Challenges for the International Criminal Court and the Crime of Aggression
- Jurisdiction, Immunity and Politics

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1. Abbreviations

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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTY</td>
<td>International Criminal Tribunal of the former Yugoslavia</td>
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<td>ICTR</td>
<td>International Criminal Tribunal of Rwanda</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>UN</td>
<td>United Nations</td>
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<td>SWGCA</td>
<td>Special Working Group on the Crime of Aggression</td>
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<td>SC</td>
<td>United Nations Security Council</td>
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<td>GA</td>
<td>United Nations General Assembly</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>FRY</td>
<td>The Federal Republic of Yugoslavia</td>
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2. Abstract

2.1. Purpose
As of the year 2017, the ICC will have the possibility of prosecuting offenders for the breach of the Crime of Aggression. My purpose with this essay is to examine the main challenges facing the court in regards to this crime. Furthermore, the purpose is also to focus on general practical difficulties in prosecution when there has been a violation of the Crime of Aggression in order to find solutions for the future or at least be aware of the difficulties. This is an important and highly-relevant task since the crime itself may not be new even though the possibilities of prosecution definitely are now a current matter.

2.2. Research Question
What are the main challenges facing the International Criminal Court when prosecuting state leaders and policy makers for violation of the Crime of Aggression?

2.3. Method and material
The standard sources used in resolving matters under international law will be used. More specifically, several treaties will be studied and customary international law will be examined. Furthermore, the practice under ICJ will be studied in order to determine whether there is any guidance for the International Criminal Court when defining acts of aggression. This thesis will also discuss the purpose of defining the Crime of Aggression. Finally, a doctrine from scholars of this field will also be carefully studied.

2.4. Limitations
Focus will be on the Crime of Aggression and prosecution before the International Criminal Court and areas where there the court likely will face difficulties and
challenges in regards to prosecution of this crime. This thesis is limited to this area only. The other crimes under the jurisdiction of ICC will not at all be subject of this paper. Case studies will also be conducted to outline whether they would be prosecutable before the ICC in order to more clearly outline where potential difficulties lie. The cases selected are Kosovo 1999 and the invasion of Iraq 2003. A short comment on the present-day situation in Syria has also been included.

2.5. Outline/Structure of analysis

This essay will start with a brief overlook at the events leading up to the agreement in Kampala and thereafter a brief overlook of the history of the Crime of Aggression. Subsequently, the material aspects of aggression will be examined, the definition of article 8bis Rome Statute will be closely examined as well as the criticism towards it. In this chapter the question of how the ICC would assess the material aspects are looked into and whether proper guidance is to be found in the sources of International law.

Furthermore, the issues of immunity and jurisdiction, when prosecuting of Crime of Aggression, will be addressed. And the political dimension of the Crime of Aggression will be discussed. The case studies will be debated hereinafter, and finally, this essay will end with conclusions and analyses of challenges and potential possibilities.
3. Briefly about the lead-up to the historical agreement in Kampala 2010

This part will describe briefly the lead up to Kampala in order to examine what types of issues were the most problematic. We will look at issues that still remain problematic and as a result have been much discussed by scholars. One key issue has been what role the Security Council should have in the process of prosecuting the Crime of Aggression, especially by distinguishing between the state Act of Aggression and the individual responsibility for that state act which results in criminal responsibility. Other issues were the definition as well as the premises for jurisdiction.

The SWGCA was a working group formed after the entry date of the Rome Statue in 2002 for the sole purpose of reaching a definition of and jurisdiction on the Crime of Aggression. The participation was open to all states rather than merely state parties to the Rome Statue. The UN ambassador to Liechtenstein was leading the group, and the first meeting was held in 2003. During that meeting he realized that the issues that needed to be resolved regarding the Crime of Aggression were very complex. He therefore made a decision that has been widely regarded as what caused a breakthrough in reaching decisions on the Crime of Aggression. It was decided that it would be much better to hold informal meetings where discussions could flow more freely. This idea later became referred to as the Princeton Process.

The central issues that were problematic were issues that in my view are considered more political—namely, the role of the Security Council and the definition of the crime. The starting point of the discussions were therefore of a more technical character, such as criminal-law aspects of the crime. In 2009, SWGCA finished their work with one matter still unresolved—the controversial question of the role of the
Security Council.\textsuperscript{1} It is also noteworthy that the US was a part of the Princeton process, after a nearly eight-year hiatus. The reason was mainly Obama’s friendlier view towards the ICC compared to the negative view the former President George Bush had. However, the fact still remained that the US still had a negative view towards including the Crime of Aggression in the Rome Statue even if they were a more willing participant in the process.

Early on in the Princeton Process three main proposals were put forward in regards to defining the state Act of Aggression. Germany put forward the idea that the state Act of Aggression should be defined as a war of aggression, derived from Nuremberg. This was a proposal that was supported by a few western states, obviously a high threshold because the purpose or result would be annexation or occupation. The problem with this proposal would then be that the majority of interstate violence would then not be covered by the Crime of Aggression. The second proposal was put forward by the five permanent members of the Security Council that it should be up to the Security Council to determine what acts of aggression mean on a case-by-case basis and that whether the ICC would prosecute or not for the Crime of Aggression would depend on the decision of the Security Council.\textsuperscript{2} In my view, this was a problematic proposal from a legality perspective. In all criminal law--national as well as international--it is crucial that the potential offender knows what is criminalized.

The third idea was the notion of resolution 3314\textsuperscript{3}, that this would be what defined aggression. It covers a more broad range of situations than the first proposal, where aggression would be defined as a war of aggression.\textsuperscript{4} This was in the end what was accepted as Article 8bis. \textit{The full text of Article 8bis can be found in Chapter 5.1.}

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\textsuperscript{1} Barriga, Stefan; Kreß, Claus. \textit{“The Travaux Préparatoires of the Crime of Aggression”}, Cambridge University Press 2012, 14-18.
\textsuperscript{3} General Assembly Resolution 3314(XXIX) of 1974.
\textsuperscript{4} Wrange, \textit{Aggressionsbrottet och internationella brottmålsdomstolen}, 27-28.
\end{flushleft}
4. Understanding the Crime of Aggression; historical review of breach of the peace

A Crime of Aggression was in the past considered a crime against international peace. Historical trials took place in Nuremberg and Tokyo after the ending of World War II. And the Nuremberg trial was the first proper judicial verdict on international criminal law in the modern era. What was especially unique about these trials was the fact that it concerned individual criminal liability for crimes against peace—the ancestor to the Crime of Aggression and ICC in some ways. The International Military Tribunal tried Nazi war criminals but the legal foundation for that has been questioned; the criticism was that the Crime of Aggression was not a crime under international law and that the tribunal was guilty of “ex post facto”. The court argued that there was in fact the ban on war and it did exist under international law because of the Kellogg-Briand Pakt since 1928 that stated that war was not allowed as means for national politics. However, there was a settling in the matter under the London charter, article 6a and was defined as a crime against peace. The definition was:

the 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.

As one can see, the definition differs slightly from the modern era, even though similarities with article 8bis exists. However, in the article the wording is "war", and there is a pretty high prerequisite in our era for the term warfare because the way in which the international community settles their disputes differs highly from the manners of the beginning of 20th century warfare. Nowadays, the conflicts are moving towards more internal war concerning ethnicity, religion or even ideologies,

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5 Latin for “after the fact”. Meaning retroactive law.
6 Cryer, Friman, Robinson and Wilmshurst, An Introduction to International Criminal law and procedure, 2010
and there are other threats to world security such as terrorism and environmental threats. Of course, there are still elements of state-on-state attacks in modern-time dispute settling but whether they amount to "war" is debatable, and more often they do not amount to the requisite war. Most probably, the unofficial goal for warfare or conflicts will always be the same no matter what time era it is: to gain more power, whether it is by conquering countries in Hitler's manner or to avert security threats against the own territory by attacking another country as the US did in Iraq 2003. However, in my view, the US official explanation for the invasion of Iraq is not credible for obvious reasons which I will return to in Chapter Nine of case studies. I will in the Chapter of Material Aspects of the Crime also return to the issue of how disputes are settled in today’s world compared to the time in which Resolution 3314 was negotiated.

If we return to the overview of the historical background of the definition of aggression; the Nuremberg trials sanctioned aggression and qualified it as a crime under international law. Shortly after the trials, resolution 95(1) was approved by the General Assembly of the United Nations; this resolution confirmed the Nuremberg principles. Shortly, waging international aggressive war against other states was banned under customary International Law.

Also of importance, article 2(4) of the UN charter introduced an absolute prohibition to the use and threats of use of force. This was an important step in making it customary international law and generally binding. Noteworthy, the UN Charter does not specify aggression in detail. It is left undefined in terms of threat to peace and breach of peace. There have been many attempts to define aggression, and there have been several states willing to reach a definition with the purpose of preventing the Security Council from using its power when determining aggression in an indiscriminate, unfair manner. But as history demonstrates, it is a delicate question

8 “Affirmation of the Principles of International Law recognised by the Charter of the Nüremberg Tribunal”. General Assembly resolution 95 (I) 11 December 1946.
and one that has been proven difficult to agree upon within the international community.

There were further attempts to reach a definition spanning from the year 1950 leading up to the final approval of resolution 3314 in 1974. Interestingly, the resolution does neither affect article 39 of the UN Charter nor the responsibilities of the Security Council. If it did in fact limit the power of the SC it would most likely, in my view, never have been agreed upon.\(^9\) There is reason to return to this matter, and this will be done further below.

