Aggression

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A. Introduction

1 Aggression is an old concept in international law meaning, in essence, State conduct that either initiates war against another State or brings about a situation in which the victim is (or may be) driven to war. It has never been settled whether aggression of itself must consist of use of force, or whether it could manifest itself through lesser acts, such as the threat of force, or even acts unrelated to the use of force eg, the diversion of the waters of an international river. Charges of aggression have been levelled by States against one another for centuries, even prior to the general renunciation of war as an instrument of national policy in the → *Kellogg-Briand Pact (1928)* (General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928, entered into force 25 July 1929) 94 LNTS 57).

2 In the period before the Kellogg-Briand Pact, States often concluded, either bilaterally or multilaterally, non-aggression treaties in which they committed themselves not to engage in any act of aggression against each other (→ *Non-Aggression Pacts*). In Art. 10 Covenant of the League of Nations ((signed 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 195; 'League Covenant'), Members of the League of Nations pledged 'to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League'.

3 Under Art. 6 (a) Charter of the Nuremberg International Military Tribunal ('IMT'), annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ((signed and entered into force 8 August 1945) 82 UNTS 279), the 'planning, preparation, initiation or waging of a war of aggression' were defined as crimes against peace. On that basis, in the Nuremberg Judgment of 1946, the IMT proclaimed: 'To initiate a war of aggression … is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole' (IMT at 186; → *International Military Tribunals*). This was in many respects an innovation at the time. It may therefore be added that the sole Nuremberg defendant convicted exclusively of crimes against peace was Hess, who was sentenced to life imprisonment. Eleven other defendants were also convicted of crimes against peace—Göring, Ribbentrop, Keitel, Rosenberg, Frick, Funk, Dönitz, Raeder, Jodl, Seyss-Inquart and Neurath—yet, they were all found guilty also of traditional → *war crimes*, so that arguably they would have paid the price of capital punishment or imprisonment regardless.

4 The Nuremberg criminalization of a war of aggression was upheld, in 1948, by the International Military Tribunal for the Far East ('IMTFE') at Tokyo. For its part, the IMTFE convicted no less than 23 defendants (headed by Tojo) of crimes against peace. The Nuremberg precedent was also followed in other trials against criminals of World War II ('WWII'), most conspicuously by an American Military Tribunal in the *Ministries Case* of 1949, part of the 'Subsequent Proceedings' at Nuremberg.

5 It is clear from the WWII case law that individual liability for crimes against peace can only be incurred by high-ranking persons: leaders and policy-makers, whether military or civilian. This is not to say that penal responsibility for crimes against peace is reduced, even in a dictatorship, to one or two individuals at the pinnacle of power. As an American Military Tribunal in the Subsequent Proceedings *High Command Case* phrased it: 'No matter how absolute his authority, Hitler alone could not formulate a policy of aggressive war and alone implement that policy by preparing, planning and waging such a war' (at 486). The tribunal declined to fix a distinct line, somewhere between the Private soldier and the Commander-in-Chief, where liability for crimes against peace begins. But it is clear from the judgment that criminality is contingent on the actual power of an individual 'to shape or influence' the policy of his/her country (*High Command*

Case 488; → *Command Responsibility*). Those acting as instruments of the policy-makers 'cannot be punished for the crimes of others' (*High Command Case* 489). The limitation of individual accountability for the crime of aggression to leaders or organizers is also embedded in the 1996 text of Art. 16 Draft Code of Crimes against the Peace and Security of Mankind (UN ILC (1996) GAOR 51st Session Supp 10, 9; see para. 38 below).

6 No indictment for crimes against peace has followed the multiple armed conflicts of the post-WWII era. The idea of charging Saddam Hussein with the crime of waging a war of aggression against Kuwait was advanced by scholars in the early 1990s (→ *Iraq-Kuwait War (1990–91)*). However, after his apprehension in the final phase of the Gulf War, Saddam Hussein was tried and convicted by Iraqi courts for other crimes. Crimes against peace do not come within the jurisdiction of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda. Only in 1998, upon the conclusion of the Statute of the International Criminal Court ('Rome Statute'), did the crime of aggression truly come back into the international legal arena, although so far without practical effects (see paras 34–39 below).

