9. The Crime of Aggression: Definitional Options for the Way Forward
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I wish to start my presentation on “The Crime of Aggression – Definitional Options for the Way Forward” by simply saying: nobody should underrate the thirst of the international community for more international justice. This is also relevant with regard to the crime of aggression, in particular with regard to a definitional solution for this crime which is so grave and has, in the past, haunted so many people. Judge Jackson, the great American lawyer of the International Military Tribunal of Nuremberg, was among the first to fully understand and to appreciate this.

In my brief contribution I will present – or better recall! – in two sections, with the help of the annex to this contribution:
1. The three or four main definitional models for the crime of aggression;
2. Some main definitional elements and issues with regard to an appropriate definition.

With regard to the latter, the emphasis is on some, not all. And among those main definitional elements, there are some which seem more or less uncontroversial or accepted, there are others which continue to be controversial, unclear and unresolved.

In addition and very quickly, let me add three other clarifying remarks:

First, after the thorough discussions and contributions of this conference, I cannot exclude the possibility that my own contribution may be a little bit repetitive. But for the sake of analytical clarity I will simply

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The form of an oral presentation as held is maintained throughout the text.

review the main definitional models and approaches that were and continue to be discussed in the Preparatory Commission. In so far, I hope, nevertheless, that things are different if they are presented from a different angle.

Second, this also means that this time I will try to set aside my well-known role as a German delegate, who in the past five years has continuously argued for a specific approach for a definition of the crime of aggression. As many of you are aware this specific approach is reflected more recently in U.N. Doc DP 4 of 13 November 2000 - "A further informal discussion paper" regarding the crime of aggression. If I lay out my own personal and subjective view with regard to a specific issue, I will indicate this explicitly.

Third and last introductory remark: as you are aware, as by now you all should be aware, the crime of aggression is in itself a very complex crime, namely a composite crime, a two level crime, two tier crime. In this crime - there seems now to be general agreement on this point - two main components, two essential elements must come together in order to be able to establish individual criminal responsibility:

1. There must be an illegal use of armed force, an illegal armed attack by one State against another which gives rise, according to international law, to State responsibility (and in this connection I would like to refer to Article 5 par. 2 of the Annex to GA Resolution 3314).

2. There must be an individual who is in a position of control and leadership in the attacking State whose action or conduct was, at least in part, a cause for the attack in question to take place.

At this juncture, I should like to insert a quick remark.

Let me recall the very interesting idea of our colleague Gérard Dive from Belgium put forward at the February/March PrepCom 2001 that maybe one should reflect this two level composition of the crime of aggression in an appropriate manner in a new draft structure. This would mean in concrete terms, that there would have to be an appropriate paragraph on action giving rise to State responsibility and an appropriate, but separate paragraph on the action of the individual which was causal for the armed attack. Such an approach should be further reflected upon.

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I now turn to part one of my presentation: What are the four main definitional models which form the material for our future efforts?

Three of them you find in the two-page illustrative paper with the title "The Definition of the Crime of Aggression: Definitional Options for the Way Forward".

The fourth model, however, is still a virtual one. It is the almost magical formula of a generally acceptable definition of the crime of aggression which we have so far been unable to find. At the same time, there is hope that with assistance and gradual progress - to be promoted hopefully also through this conference - we may be able to get closer to such a generally acceptable definition.

Now, when we look at the paper, we have at first Model 1. Obviously Model 1 is based on the text of the International Military Tribunal of Nuremberg which you find in variant 1 of Model 1. Variant 2 is the Russian proposal of 1999. This proposal is also based on the text of the International Military Tribunal of Nuremberg and defines the crime of aggression as planning, preparing, initiating or carrying out a war of aggression.

When we study Model 2 and the two variants contained under this heading, you are certainly aware that both variants are based on the famous text of General Assembly Resolution 3314:

- Variant A is the 1997 proposal made by Egypt and Italy which consists of a rather general, if not vague, definition of the crime of aggression.

- Variant B is the Russian proposal of 1999. This proposal is also based on the text of the International Military Tribunal of Nuremberg and defines the crime of aggression as planning, preparing, initiating or carrying out a war of aggression.

- Variant C is the 1997 proposal made by Egypt and Italy which consists of a rather general, if not vague, definition of the crime of aggression.

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1 For a recent and thorough summary of the state of discussion in the Preparatory Commission see Gerd Westdickenberg, Oliver Fixson "Das Verbrechen der Aggression im Römischen Statut des Internationalen Strafgerichtshofes" in: Festschrift für Tono Eitel, forthcoming 2003, Heidelberg.