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\(^9\) Politi, M, Nesi, G, *The International Criminal Court and the Crime of Aggression*: article: *the historical background*, Leanza, Umberto, 3-17.
5. Material aspect of the Crime of Aggression. What constitutes the crime and what are the exceptions?

In Kampala, Uganda, on the June 11, 2010, a definition on the Crime of Aggression was agreed upon and thereafter included in the Rome statue by Resolution RC/Res.6 of June 11, 2010. Many scholars claim that this was a noteworthy historical agreement and one can only agree with that. Years of disagreement and discussions and passiveness and unwillingness had been the norm up to that day. The definition used was article 8bis. Even though it is not possible to prosecute for individual liability for the Crime of Aggression until earliest the year of 2017, it is of great matter to examine the challenges ICC would face. In my opinion there are several key questions regarding material aspect of the crime and how the court would assess these issues and where the ICC would find guidance when judging material aspects of the Crime of Aggression.

There are several terms in the definition which are not fully comprehensible in my view, and it is not clear how the court will assess and practice these and what meaning the judges will give to the different terms of article 8bis of the Rome Statue since most of them are undefined. This is what will be examined in this chapter as well as several scholars’ critique towards the definition and difficulties with interpretation of the paragraph as well as application.

The starting point will be to assess article 8bis; thereafter, Resolution 3314 will be looked into more closely, and the circumstances in which the resolution was accepted, its legal status and the critique that has been directed towards it. The Non-use of Force under customary law will be briefly discussed as well as the difference between it and article 8bis in order to evaluate if any guidance for ICC is to be found. Praxis will be briefly discussed because the ICJ has already ruled on aggression, and

10 See the International Criminal Court’s official website, under legal text and tools.
this can be of guidance for the ICC even if they are not legally obligated to follow other courts' findings. The first part of this chapter will close with a brief overlook of the exceptions to the crime because in my view these are as important material aspects as the definition itself, and they also pose challenges to the court especially the grey areas in which a justification to aggression are under debate.

The second part of this chapter is more specifically focused on sources of international law such as the starting point of Article 38 of the Statue of the International Court of Justice.

5.1. Article 8bis of the Rome Statute

The purpose of the General Assembly Resolution 3314 (XXIX) of December 14, 1974 was to be a guide to the Security Council in order for them to fulfill their duties under Chapter VII of the UN Charter. But is now included as a part of article 8bis.\textsuperscript{11} More specifically, it is based on Articles 1 and 3 of the Resolution 3314.

The Rome Statue’s article 8bis consists of two parts: the first part describes the individual act, and the second part the state act. Moreover, a state Act of Aggression amounts to a Crime of Aggression and individual liability, only \textit{when} the state act constitutes a manifest violation of the UN Charter.\textsuperscript{12} The conclusion by reading the article is that Crime of Aggression is considered to be the more serious form of the use of armed forces. With the exception of sub-paragraph F, every sub-paragraph from A-G of article 8bis incorporates the clause “armed forces” as a criterion Act of Aggression; an Act of Aggression is more or less equal to the use of armed forces at the most fundamental level of this law. So one can conclude that the Crime of Aggression is an even more serious form of the Act of Aggression. However, the problems that I can see is that manifest violation of the UN Charter is a difficult term to assess and could cover many situations. Article 8bis states;

\textsuperscript{11} Van der Vyver, Johan D: \textit{Prosecuting the Crime of Aggression in the International Criminal Court}, Nat'l Sec. & Armed Conflict L. Rev. 1 2010-2011.
Article 8 bis Crime of Aggression

1. For the purpose of this Statute, “Crime of Aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an Act of Aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “Act of Aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an Act of Aggression:

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

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

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

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

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

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

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.
The other crimes under ICC jurisdiction are based on *Jus in bello* whereas the Crime of Aggression differs and is based on *Jus ad Bello*, which easily is explained with the right to go to war. Interestingly, Carrie McDoougals argues that "the definition adopted is questionable at best and a poor reflection of the understanding of the meaning of an Act of Aggression under *Jus ad Bellum*".\(^\text{13}\)

What is of interest is that the threshold to violate article 8\(\text{bis}\) is higher than the principle of Non-use of Force under customary international law and Article 2(4); it is only the serious use of force that constitutes a Crime of Aggression. The meaning of the term Act of Aggression is related to grave breaches of the peace, McDoougals describes this as a large-scale uses of armed forces or very grave consequences of a threat or use of armed forces. But this is a bit unclear since threat of use of force is not included in article 8\(\text{bis}\).\(^\text{14}\)

5.2. The Non-use of Force under customary international law

The law against Crime of Aggression maintains the principle of Non-use of Force in the international community and is therefore closely linked to the principle of Non-use of Force.\(^\text{15}\) Article 2:4 in the UN Charter states:

1. 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

An analysis of this short but important passage will lead us to the preamble in the same charter, article 1, where the purposes of the UN are stated (comment: I have italicized key pieces);

\(^\text{13}\) Ibid
\(^\text{14}\) Ibid
1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

By looking at the wording of the preamble, one can see that it covers a broad range of situations. The purpose of article 2(4) is in my view an ambitious one. The purpose of the article is mainly to preserve peace in the international community. I believe as Morgenthau stated that since there does not exist proper sanctions under international law, states will be reluctant to follow and maintain the principles of the UN Charter. But this is not the whole truth either; for example, international community member states follows certain international rules such as respect for other countries' diplomacy because it is in their interest to do so. They respect other countries' diplomats and principles of immunity because they can therefore expect the same treatment of their own diplomats. The concept of reciprocity is still very powerful.

With that said, the scope of article 2:4 UN-charter, encompasses both direct and indirect violence: it must be a matter of military violence and not economical or political measurements against other states. The requirement is that it has reached a certain level of physical violence; however, this is not a requirement that there be a military invasion. Furthermore, the laying of mines in other states' ports constitutes the use of force as well as support to armed groups who are anti-governmental in another state. It is worth noting, however, that this contradicts the verdict in the Nicaragua –case of 1986, which I will deconstruct below, in which the ICJ stated that

16 Mahmoudi, Bring, Wrange, Sverige och folkrätten, 2011.
17 Wrange, Aggressionsbrottet och Internationella Brottsmålsdomstolen, 15.
the US support to contra-forces in Nicaragua did not constitute use of force to the degree that article 2(4) requires. This interpretation came about despite the fact that it was thoroughly proven that the United States had trained and supported the contra forces to a large extent. The bar was set pretty high, in my opinion, because it would have required that the US had been entirely responsible for the contra-forces and in some way also the commander of the group. Although their reasoning is understandable, it undermines the necessary future effectiveness of control.

Finally, some of the greatest issues for the judges in the ICC will be determining how high or low the standards of use of force will be. Since article 8bis constitutes that the most serious use of force is a Crime of Aggression, it is a new area to the court, and there is not very much quality guidance from the court-cases from the ICJ.

5.3. Resolution 3314

Resolution 3314 (XXIX) has been heavily criticized, and one can maintain that it was surrounded by controversies from the very start. Even before it was adopted, several member states were reluctant and skeptical towards the resolution, claiming that it was more of a political game rather than an attempt to reach the most accurate definition of the State Act of Aggression. Since the resolution is not legally binding, I believe this fact also had a positive impact on the ultimate adoption of it despite all the controversy. And the resolution was not legally binding but now it will be since Articles 1 and 3 are a part of article 8bis, Rome Statute.

It is noteworthy that even though it was not binding, it took approximately 22 years to come to some form of consensus on it even if the consensus was tenuous—stretching back from 1952 when the first special committee on the Question of Defining Aggression was established by the General Assembly. This is an indicator that the question of aggression committed by states is a sensitive one on several levels; and for obvious reasons, in my view. But this will be looked into closer in Chapter 6 where I discuss the political dimension.

18 Barriga, Stefan; Kreß, Claus. “The Travaux Préparatoires of the Crime of Aggression”.
The resolution has had questionable issues on the matter of legitimacy and functionality. Several scholars have questioned Resolution 3314 on several grounds. Carrie McDougall argues that the criticism the resolution is subjected to has to do with its ambiguity. She further criticizes the resolution on the ground that the definition sometimes is too broad and sometimes to narrow. She takes article 3b as an example of being too broad and unclear where it states “…the use of any weapon.”\(^{19}\) I agree with these arguments about being too broad or narrow; in my view, the problem with it being too broad is that of legality issues, especially in this context since it is now used for criminal law. It is necessary for possible perpetrators to know what is criminalized. Furthermore, in my view, a key issue is difficulties for the ICC in assessing what are actually considered weapons and as McDougal further argues; what will come tomorrow.\(^{20}\) Interestingly, Saeid Mirzae states that resolution 3314 “is a sound basis for negotiations and agreements on the Crime of Aggression”,\(^{21}\) One of the few that has been more positive towards the resolution.

If we look further to the functionality of the Resolution 3314 or Article 8bis, I believe it is important to include the critique of some scholars on, Resolution 3314 even if it occurred prior to the establishment of Article 8bis.

Resolutions are not legally binding and do not create rights or duties in the sense of treaties. However, they can be binding if they become customary international law.\(^{22}\) So at issue is also whether the resolution is considered customary international law.

