on the Security Council to make a finding of aggression. Option 2 provides a way out of this by allowing the Security Council to authorize an aggression prosecution without necessarily making a finding that aggression occurred.

However, option 2 would not necessarily insulate the role of the Security Council from criticism based on the veto power of its five permanent members. The argument here, of course, is that no national of these states (or of states allied with them) would ever be prosecuted for aggression. Prosecutions for aggression would therefore continue to bear the taint of victor’s justice that has followed them since Nuremberg. Some have proposed getting around the veto issue by positing that a decision under alternative 1, option 2 should be regarded as a procedural decision under article 27(2) of the Charter, which requires only ‘an affirmative vote of nine members’. The text currently proposed for this concept does not, however, make this clear.

**Alternative 2: The ICC, the General Assembly or the ICJ**

Alternative 2 of the Chairman’s 2009 Paper considers how an aggression prosecution could proceed even if the Security Council declines to take either of the routes made available to it under alternative 1. This alternative includes four options for what might happen if the Council does not act within six months of notification by the Prosecutor:

Option 1. the Prosecutor may proceed with the investigation.

Option 2. the Prosecutor may proceed with the investigation ‘provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15’.

Option 3. the Prosecutor may proceed with the investigation ‘provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 bis’.

Option 4. the Prosecutor may proceed with the investigation ‘provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis’.

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91 Similar concerns were expressed with respect to the delaying mechanism contained in art. 16. See, for example, Gargiulo, note 26 supra, at 89, n. 57. This aspect of the relationship between the ICC and the Security Council is discussed at note 94 infra.

92 Meron, note 45 supra, at 13.

93 In contrast, art. 27(3) enshrines the veto power (‘Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.’).

94 A third Security Council related option, which was presented and considered during 2008–2009 was the so-called ‘red light’ proposal. This would allow the Council to stop an ongoing investigation of aggression. Aggression Working Group February 2009 Report, note 35 supra, at 24. This proposal seems to duplicate the suspension power already found in art. 16 of the ICC Statute and did not garner much support. See, text accompanying note 100 infra.
The ICC

Options 1 and 2 – which would allow an aggression prosecution to commence without a determination by any other body as to the existence of state-level aggression – would leave this issue to the ICC itself to decide. The resistance to giving the ICC this mandate is based on the argument that this would violate the institutional peace and security structure of the UN Charter. This argument is resonant of the aspect of the political question doctrine that the judiciary should not make decisions relating to matters that are entrusted to another branch of government.

As has been convincingly argued by many commentators, the Security Council has primary, but not sole, responsibility for determining the existence of a threat to the peace, breach of the peace, or act of aggression. As early as 1962, the ICJ held that the Security Council’s responsibility in the area of peace and security was primary and not exclusive and that the UN Charter ‘makes it abundantly clear … that the General Assembly is also to be concerned with international peace and security’. This position has been consistently reaffirmed by the Court. As discussed above, the ICJ has frequently considered issues relating to peace and security, including in situations that were simultaneously under consideration by the Security Council. Accordingly, there is nothing in the UN Charter structure that categorically prevents another organ from taking a role in determining the existence of a threat to the peace, breach of the peace, or act of aggression.

Moreover, under the ICC Statute, the Security Council can suspend criminal investigations and proceedings in the interests of international peace and security. Article 16 of the Statute provides:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the UN, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Thus, the Security Council can act under Chapter VII (which allows it to take mandatory action in the interests of maintaining international peace and security) to stop ICC investigations and prosecutions. The availability of the suspension mechanism undermines the argument that the ICC’s exercise of jurisdiction over the crime of aggression would hamper the Security Council in fulfilling its primary responsibility for the maintenance of international peace and security.

By allowing suspension, the ICC Statute also recognizes that prosecutions at the ICC (unlike those at the ICTY and the ICTR) are not necessarily measures to restore international peace and security. Rather, the role of the ICC is to provide a forum for holding individuals accountable for the most serious crimes of concern to the international community as a

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95 See Blokker, note 24 supra, at 886.
97 See, for example, Nicaragua Jurisdiction Decision, note 8 supra, paras 94–5; Case Concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, note 71 supra, para. 26.
98 See text accompanying notes 8–12 supra.
whole’. Since outlawing the illegitimate use of force by one sovereign state against another is surely the fundamental aim of the UN Charter, the purpose served by prosecuting aggression is to ensure that the norm against such uses of force is enforced at the individual level.

