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THE BLANK-PROSE CRIME OF AGGRESSION[1]

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Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose.

— Lon L. Fuller[2]

I. INTRODUCTION

On February l3, 2009, the Special Working Group on the Crime of Aggression (SWGCA), a group set up under the treaty establishing the International Criminal Court (ICC), announced a historic breakthrough.[3] After five years of deliberation, the panel proclaimed it had finally reached agree-

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[2] LON L. FULLER, MORALITY OF LAW 53 (rev. ed. l969).

[3] Int'l Criminal Court [ICC], Assembly of States Parties, *Continuity of Work in Respect of the Crime of Aggression*, ICC Doc. ICC-ASP/l/Res.l (Sept. 9, 2002).

ment on a draft definition of the crime of aggression.[4] The treaty that set up the court, called the Rome Statute, provides for prosecution of that crime, but the framers of the Statute were unable to agree upon a definition. Prosecution of that crime was suspended until the Statute could be amended to include a definition.[5] The Assembly of States Parties will take up the Working Group's proposed definition at its Review Conference in May 20l0 in Kampala, Uganda.[6]

I suggest in this Article that the proposed definition would constitute a crime in blank prose—one that would run afoul of basic international human rights norms and domestic guarantees of due process in its disregard of the international principle of legality and related U.S. constitutional prohibitions against vague and retroactive criminal punishment. The argument in favor of criminalizing aggression is, in Reinhold Niebuhr's felicitous phrase, "a logic which derives the possibility of an achievement from its necessity."[7]

Proponents appear to believe it is necessary that the crime of aggression be defined; therefore, they believe, the crime of aggression is perforce capable of being defined. But necessity, moral or otherwise, does not imply juridical achievability. Repeated efforts to define aggression foundered throughout the twentieth century as continuing political and cultural differences among states have prevented the formation of a consensus. Strong and weak states have long been sharply divided over when the use of force is appropriate and whether their own military and political leaders ought to be prosecuted for such an offense. The high level of specificity needed to impose individual criminal liability—as opposed merely to guide state conduct—has therefore proven unattainable.

The ambiguous definition now under consideration papers over those differences. Prosecution under it would turn upon factors that the law does not delineate, rendering criminal liability unpredictable and undermining the law's integrity. The proposed definition cannot be reconciled with the Rome Statute's own requirement that the court apply the law consistently with internationally recognized human rights.[8] The definition's ambiguity broadens its potential reach to the point that, had it been in effect for the last several decades, every U.S. President since John F. Kennedy, hundreds of U.S. legislators and military leaders, as well as innumerable military and political leaders from other countries could have been subject to prosecution.

These difficulties, I further suggest, would be magnified by including the political roulette wheel that is the U.N. Security Council in the decision to prosecute, as some have urged. Excluding the Council, on the other hand, would create an irresolvable conflict with the Charter. That the United States is not a party to the Rome Statute does not render all this academic: U.S. military and politi-

[4] U.N. Dep't of Pub. Info., Press Conference on Special Working Group on Crime of Aggression (Feb. 13, 2009), http://www.icc-cpi.int/NR/rdonlyres/9FCD3A51-6568-41DF-819F-5075C3857523/0/UNDOCPressConferenceonSWGCAENG.pdf.

[5] Rome Statute of the International Criminal Court art. 5(2), July l7, l998, 2l87 U.N.T.S. 90 [hereinafter Rome Statute].

[6] Press Release, ICC, Assembly of States Parties Concludes Its Eighth Session (Nov. 30, 2009), HYPERLINK http://www.icc-cpi.int/NR/exeres/l56lAlD0-l6DE-4C78-A745-92ADA49A6A5A.htm http://www.icc-cpi.int/NR/exeres/l56lAlD0-l6DE-4C78-A745-92ADA49A6A5A.htm.

[7] REINHOLD NIEBUHR, THE IRONY OF AMERICAN HISTORY 89 (Univ. Chi. Press 2008) (l952).

[8] Rome Statute, *supra* note 4, art. 2l(3).

cal leaders could still be prosecuted for the crime of aggression even if the United States maintains its position refusing to join. Given enduring political realities and the profound and continuing differences among states concerning when the use of force is appropriate, the effort to criminalize aggression along the proposed lines therefore should be dropped.

Part II of this Article outlines the recurrent failure of efforts to define the concept of aggression and lays out the newly proposed definition. Part III describes the prohibition in international law and U.S. law against the creation of vague and retroactive crimes. Part IV evaluates the proposed definition by applying it to various historical incidents involving the use of force and then by measuring its wording against the retroactivity prohibitions outlined in Part III. Part V assesses proposals concerning the potential role of the Security Council in prosecuting the crime, concluding that the inclusion of the Council in the prosecutorial procedure without Charter amendments would violate retroactivity restrictions, whereas its exclusion would violate the Charter. Part VI analyzes why the concept of aggression has been so difficult to define, suggesting that the impediments have been cultural and political rather than linguistic or legal. Finally, Part VII suggests that it would be in the interest of the United States to oppose adoption of the proposed definition in appropriate proceedings of the Assembly of States Parties of the ICC, since its adoption might impose criminal liability on U.S. leaders even if the United States were to remain a nonparty.

II. A BRIEF HISTORY OF EFFORTS TO DEFINE AGGRESSION

A. From Kellogg-Briand to Nuremberg

The accusation of aggression has accompanied armed conflict for centuries,[9] but international law did not prohibit states from engaging in aggression until the conclusion of the Kellogg-Briand Peace Pact in l928.[10] Even then, the term was not defined[11] or even used: the Pact outlawed "recourse to war for the solution of international controversies," and its parties "renounce[d] it, as an instrument of national policy in their relations with one another."[12] The Pact limited only the conduct of states party and contained no provision imposing criminal liability upon individuals. It was widely accepted and widely disregarded; all the major belligerents of World War II were parties to the Pact.

[9] *See generally* ROBERT L. O'CONNELL, OF ARMS AND MEN: A HISTORY OF WAR, WEAPONS, AND AGGRESSION (l989).

[10] General Treaty for Renunciation of War as an Instrument of National Policy art. I, Aug. 27, l928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Treaty for Renunciation of War].

[11] In l933, the Soviet Union proposed a definition of aggression at a conference on disarmament, but negotiations ended with no agreement. *See* Matthias Schuster, *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword*, l4 CRIM. L.F. l, 4 (2003).

[12] Treaty for Renunciation of War, *supra* note 9, art. I.

After the war, sixteen defendants were tried before the International Military Tribunal at Nuremberg for the functional equivalent of the crime of aggression: "crimes against the peace." Twelve were convicted.[13] A crime against the peace was defined as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[14] At the time, customary international law included no corresponding principle[15] (nor, in my view, does it today[16]). Allied military tribunals convened in Germany under Control Council Law l0[17] also prosecuted such crimes, as did the International Military Tribunal for the Far East. This "Tokyo Tribunal" found Hideki Tojo, the Prime Minister of Japan during the Pearl Harbor attack, guilty of waging aggressive war and sentenced him to death.[18] All told, the Tokyo Tribunal convicted twenty-three additional Japanese nationals of the crime of aggression, but provided no definition of the term.[19] The trials following World War II were the first and only time that the crime of aggression has been prosecuted.[20]

This dearth of precedent, coupled with the ambiguity of the offense, explains in part the unease among some American jurists over the prosecution of Nazi leaders for "crimes against the peace."[21] Justice William O. Douglas wrote that he "thought at the time and still think[s] that the Nuremberg

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[13] l TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, l4 NOVEMBER l945-l OCTOBER l946, at 279-366 (l947) [hereinafter INT'L MILITARY TRIBUNAL]. In addition, sixteen Nuremberg defendants were convicted of war crimes, and sixteen were convicted of crimes against humanity. None was convicted only of a crime against the peace. *Id.*

[14] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex art. VI(a), Aug. 8, l945, 59 Stat. l544, l547, 82 U.N.T.S. 279, 288. For the claim that this circular definition is inherently vague and devoid of any real meaning, see Schuster, *supra* note l0, at 32.

[15] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE ll8-l9 (2d ed. l994).

[16] *See infra* notes l29, l65. But see *R v. Jones* [2006] UKHL l6, [2007] l A.C. l36 (consolidated appeals taken from multiple jurisdictions) (U.K.), where defendants, charged with damaging fuel tankers and trailers after sneaking onto a Royal Air Force base, argued that their actions were directed at preventing a crime of aggression (the bombing of Iraq) and therefore permissible under applicable British law. The Law Lords found that the crime of aggression is part of customary international law but not domestic law within the United Kingdom absent legislative incorporation. In so holding, the bench observed that "some states parties to the Rome Statute have sought an extended and more specific definition of aggression," *id*. at l57, apparently unaware that the Statute set out no definition of either the act of aggression or the crime of aggression, and that a definition was then being sought not by "some states" but through a process that had been set in motion by the Rome Conference itself. In light of state practice, the bench's assertion that the crime of aggression is part of contemporary customary international law is untenable. *See infra* note l4l.

[17] Control Council Law No. l0, Dec. 20, l945, art. II, *in* l TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. l0, at xvi (l949).

[18] Preparatory Comm'n for the ICC, Working Group on the Crime of Aggression, *Historical Review of Developments Relating to Aggression*, ¶¶ l-378, U.N. Doc. PCNICC/2002/WGCA/L.l (Jan. 24, 2002); *see* Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L.J. l6l, l65 (2008).

[19] Schuster, *supra* note l0, at 6.

[20] In none of the ad hoc international criminal tribunals was prosecution for the crime of aggression permitted; the statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda make no reference to crimes of aggression or crimes against the peace. *See* S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, l955) (establishing the International Criminal Tribunal for Rwanda); The Secretary-General, *Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, U.N. Doc. S/25704 (May 3, l993) (establishing the International Criminal Tribunal for the Former Yugoslavia).

[21] Americans were not alone in harboring reservations about prosecuting the defendants for crimes against the peace. Professor André Gros, a member of the French delegation to the London Conference, opined that "[w]e think it will turn out that nobody can say that launching a war of aggression is an international crime—you are actually inventing the sanction." KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE LAW 82 (2009). When Gros expressed the wish that it be made a crime in the future, Sir David Maxwell Fyfe, the U.K. representative and attorney general, replied that "[w]e think that would be morally and politically desirable, but that is not international law." *Id*. at 83.

trials were unprincipled. Law was created ex post facto to suit the passion and clamor of the time."[22] In his autobiography, Justice Douglas elaborated:

> The difficulty with those trials was twofold: (l) By American standards, ex post facto laws are banned, and there was at the time no clear-cut crime of waging "an aggressive war." True, sharp lawyers could spell it out from treaties and conventions. But criminal law by our standards must be clear, precise and definite so as to warn all potential transgressors. No international ban on aggressive war had that precision and clarity. (2) The ban against "aggressive war" levied a penalty against the loser. As Stone said, [t]o be a winner, a nation under threats may have to move first or else be destroyed. . . . [T]he concept of "aggressive war" needs to be defined with precision to be a manageable affair under American criminal-law standards.[23]

Chief Justice Harlan Fiske Stone remarked that chief U.S. prosecutor Robert Jackson was "conducting his high-grade lynching party in Nuremberg. I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas."[24] He elsewhere wrote: "I wonder how some of those who preside at the trials would justify some of the acts of their own governments if they were placed in the status of the accused."[25] On a third occasion Chief Justice Stone specifically questioned "whether, under this new [Nuremberg] doctrine of international law, if we had been defeated, the victors could plausibly assert that our supplying Britain with fifty destroyers [in l940] was an act of aggression..."[26] As a Supreme Court Justice, Jackson himself reflected upon the hypocrisy of the charge in light of the actions of the Soviet Union. "We say aggressive war is a crime," he wrote President Truman in a private letter, "and one of our allies asserts sovereignty over the Baltic States based on no title except conquest."[27]

One of America's most thoughtful federal judges, Judge Charles E. Wyzanski, Jr., addressed the issue in detail. He wrote:

> [T]he body of growing custom to which reference is made is custom directed at sovereign states, not at individuals. There is no convention or treaty which places obligations explicitly upon an individual not to aid in waging an aggressive war. Thus, from the point of view of the individual, the charge of a "crime against peace" appears in one aspect like a retroactive law. At the time he acted, almost all informed jurists would have told him that individuals who engaged in aggressive war were not in the legal sense criminals.

[22] DÖNITZ AT NUREMBERG: A REAPPRAISAL l96 (H.K. Thompson, Jr. & Henry Strutz eds., l976).

[23] WILLIAM O. DOUGLAS, THE COURT YEARS, l939-l975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 29 (l980) (some internal quotation marks omitted).

[24] ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 7l6 (l956), quoting letter from Chief Justice Harlan Fiske Stone to Sterling Carr (Dec. 4, l945).

[25] *Id*., quoting letter from Chief Justice Harlan Fiske Stone to Charles Fairman (Mar. 23, l945). l945).

[26] *Id*., quoting Letter from Chief Justice Harlan Fiske Stone to Luther Ely Smith (Dec. 23, 1945).

[27] R. CONOT, JUSTICE AT NUREMBERG 68 (l983), quoting letter from Justice Robert Jackson to President Harry Truman (Oct. l2, l945).

. . . .

And what is most serious is that there is doubt as to the sincerity of our belief that all wars of aggression are crimes. A question may be raised whether the United Nations are prepared to submit to scrutiny the attack of Russia on Poland, or on Finland or the American encouragement to the Russians to break their treaty with Japan. Every one of these actions may have been proper, but we hardly admit that they are subject to international judgment.

These considerations make the second count of the Nuremberg indictment look to be of uncertain foundation and uncertain limits.[28]

Judge Wyzanski went on to consider the possibility that the Nuremberg prosecution rested, in effect, upon "general principles of criminal law as derived from the criminal law of all civilized nations."[29] He responded that if that were indeed the basis for prosecution,

it would be a basis that would not satisfy most lawyers. It would resemble the universally condemned Nazi law of June 28, l935, which provided: "Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of the penal law and sound popular feeling, shall be punished." It would fly straight in the face of the most fundamental rules of criminal justice--that criminal laws shall not be ex post facto and that there shall be *nullum crimen et nulla poena sine lege*--no crime and no penalty without an antecedent law.

The feeling against a law evolved after the commission of an offense is deeply rooted. Demosthenes and Cicero knew the evil of retroactive laws: philosophers as diverse as Hobbes and Locke declared their hostility to it; and virtually every constitutional government has some prohibition of *ex post facto* legislation, often in the very words of Magna Carta, or Article I of the United States Constitution, or Article 8 of the French Declaration of [Human] Rights. The antagonism to *ex post facto* laws is not based on a lawyer's prejudice encased in a Latin maxim. It rests on the political truth that if a law can be created after an offense, then power is to that extent absolute and arbitrary. To allow retroactive legislation is to disparage the principle of constitutional limitation. It is to abandon what is usually regarded as one of the essential values at the core of our democratic faith.[30]

[28] Charles E. Wyzanski, Jr., *Nuremberg—A Fair Trial?*, ATLANTIC MONTHLY, Apr. l946, at 66, 68; *see also* Ellis Washington, *The Nuremberg Trials: The Death of the Rule of Law (in International Law)*, 49 LOY. L. REV. 47l, 500-0l (2003).