Patricia Grzebyk argues that the resolution is not customary law, and its legal status is that it is only binding for the General Assembly and notably not binding to Security Council; but as I have earlier stated, it is used for guidance when the

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20 Ibid.
Security Council needs to determine aggression.\textsuperscript{23} McDougal agrees with the conclusion that Resolution 3314 is not yet customary international law, and his argument for this is that the Resolution has hardly ever been referred to by the ICJ and GA and that there is lack of use by the SC. And the issue at hand is that state practice and opinio juris has not been sufficient by far to make it customary law.\textsuperscript{24} Interestingly enough, is the ICJ states in the Nicaragua case that Resolution 3314 is valid as international customary law when determining when an armed attack has occurred. It is unclear whether the court means that the whole of 3314 is expressing customary law.\textsuperscript{25} Kemp argues that; what is customary law is that individuals can be held responsible for the Crime of Aggression or at least for the waging of aggressive war\textsuperscript{26}, and Wrange also states the Nuremberg principles are without a doubt customary international law.\textsuperscript{27} In my view, there seems to be somewhat of a gap. Individual criminal responsibility for waging aggressive wars against another state is under customary international law but is that a Crime of Aggression? Because several points under article 8bis would in my view not amount to waging an aggressive war. There are multiple more forms of attacks on other countries. What does it require for it amounting to a war instead of what we now more often than not refer by the word “conflict”? By looking up the word “war”, it states that war means the use of organized, military violence used against another state for the purpose of reaching political goals.\textsuperscript{28} My intention for returning to the core semantics of the word is that the legal question deals with semantics: to what extent, more specifically, how much armed forces does it takes for it to amount to waging aggressive wars? The only guidance we have are really the Nuremberg and Tokyo trials. However, in my view it seems as article 8bis is put somewhere between article 2(4) and the Nuremberg trial principles. Resolution 3314 defines aggression rather than wars of aggression.

\textsuperscript{24} McDougal, C, The Crime of Aggression under the Rome Statute of the International Criminal Court.  
\textsuperscript{25} paras 187-201  
\textsuperscript{26} Kemp, Gerhard, Individual Criminal Liability for the International Crime of Aggression, Intersentia, 2010.  
\textsuperscript{27} Wrange, Pål, Aggressionsbrott och Internationella Brottmålsdomstolen.  
\textsuperscript{28} http://www.ne.se/krig, visited on 2013-10-26.
Another matter that has been addressed by several scholars is that the resolution was not intended for criminal law such as its current use with the ICC and article 8bis but rather for collective security. But McDougal claims that this does not mean that very different definitions are needed for state responsibility or criminal responsibility. 

Mohammed Gomaa goes a bit further by stating: "Resolution 3314 deals with aggression by states, not with crimes of individuals. As such and without the appropriate cross-reference to the act of the individual it is of no use whatsoever for the purposes of criminal law." And this has been done in article 8bis in my view via a cross-reference to the individual act. Similar reasoning is made by Kemp who argues that Resolution 3314 is not suitable for individual criminal responsibility because it lacks actus rea and mens rea.

These are valid arguments of course, but in my view, resolution 3314 is indeed to determine whether a state Act of Aggression has occurred. But article 8bis along with articles 25, 30, 31 under the Rome Statute are sufficient for individual criminal responsibility since they states that intent is a requisite, and in article 25 paragraph 3bis (newly inserted through resolution RC/Res.6 of 11 June 2010 (adding paragraph 3bis), it states that specifically for the Crime of Aggression, there needs to be a person in a position effectively... The same exact words are found in article 8bis. Therefore, it is my conclusion that this is sufficient to fulfill the demands on individual criminal responsibility. To add to that, note that Gerhard Kemp and Mohammed Gomaa made their statements before the agreement in Kampala 2010.

The threat to contemporary transnational security is not as it was at the time when the resolution was approved. The resolution originated not from the adoptive year 1974, but in fact from approximately 1950 when the actual discussions started. But the question is whether this is a relevant problem because law originating approximately

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30 Politi, M, Nesi, P, *The International Criminal Court and the Crime of Aggression*, article: *the definition of the Crime of Aggression and the ICC Jurisdiction over that Crime*, Gomaa, Mohammed M.
60 years back doesn’t have to necessarily be problematic just because of its age; it is in fact not uncommon for laws to be of that age. In fact, if we look more closely into article 8bis and certain points in order to see how well they cover different situations of inter-state violence, it does in fact cover current and relevant scenarios of inter-state violence even if some of the definitions in article 8bis are unclear. But my primary point is that there is indeed space for the ICC to prosecute. There is potential but also a lack of clarity such as when article 3(b) of the resolution states:

“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”

This passage is fairly precise but what constitutes Crime of Aggression in a state would be bombing another state's territory. But how much bombing would it require for it to be a manifest violation of article 3(b) in regards to Character, Gravity, and Scale? Is bombing in itself serious in regards to the criterion Character? one might contemplate. Could Gravity be bombing public or civilian buildings or by using chemical weapon? One can merely speculate.

In my view, a solution would have been if the damages/result/outcome of weapons would have been specified in similarity with the crime murder where the outcome is the main issue not what type of weapons is used. It would have been much easier for the court to assess, on the other hand, and this would also cause great issues and headache in reaching a consensus, and the question would then be: what is “damage”? But this could perhaps make the result a better one, or this is what the ICC could be debating when making rulings on cases. On the other hand, this could present difficulties regarding evidence because it would be easier to prove what types of weapons had been used by an aggressor than what the damages were. Where an aggressor could claim that it was not s/he but the people in the country, such as Iraq. For example, after the invasion of Iraq, various types of terrorist groups appeared and caused great damage.
5.4. ICJ Cases

5.4.1. The Nicaragua Case
An important matter to discuss is that in International law in accordance with Article 59 in the ICJ statute, other courts’ findings are not binding for the ICC to follow but they nonetheless maintain weight in determining legal issues. And the Nicaragua case of 1986 had several interesting and crucial arguments as well as somewhat confusing arguments. Moreover, since it was a permanent tribunal based within the UN-system, one may argue that the verdict weighed pretty heavily in contrast to had it been a national court convicting offenders for international crimes. There has hardly been any cases concerning aggression, and this case is a therefore a historical one and of interest when examining whether there is any guidance for the ICC when dealing with the Crime of Aggression—even though the ICJ deals with unlawful state acts as opposed to individual criminal acts.

Background
This case dates back to 1986. The ICJ handled several complaints from Nicaragua regarding attacks on Nicaraguan territory as well as the laying of mines in the internal and territorial water of Nicaragua and being responsible for creating armed contra forces against the Nicaraguan Government. There are several other complaints such as a trade embargo but they are not of interest for this work. The United States justifies their actions by claiming collective self defense.

The court states that the laying of mines and the attacks on Nicaraguan ports, oil installations and naval bases carried out by the US constituted violations of the principle of Non-use of Force under customary international law in absence of justifiable circumstances.

Whether the principle was violated by the arming and training of the contra forces is more discussed in the case. The court examines whether the US committed a prima

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facie violation of Non-use of Force or if this was justified by the right of self-defense.

Interestingly, the court states that resolution 3314 is customary international law and refers to this when determining what an armed attack is in order to see whether the US violated Non-use of Force. So in that case, the court says that force in the sense of article 2(4) is the same as armed attack in the meaning of 3314 and therefore the same as in article 8bis (second part)\(^3\)

The more interesting point, in my view, is that the court examines whether training and giving assistance to contra-forces can be considered the use of force and therefore also aggression. And if the United States would have full, effective control over the contra-forces, it would violate the ban on use of force. So the prerequisite was not fulfilled even though it was stated that the United States had somewhat control over the contra-forces in that sense that they had picked the leader and, to a large extent, financed, trained and equipped these forces. And the court also stated it could not be proven that the US had “created” the forces. However, the conclusion would be that the use of force is extended to comprise this situation.

This case sheds a certain relevant light on the issue because this amounts to any state sending, for instance, terrorist groups to fight against another state on their behalf qualifying as aggression. Depending of the scale and extent of the attacks, prosecution for this could be at hand before the ICC. The reason for bringing up terrorist groups is that, as earlier mentioned, the nature and character of warfare is no longer the same as the first half of the century. Would the contra forces in Nicaragua count as terrorist groups by today's definition? Unfortunately, there isn't that much guidance for how to assess what type of extra-sovereign involvement amounts to aggression.

\(^3\) Paras 187-201.
However, regarding the question of collective self-defense, the case does offer some guidance.

The exception to article 2(4) UN Charter is collective self-defense under Article 51. The requisite for self-defense is that it needs to be proportionate and necessary. And furthermore, it must be a response to an armed attack. Worth mentioning is that the right to self-defense does not include when another state is being attacked if that state doesn’t ask for assistance and has not declared that it has been under an attack.

5.4.2. Case Concerning Armed Activities on the Territory of the Congo

The other case of concern to aggression is the “Case Concerning Armed Activities on the Territory of the Congo”, a more recent case than the prior, dating back to 2005. The Democratic Republic of Congo (DRC) filed a complaint against the Republic of Uganda for charges of act aggression within the meaning of article 1 Resolution 3314 and in violation of the UN Charter. Committed on DRC territory carried out by Ugandan armed forces. DRC claimed that Uganda had occupied DRC territory and given financial aid to forces within DRC borders and that they had strong connections to military and paramilitary groups fighting against DRC. In doing so, they had violated the principle of Non-use of Force clause as well as other principles under international law such as respect for sovereignty, which one can preclude is also linked to the conceptualization of state-on-state aggression. An Act of Aggression at its core and per definition violates the respect for state sovereignty in my view.