Another argument advanced against allowing the ICC to decide on the state act of aggression is that this type of inquiry would unduly politicize the Court. The latter argument has been articulated by Professor Meron:

Moreover, to ask the ICC, in the absence of a determination by the Security Council, to decide that an act of aggression has taken place would force the ICC to become immersed in political controversies between states. Such an immersion would endanger the ICC’s judicial role and image. Aggression is an act of state. Imagine the immense difficulties the ICC, as a court of individual criminal responsibility, would face in dealing even with relatively simple matters of aggression. Is it equipped to consider such matters as historical claims to territory, maritime boundaries, legitimate self-defense under Article 51, or legitimate reprisals? Do we want to expose the ICC to the inevitable accusations of politicization? And is the competence of the ICC, in any event, not limited to jurisdiction over natural persons? We must not turn the ICC into a political forum for discussing the legality of use of force by states.

Taking these arguments in reverse order, it is clear that any threshold determination by the ICC relating to the state act of aggression relates only to its jurisdiction over individuals and not to state responsibility. Moreover, as is evident from the preceding section, regardless of whether the jurisdictional trigger for an aggression prosecution is pulled by the Security Council, the ICC would be required – as part of the trial of any individual for the crime of aggression – to decide on the issue of state aggression. Thus, the ICC, in any event, would affect the political landscape of aggression. Indeed, setting up a structure in which there is an inherent risk of inconsistent outcomes is perhaps more dangerous than removing aggression from the political sphere of the Security Council to the judicial sphere of the ICC. With regard to the ability of the ICC to rule on questions relating to the use of force, it is noted that the judges on the Court have expertise in both criminal law and international law so that it should be considered no less able to decide on these issues than the other international courts that have been called upon to do so.

Apart from the high politics surrounding the two broad alternatives discussed above, it is worth exploring certain technical differences between them. These stem from the mechanism for triggering a case under the ICC Statute. Article 13 of the ICC Statute identifies three situations in which the Court may exercise its jurisdiction: (1) referral to the Prosecutor by a state party; (2) referral to the Prosecutor by the Security Council; and (3) investigations initiated by the Prosecutor.

In cases where the Prosecutor has initiated the investigation, he is required to follow the procedure set out in article 15 of the ICC Statute. Several elements of this process are important to our analysis and the corresponding provisions are reproduced below:

Article 15 Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental

99 Meron, note 59 supra, at 13.
or non-governmental organizations, or other reliable sources that he or she deems appropriate, and
may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or
shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with
any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in
accordance with the Rules of Procedure and Evidence.

The ICC Statute envisages a two-step process. First, the Prosecutor would initiate an
investigation. This stage involves the analysis of information available to the Prosecutor and
the seeking out of additional information. If, on the basis of his own investigation, the
Prosecutor concludes that there is a reasonable basis to proceed, he may trigger the second
stage and request authorization from a Pre-Trial Chamber.

Alternative 1 would not change this process for the crime of aggression. If the Security
Council did not act within a specified period of time after notification by the Prosecutor, the
normal process for investigations initiated by the Prosecutor would be followed.

Alternative 2 would change this process for the crime of aggression; the investigation
could only proceed if ‘the Pre-Trial Chamber has authorized the commencement of the inves-
tigation in respect of a crime of aggression in accordance with the procedure contained in
article 15’. It is not fully clear whether the two-step structure of article 15, paragraphs 1 to
3, is retained. Is the Prosecutor authorized to conduct any investigation before bringing it to
the Pre-Trial Chamber for authorization or is that authorization required before the Prosecutor
can proceed with the activities set out in article 15, paragraph 2?

If a Pre-Trial Chamber is involved, one must consider what the Chamber will have to
decide in an aggression investigation. Article 15(4) provides:

If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers
that there is a reasonable basis to proceed with an investigation, and that the case appears to fall
within the jurisdiction of the Court, it shall authorize the commencement of the investigation, with-
out prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissi-
ability of a case.

Since the state act of aggression is the *sine qua non* of the individual crime of aggression,
the Pre-Trial Chamber will be required to find that there is a reasonable basis to proceed with
respect to the state-level act and the individual act. This would likely be a *prima facie* type of
determination and could be based on documentary evidence developed by other parts of the
United Nations, including Security Council records.

**The UN General Assembly or the ICJ**

A number of non-aligned states have pushed for allowing the General Assembly or the ICJ to
decide on the issue of state-level aggression. Proponents of the General Assembly ‘invoke
the Uniting for Peace Resolution of 1950, whereby the General Assembly, faced with recur-

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100 The Aggression Working Group also discussed the possibility of whether a Special Chamber
should be constituted to consider the threshold question of state-level aggression. However, this
proposal does not seem to have garnered much support. Aggression Working Group November 2008
rent Security Council deadlocks, exerted authority over determinations relating to the use of force and subsequently condemned armed attacks in a number of violent crises’.¹⁰¹ Not only has the ICJ recognized the role of the General Assembly in the field of international peace and security, the practice of the United Nations shows that the Assembly has firmly asserted its role in the determination of state-level aggression. The Assembly adopted Resolution 3314, which is likely to be the basis of the definition of aggression in the ICC. Moreover, in six situations the Assembly has qualified state use of force as acts of aggression.¹⁰² Opponents of General Assembly involvement argue that the procedural and evidentiary standards of the Assembly are insufficiently rigorous.