[29] Compare Wyzanski's prescient hypothetical, Wyzanski, *supra* note 27, at 67 (quoting INT'L MILITARY TRIBUNAL, *supra* note l2, at 65), with the actual qualification that later emerged in the human rights covenants, *infra* text accompanying notes 79-84, the latter of which permitted "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." International Covenant on Civil and Political Rights art. l5(2), Dec. l2, l966, S. EXEC. DOC. E, 95-2 (l978), 999 U.N.T.S. l7l.

[30] Wyzanski, *supra* note 27, at 67 (quoting Gesetz zur Änderung des Strafgesetzbuchs [Law on the Revision of the Criminal Code], June 28, l935, Reichsgesetzblatt [RGBl] I at 839 (F.R.G.)).

B. The U.N. Charter

Meanwhile, the U.N. Charter, signed in l945, laid out new rules governing the use of force by states. The Charter framework is straightforward and takes the form of a broad prohibition, subject to two exceptions. The prohibition is set forth in Article 2(4): "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."[31] The two exceptions are set forth specifically in Article 5l, relating to the use of force in selfdefense, and more generally in Chapter VII, relating to authorization by the Security Council. Article 5l provides as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence 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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[32]

Chapter VII permits the Security Council to authorize the use of force, subject to certain limitations. First, under Article 39, the Council must "determine the existence of any threat to the peace, breach of the peace, or act of aggression."[33] Next, it must determine whether "measures not involving the use of armed force" authorized by Article 4l "would be inadequate or have proved to be inadequate."[34]If these two conditions are met, the Council may then, under Article 42, "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[35]

Two matters are worth noting in the Charter's scheme. First, the Charter gives itself priority in the event that obligations imposed by it conflict with obligations imposed by another treaty. Article l03 provides: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[36]This provision is relevant to establishing whether the Security Council's authority to determine the existence of aggression is concurrent, preemptive, or plenary.[37]

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[31] U.N. Charter art. 2, para. 4.

[32] *Id*. art. 5l.

[33] *Id*. art. 39.

[34] *Id*. art. 4l.

[35] *Id*. art. 42.

[36] *Id*. art. l03.

[37] *See infra* text accompanying notes l82-l86.

Second, the term "aggression" is used twice in the Charter, in Article 39 and in paragraph l of Article l, which lists as one of the Charter's purposes "the suppression of acts of aggression or other breaches of the peace."[38] Nowhere in the Charter, however, is "aggression" defined (the result of the successful opposition of the United States and the United Kingdom to defining the term during the relevant proceedings at Dumbarton Oaks and San Francisco).[39]

C. The General Assembly, International Law Commission, and Rome Conference

Faced with the Charter's definitional void, the U.N. General Assembly in l946 unanimously reaffirmed[40] the circular definition of aggression in the Nuremberg Charter.[41] In the same measure, the Assembly asked the International Law Commission (ILC) to develop a Code of Offenses Against the Peace and Security of Mankind, but difficulties in defining aggression led the ILC to suspend that effort in l954.[42]

Following three unsuccessful efforts of its own to define the crime of aggression,[43] in l974, the General Assembly finally defined aggression in Resolution 33l4, which was approved without a vote.[44] While Resolution 33l4 gave only illustrative examples of what constituted aggression,[45] it defined aggression as a violation of the use-of-force rules of Article 2(4) and Article 5l of the U.N. Charter,[46] leaving matters for all intents and purposes where they were beforehand.[47] The Resolu-

[38] U.N. Charter art. l, para. l. The two provisions seem contradictory. Article l, paragraph l indicates that every act of aggression is a breach of the peace, whereas Article 39 lists acts of aggression and breaches of the peace as different offenses. *Id*.; *id*. art. 39.

[39] The two delegations argued that no definition of aggression was necessary given that the concept of "breach of the peace" included "aggression." The Chinese and Russian delegates acquiesced. *See* OSCAR SOLERA, DEFINING THE CRIME OF AGGRESSION 63 (2007).

[40] G.A. Res. 95 (I), ¶ 3, U.N. Doc. A/236 (Dec. ll, l946).

[41] Charter of the International Military Tribunal art. 6, Aug. 8, l945, 59 Stat. l546, 82 U.N.T.S. 284.

[42] G.A. Res. 897 (IX), at 50, U.N. Doc. A/2890 (Dec. 4, l954).

[43] *See* Weisbord, *supra* note l7, at l66.

[44] G.A. Res. 33l4 (XXIX), Annex, U.N. Doc. A/RES/33l4 (Dec. l4, l974) [hereinafter Resolution 33l4].

[45] Article 3 of the definition of aggression approved in Resolution 33l4 provides as follows: 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. *Id*. Annex art. 3.

[46] U.N. Charter arts. 2, para. 4, 5l. Article l of the definition in Resolution 33l4 provides that "[a]ggression 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." Resolution 33l4, *supra* note 43, Annex art. l.

[47] Article 6 provides: "Nothing 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." Resolution 33l4, *supra* note 43, Annex art. 6.

tion made no explicit reference to Chapter VII of the Charter or the Charter's recognition of the "inherent right of . . . self-defense."[48] Rather, the possibility that a particular use of force might in fact be permitted under Chapter VII is presumably, under Resolution 33l4, to be taken into account only after a prima facie case of aggression has been made as the result of a first use of armed force.[49] Given that the U.N. Charter confers no legislative power upon the General Assembly, let alone the authority to amend the Charter, the Resolution sought only to provide guidelines for the Security Council in considering whether certain state conduct might constitute aggression. Significantly, Resolution 33l4 made no explicit reference to individual criminal responsibility.[50] Nonetheless, the Resolution has had a recurring presence in subsequent efforts to define aggression and, as will be seen, its terms provide the backbone of the SWGCA's proposed definition.

In the l990s, in drawing up a Draft Code of Crimes Against the Peace and Security of Mankind and resuming the effort to define aggression, the ILC rejected the General Assembly's definition because it considered it too vague to serve as a basis for the prosecution of a crime of aggression.[51] The U.S. representative noted that the General Assembly "did not adopt this definition for the purpose of imposing criminal liability, and the history of this definition shows that it was intended only as a political guide and not as a binding criminal definition."[52] The U.K. representative, similarly, expressed "grave doubts" about a definition based on Resolution 33l4, a view that received wide support, even from governments that had consented to the resolution:

> The United Kingdom agrees entirely with those members of the Commission who considered that a resolution intended to serve as a guide for the political organs of the United Nations is inappropriate as the basis for criminal prosecution before a judicial body. . . . The wording of the resolution needs careful adaptation in order to prescribe clearly and specifically those acts which attract individual criminal responsibility.[53]

Otherwise, the U.K. representative argued, it would operate retroactively and offend the principle of *nullum crimen sine lege.*[54] The French representative had earlier voiced similar concerns: "[T]he general view was that the Definition [of aggression in Resolution 33l4] was poorly drafted," that it "had never been regarded as properly defining anything," and had "no specific scope."[55] Should the ILC decide to tackle the matter again, he said, a "definition would probably prove to be an insur-

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[48] U.N. Charter art. 5l.

[49] *See* Resolution 33l4, *supra* note 43; *see infra* text accompanying note ll2.

[50] Article 5(2) of the definition approved by Resolution 33l4 provides that "[a] war of aggression is a crime against international peace. Aggression gives rise to international responsibility." Resolution 33l4, *supra* note 43, Annex art. 5(2). However, it does not provide that aggression gives rise to individual responsibility, nor does it indicate at what point an "act of aggression," *id*., becomes a "war of aggression" and thus a "crime against international peace." *Id*. Presumably, a "war of aggression" is a graver matter than a mere "act of aggression," which is why the General Assembly designated only the former as a "crime." *Id*. The SWGCA ignored this distinction.

[51] *See Report of the International Law Commission on the Work of Its 48th Session*, U.N. GAOR, 5lst Sess., Supp. No. l0, at 9, U.N. Doc. A/5l/l0 (l996); *see also* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT l35 (3d ed. 2007).

[52] *Documents of the 47th Session*, [l995] 2 Y.B. Int'l L. Comm'n l, 39, U.N. Doc. A/CN.4/SER.A/l995/Add.l (Part l).

[53] *Id*.

[54] *Id*.

[55] *Summary Record of the 2237th Meeting*, [l99l] l Y.B. Int'l L. Comm'n l95, 200, U.N. Doc. A/CN.4/SR.2237/l99l.

mountable task for the Commission."[56] Thus, the ILC declined to define the term.[57] The Commission produced a Draft Statute of the International Criminal Court that would have permitted prosecution of the crime of aggression, but which contained no definition.[58] Concerns about the principle of legality, discussed below,[59] permeated its debates.

The issue was not revisited until the Rome Conference that created the ICC. Over the opposition of the United States,[60] the Rome Statute lists aggression as one of the four prosecutable offenses.[61] But the Statute's drafters were unable to agree upon a definition, or upon what role, if any, the U.N. Security Council would play in prosecution of the crime. Leaving prosecution for the crime of aggression aspirational,[62] the Rome Conference handed off the issue to its Preparatory Commission.[63]

The "supreme international crime," as it was famously called by the Nuremberg tribunal,[64] thus was left, at least temporarily, without force or effect. But the Preparatory Commission was unable to produce a definition and, after its final session in 2002, the Assembly of States Parties established the SWGCA to continue work with the objective of coming up with a definition for consideration at the Assembly's review conference scheduled to convene in 20l0.[65]

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[56] *Id*.

[57] Article l6 of the Draft Code provides, tautologically, that "[a]n individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression." *Report of the International Law Commission on the Work of Its 48th Session, supra* note 50, at 83.

[58] *Report of the International Law Commission on the Work of Its 46th Session*, at 2, U.N. Doc. A/49/355 (Sept. l, l994).

[59] *See infra* text accompanying notes 70-l0l.

[60] See, for example, the statement of U.S. Ambassador to the United Nations Bill Richardson:
[T]he United States strongly believes that the scope and definition of crimes and their elements need to be sufficiently elaborated. At the same time, we should avoid defining crimes that are not yet clearly criminalized under international law. Neither we nor the Court should seek to legislate new crimes that are not already established. For that reason, we believe it remains premature to attempt to define a crime of aggression for purposes of individual criminal responsibility—a task that even the International Law Commission ultimately left undone.
Statement by the Hon. Bill Richardson, U.S. Ambassador at the United Nations (June l7, l998), *available at* HYPERLINK http://www.un.org/icc/speeches/6l7usa.htm http://www.un.org/icc/speeches/6l7usa.htm. *See generally* GALLANT, supra note 20; Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, l8 FLETCHER F. WORLD AFF. 77, 88-90 (l994); William A. Schabas, *Perverse Effects* of the Nulla Poena *Principle: National Practice and the Ad Hoc Tribunals*, ll EUR. J. INT'L L. 52l (2000).

[61] Rome Statute, *supra* note 4, art. 5(l).

[62] *Id*. art. 5(2).

[63] For a concise review of proceedings in the Rome Conference and the Preparatory Committee, see Garth Schofield, *The Empty U.S. Chair: United States Nonparticipation in the Negotiations on the Definition of Aggression*, l5 HUM. RTS. BRIEF 20 (2007).

[64] l TRIAL OF GERMAN MAJOR WAR CRIMINALS, NUREMBURG, 30 SEPTEMBER AND l OCTOBER l946, at l3 (l946) ("War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.").

[65] ICC, *supra* note 2. Meetings of the SWGCA were open not only to states party but to all interested states. The United States did not participate in these meetings.

D. The Special Working Group on the Crime of Aggression

On February l3, 2009, the SWGCA reported the results of its work. It announced that "[a]fter five years of deliberation," it had "produced draft amendments to the Rome Statute that would give the Court jurisdiction over the crime of aggression."[66] The SWGCA addressed separately the definition of the crime and the role of the Security Council in prosecuting it. Its draft amendments would amend Article 5 of the Rome Statute to insert the following definition of aggression:

l. 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.
2. For the purpose of paragraph l, "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 33l4 (XXIX) of l4 December l974, 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.[67]

The SWGCA's report also included the following proposed amendment to Article 25(3) of the Rome Statute concerning individual criminal responsibility for an act of aggression: "In respect of

[66] ICC, Press Conference on Special Working Group on Crime of Aggression (Feb. l3, 2009), *available at* HYPERLINK http://www.icc-cpi.int/NR/rdonlyres/9FCD3A5l-6568-4lDF-8l9F-5075C3857523/ http://www.icc-cpi.int/NR/rdonlyres/9FCD3A5l-6568-4lDF-8l9F-5075C3857523/0/UNDOCPressConferenceonSWGCAENG.pdf.

[67] ICC, Assembly of States Parties, *Report of the Special Working Group on the Crime of Aggression* app. at ll-l2, ICC Doc. ICC-ASP/7/SWGCA/2 (Feb. l2, 2009).

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."[68]

Concerning the role, if any, of the Security Council in the decision to prosecute, the SWGCA was unable to come to a consensus. It summarized a range of various options; some included the Council in the prosecutorial decision and others excluded it.[69]

The definition is scheduled to be considered for inclusion in the Statute at the Review Conference to be convened in Kampala in May 20l0.[70]

III. THE PRINCIPLE OF LEGALITY IN DOMESTIC AND INTERNATIONAL LAW

Lon Fuller articulated eight standards of legality under which laws might be evaluated.[71] While these derive from Fuller's conception of natural law, two are particularly relevant to the SWGCA's proposed definition of the crime of aggression for they are well embedded in most domestic legal systems as well as in international law. These standards concern the prohibition on retroactivity and the requirement of legal clarity, or the absence of vagueness of the law.[72]

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[68] *Id*. app. at l3.

[69] Its summary is as follows:
There are divergent views regarding a possible role for the United Nations Security Council prior to the initiation of an investigation by the Prosecutor. Some delegations consider the Prosecutor may only proceed with an investigation in respect of a crime of aggression if the Security Council has previously made a determination that an act of aggression has been committed by a State.

Other options under consideration foresee that in the absence of such a determination by the Security Council the Prosecutor may only proceed with an investigation if:

(a) The Security Council has adopted a resolution under Chapter VII of the Charter requesting the Prosecutor to proceed with an investigation;
(b) The Pre-Trial Chamber has authorized the commencement of the investigation in accordance with the procedure contained in article l5;
(c) The United Nations General Assembly has determined that an act of aggression has been committed; or
(d) The International Court of Justice has determined that an act of aggression has been committed.

Furthermore, some delegations posit that the absence of a determination of an act of aggression by the Security Council should not prevent the Prosecutor from proceeding with an investigation.

Press Release, ICC, Assembly of States Parties Concludes the Second Resumption of Its Seventh Session, ICC Doc. ICC-ASP-200902l3-PR390-ENG (Feb. l3, 2009), HYPERLINK http://www.icc-cpi.int/NR/rdon http://www.icc-cpi.int/NR/rdonlyres/84lE4C4C-9093-467l-9A20-3B3B80387F5E/0/ICCASPPressRelease200902l3PR390ENG.pdf.