Uganda had three counter-claims but only one regarding non-use of force under Article 2(4). The claim was that DRC had violated this same principle. Uganda claimed right to self-defense; however the court rejected this notion stating

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34 ICJ reports 2005.
that Uganda did not claim that they had been under an armed attack, which called into serious question the credibility of their counter claim.

The Court stated in December 2005 in their judgment that Uganda had violated the principle of non-use of force under international law as well as principle of non-intervention. The unlawful actions was as, briefly mentioned above, the active assistance to irregular forces, operating on DRC territory, through military, economic and logistical aid. The other unlawful act was the occupation of Ituri, which was also DRC territory.

Conclusive, the unlawful acts in this case has some similarities with the Nicaragua Case and can be of some guidance to the ICC in defining acts of aggression.

5.5. Justification: The grey area

Also of importance and something that may cause difficulties for the ICC in determining whether an Act of Aggression has occurred are the exceptions. There are a few justifications for the use of force that a state can plead, and they must certainly be valid in the case of whether aggression has been committed. What is of interest in my view are the exceptions that are controversial and up for debate; these are what will cause a challenge for the judges in the ICC. In this passage, I will discuss these grey areas to examine whether they are still considered grey or if they are accepted as valid under international law.

The right to collective self-defense under customary law and Article 51 as well as measures approved by the Security Council are well established under international customary law, and I will briefly touch upon the subject because it is of interest how the court will assess terms as proportional and as instant threat, both of which are the prerequisites for the right to collective self-defense.35 However, this will in my belief

35 Wrange, P. Aggressionsbrottet och den Internationella Brottmålsdomstolen
not pose too many difficulties for the court. The area that may pose challenges is the case of humanitarian intervention.

The more controversial area that has been highly discussed in the modern era is the case of humanitarian intervention and whether it is an admissible justification when using force against another state. The NATO intervention in Kosovo is one that many considered justified under the reason of humanitarian intervention; however, others have argued that it is not under customary international law yet and therefore not a valid argument.

In Article “Prosecuting the Crime of Aggression in the International Criminal Court” Johan D. Van Der Vyver argues that humanitarian intervention can be accepted as a valid justification for use of force but only in exceptional cases. He means that the purposes of these interventions are to bring an end to violations of human rights committed by the government in question. And therefore they are not targeting another state’s political independence or wanting to change that state’s territorial border. Interestingly, he argues that it does not violate the Non-use of Force since the requirements of use of force "against the territorial integrity or political independence of any state". 36 In my view, the arguments that the main aim for humanitarian interventions are to bring an end to violations of human rights are correct. But in doing so, it can still involve in that action that the “attacking” state violates the territorial integrity or political independence. Or does Article 2(4) actually require that the main purpose be to violate other states' territorial integrity? This is somewhat unclear. The other exceptions are codified and under customary international law but humanitarian intervention is not established at all so to speak. And therefore, those arguments are in my view not entirely valid.

Some states have stated opinio juris on the matter of humanitarian intervention and to some extent also usus: practice. This has become more and more accepted as a

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36 Van der Vyver, Johan D; Prosecuting the Crime of Aggression in the International Criminal Court.
justification for use of force—Especially when it is a matter of large-scale suffering in a country such as today's Syria where the UN and the international community have also been proactive in taking measures against the country on the basis of humanitarian intervention. This was something that differs from the response to the case of Iraq where the international community was not particular keen on using force against Iraq. This is for acceptable reasons, I believe; the case of Iraq had some similarities with Syria but there are many circumstances that differ, especially regarding the scale of humanitarian disaster in Syria as opposed to Iraq, which had many similar occurrences but not to the same degree and scale.

The discourse on humanitarian intervention will proceed but any country wanting to use force is better off going through the table of the Security Council at this time.

5.6. Specific problems

5.6.1. Manifest- Character- Gravity- Scale

For it to qualify as an Act of Aggression, it is necessary that the particular act or acts in question also fulfill the three requirements in article 8bis of character, gravity and scale. And notably, it is important that all three criteria are fulfilled because these constitute a manifest violation of the UN charter. But what does this really mean and how can the court assess these criteria?. It is a vague formulation in my view and can be interpreted very widely or very limitedly. More likely is that it sets a pretty high threshold for the Crime of Aggression. Of course this can be of use since Crime of Aggression is one of the more serious crimes under international law. The issue, though in my view can be that it results in covering very few cases of inter-state violence or hardly any. This is more discussed under the Kosovo case in 9.1.

5.6.2. Vienna Convention on the Law of Treaties

According to the Vienna Convention on the Law of Treaties Article, the preamble should be studied in order to understand the purpose of the law. However in this case,
the preamble of the Rome Statue does not give a clear guidance, and it is somewhat unclear in certain parts. There is a reminder to states to uphold the non-use of threat or use of force, thus equivalent to article 2(4) UN charter. It seems to have been not entirely well-reasoned because this part of the preamble hardly clarifies the purpose of the Crime of Aggression; on the contrary, it adds some confusion. The use of threat is not criminalized as a part of 8bis but is to be found in the preamble. The legal meaning of this is unclear and also what the purposes are with having it included in the preamble.

This section of the preamble of the Rome Statue can be of some guidance in order to outline the purposes of article 8bis:

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, Recognizing that such grave crimes threaten the peace, security and well-being of the world.

It is a reminder that the ICC handles the gravest crimes, and the Crime of Aggression would in my view fall under threats to peace, security and well-being. The first sentence is more of a tone-setter for the handling of crimes under ICC jurisdiction that reminds all parties that Crimes of Aggression certainly can be of unimaginable atrocity.

5.7. Conclusions

A great quote that can well explain how the ICC can be equipped to deal with some of the issues that material aspects of the Crime of Aggression can pose is stated below:

‘‘generality and ambiguity are not uncommon in legal instruments, and judges are well trained to apply sweeping provisions to specific fact scenarios, to create consistency within
the array of conflicting provisions, and to afford a workable degree of legal certainty and practicality to dubious language often employed by law makers.\textsuperscript{37}

This quote describes my view of how to address the issues mentioned above with article 8bis. There are possibilities and margins for the ICC through praxis to make this a concrete and relevant law rather than a toothless paragraph. The preamble gives space for this and opens the door to interpret terms such as gravity in several different manners as there are no official outlined rules and regulations as to how to interpret what level is sufficient enough for an occurrence to qualify in regards to “character, gravity, scale”. What Act of Aggression implies is fairly well documented but in my view, these other terms do not have the same degree of documentation.

Of importance is that that the ICC interprets the Crime of Aggression from a standpoint where the purposes of criminalization and article 8bis is very much taken into consideration; in my view, it is also of importance because the guidelines are few and far between for natural reasons. There is hardly any praxis on the crime, and the many disagreements in the leading up to the crime have resulted in that many important issues have not been discussed properly.

There is indeed a heavy weight on the shoulders of the ICC judges and prosecutors. However, I do believe that it is of great matter that the court takes this commission seriously and doesn’t leave it to a distant future to prosecute because of being too cautious so that article 8bis becomes a stigmatized paragraph. My point to all this is that it is of importance that it is an active paragraph and not a passive one. By stating that, my point is not that the court should aspire for as many convictions as possible for the mere sake of convictions but rather only when it is called upon to proceed a preliminary investigation. When honoring balance and bearing in mind the purpose of the legislation, it is important to consider the preamble of the Rome Statue in this case.

\textsuperscript{37} Ibid
The largest concerns are in my view that the terms have no explanation and there is
not much guidance. How does one assess the words “manifest” or an “instant threat”.
How states have acted in the past may be an indicator but that is dangerous because
then states dictate law and not law dictating state behavior. How much violence is
necessary for it amounting to Crime of Aggression and not merely use of force? The
answer is unclear and gives the judges great responsibility. This doesn’t necessarily
have to cause a problem because there are countries with judicial systems that allow
judges to influence much of the interpretation of different terms such as the United
Kingdom. However, from a Civil Law tradition and in my view, it is still a gamble,
nonetheless.
6. Jurisdiction

Another area which I believe will cause challenges or problems when prosecution for Crime of Aggression is at hand is the matter of jurisdiction. In my view, it is too easy to opt out from the court’s jurisdiction. There are a few areas where the issue of jurisdiction may cause problems. The most obvious one is where there is clearly lack of jurisdiction and especially in the case of crime against aggression as opposed to the other crimes under the ICC jurisdiction, since it requires several other measurements for there to be jurisdiction for the Crime of Aggression. The issue of jurisdiction- or lack of jurisdiction (for a lack of a better choice of words) is so conclusive that it is definitely one that will create great challenges for the ICC. From two aspects the Crime of Aggression as opposed to the other crimes under ICC jurisdiction is not automatically binding for the state parties post 2017. And the second issue is the general problem with ICC jurisdiction: there are still many countries that are not state parties, and the third issue is with the Security Council’s power in regards to referral.

The outcome of the Kampala Review conference was besides article 8bis also article 15bis and 15ter on jurisdiction specifically over the Crime of Aggression because the Article 5:2 of the Rome Statute which is now removed had demanded it. 38

What was then the outcome more specifically, and will they pose practical difficulties for the ICC? The earliest date for the Kampala amendment to be effective is after January 1, 2017.