4 See supra, fn. 2, p. 1.

and adds a non-exhaustive list of acts constituting aggression, taken from Resolution 3314.⁶

Variant B is the 1999 proposal submitted by Arab states⁷, in which Professor Shukri played an important role. This proposal is also based on GA Resolution 3314 and it demands in particular that the use of armed force by political or military leaders “aimed at depriving other peoples of their rights to self-determination, freedom and independence” shall also constitute the crime of aggression. Paragraph 2 of this proposal (variant B) is basically identical with the previous Egyptian/Italian proposal (variant A of Model 2).

As we now turn to definitional Model 3, you could call it the “generic approach”. Here, variant A is a proposal elaborated by the German delegation⁸ – the last proposal which was under active consideration on the table at the Rome Conference.

Now, why did I call it the former German proposal? Well, for a variety of reasons which I would quickly like to recall. As many of you know, the proposal contained in variant A was eventually not able to generate general agreement in Rome and it did not achieve general agreement later in the Preparatory Commission. Furthermore, numerous States who at a certain time supported it as a possible compromise for the Rome Conference later distanced themselves from it. Why? One main reason for this distancing was the inclusion of the extraneous definitional element “and subject to a determination by the Security Council”. This subjugation of a possible definition to a determination by the Security Council made this variant apparently unpalatable to a number of States. Finally, because it was emphasized many times – and also the German side is forced to acknowledge this argument – limiting the armed attack in question to invasion, annexation or military occupation is a somewhat restrictive approach, probably too restrictive. It has been stressed that such an approach does not take into account that modern mass destruction weapons, modern weapon technology and long distance weapons make it possible, for example, to totally destroy another country without a soldier of the attacking State ever setting foot in the territory of the attacked State.

The last proposal under Model 3 is the Greek–Portuguese proposal⁹ (variant B). This proposal also follows the generic approach, with a rather open definition.

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⁶ See supra fn. 4, pp. 3, 4.
⁷ See supra fn. 4, p. 12.
⁸ See supra fn. 4, pp. 10, 11.

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Let me now turn to part two of my contribution, namely to a closer look at some main definitional elements. As I said before, here you can identify some definitional elements which can be regarded as more or less uncontroversial or more or less accepted. In this category I should like to highlight two definitional elements:

One, there seems to be agreement that aggression is, by definition, a leadership crime. This is currently reflected by the formula “a person who is in a position to exercise control or capable of directing political/military action in his State against another State”. Here one gets the impression that this formula seems to be by and large uncontroversial. Indeed, all variants of definitional Model 2 (based on GA Resolution 3314) and definitional Model 3 (so-called “generic approach”) reflect this, as they contain such a formula.

Second, there seems to be general agreement that the use of armed force or the armed attack in question must be in manifest contravention or violation of the Charter of the United Nations. While this seems to be implicit in the approach of Model 1 as described earlier, it seems to be a common feature in the definitional attempts of Model 2 and 3. Here I may add a personal view: I myself now have a certain preference for the definitional element which is contained in the Greek–Portuguese proposal¹⁰ (Model 3, variant B) which uses the formulation “in manifest violation of the Charter of the United Nations”.

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¹⁰ See supra fn. 8.
general prohibition to use armed force in international relations. In this respect I should like to make a remark based on common sense: it is clear that there can be no crime of aggression without violation of the territorial integrity of the attacked State. Consequently, territorial integrity must be, through obvious necessity, an indispensable object of the armed attack in question.

Second, a more difficult, more complex definitional element concerns the question of how to define the act or the conduct of the leader/perpetrator in question. In general, when we analyze the models and variants in front of us, we note that the definition taken from the Statute of the International Military Tribunal of Nuremberg, as well as the Russian proposal which is also supported by France, and the former German text, all draw on the precedent of Nuremberg. They characterize the conduct in question with the notions “to initiate, carry out, plan, prepare or order an armed attack”. On the other hand, we see that the other models and variants more or less renounce a definition or a concretisation of the individual act or contribution of the leader in question.

Third, a further controversial definitional element is how to define the action of the State (not of the individual).

Should it be:
- the notion of “war” or “war of aggression”
- the notion “use of armed force” as referred to in Article 2 para. 4 of the Charter, or
- the notion of “armed attack” as referred to in Article 51 of the Charter?

The fourth, very controversial, very unresolved definitional issue in my view has to do with the quality/quantity/dimension and magnitude/intensity/gravity of the use of armed force/armed attack and the injurious consequences.

A new formula, which is now more and more familiar and frequently used by delegates in the Preparatory Commission phrases this as the so-called “threshold issue”.

Now when you examine the definitional models and approaches contained in the paper in front of you, you can quite easily see that there are rather distant positions or wide disagreements in this respect:
- In Model 1 the approach is to use the notion of “war” or “war of aggression”.
- In Model 2 you find the notion of the “use of armed force” combined with a list of acts as contained in GA Resolution 3314.