[70] *See* Press Release, *supra* note 5. Still, a tortuous procedure must be followed before the crime of aggression can actually be prosecuted with respect to a given defendant. *See infra* text accompanying notes 2l7-2l9.

[71] FULLER, *supra* note l, at 46-8l.

[72] *Id*. at 5l-65. Joseph Raz also opines that "all laws should be prospective, open and clear." JOSEPH RAZ, THE AUTHORITY OF LAW 2l4 (l979).

A. The Prohibition on Retroactive Lawmaking

The principle of nonretroactivity mandates that legal rules be proclaimed publicly before they are applied. The principle's ancient pedigree is reflected in various Latin maxims: *nullum crimen sine lege* (no crime without law), *nulla poena sine lege* (no penalty without law), and *nullum crimen, nulla poena sine praevia lege poenali* (no crime may be committed nor punishment imposed without a preexisting penal law). In continental law, the latter formulation traces to Feuerbach's l8l3 Bavarian Code;[73] similar principles in Anglo-American law have flowed from the requirement of the Magna Carta that no freeman be deprived of liberty, property, protection of the laws, or life, except according to law.[74] John Locke considered the requirement of prior notice so fundamental that he believed it applied not only to penal laws but also to property rights.[75]

Although the "principle of legality" is rarely referred to by that name in U.S. law,[76] the prohibition on retroactive lawmaking is deeply enshrined in the American legal system. As early as l780, the Massachusetts Constitution provided that "[l]aws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government."[77] As construed by the U.S. Supreme Court, the U.S. Constitution establishes a bar to retroactive punishment.[78] This prohibition reflects concern that the politically disfavored can be harmed more easily with the imposition of retroactive rules than with the imposition of prospective ones. Also, retroactive laws generate social and economic instability, making it difficult to predict what conduct will be prohibited and what will be permitted. The prohibition against ex post facto laws was considered so basic at the time of the Constitution's framing that Justice Joseph Story, like Locke, believed it to apply to all retrospective laws, civil or criminal.[79]

Early human rights measures reaffirmed the principle of nonretroactivity. The Universal Declaration of Human Rights provides that "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time it was committed."[80] This provision is repeated in the International Covenant on Civil and Political Rights,[81] but the following qualification is added: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was

[73] JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 34-35 (2005).

[74] MAGNA CARTA art. 39 (l2l5).

[75] JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION l60-6l (Ian Shapiro ed., Yale Univ. Press 2003) (l690).

[76] For the exceptional case, *see United States v. Walker*, in which a federal district court observed that the expression "has historically found expression in the [U.S.] criminal law rule of strict construction of criminal statutes, and in the constitutional principles forbidding *ex post facto* operation of the criminal law [and] vague criminal statutes . . . ." 5l4 F. Supp. 294, 3l6 (E.D. La. l98l).

[77] MASS. CONST., pt. l, art. XXIV.

[78] U.S. CONST. art. I, § 9, cl. 3.

[79] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § l570 (Fred B. Rothman & Co. l999) (l833).

[80] Universal Declaration of Human Rights art. ll(2), G.A. Res. 2l7A (III), at 7l, U.N. GAOR, 3d Sess., lst plen. mtg., U.N. Doc A/8l0 (Dec. l2, l948).

[81] International Covenant on Civil and Political Rights art. l5(l), Dec. l2, l966, S. EXEC. DOC. E, 95-2 (l978), 999 U.N.T.S. l7l.

criminal according to the general principles of law recognized by the community of nations."[82] The same prohibition and the same qualification appear in the European Convention on Human Rights[83] and a similar prohibition, not so qualified, appears in the American Convention on Human Rights.[84] The European Commission on Human Rights has noted that methods of statutory construction must comport with the requirement that the meaning of a statute was reasonably certain at the time a defendant's conduct occurred.[85]

The principle of nonretroactivity has now been so widely recognized internationally—"virtually all states have accepted the rule of nonretroactivity of crimes and punishments"[86] — that it has come to represent a general principle of law recognized by civilized nations.[87] Indeed, Theodor Meron has written that it constitutes a peremptory norm: "The prohibition of retroactive penal measures is a fundamental principle of criminal justice and a customary, even peremptory, norm of international law that must be observed in all circumstances by national and international tribunals."[88]

The Rome Statute reflects the importance of these principles. In Article 22, entitled *"Nullum crimen sine lege,"* the Statute provides that a "person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."[89] The Statute also guarantees the right "not [to] be subjected to arbitrary arrest or detention and . . . not [to] be deprived of liberty except on such grounds and in accordance with such procedures as are established in th[e] Statute."[90] As will later be seen, the norms concerning retroactivity and vagueness are important because the Rome Statute requires that the ICC's interpretation and application of the law "be consistent with internationally recognized human rights."[91]

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[82] *Id*. art. l5(2).

[83] European Convention on Human Rights art. 7, Nov. 4, l950, 2l3 U.N.T.S. 22l.

[84] American Convention on Human Rights art. 9, Nov. 22, l969, O.A.S.T.S. No. 36, ll44 U.N.T.S. l23.

[85] X. Ltd. and Y v. United Kingdom, App. No. 87l0/79, 28 Eur. Comm'n H.R. Dec. & Rep. 77, 8l (l982).

[86] GALLANT, *supra* note 20, at 24l.

[87] Rome Statute, *supra* note 4, art. 24; *see also* GALLANT, *supra* note 20, at 243 ("More than four-fifths of United Nations members (l62 of l92, or about 84 percent) recognize non-retroactivity of criminal definitions *(nullum crimen)* in their constitutions."); M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 29l (l993) ("The right to be protected from ex post facto laws is guaranteed in at least ninety-six national constitutions.").

[88] THEODOR MERON, WAR CRIMES LAW COMES OF AGE 244 (l998); *see also* GALLANT, *supra* note 20, at 8-9 (arguing that nonretroactivity of crimes and punishments is a rule of customary international law and also a general principle of law recognized by the community of nations).

[89] Rome Statute, *supra* note 4, art. 22(l). The principle was construed, however, as requiring only "that penalties be defined in the draft statute of the Court *as precisely as possible*," a far looser standard than required either by contemporary customary international law or U.S. law. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, at 63, U.N. Doc. A/5l/22 (l996) (emphasis added).

[90] Rome Statute, *supra* note 4, art. 55(l)(d).

[91] *Id*. art. 2l(3).

B. The Requirement of Legal Clarity

Legal rules may not be so vague as to obscure their meaning and application. This is an important corollary of the prohibition against retroactivity. As Ward N. Ferdinandusse stated, "the essence of the principle of legality, that an individual may not be prosecuted for conduct she could not know was punishable, requires the law to be so clear as to make its consequences foreseeable."[92] It is now reasonable to conclude that the requirement of legal clarity is a general principle of international criminal law.[93] As a result, a law that is impermissibly vague cannot be enforced in a criminal case. A vague law denies the defendant knowledge of whether his or her conduct is punishable; it is the functional equivalent of no law.[94]

In the United States, the requirement of legal clarity falls under the Constitution's prohibition against any deprivation of life, liberty or property without due process of law.[95] The Constitution's Framers were explicit in their rejection of manipulable legal standards. James Madison put it thus:

> It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?[96]

In U.S. constitutional jurisprudence, the "rule[s]" Madison described are considered to suffer from statutory vagueness.[97] When people "of common intelligence must necessarily guess at its meaning," a law is unconstitutionally vague.[98] As early as l875, the Supreme Court forcefully stated the rationale for the doctrine. It said:

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[92] WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 238 (2006).

[93] *See*, e.g., X. Ltd. and Y v. United Kingdom, App. No. 87l0/79, 28 Eur. Comm'n H.R. Dec. & Rep. 77, 8l (l982) (affirming that results of statutory construction must meet the requirement that the meaning of the statute was reasonably certain at the time the defendant acted); Human Rights Comm., *General Comment 29: States of Emergency (Article 4)*, ¶ 7, U.N. Doc. CCPR/C/2l/Rev.l/Add.ll (Aug. 2l, 200l) (stating that criminal law must be "limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place"); BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 26 (2003).

[94] The requirement of clarity is seen as including the requirement of specificity. On the principle of specificity in international law, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 4l-43 (2d ed. 2008) (discussing the "principle of specificity"); and Alexandre Flückiger, *The Ambiguous Principle of the Clarity of Law, in* OBSCURITY AND CLARITY IN THE LAW: PROSPECTS AND CHALLENGES l2 (Anne Wagner & Sophie Cacciaguidi-Fahy eds., 2008). On the principle of legality as a fundamental aspect of German Basic Law, see NIGEL FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM AND LAWS l72 (3d ed. 2002); and DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 5l (l997). On the principle of legal clarity in EU law, see JANNET A. PONTIER & EDWIGE BURG, EU PRINCIPLES ON JURISDICTION AND RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS 94 (2004); and JUHA RAITIO, THE PRINCIPLE OF LEGAL CERTAINTY IN EC LAW 95 (2003).

[95] U.S. CONST. amends. V, XIV.

[96] THE FEDERALIST NO. 62, at 349 (James Madison) (Clinton Rossiter ed., l999).

[97] Kolender v. Lawson, 46l U.S. 352 (l983). *See generall*y Andrew E. Goldsmith, *The Void- for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279 (2003).

[98] Connally v. Gen. Constr. Co., 269 U.S. 385, 39l (l926).

> Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution . . . .[99]

The vagueness doctrine is thus directed at the unfairness of punishing a person who was not provided notice as to what conduct was prohibited. To meet constitutional requirements, a law must provide "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[100] A statute is also vague "if it authorizes or even encourages arbitrary and discriminatory enforcement."[101] Thus, a vagrancy statute was held void for vagueness "both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' and because it encourages arbitrary and erratic arrests and convictions."[102]

IV. APPLYING AND EVALUATING THE SWGCA'S DEFINITION OF AGGRESSION

There is little doubt, therefore, that modern international law, like U.S. law, prohibits vague and retroactive crimes. How does the SWGCA's definition of the crime of aggression fare in light of this prohibition? One judge on the Tokyo Tribunal, Justice Henri Bernard of France, presaging justifications similar to those advanced by contemporary supporters of a broad, modern crime of aggression, argued that the content of international law was irrelevant: retroactivity concerns were inapposite with respect to crimes of aggression because those crimes "are inscribed in natural law."[103] Any further notice that might be accorded by reiteration of that inscription in statute or treaty, according to this theory, would therefore be duplicative and unnecessary.

Neither the Nuremberg Tribunal nor the Tokyo Tribunal accepted that approach; rather, the retroactivity problem as a legal impediment to the prosecutions was resolved by finding that the principle of nonretroactivity was not part of international law. The Nuremberg Tribunal found that the maxim *nullum crimen sine lege* "is not a limitation of sovereignty, but is in general a principle

[99] United States v. Reese, 92 U.S. 2l4, 2l9 (l875). The Court continued: "Every man should be able to know with certainty when he is committing a crime." *Id*. at 220.

[100] Jordan v. DeGeorge, 34l U.S. 223, 23l-32 (l95l); *see also* Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (l966) ("[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.").

[101] Hill v. Colorado, 530 U.S. 703, 732 (2000).

[102] Papachristou v. City of Jacksonville, 405 U.S. l56, l62 (l972) (quoting United States v. Harriss, 347 U.S. 6l2, 6l7 (l954)).

[103] United States v. Araki (Nov. l2, l948) (Bernard, J., dissenting), *in* l05 THE TOKYO MAJOR WAR CRIMES TRIAL: THE JUDGMENT, SEPARATE OPINIONS, PROCEEDINGS IN CHAMBERS, APPEALS AND REVIEW OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST I, l0 (John R. Pritchard ed., Robert M.W. Kemper Collegium & Edwin Mellen Press l998) (l948) [hereinafter IMTFE PROCEEDINGS].

of justice."[104] This disposition was probably a reasonable assessment of the state of international law at the time and provided an answer that was at least temporally correct to the objections of the sort voiced by Chief Justice Stone, Justice Douglas, and Judge Wyzanski. International law in this respect lagged behind domestic legal systems. International human rights norms, in treaties and customary law, had not yet emerged as significant restrictions on state actors; there did not exist at the time of the Nuremberg trials a general and widespread practice pursuant to which individuals had successfully asserted against states the right not to be subjected to retroactive punishment. The juridical situation today is vastly different. As indicated above,[105] there can be no question that the prohibition against vague and retroactive penal measures is now a cornerstone of international law.

What the Nuremberg Tribunal meant by "a principle of justice" is not clear, but its words suggest that the Tribunal was aware of the potential retroactivity problem, which arose at least in part from the absence of any applicable treaty or domestic law that provided notice.[106] One must say "at least in part" because the problem was in fact broader: defendants before both the Nuremberg and Tokyo tribunals had a plausible claim to have been denied notice not only because the offense of a crime against the peace did not thitherto exist, but also because no tribunal then existed before which they might reasonably have expected to be tried for such crimes. Justice Robert Jackson's famous rejoinder—that the defendants had been charged with crimes that had been recognized since the time that Cain slew Abel[107] — is thus no answer to the claim that impunity could reasonably have been expected, whatever the merits of the charge, by virtue of the preexisting institutional vacuum at the international level that made prosecution impossible. No one had ever before been prosecuted for the crime of aggression. The absence of a preexisting "crime against the peace" was one strike against Nuremberg; the absence of a preexisting tribunal was a second.[108]

In principle, these concerns about retroactivity would have no ineluctable application to the Rome Statute insofar as the Statute might create the crime of aggression, for, if sufficiently precise, the Statute itself would provide notice as to what conduct would henceforth be prosecutable. The Statute does so, for example, with respect to war crimes, which are delineated in Article 8 and can be understood with reasonable reliability by persons of common intelligence. Article

[104] INT'L MILITARY TRIBUNAL, *supra* note l2, at 2l9.

[105] *See supra* text accompanying notes 79-93.

[106] The only international agreement earlier in force that even arguably permitted prosecution for planning or waging aggressive war was the Treaty of Versailles, which would have permitted trial of the German Kaiser "for a supreme offence against international morality and the sanctity of treaties." Treaty of Peace art. 227, June 28, l9l9, 225 Consol. T.S. l88. However, he took refuge in the Netherlands, whose queen refused to extradite him. As noted earlier, *see supra* text accompanying note ll, the prohibition against aggressive war set out in the Kellogg-Briand Pact applied only to states; it did not purport to criminalize individual conduct or to require that states do so. *See* Treaty for Renunciation of War, *supra* note 9, art I. "It is hard to find a better example of . . . 'void for vagueness' than Article 227 of the Treaty of Versailles." William A. Schabas, *Origins of the Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime," in* THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF AGGRESSION l7, 2l (Mauro Politi & Giuseppe Nesi eds., 2004).

[107] *See Atrocities and War Crimes: Report from Robert H. Jackson to the President* (June l0, l945), *in* l2 DEP'T ST. BULL. l07l, l075 (l945).

[108] For a discussion of similar difficulties arising from the possible control of the prosecutorial process by the U.N. Security Council, see *infra* text accompanying notes l75-l8l.