According to article 15bis and 15ter, the ICC would have jurisdiction over the Crime of Aggression after the decision is taken in accordance with the aforementioned articles and one year after the ratification of the amendments by 30 states.

There is also a possibility for a state party making a declaration that it does not accept ICC jurisdiction over the Crime of Aggression regarding the Act of Aggression committed by that state. Noteworthy is that the declaration does not apply to Security Council referrals. The state must reconsider the declaration every three years. Patricia Grzebyk argues that these states will probably be subjected to a lot of public criticism. That is an argument for the states to not submit a declaration but besides that argument; what will be the incentive to actually adopt or ratify the amendment? It is a difficult question, and one can only speculate on it. For smaller countries, yes, they are more dependent on good diplomatic relations, and pressure on them can be what makes them withdraw declaration, or in fact, the opposite. But in my view, superpowers such as the US and perhaps a few of the larger European countries have more margins too actually not ratify. They set the framework and game rules for world politics to a much larger extent. Logically, one can understand that, why would they risk going to trial when they easily can abstain? Sad but true, this is the downside of international criminal law. Everything is fragile and takes cooperation from states who in the end themselves risk indictment. In national systems, it’s very different as the mere individual has little choice but to yield to the state. But there is still some reason for careful optimism. This can develop into more solid law in the future; this is a milestone one can definitely claim. And with time, article 8bis can be something to count on. Like other international rules and laws on genocide, it is not perfect but still better with the law existing than not since at least a few transgressors have been put on trial for genocide even if the process is slow. And the international law system is constantly evolving and developing in my view. But it will take time for it to be a crime that is actually prosecutable, and I believe a proper breakthrough of indictment for the Crime of Aggression will take time.

The reason for that is that the question of jurisdiction over the Crime of Aggression is a very difficult one. Even if you are a state party there is ways to easily avoid the prosecution and ICC jurisdiction.

There are few grounds for the exercise of jurisdiction, one of them is that the Security Council can refer a situation to the court so that the ICC can then exercise jurisdiction over the Crime of Aggression and that specific situation. And the solution became to deal with in these two articles, the Security Council referrals in article 15ter or by state-party referrals or finally with the prosecutor acting on its own; so called proprio motu to be found in article 15bis. In regards to state-party referrals and proprio motu investigations, it needs to be established that the SC has made determination of an Act of Aggression. If this has been done, the prosecutor can continue with the investigation, and in other cases, the ICC pre-trial chamber can give a green light to proceed anyway. However, of great importance is that the Security Council’s findings are not binding for the ICC in both these scenarios.

Restrictions to jurisdiction regarding state party referrals and proprio motu investigations are that if the state accused is not a state party, the ICC cannot exercise jurisdiction over a national or if the attacks occurred on the territory of the particular state. The other limitation is the one I have previously described when a state submits a declaration stating it does not accept ICC jurisdiction over the Crime of Aggression.

Neither of these limitations applies to Security Council referrals.

One can state that the Security Council was awarded an important role in the process even if they perhaps had hoped for more. I believe this is a good compromise, especially since the council’s findings are not legally binding for the court. And even if arguments can be made that this would put a pressure on the court to rule in the way the council has determined. However, these issues are probably something that the ICC is equipped to handle, and in my view this will not cause major difficulties. Another issue that could well be debated and very much of importance is when the Security Council refers a situation to the ICC. From legal perspectives, this can be questioned,

41 Johan D. Van *prosecuting the Crime of Aggression in the ICC*
The following statement made by two of the leading figures of the American delegation after the Review conference very well describes the challenges the ICC is standing before and the attitude towards individual criminalization of aggression:

The court cannot exercise jurisdiction over the Crime of Aggression without a further decision to take place sometime after January 1st 2017. The prosecutor cannot charge nationals of non-state parties, including the U.S. nationals, with the Crime of Aggression. No U.S. national can be prosecuted for aggression as long as the U.S. remains a non-state party. And if we were to become a state party, we'd still have the option to opt out from having our nationals prosecuted for aggression. So we ensure total protection for our Armed Forces and other U.S. nationals going forward.42

That one of the largest, powerful states in the international community and one of the permanent members of the SC makes this statement is nothing else but unfortunate. This is not good for the future of the crime, and it doesn’t send good signals to other states in terms of promoting state cooperation which is a necessity for global stability.

42 Van der Vyver, Johan D; Prosecuting the Crime of Aggression in the International Criminal Court.
7. The question of immunity

The Crime of Aggression is a leadership crime; therefore, the question of immunity is an important one that may pose difficulties for the ICC.

There are two types of immunities under customary international law, namely functional and personal immunity. Functional immunity means that whoever acts in the interest of the state should not be held accountable for state actions. However, the question is if this is still valid in the case of serious international crimes. In the case of Pinochet, a national court reached the conclusion that immunity was not a valid argument since it was a matter of very serious offenses such as torture. Notably, Pinochet at the time was not a state leader. In the case of Arrest Warrant 2002, the ICJ found that Yerodia Ndomabsi had personal immunity in Belgian courts, even if it was a serious international crime. Ndombasi was at the time foreign minister of the democratic republic of Congo. Personal immunity means that during the time a state official such as the president, foreign minister or minister of defense holds his office he can not be prosecuted. After leaving office immunity for the person in question is no longer granted for serious international crimes.

Carrie McDougal argues that the concept of immunity under international criminal law has changed. It has moved from state leaders being completely immune for criminal responsibility before their own national courts as well as any other court to the removing of some of these immunities. But also that individual criminal responsibility is now more focused on the most responsible, those with higher positions rather than those under. McDougal further states that "These general trends were made explicit under the Rome Statue. Article 27 makes official capacity irrelevant."  

44 Wrange, Aggressionsbrottet och den Internationella Brottmålsdomstolen.  
Article 27 in Rome Statute states

1. 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. Immunities 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.

This article clearly states that immunity is not valid before the ICC. So in my opinion, there is no reason to conclude that the question of immunity will pose difficulties for the court in regard to state-parties.

However, there is a question regarding the situations when the Security Council refers a situation to the ICC in accordance with article 15(1)ter and article 13(b). What if they refer a non state party which has not signed the Rome Statue? The Rome Statue is a multilateral treaty and as such, it requires the will of that state, and it is only binding when signed and for certain crimes ratified. Therefore, the question of immunity should not be assessed according to Article 27 of the Rome Statue; rather, the question is whether immunity as then should be assessed under customary international law by the ICC. However, in my opinion, the answer is unclear. Most states have signed the UN Charter, and the Security Council can indeed make decisions that are binding for the member states but they cannot in my view take decisions that bind states to certain treaties without having even signed them. The matter of referral by the SC has been discussed also under Jurisdiction, Chapter 6. To reiterate, I am not claiming that immunity under customary international law is always granted for state-leaders who still hold office and that it

46 Svanberg, K, *Introduktion till traktaträtten*.
47 Bring, Mahmoudi, Wrange, *Sverige och folkrätten*. 
doesn’t break immunity for those who commit serious crimes as *Jus cogens* where Crime of Aggression belongs. But the question is under debate, and there seems to be under international criminal law a movement towards not granting immunity for the most serious crimes even if the person in question is still in office. Several scholars have shared these views.

Another matter that could cause issues when a state court indicts a state-leader for the Crime of Aggression and he claims immunity because he is still sitting at his post. Can in those cases the ICC still prosecute according to the complementarian principle or would this be a violation of the principle *ne bis in idem*. Because the cause is not really tried; it gets dismissed on grounds of immunity. Article 20 (3) of the Rome Statute states:

**Article 20**

*Ne bis in idem*

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

This article doesn’t answer that question entirely, merely that the ICC cannot prosecute a case when a another court is prosecuting for the same offense unless the court is conducting an insincere or dummy trial in order to make sure the ICC doesn’t prosecute. Moreover, if the trial is not conducted in an impartial or independent manner, there is definitely room for the ICC to go ahead even if a case has been dismissed by a national court due to immunity.
The question of immunity is always one that may pose difficulties and challenges, especially for the Crime of Aggression, since it is a crime reserved for those highest up in state hierarchy. However, I find it difficult to see why immunity would be a larger issue before the International Criminal Court because it is so explicitly codified in Article 27.
8. The Political Dimension

The matter of law and politics is always something that will be closely connected under international law. The individuals who in real life decide what laws there should be and the sanctions for breaking them have always been--not jurists--but in fact politicians. So really the question is, is this institution that we refer to as the international legal system in its core and foundation actually a political system? What is considered morally wrong is something that often politicians decide. To wage war against other states was in the past more or less considered necessary, but as law-makers slowly began codifying this as something legally wrong--from Kellogg Briand pact up to nowadays agreement in Kampala--the notion and opinions on inter-state warfare are not what it used to be. Even though Hugo Grotius at a very early stage in history also raised the notion of aggressive war as being unlawful.

International politics has set the frame for when and how offenders of the Non-use of Force should be held accountable. However with that said, the jurists shape the political system into a judicial one to a larger extent by applying court security principles and by making qualified interpretations of the law. Interestingly enough, it occasionally turns out not to be what the law-makers had in mind even if this of course is the main goal for jurists. All the above is very much relevant and current for the ICC and the Crime of Aggression. The dispute between legal expertise and political mandate is one that very much characterizes the negotiations on the Crime of Aggression regarding definition and jurisdiction and what role the SC should play in the process versus the ICC.