B. The Charter of the United Nations

7 The 1945 Charter of the United Nations adverts to aggression in two places. The most significant reference is in Art. 39 UN Charter (opening Chapter VII), which sets forth: '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 … to maintain or restore international peace and security'. The other place where the term aggression appears in the UN Charter is in Art. 1 (1), enumerating the Purposes of the United Nations, including the taking of 'effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace'. There is also a reference to 'regional arrangements directed against renewal of aggressive policy' on the part of enemy States of WWII in Art. 53 (1) UN Charter, but this is a technicality and in any event, by now, an anachronism. Conspicuously, in Art. 51 UN Charter—recognizing the right of → *self-defence*—the focus is on response to an 'armed attack', not aggression, although, in the French authentic text, the expression 'armed attack' is rendered as armed aggression 'agression armée' (→ *Armed Attack*).

8 Thus, in the only two places where aggression is mentioned in the UN Charter, this is done jointly with threat to the peace and breach of the peace (→ *Peace, Breach of*; → *Peace, Threat to*). The place of aggression in the triple scheme is not entirely clear. From the phraseology of Art. 1 (1) UN Charter ('acts of aggression or other breaches of the peace') it follows that aggression is linked to breach of the peace, rather than threat to the peace. There is a view that the order of the three terms in Art. 39 ('threat to the peace, breach of the peace, or act of aggression') is progressive, and thus aggression is the most egregious act. But, if so, it is not easy to explain the difference in the French (authentic) text between 'agression' in Art. 39 UN Charter and 'agression armée' in Art. 51 UN Charter.

9 A determination of the existence of 'any threat to the peace, breach of the peace, or act of aggression' by the UN Security Council may carry far-reaching consequences, including binding decisions leading to mandatory or authorized enforcement action against a State. Nevertheless, over a period of more than 60 years—while the UN Security Council has determined in a host of instances, especially since the end of the Cold War, the existence of a threat to the peace, and in a handful of instances a breach of the peace—the UN Security Council has never made a formal finding that aggression in the sense of Art. 39 UN Charter has occurred. In the past, the phrase 'acts of aggression' appeared descriptively in several texts of UN Security Council resolutions. Most repeatedly, this happened in the case of South African incursions into → *Angola* in the 1980s: UNSC Resolution 475 (1980) of 27 June 1980 (SCOR 35th Year 21), UNSC Resolution 546 (1984) of 6 January 1984 (SCOR 39th Year 1), UNSC Resolution 567 (1985) of 20 June 1985 (SCOR 40th Year 16) etc. But, typically, in UNSC Resolution 602 (1987) of 25 November 1987 (SCOR 42nd Year 12), it was stated that 'the pursuance of these acts of aggression against Angola constitutes a serious threat to international peace and security'. In any event, there is little use of similar terminology in more recent decisions.

10 The UN General Assembly has used the term aggression more often in its resolutions. However, the UN General Assembly has no Chapter VII UN Charter powers, and it cannot fulfil the tasks of the UN Security Council, even when the latter is paralyzed by dint of the use, actual or potential, of the → *veto* power of the Permanent Members. When the UN General Assembly tries to encroach upon the competence of the UN Security Council, as it does sporadically, this usually meets with protests by Permanent Members, and it cannot be deemed to be in conformity with the UN Charter.

11 The UN Security Council is vested by the UN Charter with virtually unlimited discretion to determine in what exact circumstances 'any threat to the peace, breach of the peace, or act of aggression' has occurred. The powers conferred on the UN Security Council pursuant to Chapter VII UN Charter—as to the choice of measures that it wishes to take—are vast, and they include enforcement measures. What has to be emphasized here is that these powers are identical, regardless of whether they are triggered by aggression, breach of the peace, or threat to the peace. Given

the UN Security Council's free hand, and the irrelevance of the choice between the three alternative phrases, there is no imperative need for the UN Security Council to determine specifically that aggression has been perpetrated. No matter what the exact classification of State activities examined by the UN Security Council is—as long as they can be categorized as either aggression or a breach of the peace, or indeed a threat to the peace—the UN Security Council is authorized to set in motion exactly the same measures.

12 Aggression was defined neither by the framers of the League Covenant, nor by those of the UN Charter. Some definitions of aggression were adopted in bilateral treaties, pre-eminently in the London Conventions for the Definition of Aggression concluded by the USSR with neighbouring countries in 1933 (Convention for the Definition of Aggression (signed 3 July 1933, entered into force 16 October 1933) 147 LNTS 67). But, for decades, attempts to adopt a general definition of aggression were frustrated, both in the days of the League of Nations and in the UN era. Finally, in 1974, the UN General Assembly adopted a Definition of Aggression in a consensus resolution (UNGA Res 3314 (XXIX) (14 December 1974); 'Definition of Aggression').