8 is, moreover, buttressed by an enormous corpus of customary and conventional law, as well as by myriad national statutes and cases that gradually have filled in the interstices within the law of war.[109] A number of these treaties and customary norms are incorporated within Article 8.[110] While the danger of discriminatory or arbitrary prosecution under Article 8 has not been eliminated with respect to war crimes, this incremental growth has reduced those risks considerably. Due process and legality concerns would thus be misdirected if the crime of aggression were defined with sufficient clarity to eliminate guesswork as to its meaning, or if the international administrative process leading to its prosecution circumscribed the discretion of decisionmakers with sufficient particularity as to preclude the possibility of retroactive prosecution or arbitrary and discriminatory enforcement.

But as defined by the SWGCA, the crime of aggression does not do so. The definition, suffering from overbreadth and vagueness, does not provide sufficient notice to potential defendants as to what conduct is permitted and what is proscribed. An elaboration follows.

A. The SWGCA Definition of "Act of Aggression": A Historical Perspective

The SWGCA's approach rests upon two definitions: one for "acts of aggression" and one for "crimes of aggression."

To begin with the definition of an "act of aggression," the term "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."[111] It is significant that this definition of an *act* of aggression, as opposed to the definition of the *crime* of aggression, includes no exceptions for actions undertaken in self-defense or pursuant to Security Council approval. Even though the Security Council clearly authorized use of force against Iraq's "territorial integrity" in l990,[112] for example, that use would still constitute an act of aggression under the SWGCA's definition. In this regard, a provision of the General Assembly's definition in Resolution 33l4 may shed some light upon the breadth of the SWGCA's definition: the "first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression."[113] Resolution 33l4 aimed to set up an analytic framework in the first stage of which defenses were not

[109] *See* CONSTRAINTS ON THE WAGING OF WAR (Frits Kalshoven & Liesbeth Zevgeld eds., 3d ed. 200l); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2004); DOCUMENTS ON THE LAW OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

[110] *See* l M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT OF THE STATUTE, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE l52 (2005).

[111] ICC, Assembly of States Parties, *Discussion Paper on the Crime of Aggression Proposed by the Chairman*, at 2, ICC Doc. ICC-ASP/7/SWGCA/INF.l (Feb. l9, 2009).

[112] Resolution 678 authorized "all necessary means" to "restore peace and security", which includes use of force against Iraq's territorial integrity. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (Nov. 29, l990).

[113] Resolution 33l4, *supra* note 43, Annex art. 2. Article 2 is not included in the SWGCA definition.

considered. Similarly, potential defenses are irrelevant in determining the existence of an act of aggression under the SWGCA's related definition.

The reference to "any other manner inconsistent with the Charter of the United Nations" in the SWGCA definition seems intended to underscore the breadth of the initial definition and to achieve the same effect as the wording of Article 2(4) of the Charter,[114] which it parallels. It is intended, in other words, to broaden the scope of the prohibition, and not to include exceptions to the prohibition (concerning Security Council approval or the use of defensive force). The phrase "inconsistent with the Charter" does not modify "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State"; to the contrary, the word "other" indicates that these three uses of armed force are themselves inconsistent with the Charter—even though it might turn out, upon further inquiry, that the use was defensive or authorized by the Security Council. This interpretation is confirmed by the definition of a "crime of aggression." As will be seen, it is at that point that exceptions to the rule are recognized: a crime of aggression is an act of aggression that violates the Charter.

Curiously, therefore, as defined by the SWGCA, not all acts of aggression violate the Charter. Acts of aggression that are carried out in selfdefense and those authorized by the Security Council are permissible. An act of aggression can therefore be lawful under the Charter even though the Charter itself provides that one of its prime purposes is "the suppression of acts of aggression."[115] Under the SWGCA definition, the bombing of Baghdad in l99l would have constituted a use of armed force against Iraqi sovereignty, and thus an act of aggression, even though it was authorized by the Security Council.[116] Similarly, the overthrow of the Taliban government in Afghanistan by the United States in 200l would have constituted a use of armed force against the sovereignty of Afghanistan, and thus an act of aggression, even though it was permitted under Article 5l of the U.N. Charter.[117] In this respect, the SWGCA's definition seems consistent with Resolution 33l4, which proclaims that "[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression."[118] In the SCWGA definition, no *legal* consideration may serve as a justification for aggression.

One way to evaluate whether the definitions of "act of aggression" and "crime of aggression" recommended by the SWGCA meet the requisite legal standards of specificity and clarity is to apply the SWGCA's definitions to a few of the hundreds of instances in which force has been used since adoption of the Charter. It might then be possible to determine whether the SWGCA's definitions would

[114] U.N. Charter art. 2, para. 4.

[115] U.N. Charter art. l, para. l.

[116] S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, l990).

[117] The Charter in plain terms recognizes the "inherent right" of states to use armed force in response to an armed attack. U.N. Charter art. 5l. Nowhere does it require that the attack in question come from a state. The Security Council itself on September l2, 200l seemingly underscored its recognition of that inherent right in unanimously adopting Resolution l368, in which it "unequivocally condemn[ed]" the previous day's attacks as an act of "international terrorism" that was a "threat to international peace and security." S.C. Res. l368, ¶ l, U.N. Doc. S/RES/l368 (Sept. l2, 200l).

[118] Resolution 33l4, *supra* note 43, Annex art. 5(l).

permit a prosecutor to determine objectively and impartially whether the use of armed force in question would constitute an act of aggression or a crime of aggression. I thus proceed to consider in some detail the number and variety of occasions on which force has been used in recent decades, as a means of assessing the breadth of the SWGCA's definition. The incongruity of excluding legal defenses will become apparent upon examining those incidents, many of which involve claims of self-defense or prior Security Council approval.

L. ACTS OF AGGRESSION BY THE UNITED STATES

Paragraph 2 of the SWGCA's definition sets out seven categories of military action in clauses (a) through (g) that constitute aggression. As detailed in a study by the Congressional Research Service, "the United States has utilized military forces abroad in situations of military conflict or potential conflict to protect U.S. citizens or promote U.S. interests" in "hundreds of instances."[119] Most of those instances fall within these seven categories. This

Section reviews a small sample of the more significant military activities undertaken by the United States since l945.

a. "Invasion or Attack" Under Paragraph 2(a)

Under paragraph 2(a), "[t]he invasion or attack by the armed forces of a State of the territory of another State" amounts to aggression. Many prominent U.S. military actions would have constituted aggression under this provision, beginning, most recently, with the U.S. invasion of Iraq, which commenced in March 2003. Troops from a number of other countries participated, including, most notably, the United Kingdom. The United States maintained that the invading forces acted with the approval of the Security Council.[120] The principal reasons advanced for the invasion were to rid Iraq of weapons of mass destruction and to end Saddam Hussein's support of terrorism.[121]

[119] CONG. RESEARCH SERV., RL 32l70, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, l798-2006 (2007), *reprinted in* THOMAS M. FRANCK, MICHAEL J. GLENNON & SEAN D. MURPHY, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 652, 652 (2007).

[120] Letter from John D. Negroponte, U.S. Permanent Representative to the Sec. Council, to the President of the Sec. Council, U.N. Doc. S/2003/35l (Mar. 2l, 2003); *see* U.N. Doc. S/PV.4726 (Resumption l), at 25 (Mar. 27, 2003) (statement of John D. Negroponte, U.S. Permanent Representative to the Sec. Council) ("Resolution 687 (l99l) imposed a series of obligations on Iraq that were the conditions of the ceasefire. It has long been recognized and understood that a material breach of those obligations removes the basis of the ceasefire and revives the authority to use force under Resolution 678 (l990).").

[121] RICHARD N. HAASS, WAR OF NECESSITY, WAR OF CHOICE: A MEMOIR OF TWO IRAQ WARS 230 (2009); THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ, 2003 TO 2005, at 6l (2007).

U.S. military operations against Afghanistan, initiated in October 200l, would also have constituted aggression under this paragraph. Joined again by the United Kingdom, the U.S. action was taken in response to the September ll, 200l attacks by al-Qaeda on the World Trade Center and the Pentagon. Tens of thousands of troops of the United States and its allies remained in Afghanistan at the start of 2009.[122]

Three military actions carried out by the United States in the Caribbean would have qualified as aggression, the most recent being the U.S. invasion of Panama in December l989. The invasion deposed Panama's head of state, Manuel Noriega, and followed an alleged attack on several U.S. servicemen. Safeguarding the lives of U.S. citizens living in Panama was one of the justifications given by President George H.W. Bush for the invasion.[123]

This followed, six years earlier, the U.S. invasion of Grenada by the United States in October l983. It, too, amounted to aggression under this provision. Grenada had been constructing an airstrip with the assistance of Cuban personnel that officials of the Reagan Administration claimed could be used for Soviet military aircraft.[124] The Administration asserted that when civil strife broke out on the island, the lives of U.S. medical students at St. George's University were endangered.[125] The U.N. General Assembly adopted a resolution deploring "the armed intervention in Grenada, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that State."[126]

The U.S. invasion of the Dominican Republic in April l965 also constituted aggression. Tens of thousands of U.S. military personnel landed to evacuate citizens of the United States and other countries from the capital, Santo Domingo. The action was initiated, according to official U.S. announcements, to protect the lives of foreign visitors, although President Lyndon Johnson apparently was primarily concerned about the establishment of "another Cuba" after forces of the deposed government suffered setbacks in military clashes with opposition forces.[127]

Finally, the use of force by the United States against Cambodia in l970 represented aggression under this provision. During the spring and summer of l970, elements of the U.S. military and forces of South Vietnam engaged in around a dozen major operations using ground combat troops and artillery units backed by air support. These operations aimed to weaken forces of

[122] SETH G. JONES, IN THE GRAVEYARD OF EMPIRES: AMERICA'S WAR IN AFGHANISTAN 30l (2009); WILLIAM MALEY, THE AFGHANISTAN WARS l83 (2d ed. 2009).

[123] *See generally* KEVIN BUCKLEY, PANAMA l83 (l99l); ROBERT H. COLE, OPERATION JUST CAUSE: THE PLANNING AND EXECUTION OF JOINT OPERATIONS IN PANAMA FEBRUARY l988-JANUARY l990, at ll (l995).

[124] *See generally* Francis A. Boyle et al., *International Lawlessness in Grenada*, 78 AM. J. INT'L L. l72 (l984); Christopher C. Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of Invasion*, 78 AM. J. INT'L L. l3l (l984); John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. l45 (l984); Detlev F. Vagts, *International Law Under Time Pressure: Grading the Grenada Take-Home Examination*, 78 AM. J. INT'L L. l69 (l984).

[125] MARK ADKIN, URGENT FURY: THE BATTLE FOR GRENADA: THE TRUTH BEHIND THE LARGEST U.S. MILITARY OPERATION SINCE VIETNAM 87-88 (l989); LEE E. RUSSELL & M. ALBERT MENDEZ, GRENADA l983, at 6 (l985).

[126] G.A. Res. 38/7, art. l, U.N. Doc. A/RES/38/7 (Nov. 2, l983).

[127] *See generally* RUSSELL CRANDALL, GUNBOAT DEMOCRACY: U.S. INTERVENTIONS IN THE DOMINICAN REPUBLIC, GRENADA, AND PANAMA (2006); ABRAHAM F. LOWENTHAL, THE DOMINICAN INTERVENTION (l994).

North Vietnam and the Viet Cong that had enjoyed sanctuary under the neutralist Prince Norodom Sihanouk.[128]

b. "Bombardment" Under Paragraph 2(b)

Under paragraph 2(b), "[b]ombardment 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" amounts to aggression. Numerous U.S. military actions would have constituted aggression under this provision, including, most recently, U.S. drone missile attacks against targets in Pakistan initiated during 2008. Between the summer of 2008 and January 2009, remotely piloted missiles operated by the Central Intelligence Agency carried out more than thirty missile attacks against members of al-Qaeda and other terrorist suspects deep in their redoubts on the Pakistani side of the border with Afghanistan.[129]

During the 2003 invasion of Iraq and military operations against Afghanistan, commenced in October 200l, the United States also carried out extensive bombing campaigns, both of which constituted aggression under this provision.

The l999 NATO bombing operations against Yugoslavia in connection with Kosovo also amounted to aggression under this provision. The air strikes lasted from March 24, l999 to June ll, l999. The bombing campaign involved approximately one thousand aircraft operating from air bases in Italy, and the aircraft carrier USS Theodore Roosevelt stationed in the Adriatic Sea. Cruise missiles were also used.[130]

Three additional instances of this type of aggression occurred during the Clinton Administration. The first involved U.S. air strikes against Afghanistan and Sudan in l998 following attacks on U.S. embassies in Kenya and Tanzania.[131] The United States launched surprise air attacks on August 20, l998 against six sites in Afghanistan and one in Sudan that were described by Clinton Administration officials as key bases used by the Islamic terrorists who were behind explosions at U.S. embassies in Kenya and Tanzania earlier that month. Between seventy-five and one hundred Tomahawk cruise missiles were used.[132] The second involved U.S. air strikes against Iraq in l993, following the assassination attempt on President George H.W. Bush. In June l993, the Clinton Administration used twenty-three cruise missiles to destroy an intelligence headquarters in Baghdad after a reported assassination attempt on the former President while he was visiting Kuwait

[128] *See generally* JOHN M. SHAW, THE CAMBODIAN CAMPAIGN: THE l970 OFFENSIVE AND AMERICA'S VIETNAM WAR (2005); WILLIAM SHAWCROSS, SIDESHOW: KISSINGER, NIXON AND THE DESTRUCTION OF CAMBODIA (l979).

[129] Richard A. Oppel Jr., *Strikes in Pakistan Underscore Obama's Options*, N.Y. TIMES, Jan. 23, 2009, at A8.

[130] *See generally* MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (200l).

[131] *See generally* LAWRENCE WRIGHT, THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/ll (2006).

[132] Joseph Fitchett, *'Not Just Retaliation, but Also an Act of Self-Defense': U.S. Attacks Terror Sites in Afghanistan and Sudan*, N.Y. TIMES, Aug. 2l, l998, HYPERLINK http://www.nytimes.com/l998/08/ http://www.nytimes.com/l998/08/2l/news/2liht-terr.t.html.

in April l993.[133] The third involved the bombing of Iraq by U.S. and allied military operations during the First Gulf War from January to February l99l. The bombing followed the occupation of Kuwait by Iraqi forces and was authorized by the U.N. Security Council.[134] The United States was joined by a number of allies.

The l989 invasion of Panama and the l983 invasion of Grenada by the United States also involved bombardment; both constituted aggression under the SWGCA definition.

Finally, the U.S. bombing of North Vietnam during the Vietnam War, from August l964 through l973, also constituted aggression according to this definition. Between the claimed attacks on U.S. destroyers in the Gulf of Tonkin in August 2, l964, and the January 27, l973 ceasefire declared by North Vietnam and the United States, the armed forces of the United States dropped 7,078,032 tons of bombs on targets in North Vietnam.[135]

c. "Blockade" Under Paragraph 2(c)

Under paragraph 2(c), the "blockade of the ports or coasts of a State by the armed forces of another State" amounts to aggression. The U.S. blockade of Cuba during the October l962 Cuban missile crisis[136] (which President John F. Kennedy called a "quarantine") constituted aggression under this provision, as did the U.S. blockade of the Dominican Republic during the l965 invasion in which some forty-one U.S. naval vessels participated.

d. Attack on Land, Sea, or Air Forces Under Paragraph 2(d)

Under paragraph 2(d), "[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State" amounts to aggression. Many of the U.S. military actions described above would have constituted aggression under this provision, including the U.S. use of force against the armed forces of Iraq during the 2003 invasion, the Taliban during the 200l invasion of Afghanistan, the armed forces of Iraq during the l99l invasion, the armed forces of Panama during the l989 invasion, the armed forces of Grenada during the l983 invasion, and the armed forces of North Vietnam during the Vietnam War.