The political dimension is also of matter from other standpoints and one that may cause challenges for the ICC. It is the fact that the Crime of Aggression itself is very politically charged, more so than other crimes under international criminal law. Invasion or attack on other states is a very much political act, and it expresses a political strategy. Also, that there will be now possibilities to prosecute another state leader, it could also be for political reasons state parties refer situations to the ICC with the motivation to get rid of an undesirable opponent.
8.1. The role of the Security Council

One of the problems is the question of what role the Security Council should play in regards to defining state acts, since the ICC only has mandate over individual acts and not state actions. This is contrasted with another international court, the ICJ that has that has legal mandate over state actions and can rule over this. The Security Council has under chapter VII the authority to determine whether an Act of Aggression has been committed by a state. To conclude, what role would the SC have in regards to both definition and determining when Act of Aggression has occurred and whether any power should be granted the SC on determining jurisdiction.

The question on the Security Council’s exclusive role to determine aggression was debated on well up to the agreements in 2010 as well as what role they should play in the process. The issue has also been whether the SC should be responsible for determining the state Act of Aggression and ICC the individual criminal act. Hereinafter I will describe how the discussions went along regarding these questions.

The UN bodies all have their own assigned roles, and the determination of aggression was one that the SC was given. Although, Giorgio Gaja argues that this doesn’t mean that they have an exclusive right on the matter or that the council’s findings would be binding for “…a treaty body entrusted with repression of individual crimes.”48 This obviously means that it is not binding for the ICC, which is a treaty-based court trying individual crimes. Yengejeh agrees with this, but in his opinion the SC; accordingly with article 24 UN Charter, should have an important role when deciding the commission of an Act of Aggression. But he also thinks that the General Assembly also should play a part in determining aggression because according to the UN Charter, this UN body also has a role in maintenance of international peace and security. But merely in the form of recommendations to what

measures should be taken to peacefully settle disputes. If the SC fails to make a ruling in determining aggression, the ICC should then after a period of time have the possibility to make a ruling instead.\textsuperscript{49} Most notably, arguments as to the SC’s core role in regards to collective security were brought forward, and many states did not want to limit the role of the council in determining aggression. At the same time the need for an independent ICC was put forward, and that it was of importance that the role of the council would not interfere with the court’s independent role when determining individual criminal responsibility.\textsuperscript{50} And finally, both the ICC and the ICC have different roles to play, and it does not necessary have to be conflicting ones, but for the sake of the UN charter provisions, the council also must have an important role.\textsuperscript{51}

Another argument brought forward was that since the ICC really cannot determine whether a state act has occurred, this role had to be awarded to the Security Council. However, this would cause other issues from the perspective of fair trials; namely, the council’s findings cannot be appealed, and this violates the UN Charter principles of a fair trial. The outcome of the Kampala agreement on the matter and the role of the SC was article 15ter, and this has been described under the chapter on jurisdiction.

\textbf{8.2. The credibility of the court}

There is a large risk that the Security Council would use the court as a political platform. They are a political organization, and the judicial knowledge is not there even if they can outsource it to other UN bodies. Making the prosecution of this crime into political questions or for serving political interest is a significant hazard,

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\footnotesize{50} Bachmann, Sascha-Dominik, Kemp, Gerhard, \textit{The international Crime of Aggression in the context of the global "war on terror": some legal and ethical perspectives}

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in my view. Even though it can be said that the Crime of Aggression has a natural connection to world politics, there is a danger of when one is determining an Act of Aggression, it becomes a question of “moral” evaluations such as justified and unjustified attacks in the sense of ideology and even religion rather than the actual rule of law. The Security Council does not represent the whole world community even if it should. They have been notorious for serving their own national interests, and the five permanent members has even more power in the form of a veto. Until the Security Council itself is truly democratically based, it is my conviction that there cannot be an entire fair handling of the authorities given to the council in regards to the Crime of Aggression.

There is also another matter, which in my view can harm the ICC or at least make it more difficult for the court to get convictions on the Crime of Aggression, and that is the lack of national cooperation. And this touches on the subject of the court's credibility.

It takes just a quick glimpse on the International Criminal Court's website to see that the court has only charged African leaders. The question is whether this is a coincident or a system fail. The suspicion would likely be that the court is not a court for the whole international community but merely one that prosecutes non-western countries. And this can hurt the court’s credibility in a great manner. Instead of a seat where justice can be potentially served, it becomes another platform where the west can use its power. Observe that my opinion here is measured and somewhat divided, but I believe that it poses tremendous difficulties if the court’s credibility is not strong, and it is not viewed as a fair, judicial international body and instead is viewed as a political and even western-imperialistic court. My belief is that in order for the court to be able to do its job properly so that there will be incentives to work with the ICC regarding cooperation around collecting evidence and extradition of accused offenders, it must be generally considered to be a court with integrity and credibility.

Finally, another cause for the Crime of Aggression being of much political nature in my view, is that in some sense, much more than the other crimes under ICC
jurisdiction it is as if the state is on trial. If there for instance would be an indictment of for instance Germany’s leader Angela Merkel it would seem in the international community as if the state Germany is on trial. The leaders become symbolic with state. As opposed to for instance war crimes where military leaders or alike are often prosecuted and this does not have the same political stigma even though there are exceptions.

9. Case studies. Would these constitute aggression

9.1. Kosovo 1999

Something that I have had a hard time wrapping my head around is that NATO is a military organization, why they would be interested in humanitarian intervention is somewhat unclear. Arguments that I believe are more likely is that the aim was stability in the region because the conflict was taken place in Europe. But on the other hand, maybe this becomes the same results, bring an end to human rights violations and the region will be more stable. Or the genuine purpose of helping the people of Kosovo from the oppression they were enduring. The problem is also, there are areas that desperately needed humanitarian intervention, such as Rwanda 1994 in my view.

The NATO bombings of the Federal Republic of Yugoslavia started in March 1999 and continued until June, during a time span of approximately 96 days. The code name of the operation was “Operation Allied Force” and has given rise to many discussions on the legality of the intervention under international law among scholars. My purpose is to examine whether the bombings of FRY could have constituted crime of aggression under article 8bis Rome Statute. For obvious reasons the ICC does not have jurisdiction over the Kosovo case since prosecution for the crime of aggression is not even a reality yet, however it would be of interest to examine mainly the material aspects of the invasion and to some extent touch upon the question of jurisdiction. Of interest is also that NATO is not a country, it is an organization or a group of states one might state.
The purpose of the military intervention against Serbia was according to NATO, for humanitarian reasons, more specifically stopping the ethnic cleansing taken place in Kosovo. Slobodan Milosevic accepted the NATO demands after more than two months of bombing and an agreement was signed between the International Security Force (KFOR) and FRY in June 1999. The content of the agreement was a political solution of the Kosovo Crisis such as a withdrawal of Serbian military police and paramilitary forces. The international community also accepted this in the form of a Security Council resolution 1244 only one day later and thereby the air strikes by NATO were put to an end. The airstrikes resulted in approximately 500 civilian’s death and more than 800 civilians injured. 52

Interestingly, Kosovo was the first case where international forces were used for humanitarian reasons in defiance of a sovereign state. The bombings of FRY were made without the approval of Security Council. Russia had beforehand declared that it would veto the approval. However, NATO argued that their actions were in accordance with the principles of the UN Charter because they were intervening in order to put an end to crimes against humanity in Kosovo.53 Wrang argues that the main argument that is given for those in favor of humanitarian interventions as a legal justification is that it upholds one of the UN Charters cornerstones; the respect for the human rights. However, there should be an approval by the Security Council in order to intervene in other states affair when there are risks for humanitarian disasters or by minimum get the support from the UN General Assembly.54 The UN and the SC did not condemn the NATO’s use of force although Russia did try to get a SC resolution approved in order to put an end to the bombings, however without any success.

54 Wrang, Aggressionsbrottet och den Internationella Brotmälsdomstolen.
So what was the aftermath of the NATO intervention, on the positive note there has been an improved security situation resulting in much fewer numbers of international soldiers and police deployed in Kosovo. There has also been a number of elections and transitions of power. On the negative side, there is still much ethnic violence occurring as well as high unemployment and an area where organized crime is high.\textsuperscript{55}

So, would this invasion qualify as a crime against aggression. Wrange argues that the situation in Kosovo could fall under resolution 3314 under paragraph 3(b), there can be much damage caused by bombings and this is what happened in Kosovo, he argues.\textsuperscript{56}

In article 8\textit{bis} the equivalent to this is paragraph 2(b), it has been established that NATO were bombing the territory of FRY which constitutes “…bombardment by the armed forces…against the territory of another state”. Should there be taken any notice to the requirement under paragraph 2 that the bombings must be: “…against the sovereignty, territorial integrity or political independence…”, that the purpose of the bombings should be to violate this in order for the offenders to be held responsible. Wrange states that when looking into the principle of non use of force, codified in 2(4) UN Charter there has scholars arguing that: yes it does matter. They argue that the purpose of the NATO attacks on FRY was not intended to violate the state’s territorial integrity or political independence but to merely put an end to persecutions of Kosovo-Albanians accordingly with the UN purposes. However, the majority of states reject this notion and the common view is that all use of force automatically violates territorial integrity or political independence, thereby a violation of the UN Charter \textsuperscript{57}

\textsuperscript{55} Baylis, Smith, Owens, \textit{The Globalization of World Politics}.