The procedural and evidentiary standards of the General Assembly are not substantially different from those of the Security Council and, in any event, any determination by the General Assembly (like any determination by the Council or the ICJ) would have to be fully re-examined by the ICC at the trial stage.¹⁰³ While there is no technical bar to the General Assembly’s making the determination of State level aggression, given the power structure within the United Nations, it seems highly unlikely that this will come to pass. From the point of view of the ICC, using the General Assembly rather than the Security Council as the jurisdictional trigger would not appear to make much difference in terms of the Court’s ability to decide a particular case.

The ICJ seems a slightly more likely choice than the Assembly. Its proponents note the Court’s experience in ‘making legal determinations related to acts of aggression and point to the recent Armed Activities on the Territory of the Congo, the 1996 Nuclear Weapons Advisory Opinion, the 1986 Nicaragua Case, and the 1962 Certain Expenses of the United Nations in support of this view’.¹⁰⁴ Although, as with the General Assembly, critics have pointed out that the ICJ does not use the same high evidentiary standards that the ICC as a criminal court must follow, any determination would be re-examined at the trial stage. Moreover, many of the states that object to allowing the General Assembly to decide on aggression would likely also object to giving this role to the ICJ.

CONCLUSION

The discussion above reveals the complexities of the debate surrounding the crime of aggression and, in particular, the circumstances under which the ICC should exercise jurisdiction over it. There remains a great divide amongst commentators as to the political feasibility of reaching an agreement on the definition and jurisdictional trigger for the crime of aggression. The lens of this chapter is somewhat different in that it focuses instead on the ability of the ICC to decide on the crime of aggression. However, it is apparent that this aspect of the issue will itself be affected by the decision on the jurisdictional trigger.

¹⁰¹ Weisbord, note 24 supra, at 201, n. 159.
¹⁰² See Blokker, note 24 supra, at 881.
¹⁰³ See text accompanying note 92 supra.
To determine whether the crime of aggression is amenable to judicial determination by the ICC, this chapter examined the contours of the crime and, at every step, asked three questions.

1. Was the decision that the ICC would have to make committed to another organ of the United Nations?
2. Were there available or discoverable legal standards that the ICC could use in making its decision?
3. Would the ICC be able to make the necessary factual findings?

The first issue considered was individual criminal liability, with respect to which there is no question of a role for other UN organs; this is clearly a judicial task. It was demonstrated that the jurisprudence of the ICTY and ICTR showed that sufficient legal standards exist to allow the ICC to make the necessary determinations. Moreover, establishing a factual record on individual conduct is typical of criminal trials and has previously been undertaken in the international sphere.

Turning to the state act of aggression, it is noted that since the state action is an element of the crime of aggression, the ICC would have to examine the matter at the trial stage. As with the issue of individual liability, there is no question that during the trial, this is the responsibility of the Court and not any other UN organ. This section examined the jurisprudence of the ICJ in cases involving allegations of the use of force or aggression or other sensitive security issues, as well as the case law of the ICTY relating to the conflict in the Former Yugoslavia. It concluded that international courts have available to them standards for deciding questions relating to armed conflict, including whether certain state conduct can be categorized as aggression. This section also demonstrated the type of factual record that could be built with regard to an aggression case before the ICC.

The last section of this chapter considered the most controversial issue with respect to aggression prosecutions before the ICC: How should they be triggered? This section focused primarily on whether the decision on state-level aggression was the sole prerogative of the Security Council. Could the ICC decide on it without Council authorization? Analysis of the UN Charter and of the ICJ case law relating to the division of responsibilities among UN organs in the field of international peace and security demonstrated that the Security Council has primary, but not exclusive, competence in this field. Furthermore, this section considered arguments that allowing the ICC to make a determination of state-level aggression without Security Council authorization would hinder the Council’s ability to carry out its mandate to maintain international peace and security and unduly politicize the Court. This section argued that because the Security Council can suspend ICC investigations and proceedings with a decision under Chapter VII of the UN Charter, its authority and ability to restore international peace and security would not be hampered by allowing the Court to decide on state-level aggression. Finally, with respect to the issue of possible politicization, this section pointed out that, given that the ICC will be required to decide on state-level aggression at the trial stage, perhaps a greater risk would be that of inconsistent outcomes.

In sum, this chapter concludes that judicial determination of the crime of aggression is indeed possible. There are, no doubt, difficult issues of law and fact that will require careful reflection and analysis by the ICC, but the crime itself is certainly amenable to judicial determination.