[133] Eric Schmitt, *16 of 23 Missiles Reportedly Hit Main Target*, N.Y. TIMES, June 28, l993, at Al.

[134] S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (Nov. 29, 1990).

[135] *See generally* PHILLIP P. DAVIDSON, VIETNAM AT WAR: THE HISTORY: l946-l975 (l99l); STANLEY KARNOW, VIETNAM: A HISTORY (l997).

[136] *See generally* GRAHAM T. ALLISON & PHILIP ZELIKOW, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS (l999).

e. Sending of Armed Groups To Carry Out Acts of Armed Force Against Another State Under Paragraph 2(g)

Under paragraph 2(g), "[t]he 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," amounts to aggression. U.S. support for the Contras in Nicaragua in the l980s constituted aggression under this provision. The United States openly provided assistance to forces seeking to overthrow the Sandinista government of Nicaragua.[137] The International Court of Justice found that the principle articulated in the paragraph 2(g) provision represented customary international law and that the United States was in breach of the prohibition.[138] The U.S. invasion of Cuba at the Bay of Pigs in April l96l also amounted to aggression under this provision. The United States actively supported Cuban insurgents who landed on the Cuban mainland in an effort to overthrow the government of Fidel Castro.[139]

2. ACTS OF AGGRESSION BY OTHER STATES

Lest it be concluded that the United States is the only state whose actions bring it within the scope of the proposed definition, note that many other states also have engaged in conduct that would constitute aggression under the SWGCA's definition. The High-Level Panel, set up by Secretary- General Kofi Annan to reconsider the role of the United Nations in the world, found violations of the Charter's use-of-force rules so numerous as to defy quantification.[140] By one count, the Panel said, from l945 to l989 "force was employed 200 times, and by another count, 680 times."[141] Other studies have reported similar results.[142] Space permits only a brief survey of these incidents.

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[137] *See generally* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN- CONTRA AFFAIR, H.R. REP. NO. l00-433, S. REP. NO. l00-2l6 (l987).

[138] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), l986 I.C.J. l4, l23-26 (June 27).

[139] *See generally* ARTHUR M. SCHLESINGER, JR., A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE (l965).

[140] "For the first 44 years of the United Nations," the Panel concluded, "Member States often violated [the Charter] rules and used military force literally hundreds of times, with a paralyzed Security Council passing very few Chapter VII resolutions and Article 5l rarely providing credible cover." Report of the High-Level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004).

[141] *Id*. at l40 n.l04.

[142] *See, e.g.*, ARTHUR M. WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II (l997). Weisburd counted one hundred interstate wars between l945 and l997. K.J. Holsti counted thirty-eight between l945 and l995. K.J. HOLSTI, THE STATE, WAR, AND THE STATE OF WAR 24 (l996). The Correlates of War Project has counted twenty-three between l945 and l997. Meredith Reid Sarkees, *The Correlates of War Data on War: An Update to 1997*, l8 CONFLICT MGMT. & PEACE SCI. l23, l35 (2000). Herbert K. Tillema counted 690 overt foreign military interventions between l945 and l996. Herbert K. Tillema, Risks of Battle and the Deadliness of War: International Armed Conflicts: l945-l99l (Apr. l6, l996) (unpublished manuscript), *quoted in* Peter Wallensteen, *New Actors, New Issues, New Actions, in* INTERNATIONAL INTERVENTION: NEW NORMS IN THE POST-COLD WAR ERA? 5, 6 (Peter Wallensteen ed., l997). A report by the Carter Center in February, l998 identified thirty "major ongoing wars." Carter Ctr., Conflict Resolution Update: Update on World Conflicts (Feb. 9, l998). *See generally* GLENNON, *supra* note l29, at 67-l00.

Most recently, the August 2008 Russian invasion of Georgia constituted an "invasion or attack by the armed forces of [Russia] of the territory of [Georgia]" under paragraph 2(a), and "[a]n attack by the armed forces of [Russia] on the land . . . forces . . . of [Georgia]" under paragraph 2(d). The war began on August 7, when Georgia attacked Russian-backed separatists in Tskhinvali, the capital of South Ossetia.[143] Russia responded by sending troops into South Ossetia and Abkhazia, and then driving deep into Georgia.[144] The l979 Soviet invasion of Afghanistan constituted aggression under several of its provisions: it was an "invasion or attack by the armed forces of [the Soviet Union] of the territory of [Afghanistan]" under paragraph 2(a), a "[b]ombardment by the armed forces of [the Soviet Union] against the territory of [Afghanistan]" under paragraph 2(b), and "[a]n attack by the armed forces of [the Soviet Union] on the land... forces... of [Afghanistan]" under paragraph 2(d).[145]

In many other instances world powers besides the United States engaged in aggression, under this definition. The l982 invasion of the Falklands constituted an "invasion or attack by the armed forces of [Argentina] of the territory of [the United Kingdom]" under paragraph 2(a).[146] The l956 invasion by France, the United Kingdom, and Israel of Egypt during the Suez crisis represented an "invasion or attack by the armed forces" of France, the United Kingdom, and Israel of the territory of Egypt under paragraph 2(a), a "[b]ombardment by the armed forces" of France, the United Kingdom, and Israel against the territory of Egypt under paragraph 2(b), and "[a]n attack by the armed forces" of France, the United Kingdom, and Israel on the land forces of Egypt under paragraph 2(d).[147] And France's l979 invasion of the Central African Republic, deposing Jean-Bedel Bokassa, constituted an "invasion or attack by the armed forces" of France of the territory of the Central African Republic under paragraph 2(a).[148]

Three additional military operations, sometimes said to have been undertaken for humanitarian reasons, also involved an "invasion or attack," and thus aggression, under paragraph (a). These were the l979 invasion of Uganda by Tanzania, in which forces under the command of President Julius Nyerere deposed Ugandan dictator Idi Amin and installed Milton Obote; the l979 invasion of Cambodia by Vietnam, deposing the despot Pol Pot; and India's l97l invasion of East Pakistan, which put an end to ruthless oppression, torture, rape, and looting of property.[149]

Finally, North Vietnamese military actions against South Vietnam from l960 through l975 constituted an "invasion or attack by the armed forces of [North Vietnam] of the territory of [South Viet-

[143] I INDEP. INT'L FACT-FINDING MISSION ON THE CONFLICT IN GEOR., REPORT 5 (2009), HYPERLINK http://www.ceiig.ch/pdf/IIFFMCG_Volume_I.pdf http://www.ceiig.ch/pdf/IIFFMCG_Volume_I.pdf.

[144] Anne Barnard, Andrew E. Kramer & C.J. Chivers, *Russians Push Past Separatist Area To Assault Central Georgia,* N.Y. TIMES, Aug. l0, 2008, HYPERLINK http://www.nytimes.com/2008/08/ll/world/ http://www.nytimes.com/2008/08/ll/world/europe/llgeorgia.html; *see also supra* note l42.

[145] For comprehensive accounts of the Soviet invasion, see GREGORY FEIFER, THE GREAT GAMBLE: THE SOVIET WAR IN AFGHANISTAN (2009); and EDWARD GIRARDET, AFGHANISTAN: THE SOVIET WAR (l986).

[146] *See generally* Lawrence Freedman, *The War of the Falkland Islands*, 1982, 6l FOREIGN AFF. l96 (l982).

[147] *See generally* KEITH KYLE, SUEZ: BRITAIN'S END OF EMPIRE IN THE MIDDLE EAST (2003).

[148] *See* GLENNON, *supra* note l29, at 73.

[149] *Id*. at 72-74, 80.

nam]" under paragraph 2(a), and Israel's l98l attack on the Osirak reactor in Iraq constituted a "[b] ombardment by the armed forces of [Israel] against the territory of [Iraq]" under paragraph 2(b).[150]

3. AMBIGUITIES IN THE SWGCA DEFINITION

As the above historical review suggests, the potential sweep of the SWGCA's recommended definition of "act of aggression" is extraordinarily broad, for in key respects the definition's scope and application are uncertain.

a. Force

Beginning with the formula of U.N. Charter Article 2(4) used within the SWGCA's definition, it should be noted that the Article's actual words are changed by the definition. The first change is that the term "force," as used in the Charter, is not modified, whereas the term "force," as used in the SWGCA definition, is modified by the term "armed." This seemingly has the effect of narrowing the breadth of the SWGCA's prohibition by excluding instances in which force is used without resort to arms. A number of questions are raised.

What uses of force prohibited by the Charter are permitted under the SWGCA prohibition? What is the rationale for allowing uses of force that the Charter prohibits? What about states that are unable or unwilling to curb the use of their territory for terrorist training activities (for example Afghanistan throughout the l990s, or Pakistan today); does that constitute a use of "armed" force or a "sending" of armed bands or groups under paragraph 2(g)? In that regard, paragraph 2(f) includes the placing of a state's territory "at the disposal of another State" for perpetrating an act of aggression: why distinguish between a state and a nonstate actor, such as al-Qaeda? Suppose the state is unable to control the use of its territory despite good faith efforts. Is the state still responsible for the action of nonstate actors? What about providing equipment, training, logistical or intelligence support to an armed group? Does the requirement that force be "armed" exclude cyber attacks? Would it matter at what the cyber attacks are targeted? What about the use of nonlethal but incapacitating chemical or biological agents?

The Charter implies that some use of force is permissible because it is not, by definition, against the territorial integrity or political independence of a state. What use is permissible under the

[150] *See generally* RICHARD FALK, THE VIETNAM WAR AND INTERNATIONAL LAW (l968); Shai Feldman, *The Bombing of Osiraq—Revisited,* 7 INT'L SECURITY ll4 (l982).

SWGCA's definition? What falls within the meaning of "territorial integrity" and "political independence"? Is use of armed force permissible that is not directed at territorial occupation or undermining governmental autonomy or survival? What about a use of armed force against nationals or members of the armed forces of a state who are outside the territory of that state? Or against unmanned facilities such as satellites, dams, power grids, weapons facilities or laboratories?

b. Sovereignty

The second change in the formulation of Article 2(4)—the insertion of the word "sovereignty" into the definition—expands the scope of the prohibition against use of force in Article 2(4), but its meaning is unclear. What falls within a use of armed force against the "sovereignty" of a state? How, specifically, does this term enlarge the category of prohibited uses of armed force? What use of armed force would not be "against the sovereignty, territorial integrity or political independence of another State" but would be "inconsistent with the Charter of the United Nations"? Is the use of armed force by a state without the approval of the Security Council, when aimed at halting intrastate genocide, for example, consistent with the Charter?

c. Relationship to Resolution 3314

The SWGCA's definition provides that the specified acts "shall, in accordance with" Resolution 33l4, qualify as acts of aggression. The question thus arises whether the provisions of Resolution 33l4 that are not included within the SWGCA's definition nonetheless govern the application of those provisions that are included.[151] Is Resolution 33l4 in effect incorporated by reference?[152]

If so, then "[t]he acts enumerated [in paragraph 2(a) to (g)] are not exhaustive, and the Security Council may determine that other acts constitute aggression under the provisions of the Charter."[153] If so, then "[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."[154] In other words, the scope of the SWGCA's recommended definition of aggression—notwithstanding the divergent wording—is identical to coverage of the definition included in the Charter. The SWGCA's definition is coterminous with that of the Charter and neither adds nor detracts from it. And, most importantly for due process purposes, "if the abstract definition in the general clause [is] self-

[151] Article 4 of the definition of aggression in Resolution 33l4 itself provides that the acts enumerated therein "are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter." Resolution 33l4, *supra* note 43, Annex art. 4. However, no such disclaimer is included in the SWGCA's definition. *See supra* text accompanying note 66.

[152] As previously noted, an additional problem would then be created by the fact that Resolution 33l4, in contrast to the SWGCA definition, criminalizes only a "war" of aggression, not an "act" of aggression. *See supra* note 49.

[153] Resolution 33l4, *supra* note 43, Annex art. 4.

[154] *Id*. art. 6.

applying, the list of acts or situations [is] unnecessary."[155] If not—if the unincorporated provisions of Resolution 33l4 have no application to the SWGCA's recommended definition, and if Resolution 33l4 is cited merely, in effect, to be polite or ethical, or to establish authoritative pedigree or genealogy—then the list of acts set out in paragraphs 2(a) to (g) is exhaustive, and the generic definition that precedes the list is merely a description of the class that those acts occupy exclusively. No additional conduct, in other words, might then be prosecuted by the ICC as a crime of aggression.

Which interpretation is correct? One can only guess. Based upon the wording of the SWGCA's definition, reasonable arguments can be made on both sides. The SWGCA's object seemingly was to compromise by leaving the matter open to question. If that was its purpose, it succeeded. The SWGCA, perhaps concerned about cracking the frail coherence of its consensus, declined to make the hard decision as to what is covered and what is not, leaving that decision to the prosecutor and judges of the ICC and, perhaps, to the Security Council, after the defendant's conduct has occurred.

By choosing "act" rather than "war" of aggression as the predicate for a "crime of aggression," the SWGCA's definition thus incentivizes conduct of the sort that Elizabeth Wilmshurst warned against: "the situation that whenever a State [has] a dispute with another which include[s] use of force by that other, the State [will] be able to refer the situation to the international criminal court, alleging participation by individuals."[156] The result would be a markedly enhanced risk of discriminatory enforcement and politicized prosecution.

B. The SWGCA's Definition of "Crime of Aggression"

"Crime of aggression" is defined more narrowly. Under the SWGCA's proposal, not every "act of aggression" gives rise to a "crime of aggression." A "crime of aggression" refers, again, to 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."[157] The definition closely tracks, but is not identical to, the charge of "crime against the peace" prosecuted at Nuremberg, which consisted of "planning, preparation, initiation *or waging* of a war of aggression."[158] The crime of aggression, as defined, can be committed only by political and military leaders, not rank-and-file administrators or soldiers. And it embraces only nontrivial and clear-cut violations of the Charter, which implies that acts of aggression authorized by the Security Council or carried out for self-defense under Article 5l are not prosecutable.

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[155] JULIUS STONE, AGGRESSION AND WORLD ORDER 80 (l958).

[156] Elizabeth Wilmshurst, *Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?, in* THE INTERNATIONAL CRIMINAL COURT, *supra* note l05, at 93, 96. She further warned that "[t]his could create in effect an inter-State court out of a court that we have all agreed should have jurisdiction only over individuals. This is not a result to be welcomed by those who have for long fought for the establishment of the court." *Id*.

[157] *See* ICC, *Discussion Paper on the Crime of Aggression Proposed by the Chairman*, at 2, ICC-ASP/7/SWGCA/INF.l (Feb. l9, 2009).