\textsuperscript{56} Wrange, \textit{Aggressionsbrottet och den Internationella Brottmålsdomstolen}.

\textsuperscript{57} Ibid
The NATO air strikes was also violating article 53 of the UN Charter because there was no mandate given by the SC\textsuperscript{58}, under article 8bis paragraph 2 in the opening wording it states that “…or in any manner inconsistent with the Charter of the United Nations.”

The more difficult part of assessing the matter in my view is under paragraph 1, article 8bis where he requirements are that the act of aggression must be constitute a manifest violation of the UN Charter and the three requirements of character, gravity, and scale determines whether it is a manifest violation. That there has been an act of aggression has been stated earlier in this text. In amendments to the elements of crime, Annex II under Introduction subparagraph 3 it states that the term “manifest” is an objective qualification. What this entails is unclear however.

Furthermore, the understandings under paragraph 6-7\textsuperscript{59} states:

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.

Manifest threshold; requires act of aggression to be both of particular seriousness and obviously unlawful. To reach a determination as to whether this has been met, the court needs to decide whether the combination of character, gravity and scale indicate a serious and unlawful act. \textsuperscript{60}

\textsuperscript{58} Bring, Mahmoudi, Internationell våldsanvändning och folkrätt, Norstedts Juridik, 2006, 45-67.

\textsuperscript{59} Understandings regarding the amendment to the Rome statute of the ICC on the crime of aggression, ANNEX III. Resolution RC/RES.6

\textsuperscript{60} McDougal, The Crime of Aggression under the Rome Statute of the International Criminal Court, 130.
Also, of interest is that the consequences of the act should be taken into consideration. The question of what consequences that should be taken into consideration, the number of civilian casualties or the state the country is left in due to the bombings? Or perhaps both, “…a consideration of all circumstances…” under paragraph 6. Whether the NATO bombings fulfills the criteria’s mentioned above is something that remains unclear and a difficult question. What can be of some interest is that there has previously been discussed whether the NATO were guilty of war crimes due to the number of causalities as well as the circumstances in which they occurred. In that case they would have been held criminally responsible before the International Criminal Tribunal for former Yugoslavia (ICTY). However, the Prosecutor of the ICTY came to the conclusion after some time that "that there [was] no basis for opening an investigation into any of the allegations or into other incidents related to the NATO air campaign." 61

Noteworthy though is that the ICTY does not have mandate to try aggression crime committed by states as does the ICJ so the prosecutor are here merely stating that for those crimes which the ICTY has jurisdiction over has not been violated, is my conclusion.

The statement and decision made not to move forward with prosecution was one that received much criticism from the majority of scholars and interestingly stated that they believed the prosecutor’s decision was more politically influenced rather than legal and claimed she was impartial. 62 This information is also of interest to this thesis since these types of international crimes involving state leader’s decision in any way becomes automatically more political. There is not the same stigma or controversies around other international crimes such as cross-border narcotics smuggling because the offenders doesn’t hold political offices.

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61 Massa, Anne-Sophie, NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion.

62 Ibid
The conclusion of the possibly committed war crimes is that because there was reason for questioning the number for casualties and the circumstances around it--this is a factor to be taken into consideration into the question on whether this amounts to crime of aggression.

And Bring states that "Most if not all international lawyers will agree that the NATO actions against FRY has been a violation of the UN Charter and consequently of international law." So whether it amounts to crime of aggression requires the NATO actions to be considered more grave than a violation of the UN Charters principle on non-use of force. This however is a question than can only be speculated in and in lack of further guidance the question remains unanswered.

Finally, the issue of NATO being an organization raises the question of who is to be held criminally responsible. Are all state-leaders in NATO possible perpetrators or merely those who was in favor of the airstrikes? An answer would be, to first look into the process of NATO decisions, does it require everyone to be in consensus of the decision to bomb FRY territory or perhaps not. Also of interest is in Resolution 3314 under article 1 explanatory notes subparagraph b it states that the definition of state also:

Includes the concept of a “group of States” where appropriate

Which leads to the conclusion that NATO can be considered a group of states and those to be held criminally responsible are based on general criminal principles of law, where intent and furthermore are necessary for individual criminal responsibility.

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9.2. Iraq 2003

The invasion of Iraq 2003 has been one of the most discussed interstate violence cases of modern time. Many have had opinions on the matter, especially whether it was a legitimate war or not from several standpoints, legally as well as morally and economically. The cost of the war in the form of human lives, Americans as well as Iraqis, as well as in the form of state budgets went above and beyond all expectations. Of interest for this paper is whether this can be considered a Crime of Aggression and whether responsible state leader or leaders could be prosecuted in the ICC. The purpose of this is to assess from a real case how potential challenges for the ICC would appear.

Background

So what were the reasons for the US along with allies to start a war against Iraq? What were the justifiable causes for using force against another sovereign state?

The invasion of Iraq was called “Operation Iraqi Freedom” and has caused international lawyers to debate the legality of the invasion since it was not explicitly authorized by the Security Council nor an apparent act of self-defense under Article 51 of the UN Charter.\(^{64}\) There were three main possible justifications as to the legality of the invasion under international law. The first one concerns the UN resolutions approved under chapter VII stating in the beginning of the 1990\(^{th}\) due to the Kuwait invasion. The resolution states that force on Iraq was legitimate for the purpose of restoration of peace and withdrawal of Iraqi troops from Kuwait. The other justifications brought forward has been that it was a form of preventive self-defense against international terrorism, and finally that this was a humanitarian intervention set out to save the Iraqi people from an totalitarian government.\(^{65}\) The only argument of these three in my view that can be somewhat valid even though it is highly questionable under international law is that the invasion was a form of humanitarian invasion. However, this argument was not brought forward by the

\(^{64}\) Bachmann, Sascha-Dominik, Kemp, Gerhard, *The international Crime of Aggression in the context of the global "war on terror": some legal and ethical perspectives.*

\(^{65}\) Bring, Mahmoudi, *Internationell våldsanvändning och folkrätt,* 89-105.
American Government before the invasion. Discussions on regime change was indeed made to a small extent but there was mostly arguments on Iraq posing a security threat to the US partly because they possessed weapons of mass destruction (hereafter WMD) and that they were entitled to defend themselves as a an extension of the resolution on international terrorism accepted the day after the attack on World Trade Center. However, there is reason to return to that very matter. I will hereinafter briefly describe the events to outline whether individual criminal responsibility for the Crime of Aggression could come in question.

After the attack on world trade center in 2001, America wanted Iraq to support the US and commit against Al- Qaida and their war on terror. The Iraqi foreign minister at the time, Tariq Aziz agreed to this. But a different answer came from Saddam Hussein. He gave the answer that not only the US were victims of terrorism, but that the sanctions on the Iraqi government were also terrorism and that far more people had been killed by the sanctions toward Iraq than at the World Trade Center.

In 2002, Dick Cheney argued that there may be more terrorist attacks directed towards the US and that Saddam posed a potential security threat and therefore needed to be overthrown. In my view, no valid arguments for this have been given. Saddam was indeed posing a threat to his own people, and his brutal rule was well known, but there were no real arguments as to why he would pose a security threat to the US more than that he was unpredictable dictator, something that can be stated about many of the undemocratic nations worldwide.

Arguments from the US were also made that Saddam Hussein would supply Al-Qaida with chemical, biological and nuclear WMD. The Iraqi Government had used chemical weapons against Iran during the Iran-Iraq war and also against the Kurds in northern Iraq. So obviously, they were known for having WMD or at least had access to them at one time. The striking thing in this scenario is that, from asking Iraq to commit against Al-Qaida to one year later accusing them of aiding Al-Qaida seems a bit odd. However, the US’s closest ally in the matter of a possible invasion of Iraq

66 The Iraq war, BBC documentary from 2013
was the UK government and more specifically Tony Blair, prime-minister at the time.

The success and outcome of the Iraqi war for the US is questionable, Saddam Hussein was overthrown but no WMD were found, and no changes were made in regards to securing oil supplies from Iraq, and an uncertain future for the Iraqi democracy has been the outcome.67

In the article “The international Crime of Aggression in the context of the global "war on terror": some legal and ethical perspectives” it is argued that the legality of the invasion of Iraq will be debated furthermore from an international law view. But it also argues that from an international criminal law perspective, there seems to be no possibility to take actions against any individual guilty of the invasion of Iraq “and in particular [to answer] the question whether any individuals can be held liable for the Crime of Aggression.” Interestingly the authors also argue that is also necessary to take on a political view alongside with the legal, the Security Council accepted that the occupation could be a reality.68

The question is what the US purpose was: was it a war on terror excused by a resolution accepted after September 11, 2001, to overthrow Saddam for the purpose of regime change and humanitarian intervention or was it to get rid of WMD? All is unclear, and seems that not even the United States are sure what official justification should be made. It is not farfetched to come to the conclusion that the reason for invading Iraq was matters that served the US in some way, and the other justifications were ad hoc after-the-fact fabrications to be able to justify the war in the public eye. I will in this paper not speculate on what potential incentive the US and its allies had to starting, in my legal opinion, an unlawful war. However, what is more clear is that had the US government had to plead their case in the ICC or the

68 Bachmann, Sascha-Dominik, Kemp, Gerhard, The international Crime of Aggression in the context of the global "war on terror": some legal and ethical perspectives.
ICJ, it is likely the court would have left their testimony as not credible and the grounds for invading Iraq as not sufficient and inconclusive.