C. The General Assembly Definition of Aggression

1. The Thrust of the Definition

13 Art. 5 (2) of the consensus Definition of Aggression differentiates between aggression, which 'gives rise to international responsibility', and war of aggression, which is 'a crime against international peace'. The drafters of the Definition of Aggression thereby signalled clearly that not every act of aggression constitutes a crime against peace: only war of aggression does. That is to say, an act of aggression short of war—as distinct from a war of aggression—would not result in individual criminal responsibility, although it would bring about the application of general rules of → *State responsibility*.

14 While Art. 5 (2) Definition of Aggression pronounces war of aggression to be a crime against international peace, the definition as a whole is not focused on criminal accountability. UNGA Resolution 3314 (XXIX) of 14 December 1974, to which the Definition of Aggression is annexed, makes it plain that the primary intention was to recommend the text as a guide to the UN Security Council—an intention which, as will be seen in para. 32 below, missed its mark). The perspective is thus non-criminal, although the contours of Definition of Aggression are likely to prove of material relevance to any future prosecution of persons accused of the crime of aggression (see para. 37 below). Of course, even if the definition, or parts thereof, will serve—in any such trial—as the gravamen of the *actus reus*, there will be a separate question of the *mens rea* required for conviction.

2. Aggression in General

15 The UN General Assembly utilized the technique of a composite definition, combining general and specified elements: the Definition of Aggression starts with an abstract statement of what aggression means, and then adds a non-exhaustive list of illustrations. The general part of the Definition of Aggression is embodied in Art. 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.

In an explanatory note, the framers of the Definition of Aggression commented that the term 'State' includes non-UN members, embraces a group of States, and is used without prejudice to questions of → *recognition*.

16 Art. 1 Definition of Aggression repeats the core of the wording of Art. 2 (4) UN Charter, which promulgates: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. But a comparison between the two texts shows that there are a number of variations: (i) the mere threat of force is excluded; (ii) the adjective 'armed' is interposed before the noun 'force'; (iii) 'sovereignty' is mentioned together with the territorial integrity and the political independence of the victim State; (iv) the victim is described as 'another' rather than 'any' State; (v) the use of force is forbidden whenever it is inconsistent with the UN Charter as a whole, and not only with the Purposes of the UN; (vi) a linkage is created with the rest of the Definition of Aggression. Some of these points are of peripheral significance, others are of greater consequence. The cardinal divergence from Art. 2 (4) UN Charter is the first point: the threat of force per se does not qualify as aggression, since an actual use of armed force is absolutely required.

17

Art. 5 (1) Definition of Aggression states that '[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression'. This clause underscores that the motive does not count: even a good motive does not detract from an act constituting aggression.

18 There is no allusion in the Definition of Aggression to any necessary aggressive intent on the part of the aggressor State. The intent is usually inferred from the action taken by the State, rather than the reverse. Moreover, there are complex situations in which a minor incident between States flares up into a fully-fledged war—as a result of escalation and counter-escalation—in circumstances that defy any attempt to ascribe an intent to the country that, upon close examination of the facts, is branded as the aggressor.

19 Art. 6 Definition of Aggression adds a proviso that '[n]othing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful'. It goes without saying that, in any instance of divergence between the two, the UN Charter trumps the Definition of Aggression. But this is a useful reminder that no aggression can take place if, and as long as, a State is acting in lawful self-defence under Art. 51 UN Charter, or pursuant to a binding decision of the UN Security Council.

20 The most controversial stipulation in the Definition of Aggression is that of Art. 7, whereby the text is without prejudice to the right to → *self-determination* and the right of 'peoples under colonial and racist regimes or other forms of alien domination' not only 'to struggle to that end', but also 'to seek and receive support in accordance with the principles of the Charter'. Yet, the specific reference to the UN Charter, in addition to the general caveat in Art. 6 Definition of Aggression and to the fact that all UN General Assembly resolutions must be consistent with the UN Charter, is a clear indication that the right to receive—and presumably to give—support from the outside for a war of 'national liberation' is subordinated to the UN Charter. The UN Charter does not permit the use of inter-State force, except in the exercise of self-defence or pursuant to a binding decision of the UN Security Council. An interpretation of Art. 7 Definition of Aggression as a licence for one State to use force against another, in support of the right of a people to self-determination but in circumstances exceeding the bounds of self-defence or enforcement action decided by the UN Security Council, is irreconcilable with the UN Charter.