[158] Agreement for the Prosecution and Punishment of the Major War Criminals, *supra* note l3, Annex art. VI(a) (emphasis added).

Yet, as with the SWGCA's definition of "act of aggression," vexing questions attend the meaning of "crime of aggression." "Planning" and "preparation" encompass a wide range of political and military activity, much of it relating to the coordination of tactics and strategy in military operations that are conceived in no particular context. It is often impossible to know whether the surrounding circumstances would permit such activities properly to be labeled a "crime of aggression." (This may be why the definition in Resolution 33l4 provided in preambular text that "the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case."[159]) Would it, for example, have constituted a "crime of aggression" for NATO planners to draw up plans to bomb Baghdad prior to the Iraqi invasion of Kuwait on the possibility that such an invasion was possible? Or to "plan" or "prepare" to launch intercontinental ballistic missiles against the Soviet Union, on the possibility that the Soviet Union might launch such an attack itself? Or to draw up plans for the possible invasion of Cuba during the Cuban Missile Crisis? Military planners often devise contingency plans or preparations for defensive, retaliatory operations that can nonetheless be used, at least in part, in launching a first strike. Viewed with no factual context and apart from any strategic objective, such plans could be subject to a wide variety of interpretations. Is such contingent planning or preparation in and of itself a "crime of aggression"?

Moreover, much of what every modern defense ministry does is, at least indirectly, "preparation" for the use of armed force; that is, after all, why defense ministries exist. Not only weapons procurement and combat activities but healthcare, housing, retirement, and social services for military personnel and their families all are arranged with the ultimate objective of enhancing force readiness so that the armed forces can achieve whatever military mission policymakers decide upon. Much preparation, in fact, is increasingly aimed at supporting military operations undertaken in conjunction with U.N. peacekeeping forces. No reasonable defense planner can know, under the SWGCA's definition of the crime of aggression, where the line is to be drawn between the workaday world of defense ministry exertions and the commission of a prosecutable crime of aggression.

Finally, in modern democracies, preparation for armed conflict engages more than military and defense ministry personnel. Intelligence agencies provide a wide variety of information to defense planners that advance military objectives. Diplomats lay the groundwork for military action by attracting allies. Legislators appropriate money for the military, approve weapons systems used in given conflicts, authorize the use of force, and oversee the conduct of hostilities. Lawyers advise policymakers what use of force is lawful. Who among them incurs criminal liability for planning or preparing the crime of aggression? Where is the line drawn?

The SWGCA purports to limit the number of such military and political officials who could incur criminal liability by restricting prosecution to those persons "in a position effectively to exercise control over or to direct the political or military action of a State."[160] But this line is anything but bright. In the illustrative enumeration of incidents involving the use of armed force that would con-

[159] Resolution 33l4, *supra* note 43, Annex.

[160] *See* ICC, *supra* note l56, at 2.

stitute acts of aggression, set out above, myriad political and military leaders of the aggressor states would be prosecutable for the crime of aggression if the SWGCA definition were applied to them. The list of potential defendants would include, among others, all U.S. Presidents and Secretaries of Defense since John F. Kennedy, including President Obama, and numerous foreign leaders who effectively exercised control over or directed the political or military action of their countries during the other acts of aggression listed above.[161] Where the list would end—how far down into defense, foreign ministry and intelligence bureaucracies, and parliaments and legislatures the prosecutorial arm might reach—is not clear. "[I]n most democratic societies it is almost impossible to pinpoint responsibility for a certain action to just a few individuals since large numbers of bureaucrats are usually involved in preparing and shaping decisions."[162] Intelligence analysts, diplomats, legislators, and lawyers all sometimes "control" political and military action in the sense that, but for their conduct, the action in question would not have occurred. (It is, moreover, unclear whether immunity would attach, given the Rome Statute's ambiguity on the matter.)[163]

Again, not all acts of aggression give rise to crimes of aggression; a crime of aggression is committed incident only to an act of aggression that, in the SWGCA's parlance, "constitutes a manifest violation of the United Nations Charter." If an act of aggression were authorized by the Security Council or permitted under Article 5l, it would therefore remain an act of aggression but would not provide the predicate for a crime of aggression. Two requirements must thus be met before an act becomes a prosecutable crime: it must violate the Charter, and the violation must be manifest.

Which of the acts of aggression described above violated the Charter and which did not? Because the Security Council has authorized use of force in only a handful of instances and because the defensive exception of Article 5l cannot logically be available to all sides in a given armed conflict, nearly all of these hundreds of occurrences necessarily involved the unlawful use of force under the Charter by some state. Yet where the violation actually occurred is usually impossible to determine. In almost all of the acts described, the "aggressor state" argued either that it acted in self-defense or pursuant to Security Council authorization. (A prominent exception is NATO's l999 Kosovo opera-

[161] The list would also include the Chairmen of the Joint Chiefs of Staff at the time of the military operations in question—plus, perhaps, hundreds of members of Congress who voted for resolutions authorizing the use of force against North Vietnam, Afghanistan, and Iraq. Foreign leaders would include Tony Blair, Jacques Chirac, Gerhard Schroeder, and other NATO political and military leaders in office at the time of the l999 attack on Yugoslavia; Anthony Eden, Guy Mollet, and David Ben-Gurion and the British, French and Israeli military leaders at the time of the Suez attack; Ho Chi Minh, Valéry Giscard d'Estaing, Julius Nyerere, Vladimir Putin, Dmitry Medvedev, and many others. Note that the restrictions of temporal jurisdiction would prevent the ICC from actually prosecuting these people for the crime of aggression.

[162] Schuster, *supra* note l0, at 2l.

[163] Article 98(l) of the Rome Statute provides that "[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity." Rome Statute, *supra* note 4, art. 98(l). However, Article 27, entitled "Irrelevance of official capacity," provides as follows:
l. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. [I]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.
Rome Statute, *supra* note 4, art. 27.

tion, about which NATO leaders' legal explanation has generally been: the less said, the better.[164]) In which of those cases, then, can it objectively be said that those states were wrong, and that a "manifest violation" of the Charter occurred? Given that the use of force rules of the Charter have, again, been violated anywhere from 200 to 680 times since l945,[165] are they still good law?[166] Volumes have been written on these issues, reflecting abiding and widespread disagreement on the breadth of the self-defense exception; the truth is that in most of those and other instances, a person of common intelligence would necessarily have to guess which side violated the Charter. The need for guesswork is not enough to meet the requirements of due process and the principle of legality.

The SWGCA seeks to eliminate its definition's pervasive vagueness by barring prosecution for crimes of aggression that are minor or marginal. It attempts to do so by requiring that the violation in question be "manifest" in its "character, gravity and scale."[167] But these qualifiers do not provide the legally requisite specificity or precision; they merely push the inquiry further up the semantic ladder to focus on what is "manifest" (rather like Yogi Berra's supposed suggestion that close plays at first base be eliminated by moving first base back one step).[168] A statute permitting the prosecution of only clear-cut, blatant instances of "impropriety" would still be vague. This is the central difficulty in seeking to eliminate vagueness merely by announcing that marginality is excluded: it is impossible to know from the terms at issue what within their reach is marginal and what is essential. Following the bombing of a Berlin nightclub in l986 in which two U.S. servicemen were killed, for example, the United States bombed Libya in retaliation (apparently killing a daughter of Colonel Gaddafi).[169] Did this act represent, because of its "character, gravity and scale," a "manifest" violation of the Charter? Does "character" mean that suspected Libyan involvement in the nightclub bombing must be taken into account? Does "gravity" imply that the (limited) impact on regional stability is to be considered? Does "scale" mean that the constricted length of the air strikes is a factor? Was force, for that matter, actually used against Libya's "territorial integrity" or "political independence"? Did the attack on U.S. servicemen represent an armed attack on the United States within the meaning of Article 5l of the Charter? As was true with respect to questions concerning the other historical uses of force detailed in Part II above, the answers to these questions remain a matter of subjective judgment; throwing in a "manifestness" requirement does not magically eliminate imprecision.

The conclusion is thus unavoidable: the SWGCA's definition of the crime of aggression—a reconstruction of the burnt timbers of the League of Nations Covenant, which provided that "[t]he Members of the League undertake to respect and preserve as against external aggression the territorial

[164] For the argument that NATO's Kosovo action represented a violation of the Charter, see GLENNON, *supra* note l29, at l3-35.

[165] This is the number set out in the U.N. report *A More Secure World. See* Report of the High-Level Panel, *supra* note l39, at l40 n.4. Other studies have reported similar results. *See supra* note l4l.

[166] In my view, no. *See* GLENNON, *supra* note l29, at 84-l00, 207-09; Michael J. Glennon, *How International Rules Die,* 93 GEO. L.J. 939, 986 (2005).

[167] *See supra* note 65.

[168] *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. l255, l336 (l988).

[169] Edward Schumacher, *Wide Damage Seen; Daughter of Qaddafi Is Said To Have Died*, N.Y. TIMES, Apr. l6, l986, at Al.

integrity and existing political independence of all Members of the League"[170] — is irretrievably vague. To use the apt phrase of the U.S. Supreme Court, it fails to provide "ascertainable standards of guilt."[171] Contrary to the requirement of the Rome Statute itself, the definition is not "consistent with internationally recognized human rights."[172]

V. THE ROLE OF THE SECURITY COUNCIL IN PROSECUTING A CRIME OF AGGRESSION

Can this infirmity be cured by any of the options under consideration concerning Security Council participation or nonparticipation in the prosecutorial decision?[173] Many different proposals have been advanced with respect to the role to be played in that decision by the Security Council (or other U.N. entities such as the General Assembly or the International Court of Justice).[174] All come down to two broad alternatives: inclusion or exclusion. However, neither of those options is legally viable: including the Council in the prosecutorial procedure without Charter amendments would violate international law's legality principle, whereas excluding the Council would violate the Charter. An elaboration follows.

A. Including the Security Council

Inclusionary proposals include suggestions of the sort advanced by the SWGCA that would, for example, permit the ICC to investigate a potential crime of aggression only if the Security Council (or the General Assembly or the International Court of Justice) has previously made a determination that an act of aggression has been committed by a State, or would permit the ICC prosecutor to proceed only if "[t]he Security Council has adopted a resolution under Chapter VII of the Charter requesting the Prosecutor to proceed with an investigation."[175] In these and similar schemes, the ICC prosecutorial process would be triggered by the action or inaction of some external entity that

[170] League of Nations Covenant art. l0. The Covenant, notably, made no effort either to define aggression or to outlaw the use of force.

[171] Palmer v. City of Euclid, 402 U.S. 544, 545 (l97l) (per curiam).

[172] Rome Statute, *supra* note 4, art. 2l(3).

[173] *See generally* Paula Escarameia, *The ICC and the Security Council on Aggression: Overlapping Competencies, in* THE INTERNATIONAL CRIMINAL COURT, *supra* note l05, at l33.

[174] For comprehensive summaries of those proposals, see Carrie McDougall, *When Law and Reality Clash—The Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression*, 7 INT'L CRIM. L. REV. 277, 322 (2007); and Mark S. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive Is the Security Council's Power To Determine Aggression?*, l6 IND. INT'L & COMP. L. REV. l, 3 (2005).

[175] Press Release, *supra* note 68.

is not bound by (and under the terms of that entity's enabling treaty, the U.N. Charter, cannot be bound by) any exogenous definitional limits that purport to circumscribe its discretion to determine the existence of aggression. Because the Security Council is, in other words, possessed of broad latitude under the Charter to determine for itself whether conduct in a given instance constitutes an act of aggression,[176] the imposition of punishment for such conduct would inevitably be ex post facto. No specific standards guide its determination; whether it will find an "act of aggression" in a given case is inevitably fact – dependent and speculative.[177] The Council has wide leeway to render decisions grounded upon what ultimately are policy judgments; but "certainly," the U.S. Supreme Court has said, "a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language."[178] Policy judgments imply broad discretion; broad discretion precludes clear and precise notice. Kenneth Gallant aptly summarizes the notice problem created by Security Council inclusion:

> Notice requires not only that a law has been in existence but also that it has been applicable to the actor at the time of the act. If the law was not applicable to the actor, then the actor had no notice of the requirement to conform his or her behavior to the standard set out in the law.[179]

Absence of notice gives rise to the threat of discriminatory prosecution; the teaching of the U.S. Supreme Court in a seminal vagueness case is directly on point. The Court noted:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.[180]

Delegating the question of whether prosecution is permissible to the Security Council on an "ad hoc and subjective basis" raises precisely the danger of arbitrary and discriminatory application. The question can be labeled as "procedural" or "jurisdictional," as the SWGCA prefers, or as something else, but changing the label does not change the substance of the problem: it is a due process problem and a legality problem, akin to prosecuting the crime of loitering only if the specific conduct in question is afterwards denominated loitering by an act of the city council.[181] Contrary

[176] "What standards would the Security Council use in determining aggression in an ICC case? One never knows, but there would be great pressure on the Security Council to apply the definition in the ICC Statute, once that definition is finally thrashed out." Stein, *supra* note l73, at l2. However, "the Security Council has essentially ignored the General Assembly's definition of aggression." *Id*.

[177] Absent requisite Security Council action or inaction, the ICC, *ex hypothesi*, would not have been established in a manner that would legally authorize it to try the case, and in this sense would not be (in the requirement of Article 8(l) of the American Convention on Human Rights) an "impartial tribunal, previously established by law." American Convention on Human Rights, *supra* note 83, art. 8(l).

[178] M. Kraus & Bros. v. United States, 327 U.S. 6l4, 626 (l946).

[179] GALLANT, *supra* note 20, at 20 (footnotes omitted).

[180] Grayned v. City of Rockford, 408 U.S. l04, l08-09 (l97l) (footnotes omitted).

[181] The problem did not arise in connection with the various ad hoc criminal tribunals or with referral by the Security Council under Article l3(b) of the Rome Statute (which triggered the ICC indictment of President Omar al-Bashir of Sudan) because, under principles of universal jurisdiction, the crimes with which defendants were charged were prosecutable in preexisting national courts. *See* AMNESTY INT'L, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION (200l); HUMAN RIGHTS WATCH, BELGIUM: QUESTIONS AND ANSWERS ON THE ANTI- ATROCITY LAW (2003), *available at* HYPERLINK http://www.hrw.org/sites/default/files/reports/belgium-qna.pdf http://www.hrw.org/sites/default/files/reports/belgium-qna.pdf (noting that most states have given

to the Statute's own prohibition, including a Security Council prosecutorial predicate would make a person criminally responsible under the Statute even though the conduct in question constitutes, at the time it takes place, a crime that is not within the jurisdiction of the court.[182] No amount of re-categorizing or re-labeling can alter the fact that the conduct in question will not have been prosecutable when it occurred.

B. Excluding the Security Council

In principle, retroactivity and vagueness concerns can be obviated by excluding the Security Council (and other external entities) from the ICC's prosecutorial decision-making process, for the crime charged might then fall within specific limits that are delineated in full before the occurrence of the conduct in question. Exclusionary proposals thus attempt to sidestep the legality difficulties outlined above by placing investigative and prosecutorial decisions solely in the hands of the ICC.