The German proposal (i.e. Model 1, variant A) takes as a point of departure the notion of “armed attack” as referred to in Art. 51 of the Charter. It then stipulates that the armed attack in question must result in an “occupation or annexation”. It is obvious that these two latter notions stem from GA Resolution 3314 paragraph 2 as can be seen in definitional Model 2.

With regard to these disagreements, these unresolved issues, I should like to make a number of comments, all on a personal basis. I believe that the following should be borne in mind:

First, a norm of international criminal law establishing individual criminal responsibility must fully reflect the seriousness of the crime. Furthermore, it must – in accordance with the principle of legality – also be as clear, precise, and well-defined as possible. This requirement applies both to the illegal conduct of the State involved in a crime of aggression and to the conduct of the individual leader who is responsible for the aggression.

Second, in particular with regard to the illegal conduct of the State in question we should make a very conscious and serious effort to solve the so-called “threshold issue”. In my view, we cannot do without a definitional element as clear, precise and well-defined as possible which deals with the quality, quantity, dimension, intensity, grave consequences or overall gravity of the armed attack in question.

Third, in order to emphasize this necessity and to argue for an appropriate solution Germany submitted on 13 November 2000 a further informal discussion paper on a definition for the crime of aggression as referred to in Article 5 of the Rome Statute. This document, also known as DP.4 has been mentioned by several speakers, among them Mauro Politi.

In the framework of this presentation I will not go into it again or elaborate the arguments as contained in this discussion paper. Everybody who is interested can read it. Let me simply say: the fundamental premise – I repeat: premise; this is not a definition – is that an aggressive, large-scale armed attack committed by a State on the territorial integrity of another State, clearly without justification under international law, represents indeed the very essence of this crime, with regard to the conduct of the aggressive State in question. In order to avoid misunderstandings let me repeat once again that this is as such not a definition for individual criminal responsibility, and we are aware of it.

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To sum up: where does this leave us? No perfect solution is yet in sight. But again, we need as much precision and clarity as possible. Openness and vagueness are nothing for a norm of international criminal law defining the crime of aggression, which is of such enormous concern to the international community as a whole. Openness and vagueness also damage the prospects of general agreement on an appropriate definition for this crime.

To conclude, maybe I can point in the direction of two possible avenues for progress for the definitional problem.

First, how about an approach to define more precisely the magnitude and dimension and the gravity of the injurious consequences of the armed attack in question which, in our view, must be large-scale and massive.

Second, how about a formula, for example, which could read: "...An armed attack of sufficient gravity, to be comparable in magnitude, intensity and actual injurious consequences to a war, whether declared or not". Maybe we can discuss such a formula at the next PrepCom. Maybe we can even improve it.

Probably I have exhausted not only my time, but also the patience of this audience. But as a last word, let my reiterate my belief that the pending issues concerning the crime of aggression can be solved, must be solved and eventually, with patience and tenacity, will be solved.

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**Annex**

**Definitional Model 1**

**Variant A (International Military Tribunal Nuremberg)**

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing; ...

**Variant B (Russian Proposal of 29 July 1999)**

For the purposes of the present Statute and subject to a prior determination by the United Nations Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating, carrying out a war of aggression.

**Definitional Model 2**

**Variant A (Italian – Egyptian Proposal of 21 February 1997)**

1. For the purposes of this Statute, the crime of aggression is committed by a person who is in a position to exercise control or capable of directing political/military actions in his State against another State, in contravention of the Charter of the United Nations, by resorting to armed force, to threaten or violate that State’s sovereignty, territorial integrity or political independence.
2. Provided that the acts concerned or their consequences are of sufficient gravity, acts constituting aggression (include) (are) the following:

a) The invasion or attack by the armed forces of a State of a 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.

Variant B (Arab Proposal of 26 February 1999)

1. For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, or depriving other peoples of their rights to self-determination, freedom and independence, in contravention of the Charter of the United Nations, by resorting to armed force to threaten or to violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those people.

2. Acts constituting aggression include the following, whether preceded by a declaration of war or not:

(a to g as in Variant A)

Definitional Model 3

Variant A (Former German Proposal of 30 July 1999)

1. For the purpose of the present Statute and subject to a determination by the Security Council referred to in article 10, paragraph 2, regarding the act of a State, the crime of aggression means either of the following acts committed by an individual who is in position of exercising control or capable of directing the political or military action of a State:

a) initiating, or
b) carrying out

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.

2. Where an attack under paragraph 1 has been committed, the

a) planning,
b) preparing, or
c) ordering

thereof by an individual who is in a position of exercising control or capable of directing the political or military action of a State shall also constitute a crime of aggression.
Variant B (Revised Greek/Portuguese Proposal of 28 November 2000)

For the purposes of the present Statute, the crime of aggression means the use of armed force (including the initiation thereof) by an individual who is in a position of exercising control or directing the political or military action of a state against the sovereignty, territorial integrity or political independence of another state (or states), in manifest violation of the Charter of the United Nations.