21 Art. 2 Definition of Aggression sets forth: 'The first use of armed force by a State in contravention of the Charter shall constitute prima facie evidence of an act of aggression', but the UN Security Council may determine otherwise 'in the light of other relevant circumstances'. The possibility of appraising these other relevant circumstances leaves a broad margin of appreciation of the factual background. When all the circumstances are fully evaluated, it may turn out that the prima facie evidence is of little consequence. A case in point, consistent with Art. 3 (e) Definition of Aggression, see para. 23 below, would be the extended presence of foreign troops within the territory of a State beyond the temporal limit of consent to such presence. If the foreign troops are not pulled out when consent is terminated, and fire is opened on them with a view to compelling their withdrawal from the local territory, these first shots will not constitute aggression.

22 The 'other relevant circumstances' referred to in Art. 2 Definition of Aggression also include 'the fact that the acts concerned or their consequences are not of sufficient gravity'. This is an apposite *de minimis* clause, which cautions against any attempt to use a trifle incident as an excuse for a major armed conflict. A few stray bullets fired across a border, not causing injury to human beings or damage to property, cannot be invoked as an act of aggression.

3. The Specifics of Aggression

23 The linchpin of the Definition of Aggression is Art. 3, which enumerates specific acts of aggression. Under Art. 3 Definition of Aggression, the following acts amount to aggression 'regardless of a declaration of war':

(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.

24 Art. 3 (g) was pronounced by the International Court of Justice (ICJ) in the → *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America) (Merits)* (‘*Nicaragua Case*’) of 1986 to be declaratory of customary international law (at para. 195). But here is a prime example of a definition, which on the face of it is detailed, requiring further amplification. The ICJ, while actually addressing the issue of an armed attack, did ‘not believe’ that ‘assistance to rebels in the form of the provision of weapons or logistical or other support’ qualified (ibid). This is a rather sweeping statement. In his Dissenting Opinion, Judge Jennings expressed the view that, whereas ‘the mere provision of arms cannot be said to amount to an armed attack’, it may qualify as such when coupled with ‘logistical or other support’ (*Nicaragua Case (Dissenting Opinion of Judge Jennings)* at 543). In another dissent, Judge Schwebel stressed the words ‘substantial involvement therein’ (appearing in Art. 3 (g) Definition of Aggression), which are incompatible with the language used by the majority (*Nicaragua Case (Dissenting Opinion of Judge Schwebel*) para. 176).

25 Whereas Art. 3 (g) Definition of Aggression alone has been held by the ICJ to be an embodiment of customary international law, other portions of Art. 3 Definition of Aggression may equally be subsumed under the heading of true codification. Thus, irrefutably, an outright invasion covered by Art. 3 (a) Definition of Aggression constitutes an act of aggression in keeping with customary law. This is strongly supported by the Separate Opinion of Judge Simma in the *Armed Activities on the Territory of the Congo Case ((Separate Opinion of Judge Simma)* para. 3).

26 Whatever the legal status of its sundry paragraphs, Art. 3 Definition of Aggression was not intended to cover the entire spectrum of aggression. According to Art. 4 Definition of Aggression, the acts inscribed in Art. 3 Definition of Aggression do not exhaust the definition of that term, and the UN Security Council may determine what other acts are tantamount to aggression. This open-ended nature of the Definition of Aggression—leaving a lot of latitude to the UN Security Council—was actually a key to the adoption of the text by consensus.

27 There is no doubt that the specifics of the Definition of Aggression do not encompass every possible angle of aggression. Thus, the interaction between aggression and self-defence is not fully examined in the Definition of Aggression. The issue arises, in particular, because under Art. 51 UN Charter the right of self-defence can be exercised ‘collectively’, ie by third States (→ *Self-Defence, Collective*). Surely, State C is allowed to come to the assistance of State B, the victim of armed attack, but not to that of State A, the aggressor. Assistance to State A may itself qualify as an armed attack against State B. By the same token, if State C sends troops into the territory of State B without being asked to do so, State C itself may be branded as an aggressor. All the same, the commission of an act of aggression by State C vis-à-vis State B does not diminish from the previous act of aggression by State A against State B. Hence, State C may simultaneously be acting as the aggressor towards State B, and the protagonist of collective self-defence against State A. There are other plausible scenarios along similar lines.