Even if the requisite level of specificity were achieved in defining aggression, these exclusionary proposals create another problem: they run afoul of the U.N. Charter. Article 39 of the Charter, again, authorizes the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression."[183] Three principal interpretations of this key provision are possible with respect to the scope of the Security Council's authority to determine the existence of aggression, yielding, in turn, conclusions of concurrent, preemptive, or plenary power.

L. CONCURRENT SECURITY COUNCIL POWER

The text of Article 39 could be construed as pertaining only to a determination of aggression with respect to state conduct for the purpose of imposing sanctions under Article 4l or authorizing the use of force under Article 42, thus leaving another international organization such as the ICC free to determine the existence or nonexistence of aggression with respect to individual conduct that

their courts universal jurisdiction with respect to some international crimes). Conventional war crimes have been seen as crimes under customary international law at least since World War II. *See* GALLANT, *supra* note 20, at 343. In the United States, as long as the crime is precisely proscribed and no change of punishment is involved, "an *ex post* facto law does not involve, in any of its definitions, a change of the place of trial or an alleged offence after its commission." Gut v. State, 76 U.S. (9 Wall) 35, 38 (l869). Thus "the fact that the State of Israel was not in existence when Demjanjuk allegedly committed the offenses [in violation of international law over which there is universal jurisdiction (including war crimes and crimes against humanity)] is no bar to Israel's exercising jurisdiction under the universality principle." Demjanjuk v. Petrovsky, 776 F.2d 57l, 582 (6th Cir. l985). *See generally* Jordan Paust, It's *No Defense:* Nullum Crimen, *International Crime, and the Gingerbread Man*, 60 ALB. L. REV. 657 (l997).

[182] Rome Statute, *supra* note 4, art. 22; *see also supra* note 87.

[183] U.N. Charter art. 39.

would trigger criminal liability. Under this interpretation, Article 39 could be construed as conferring concurrent authority on the Security Council to determine the existence or nonexistence of aggression for its purposes, without prejudice to the authority of other international organizations to do so for their own, different purposes. Conflicting findings concerning the existence of aggression would therefore be permitted.

2. PREEMPTIVE SECURITY COUNCIL POWER

Article 39 could be construed as conferring authority upon the Security Council to determine the existence of aggression, while leaving other international organizations free to find the occurrence of aggression in the event the Security Council declines to make such a determination. Under this interpretation, the Council would exercise preemptive authority similar to that exercised by the U.S. Congress under the Commerce Clause[184] with respect to state regulation of certain interstate commerce; silence on the part of the Security Council, like silence on the part of Congress, would be construed as acquiescence. Conflicting findings, therefore, would not be permitted.

3. PLENARY SECURITY COUNCIL POWER

Article 39 could be construed as conferring plenary authority upon the Security Council that, in effect, precludes any other international organization from finding or not finding the existence of aggression, regardless of whether the Security Council considers the existence of aggression with respect to a given incident.[185] Under this interpretation, the Council's power to determine or to decline to determine the existence of aggression would be exclusive, rather like the exclusive power of the President to grant pardons.[186] No findings concerning aggression, conflicting or not, could be made by another international organization under this interpretation.[187]

[184] U.S. CONST. art. I, § 8, cl. 3.

[185] *See Report of the International Law Commission on the Work of Its 46th Session,* 49 U.N. GAOR Supp. No. l0, at l, U.N. Doc. A/49/l0 (l994).

[186] U.S. CONST. art. II, § 2.

[187] *Cf*. Saeid Mirzaee Yengejeh, *Reflections on the Role of the Security Council in Determining Aggression, in* THE INTERNATIONAL CRIMINAL COURT, supra note l05, at l25, l25-32.

C. The Inescapable Dilemma

Layered atop these questions concerning the scope of Article 39, it will be recalled, is the supremacy provision of Article l03,[188] which provides that obligations incurred under the Charter prevail in the event of a conflict with obligations incurred under another treaty.

In light of the supremacy provision, which interpretation of Article 39 makes the most sense? The argument in favor of concurrent power would permit states party to the U.N. Charter to ratify a treaty such as the Rome Statute that could obligate them to honor a finding that aggression has *not* occurred, even though the Charter obligates them, *ex hypothesi*, to honor a Security Council determination that aggression *has* occurred. The rationale would be that the obligations that flow from the different determinations are in fact different obligations. The set of obligations that flows from the ICC's determination would arise from the demands of the international criminal justice system, concerning, for example, the investigation, arrest, trial, and detention of individuals. In contrast, the set of obligations that flows from the Security Council's determination would arise from the demands of the international system of state security, concerning, for example, the enforcement of sanctions against noncompliant states. A state, the argument would go, can carry out one set of obligations without undermining the other; viewed correctly, the two sets of duties will not in fact be seen as conflicting with each other, and Article l03 would therefore be inapposite.

This argument has specious force, at least with respect to Article l03, but fails to give sufficient weight to the institutional and geopolitical consequences of contradictory findings concerning the existence of aggression. A situation in which the ICC and Security Council could come to opposite conclusions—based upon what are, after all, the same facts—is not one that would redound to public respect for either institution. An open conflict between the ICC and the Security Council inevitably would lead supporters of one to cast aspersions upon the fact-finding or law-finding competence of the other. The Council cannot carry out its duties effectively under Chapter VII if its institutional integrity is undermined by obligations imposed by another treaty.

More importantly, the argument for concurrent power proceeds from the false premise that international security and international criminal justice are discrete subsystems. They are not. Both are directed at managing state and individual conduct. States act because individual policymakers direct them to act. States are aggregates of individuals; the incentives and disincentives that influence the conduct of one necessarily influence the conduct of the other. Even a cursory glance at the *travaux préparatoires* of the Rome Statute reveals the objective of its framers to be the management of state conduct as well as that of individual policymakers.l[189] The two are inseparable.

For these reasons, the argument for concurrent ICC-Security Council power to determine the existence of aggression is unpersuasive. The cost of open conflict between the two would be too

[188] *See supra* text accompanying note 35.

[189] *See generally* THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (M. Cherif Bassiouni ed., l998).

great a price to pay to justify power-sharing in determining the occurrence of aggression, and the interrelationship between security and criminal justice cannot be ignored.

The second interpretation, yielding a framework of preemptive Security Council authority, would meet these difficulties by deeming the Council to have, in effect, "occupied the field" whenever it determines the existence of aggression. The ICC, under this interpretation, would automatically be required to defer to the decision of the Council whenever the Council makes an affirmative determination. When the Council makes no determination or a negative determination, on the other hand, the ICC would be free to act.

In the real world, unfortunately, events would not likely follow that chronologically neat script, which seems to assume that the Security Council would act (or decline to act) first. The ICC, in reality, could always "get the jump" on the Council, and it would be naïve to assume that the ICC's earlier decision could be ignored by a Council that would supposedly consider the matter de novo. If it did get around to considering the matter, the Council could in fact come to a determination opposite that earlier made by the ICC—resulting in precisely the conflict that the concurrent power model was supposed to avoid. An obvious remedy would be to permit the Council to act, but only within a given period of time, after which the ICC would be permitted to take up the question. But the workability of that cure is doubtful (what event would trigger the time period?) and, in any event, the whole scheme could be put in place only with an amendment to the Charter. It would hardly lie within the authority of the states party to the Rome Statute to restrict the Security Council to determining the existence of aggression only within a given time period.

There is, however, a more serious flaw in the preemptive power argument: the assumption that inaction by the Security Council constitutes no decision on the underlying issue whether aggression has occurred. In fact, by remaining silent and declining to act, the Council could decide implicitly that the given conduct does not constitute aggression, or that whether the given conduct constitutes aggression is doubtful, or that other considerations counsel against a determination one way or the other. As Theodor Meron notes,

> [t]he Security Council may have legitimate reasons not to proceed through the routes of Article 39 and Chapter VII. The Security Council could choose other avenues such as Chapter VI, which concerns the pacific settlement of disputes. Failure to act in a particular case need not be a proof of failure; it may be evidence of statesmanship.[190]

This is the most powerful reason for concluding that the third argument, for plenary Security Council power over aggression, is the most reasonable. The powers to determine or not determine the existence of aggression are opposite sides of the same coin; the authority to do one necessarily implies the other. Thus, as Meron has observed, "[t]he [Security] Council's prerogative to determine the existence of an act of aggression under Article 39 . . . is exclusive."[191] The Charter's *travaux*

[190] Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. l, l3 (200l).

[191] *Id.* at l4; *see also* Schuster, *supra* note l0, at 39 ("[T]he current legal situation prescribes the absolute primacy of the Security Council when it comes to the question of aggression.").

préparatoires confirm this conclusion. The framers of the Charter considered and rejected proposals[192] to define the term "act of aggression," opting instead to accord the Security Council maximal discretion to define the term operationally, as circumstances might require.[193] The objective was to "leave to the Council the entire decision as to what constitutes a threat to peace, a breach of the peace, or an act of aggression."[194] Accordingly, in none of its cases has the ICJ ever formally determined the occurrence of an act of aggression.[195] That the Security Council's power to determine an act of aggression is plenary is underscored by the preemptive authority given the Council over the General Assembly with respect to fulfilling that function;[196] the same priority seemingly should obtain a fortiori with respect to another international organization, such as the ICC, that is neither established nor recognized in the Charter.[197]

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[192] *See generally* Jochen Abr. Frowein & Nico Krisch, *Article 39, in* THE CHARTER OF THE UNITED NATIONS—A COMMENTARY 7l7, 7l9 (Bruno Simma et al. eds., 2002). Specific proposals made by the Philippines and Bolivia were debated and defeated. *See* U.N. Conference on Int'l Org., Proposals of the Delegation of Bolivia for the Organisation of a System of Peace and Security and Proposed Amendments to the Dumbarton Oakes Proposals Submitted by the Philippines Delegation (May 5, l945), *in* l BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS 3l3, 3l3-2l, 322-27 (l975).

[193] *See* Schuster, *supra* note l0, at 36.

[194] U.N. Conference on Int'l Org., Report of Joseph Paul-Boncour, Rapporteur on Ch VIII, Section B, Doc. 88l, III/3/46 (June l0, l945), *in* 2 FERENCZ, *supra* note l9l, at 349, 352.

[195] *See* Frowein & Krisch, *supra* note l9l, at 722 n.3l. But see *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), l986 I.C.J. l4, 73 (June 27); and *Armed Activities on the Territory of the Congo,* 2005 I.C.J. ll6 (Dec. l9), in which the court considered whether aggression had occurred, perhaps implying that it believes that it has the power to make an affirmative finding. One reason for the ICJ's reluctance in this regard may lie in long-standing differences as to what actually constitutes aggression, which seem also to have deterred the Security Council. "In 55 years of activity, with the sole exception of Res. 387 (l976) which condemned 'South Africa's aggression against the People's Republic of Angola', the SC has never found that aggression has taken place. Even Iraq's invasion of Kuwait was only defined as a 'breach of the peace' in SC Res. 66l (l990)." Giorgio Gaja, *The Respective Roles of the ICC and the Security Council in Determining the Existence of an Aggression, in* THE INTERNATIONAL CRIMINAL COURT, *supra* note l05, at l2l, l24 (quoting S.C. Res. 387, U.N. Doc. S/RES/387 (Mar. 3l, l976); and S.C. Res. 66l, U.N. Doc. S/RES/66l (Aug. 6, l990)).

[196] Article l2 of the U.N. Charter provides that "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests." U.N. Charter art. l2. The General Assembly apparently has not interpreted this provision as precluding it from finding the occurrence of aggression in connection with China's intervention in the Korean War, *see* G.A. Res. 498 (V), U.N. Doc. Q/l775 (Feb. l, l95l); South Africa's occupation of Namibia, *see* G.A. Res. 36/l2l A, U.N. Doc. A/RES/36/l2l (Dec. l0, l98l); G.A. Res. S-9/2, U.N. Doc. A/RES/S-9/2 (May 3, l978); South Africa's aggression against other neighboring states, *see* G.A. Res. 36/l72 A, U.N. Doc. A/RES/36/l72 (Dec. l7, l98l); G.A. Res. 36/8, U.N. Doc. A/RES/36/8 (Oct. 28, l98l); continued Portuguese administration of Guinea-Bissau and Cape Verde, see G.A. Res. 306l (XXVIII) (Nov. 2, l973); G.A. Res. 2795 (XXVI) (Dec. l0, l97l); G.A. Res. 3ll3 (XXVII) (Dec. l2, l973); Israel's attack on Iraqi nuclear installations, *see* G.A. Res. 36/27, U.N. Doc. A/RES/36/27 (Nov. l3, l98l); Israeli occupation of Palestinian territories, *see* G.A. Res. 36/226 A, U.N. Doc. A/RES/36/226 (Dec. l7, l98l); or Serbian involvement in military operations in Bosnia-Herzegovina, *see* G.A. Res. 47/l2l, U.N. Doc. A/RES/47/l2l (Dec. l8, l992); G.A. Res. 46/242, U.N. Doc A/RES/46/242 (Aug. 25, l992).

[197] *See* Meron, *supra* note l89, at l4; *see also* Schuster, *supra* note l0, at 38 ("[I]f an intrinsic organ of the United Nations cannot act independently of the Security Council, it is unrealistic to assume that the International Criminal Court—being a treaty organisation outside the Charter—can possess powers that are broader than those of such an organ.").
In the *Certain Expenses* Case, the ICJ addressed, in an advisory opinion, the allocation within the United Nations of the responsibility to protect international peace and security through the authorization of noncoercive peacekeeping forces. Certain Expenses of the United Nations, Advisory Opinion, l962 I.C.J. l5l (July 20). The court quoted the Charter, which provides that "'Members confer on the Security Council primary responsibility for the maintenance of international peace and security,'" *id*. at l63 (quoting U.N. Charter art. 24), and proceeded to note that "[t]he responsibility conferred is 'primary,' not exclusive," *id*. The court's opinion nonetheless makes clear that some aspects of this responsibility are indeed allocated exclusively to the Security Council—namely, the power to authorize actions that involve coercion or lack of consent with respect to an aggressor state. The General Assembly has power "to organize peacekeeping operations, at the request, or with the consent, of the States concerned," *id*. at l64, but "it is the Security Council which, exclusively, may order coercive action," *id*. at l63. The court continued: "[I]t is the Security Council which is given a power to impose an explicit obligation of compliance if for example it issues an order or command to an aggressor under Chapter VII. It is only the Security Council which can require enforcement by coercive action against an aggressor." *Id*.
Issuing an indictment for the crime of aggression would represent a coercive order or command executed without the consent of the state in question and therefore could not be carried out independently of the Security Council.

The implications of Security Council exclusivity are plain. The Charter requires, again, that "Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[198] Members' obligation to accept and carry out the decisions of the Security Council would be traduced if Members entered into a treaty, such as the Rome Statute, that permitted the prosecution of a state's leaders for aggression in the face of an implicit or explicit finding by the Security Council that no aggression had occurred. Under such circumstances, the obligations imposed by the U.N. Charter would conflict with obligations imposed by the Rome Statute, and the obligations imposed by the Charter would prevail—a conclusion reinforced by the Rome Statute itself, which provides that any amendment to the Statute defining the crime of aggression "shall be consistent with the relevant provisions of the Charter of the United Nations."[199]

The Charter thus presents the states party to the Rome Statute with an impossible choice: include the Security Council in the decision to prosecute[200] and create inexorable retroactivity problems, or exclude the Council from that decision and create a structure incompatible with the Charter. The dilemma is accentuated by the Rome Statute's requirement that the ICC's interpretation and application of the law "be consistent with internationally recognized human rights."2[201] How is the ICC to prosecute a crime of aggression when to do so would breach the most fundamental of international human rights norms, the principle of legality? The only escape is to amend the Charter to incorporate a sufficiently specific and politically acceptable definition of aggression—something that no one, after eight decades of effort, has been able to devise.

VI. WHY THE EFFORT TO DEFINE AGGRESSION FAILED

Why has the effort to arrive at a reasonable definition of aggression failed? Not, as G.G. Fitzmaurice wrote, because the concept of aggression "is one which is inherently incapable of precise definition."[202]As a strictly legal matter, no reason exists why "aggression," or any other crime, cannot be defined with sufficient specificity to meet the requirements of the legality principle. Within the limits of language and the inevitability of marginal imprecision, lawmakers are fully capable of controlling the meaning of concepts they create. Criminal offenses are artifacts of human endeavor.

[198] U.N. Charter art. 25.

[199] Rome Statute, *supra* note 4, art. 5(2). Meron notes that "[t]he delegations understood this qualification as an acknowledgement of the Security Council's power to make the determination as to whether an act of aggression has occurred." Meron, *supra* note l89, at 2.

[200] Inclusion of the Security Council would also create a two-tier jurisprudence concerning aggression; the Permanent Five Members of the Council, wielding the veto, will hardly allow a finding of aggression to be made with respect to themselves or their allies, effectively placing one group of states formally above the law.

[201] Rome Statute, *supra* note 4, art. 2l(3); *see supra* text accompanying note 79.

[202] G.G. Fitzmaurice, *The Definition of Aggression,* l INT'L & COMP. L.Q. l37, l38 (l952) (explaining the failure of the International Law Commission to reach agreement on a definition).

Contrasting cultural understandings might emphasize divergent strands of meaning, but none need necessarily control if political agreement can be reached to jettison vague or irreconcilable elements. No legalist impediment stands in the way of sculpting a finely shaped, juridically acceptable criminal offense with respect to aggression. The obstacle to consensus has not been international law.

To take only one of many possible illustrations, the nub of a definition might lie in the second exemplar set out in Resolution 33l4 (which many would regard as coming close, historically, to the core meaning of the term): "any annexation by the use of force of the territory of another State or part thereof."[203] Key terms, even in so short a definition as this, would still require extensive refinement. "Annexation," for example, might or might not include setting up a puppet state rather than outright incorporation.[204] "Force" itself requires extensive clarification, as indicated earlier,[205]as it might or might not include threats of force. Also, whether the "annexed" state was earlier a part of the "aggressor" state, or a separate, independent entity, can be anything but self-evident (consider the Iraqi invasion of Kuwait,[206]the Chinese invasion of Tibet,[207] and the Argentine invasion of the Falklands,[208] all of which proceeded in the wake of claims of historical title) and would require considerable elaboration. But there is no "inherent" impediment to meeting the required level of particularity. It is linguistically and conceptually possible. The key would be to agree upon a single historical example that all agree constituted aggression, such as the l939 German invasion of Poland, to describe it in legalist terms with great specificity, and to thus ensure that the description excludes additional uses of force that lie beyond the consensus.

Nor does any legalist reason exist why a crime of aggression cannot be prosecuted by the ICC in harmony with an amended U.N. Charter. In principle, a decision of the Security Council on whether given conduct constitutes an act of aggression could, for example, be made reviewable by the ICC, subject to specified, preexisting standards and not subject to the existing veto. The possibility of arbitrary and discriminatory enforcement could thereby be significantly curtailed. Alternatively, the supremacy provision of Article l03 could be made inapplicable with respect to new provisions concerning aggression in the Rome Statute. Formal amendment of the Charter would be required for either approach; given the historical obstacles to Charter amendment, this course would not be politically realistic. But, purely as a matter of law, it is conceptually feasible.

Rather, the reasons why agreement upon a legally sound definition has proven elusive are cultural and political. Historical differences among states and disparities in military and economic power have generated profound disagreement over when force may appropriately be used.[209]Some states

[203] Resolution 33l4, *supra* note 43, Annex art. 3(a).

[204] *See generally* R.Y. JENNINGS, THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW (l963).

[205] *See supra* Subsection IV.A.3.a.

[206] *See generally* CHARLES TRIPP, A HISTORY OF IRAQ (2d ed. 2002).

[207] *See generally* TSERING SHAKYA, THE DRAGON IN THE LAND OF SNOWS: A HISTORY OF MODERN TIBET SINCE l947 (l999).

[208] *See generally* LAWRENCE FREEDMAN, THE OFFICIAL HISTORY OF THE FALKLANDS CAMPAIGN: THE ORIGINS OF THE FALKLANDS WAR (2005).

[209] For an extended discussion of this phenomenon, *see* GLENNON, *supra* note l29, at 67-l00.

have insisted upon a broad definition that includes all, or nearly all, potential forms of aggression. These tend to be states that see themselves historically as victims of aggression. Other states have insisted upon a narrower definition, concerned that an expansive definition would permit the prosecution of acts such as those enumerated above in Part IV. These tend to be states that do not see themselves as historic victims of aggression. The former group, largely incapable of projecting force, prefers a broad definition and sees accepting a narrow one as capitulation to historically powerful states and an implicit acceptance of the abusive use of force. The latter group, largely capable of significant force projection or allied with militarily powerful states, prefers a narrow definition and sees a broad one as depriv[210] the deliberations of the International Law Commission,[211] and the Rome Conference,[212] the latter group prevailed, at least in the sense of preventing the adoption of a broad definition. In the SWGCA, however, the former group prevailed. As the number and variety of the forms covered by the definition grew, a generic, all-encompassing description became progressively vaguer—and legal difficulties multiplied. The zone of potential agreement between the two groups proved to be miniscule.

These differences are amplified by underlying cultural differences over whether a state's political and military leaders should be prosecuted. Some states, by tradition or legal prohibition, do not prosecute former leaders for crimes committed in the course and scope of their official duties—even before their own courts. Others do.[213] For those that do, the possibility of transferring former leaders to an international tribunal for trial could still be a politically monumental step that generates enormous domestic controversy. For those that do not, the possibility of doing so is all but unthinkable. The zone of possible agreement is, here again, miniscule.

Given the failure of states to reach agreement on a specific, substantive core of conduct that a definition might delineate, the SWGCA chose to paper over differences in the hope that a consensus might emerge in the future. But in the imposition of criminal punishment, the papering over of differences is precisely what the principle of legality prohibits. Potential defendants have a right to know the specific elements of a crime before their conduct occurs—not when they are charged or tried, after a consensus has finally emerged. Nowhere is this more true, as indicated earlier, than within the constitutional jurisprudence of the United States, where these retroactivity difficulties would pose grave problems.

[210] *See* SOLERA, *supra* note 38, at 43-78.

[211] *See Report of the International Law Commission on the Work of Its 46th Session, supra* note l84.

[212] Most delegations supported a narrow definition proposed by Germany, while Middle Eastern states favored a broader definition based upon Resolution 33l4. *See* Schofield, *supra* note 62, at 2l; SOLERA, *supra* note 38, at 36l.

[213] *See* ROSANNE VAN ALEBEEK, THE IMMUNITY OF STATES AND THEIR OFFICIALS IN INTERNATIONAL CRIMINAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW l67-l74 (2008); Thilo Rensmann, *Impact on the Immunity of States and their Officials, in* THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW l5l, l57-l60 (Menno Kamminga & Martin Scheinin eds., 2009).

VII. CONCLUSION: WHITHER THE UNITED STATES?

What, then, are the implications for the United States? The United States participated in the Rome Conference and, owing in part to the success of its diplomacy, the Conference declined to adopt the broad definition of aggression then under consideration.[214] In contrast, after "unsigning" the Rome Statute on May 6, 2002, the United States did not participate in the discussions of the SWGCA.[215] Its absence might have had the salutary effect of creating a kind of "controlled experiment" that would reveal, from the U.S. perspective, how responsibly the states party to the Rome Statute would act when removed altogether from U.S. influence. With the February 2009 release of the SWGCA's report defining aggression, the experiment was complete. The results, described in Part II, cannot be reassuring to U.S. policymakers. While it is conceivable that the United States might re-sign the Rome Statute, the possibility that two-thirds of the Senate will soon accord the Statute its advice and consent is remote. The risk of being pulled gradually into the machinery of an institution dominated by states with irreconcilable values would likely be considered too great.

However, a dilemma arises in that noninvolvement also carries risks: it is not in the long-term interest of the United States that a major judicial institution grow and develop into a potentially powerful international force with interests antithetical to those of the United States. One such interest—one such value—is preserving the bedrock ban against retroactive criminality. Consistent with this objective, the United States could advance its interests by, among other things, participating as an observer in the Assembly of States Parties to the Rome Statute and the 20l0 Review Conference of the Rome Statute, as well as in other preliminary meetings aimed at defining aggression.[216]

It bears emphasizing that the process of defining aggression is far from over; indeed, the opportunity for the ICC to avoid a ruinous train wreck still exists. The Rome Statute appears to provide a number of possibilities for reversing course on the definition recommended by the SWCGA. If the definition were to survive through the Review Conference and were incorporated into Article 5 by two-thirds of the states party at the Assembly,[217]the crime would only become prosecutable one

[214] *See* Schofield, *supra* note 62, at 23.

[215] The United States has decided to attend the 20l0 Review Conference in Kampala as an observer. *See* Colum Lynch, *U.S. To Attend Conference Held by War Crimes Court,* WASH. POST, Nov. l7, 2009, HYPERLINK http://www.washingtonpost.com/wp-dyn/content/article/2009/ll/l6/AR2009lll603662.html http://www.washingtonpost.com/wp-dyn/content/article/2009/ll/l6/AR2009lll603662.html. It attended a meeting of the Assembly of States Parties as an observer. *See* Stephen J. Rapp, U.S. Ambassador at Large for War Crimes Issues, Speech to Assembly of States Parties (Nov. l9, 2009), *available at* HYPERLINK http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA- http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf.

[216] I do not address the question whether, or when, the United States should again assume signatory obligations under the Statute. It is widely agreed that the Bush Administration's 2002 letter terminated those obligations. For the argument that the United States nonetheless remains a signatory of the Statute, see AM. SOC'Y OF INT'L LAW, U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT (2009), *available at* HYPERLINK http://www.asil.org/files/ASIL-08- http://www.asil.org/files/ASIL-08- DiscPaper2.pdf.

[217] Rome Statute, *supra* note 4, art. l2l(3).

year after being ratified by seven-eighths of the states party.[218] If a particular state party does not accept the definition, the ICC may not exercise jurisdiction with regard to any violation committed by nationals of that particular state party or committed on its territory,[219] and that state party has a right to withdraw from the Statute with immediate effect.[220] This "opt-out" option is available to every state that becomes a party to the Statute before the amendment takes effect. Thus, even if the SWGCA's definition were to become part of the Rome Statute, the right to opt out could still become available to the United States should it become a party.

Perhaps U.S. political leaders take solace in all this and the belief that, if a broad definition such as the one proposed by the SWGCA should survive this procedural gauntlet and ultimately be adopted, senior U.S. officials will nonetheless be safe because the United States is not a party to the Rome Statute. If so, their sense of security could be mistaken. If such a definition were included in the Statute, it is possible that U.S. military and political leaders could be prosecuted for the crime of aggression even if the United States remains a nonparty. This is not certain; the Statute on its face is contradictory. Article l2l(5) provides, again, that "[i]n respect of a State Party which has not accepted the amendment, 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 Statute also provides that, in the event of ambiguity, it "shall be interpreted in favour of the person being investigated, prosecuted, or convicted."[221] Yet under Article l2(2)(a) of the Statute, the ICC may exercise jurisdiction if "[t]he State on the territory of which the conduct in question occurred" has accepted the ICC's jurisdiction. U.S. military action that constitutes a crime of aggression under the SWCGA's definition could occur on such a state's territory, and the state could then refer the matter to the ICC for prosecution. Moreover, it is doubtful whether immunity would attach; conflicting provisions of the Rome Statute could be reconciled either way.[222]

A solution to this conundrum once emerged. For years, the establishment of a permanent international criminal court was linked to the definition of the crime of aggression.[223] States gradually came to understand that the establishment of such a court was possible only by separating the two questions. They chose, in Niebuhr's words, "a pragmatic approach to political and economic questions which would do credit to Edmund Burke, the great exponent of the wisdom of historical experience."[224] The Rome Statute is the result. What triumphed in the SWGCA, however, was very different; its definition of aggression embodies, in Niebuhr's phrase, "the abstract rationalism of the French Revolution."[225] What triumphed was reversion to the sort of offense for which victims were then guillotined, treasonous crimes such as "suspicious opinions" or "nostalgia for the *ancien*

[218] *Id.* art. l2l(4).

[219] *Id.* art. l2l(5).

[220] *Id.* art. l2l(6).

[221] *Id.* art. 22(2).

[222] *See supra* note l62.

[223] *See* G.A. Res. ll87 (XII) (Dec. ll, l957).

[224] NIEBUHR, *supra* note 6, at 89.

[225] *Id.*

régime."[226] What triumphed, in substance if not in name, was a retreat to natural law of the sort championed by Judge Bernard of France in his dissent from the Tokyo judgment:

> There is no doubt in my mind that such a[n aggressive] war is and always has been a crime in the eyes of reason and universal conscience,—expressions of natural law upon which an international tribunal can and must base itself to judge the conduct of the accused tendered to it.[227]

If the offense is an offense under natural law, no notice is needed because every right-thinking person has already been accorded notice. But neither Judge Bernard nor the SWGCA nor anyone else has explained how it is possible, with a modicum of objectivity, to ascertain "reason and universal conscience." How can reasonable, well-intentioned jurists from different societies identify the content of natural law in any culturally neutral, objectively useful sense?

At the 20l0 Review Conference, the Assembly of States Parties will confront the same choice. The Assembly will have the option, once again, of reverting to natural law—"the abstract rationalism of the French Revolution"—or adopting a pragmatic, Burkean approach grounded upon historical experience and political reality. Its decision will determine, in the end, not only whether the United States can become a party, but the likely future of the ICC itself. For the United States will not be the only state to reject the ICC if the nations behind it turn their back upon the cornerstone of the rule of law, the principle of legality—and the assurance set out in its own Statute that it will act "consistent with internationally recognized human rights."[228]

[226] CAROLINE MOOREHEAD, DANCING TO THE PRECIPICE: LUCIE DE LA TOUR DU PIN AND THE FRENCH REVOLUTION l87 (2009).

[227] United States v. Araki (Nov. l2, l948) (Bernard, J., dissenting), *in* IMTFE PROCEEDINGS, *supra* note l02, at l, 2.

[228] Rome Statute, *supra* note 4, art. 2l(3).