28 A question of increasing practical importance in recent years—not addressed in the Definition of Aggression—is whether a State can be regarded as an aggressor when it assists paramilitaries in actions against another State that do not come within the purview of Art. 3 (g) Definition of Aggression. The issue has not yet been thoroughly explored in the case law, although some illuminating remarks have been made by Judge Kooijmans in *Armed Activities on the Territory of the Congo Case ((Separate Opinion of Judge Kooijmans)* paras 29–35).

29 An issue that did arise in the *Nicaragua Case* was the 'degree of dependence on the one side and control on the other' that would equate hostile paramilitary groups with organs of the foreign State (para. 109). The ICJ held that what is required is 'effective control' of the operation by that State (para. 115). The Appeals Chamber of the ICTY, in the → *Tadić Case* of 1999, sharply contested the *Nicaragua Case* test of 'effective control', maintaining that it is inconsonant with logic and with law (paras 115–45). The ICTY Appeals Chamber thought that the degree of control may vary according to circumstances, and that acts performed by members of a paramilitary group organized by a foreign State may be considered 'acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts' (para. 137). The ICTY focused on the subordination of the group to overall control by the foreign State: that State does not have to issue specific instructions for the direction of every individual operation, nor does it have to select concrete targets (ibid). Paramilitaries can thus act quite autonomously and still remain de facto organs of the controlling State, which can be stigmatized as the aggressor.

30 The ICJ came back to the subject at some length in the *Genocide Case* of 2007, where the previous (*Nicaragua*) position was basically endorsed and the *Tadić* criticism rejected, although the Court conceded that the *Tadić* approach might be apposite in some contexts (paras 402-6). The International Law Commission relied on the *Nicaragua* 'effective control' test in Art. 8 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, even though it too noted that the *Nicaragua* high threshold for the test of control is not required in every instance. It is doubtful, however, that the matter may be viewed as settled.

31 Can acts of aggression be perpetrated by non-State actors operating on their own, there being no complicity by any State? The possibility is not raised in the Definition of Aggression. However, it is noteworthy that in UNSC Resolution 419 (1977) of 24 November 1977 (SCOR 32nd Year 18)—one of those old resolutions in which the coinage acts of aggression was employed—the UN Security Council referred to these acts as committed by → *mercenaries* against the State of Benin, without any suggestion that any other State was involved. Since the outrage of 11 September 2001, it has become evident that an armed attack can be mounted by a terrorist organization. The UN Security Council recognized the right of self-defence in this context (UNSC Res 1368 (2001) (12 September 2001) SCOR (1 January 2001–31 July 2002) 290; UNSC Res 1373 (2001) (28 September 2001) SCOR (1 January 2001–31 July 2002) 291). There is admittedly a dictum in the 2004 → *Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)* that throws some doubt on the issue. But this has been vigorously criticized by several of the Judges, as well as many scholars. It is today quite obvious that aggression can be committed by non-State actors, regardless of the involvement of any foreign State.

4. The Usefulness of the Definition

32 The reality is that the UN Security Council—for whose benefit the UN General Assembly Definition of Aggression was crafted—has ignored it altogether. At least in part, the reason is that the UN Security Council does not feel that it needs to be told what legal standards or criteria it should follow in assessing acts of aggression. But the issue is more profound. The UN Security Council is a political, not a judicial, body. For a resolution to be adopted by the UN Security Council, especially a Chapter VII UN Charter resolution, it is necessary to surmount political hurdles in forging the required majority chiefly, but not exclusively, by eliminating the prospect of a veto by a Permanent Member. The UN Security Council may have to hammer out a compromise, or decline to take action, regardless of legal dimensions of the issue. The availability of a definition of aggression is not the leading consideration in behind-the-scenes political negotiations.

33 In fact, a paradox is latent in the UN General Assembly's Definition of Aggression. Inasmuch as the UN Security Council does not rely on it, its usefulness is not apparent where aggression is concerned. But, since the Definition of Aggression is confined to armed aggression—which is the equivalent of an armed attack (see para. 7 above)—in practice the specific acts listed in Art. 3 Definition of Aggression are treated as manifestations of an armed attack. Consequently, the context in which the Definition of Aggression is largely cited in State practice, in the case law, and in the legal literature is not the Chapter VII UN Charter setting for which it was designed but the sphere of self-defence permitted under Art. 51 UN Charter only in response to an armed attack (see para. 7 above). It is no accident that the *Nicaragua Case*, in which the ICJ gave its imprimatur to Art. 3 (g) Definition of Aggression as a reflection of customary law, dealt with the Definition of Aggression in the context of self-defence. The question as to what amounts to aggression in the Chapter

VII UN Charter, as distinct from the Art. 51 UN Charter sense—and whether aggression in that sense is conceivable in circumstances not amounting to an armed attack—has not yet received an authoritative answer.

D. The Rome Statute of the International Criminal Court

34 Art. 5 Rome Statute confers on the ICC subject-matter jurisdiction with respect to → *genocide*, → *crimes against humanity*, war crimes, and the crime of aggression. However, unlike genocide, crimes against humanity, and war crimes, the crime of aggression is not defined in the Rome Statute. Art. 5 (2) Rome Statute defers action to a future time:

> 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.

35 Arts 121 and 123 Rome Statute pertain to amendment and review procedures that will commence seven years after the entry into force of the Rome Statute (2002). In accordance with Art. 121 (5) Rome Statute, should an amendment to Art. 5 Rome Statute be adopted in the future, any State Party may refuse to accept the amendment, in which case 'the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory'. The proviso also applies to the review procedure under Art. 123 (3) Rome Statute. This safeguard was added in order to allay misgivings of contracting parties about possible future trends relating to the configuration of the crime of aggression.

36 The Rome decision to postpone the definition of the crime of aggression reflects a divergence of opinions as to the precise scope of the definition and the manner of its drafting. Above all, the Rome Conference was unable to reach an agreement as to whether the ICC would be empowered to exercise jurisdiction in the absence of a UN Security Council determination that an act of aggression has occurred. This is an issue of potentially grave consequences, since—in theory at least—the ICC, if acting independently of the UN Security Council, may convict a person of the crime of aggression, even though the UN Security Council has ruled that the other side is the actual aggressor in the war. It must be kept in mind that the ICC cannot overstep any prerogatives of the UN Security Council, as set out by the UN Charter. The reason is that pursuant to Art. 103 UN Charter, in the event of a conflict between obligations of Member States under the UN Charter and 'their obligations under any other international agreement', an expression embracing the Rome Statute and any future amendment thereof, the obligations under the UN Charter 'shall prevail'.

37 Preliminary work on the definition of the crime of aggression for the purposes of an amendment of the Rome Statute has already commenced. First, drafting was undertaken by a Preparatory Commission which drafted the Elements of Crimes that will assist the ICC in the interpretation and application of the provisions relating to other crimes within its jurisdiction. Then, the matter was tackled by a special Working Group under the auspices of the Assembly of States Parties of the Rome Statute. Until the process culminates in a binding agreement, there is no point in examining any work-in-progress text. But, interestingly, extant drafts display a conspicuous tendency to follow the language of the UN General Assembly's Definition of Aggression, notwithstanding the fact that the original perspective of the framers of the text was non-criminal (see para. 14 above).

38 The controversies attending the formulation of the crime of aggression must not be minimized. One may even argue that, pending the entry into force of the projected amendment, the crime of aggression is included in the Rome Statute only notionally. Still, the main disagreement—about the relationship between the ICC and the UN Security Council—relates more to structure than to substance. There is no indication that States regard as outdated the concept of war of aggression as a crime under international law. On the contrary, support for this concept has been manifested consistently in various international fora. It is important to note that the UN General Assembly consensus 1970 Declaration on Principles of International Law Concerning Friendly Relations and cooperation among States in Accordance with the Charter of the United Nations (UNGA Res 2625 (XXV) (24 October 1970) GAOR 25th Session Supp 28, 121) in accordance with the UN Charter—generally regarded as an expression of customary international law—enunciated that 'war of aggression constitutes a crime against peace, for which there is responsibility under international law'. The International Law Commission included the crime of aggression (without defining it) in Art. 16 Draft Code of Crimes against the Peace and Security of Mankind adopted in 1996.

39 The Rome decision to criminalize aggression—and establish individual accountability for that crime—runs counter to the distinction drawn in the UN General Assembly Definition of Aggression and rooted in Art. 6 (a) IMT Charter between war of aggression as a crime, and aggression short of war as a mere ground for State responsibility (see para. 14 above). The objection to the Definition of Aggression (and Nuremberg) approach is that the distinction between a war of aggression and acts of aggression short of war is sometimes fraught with difficulties. On the other hand, incidents

short of war may not justify the exercise of criminal responsibility. Only an actual definition of the crime of aggression—if adopted at some indefinite point in the future—will show whether the broadening of the scope of the crime of aggression to acts short of war is acceptable to States. But it must be borne in mind that, however the crime of aggression is defined, it must be linked to an inter-State unlawful use of force.

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