Could this amount to a Crime of Aggression?

Under article 8bis, the attacks on Iraqi territory per the requirements under paragraph 2(a,b,d) are fulfilled. The material aspects of the crime states that is was a matter of bombings on Iraqi territory as well as invasion by American forces on land. It was a matter of massive air and land attacks. The question is whether the requirements of Character, Gravity, Scale are fulfilled. It was a matter of 200,000 allied troops entering Iraq. This must be considered large scale and in regards to gravity, the bombings caused great damages with many civilian casualties as well as infrastructure. Many Iraqis were forced to leave their homes due to safety risks and were forced into life as refuges. Also of interest is that the Iraq invasion was not over under a short period of time; rather, the last American troops from Iraqi territory were withdrawn as late as December 2011. In looking into the criteria of Character; the US invasion of Iraq had the character of an aggressive war. However as previously stated, the meanings of these terms are unclear and it will be interesting to see how the ICC would assess this. In the case of jurisdiction, if we would assume that the Iraq war occurred after 2017, the US is not a state party, so the only way for the ICC to exercise jurisdiction is if the Security Council would refer the situation in accordance with Article 15ter Rome Statue to the ICC. This is highly unlikely since the US is a permanent member of the SC and would most likely use its veto. However, most likely Universal Jurisdiction could be valid here since war of aggression is under customary law, and there are clear arguments for the invasion of Iraq being an aggressive war.

Regarding the question of immunity, there is no immunity before the ICC and there is either way no immunity for serious international crimes after the person has left the post.

Regarding the criteria of who would be held responsible is the requirement of being
“...a person in a position effectively to exercise control over or to direct the political or military action of a State…”

The question then becomes who has the authority to issue the orders and execute the powers. Was it former President George Bush, former Vice President Dick Cheney, and former Secretary of Defense Colin Powell who are to be held responsible? Most likely, George Bush is to be held responsible because he has the power to make final decisions, but arguments to Dick Cheney’s guilt can also definitely be discussed because he was definitely one of the central figures that pushed hard for an invasion without getting the legal justification in the form of a Security Council approval. Most likely, this influenced the presidential decision at the time. Colin Powell?

It can also be questioned whether Tony Blair can be held responsible. He would have probably not initiated an invasion of Iraq on his own, and he was also the one that pushed for a justified attack, by having the approval of the SC. However, he sent British troops to Iraq as well, and he was officially supportive of the invasion and was also cooperating with the US government on the matter. The US would have most likely invaded Iraq even without the support of Tony Blair, so most likely he is to be considered an accessory to the crime with the US holding primary responsibility. Note that the United Kingdom is a state-party and ratified the Rome Statue of 2001.69

Whether the United States were committing an Act of Aggression when they invaded Iraq 2003 or if it was a justified cause can be debated, and most likely the conclusion will be that, yes, they did in fact change the limits of article 2(4) in the UN-charter. As a result, the respect for the Non-use of Force has been affected.70

69 See the International Criminal Courts webpage: www.icc-cpi.int under “state parties to the Rome Statue”. Visited 2013-11-07
70 Panel-debate on International law with Saïd Mahmoodi, Ove Bring and Hans Corell, Stockholm, 2011-09-12
9.3. Syria Today- short comment

In the context of this thesis, discussion on Syria is relevant and significant\(^1\), especially in the context of whether invading Syria would be a justified or unjustified war. The way for the US to attack Syria and have it be justified in the eyes of the world community is through humanitarian reasons. According to President Barack Obama’s official statements to other world leaders as well as the statements that US has released, Syria has WMD. Now whether it is a matter of justified use of force according to the UN-charter, as several authors have cited the exception of "humanitarian intervention", is very controversial and not really established under international law. The rhetoric seen from Obama is, in my opinion, similar to how he would speak if it was a matter of self-defense as when saying "the world community must react". And perhaps he did this very knowingly in order to legitimize a potential war through rhetoric because the legal grounds for attacking Syria are shaky and not well-founded under international law. In my view, the eventual attack on Syria is more likely unlawful if the US would attack without engaging the SC. And this is something Obama has been unwilling to do because he claims that the SC does not move fast enough. While this may be in fact true of the SC, if he doesn’t ask SC and attacks Syria, it creates precedents for other states to do the same. The laws under international law are in my view already fragile and require everyone to respect them, and in this case, the procedure dictates going about things via the SC. The question of this being a justified war and therefore morally right is not legally correct in my view at all and calls for caution. Furthermore, if they attack, what will be the purpose? What will happen? If they attack, and the situation gets worse for the people of Syria, the argument on humanitarian intervention is even less valid because the intervention can make it worse in a humanitarian sense. With that said, no one is underestimating the current suffering of Syria’s civilian population and the need for serious action in this matter by some effective agent of change.

\(^{71}\) The time of writing as of August 2013.
10. Afterword - Will there be a breakthrough for prosecution of the Crime of Aggression?

The key challenge with the specific Crime of Aggression is rooted in the larger more general difficulty with international criminal law as a whole. Surely it exists and has leverage, and the fact that the International Criminal Court exists with resources and prior convictions is proof of this, even if its meaning and scope can be debated. International criminal law deals with completely other challenges than national criminal law systems. It is a relatively new area, and scholars have in history questioned even whether public international law exists or whether it all is actually a thinly-veiled political system. The point here is that the system of international criminal law is fragile and not entirely well-cemented. Those difficulties of course affect the Crime of Aggression, and it has been difficult to reach breakthroughs with this crime of natural reasons. It affects the very same state leaders who while ratifying the treaties and resolutions, also could become its most persistent transgressors. Obviously, these leaders would not jump at the chance to commit to the Crime of Aggression.

However, given that the historical agreement 2010 was finally made, even if a long road ahead remains, it is evident that the international community sees the need for it and sees it as a priority. Stability in the world community is essential for the economy and for growth and regional stability. War and conflict spread to neighboring countries and nearby regions. A war or “conflict” can destroy a country and its core institutions tearing apart its capacity for civil society for hundreds of years afterwards. It is difficult to become a strong and stable power without peace in the region during a sustained period of time and without having good relations with other countries in the world community. The international community has much to gain from Crime of Aggression being prosecutable, and it is a positive step that individual liability instead of merely the state-act is taken up by the statute. It is in my view in the states' own interest that aggression is criminalized
specifically for the sake of stability and economical growth, even when the moral aspect of human suffering is the prevailing argument. I say this because the consideration of human suffering is unfortunately not the one that many state leaders consider when making decisions on the use of interstate violence.

What will furthermore win state cooperation and gain a breakthrough for the Crime of Aggression is when prosecution is a reality and state leaders risk their own prosecution in order to be ensured the potential prosecution of other transgressors. At this point of cost-benefit reasoning, there is an incentive to cooperate. States can be more willing to cooperate if they know that they too can be more protected from attacks on their own territory. The conclusion is that the international community has much to gain for the Crime of Aggression to be applicable. And there are real incentives for states to cooperate, and I am convinced that this is the key to progress and breakthrough.

Noting that states have actually reached an agreement on definition and jurisdiction for the Crime of Aggression is obviously a large first step but so much remains. In reality there are many obstacles: (1) it is easy to opt-out from jurisdiction, (2) there is the risk that only certain leaders of certain regions are prosecuted, (3) and there is the possibility that only the most serious crimes of aggression are being indicted—in reality as good as never since article 8bis can be interpreted as holding a very high threshold. Moreover, (4) there is the danger of not prosecuting great powers because of fear for reprisals. These countries hold much power and therefore it could be politically sensitive. There will be a large burden on the prosecutors and judges of ICC, and there is a significant risk of personal vendettas as the case of Judge Balthazar Garzón in Spain when he was investigating serious international crimes. And finally, (5) there is the risk that the US has not been positive to criminalization of aggression and has in general been generally unsupportive towards the ICC. This of course doesn’t mean that the whole concept of the ICC and the survival of the court lie in the hands of the US. But according to Amnesty International, the US has

72 See spanish documentary “Listening to Judge Garzón” on the case of Judge Garzón from 2011 for further insight.
pressed states in numerous unethical ways to not sign the Rome Statue and to not cooperate with the court that makes the issue even more problematic. Because as have been pointed out several times in this work, it is crucial that there is cooperation within the international community especially in the beginning of the process of the delicate work of criminalizing the Crime of Aggression. Because so much work remains, good intentions and good cooperation are needed. I believe that the Crime of Aggression stands out from other crimes under ICC jurisdiction in that it requires even more intent and cooperation from the international community than other laws that are more established in regards to holding individuals criminally responsible.

Furthermore, it is within this context that Bring, Mahmoudi and Wrange argues that states are sensitive towards receiving criticism and are keen on withholding their respectability. Therefore, the international public opinion is a crucial factor in preventing states from violating international public law. Not many countries want to come across as an unreliable partner violating international obligations in a time where inter-state collaboration is the generally-admitted objective. This can of course be a strong incentive, but there is of course the competing matter in international politics to appear as a strong military power, which unfortunately furthers the propensity to violate international law.

In closing, it is prudent to point out that here will not be a big breakthrough for prosecution of this serious international crime. But I do believe, that it will be used to some extent and that there will probably be a concentration of leaders charged from very specific areas of the world. We have seen that pattern before. The leaders of the five permanent members of the Security Council, in contrast, will probably be shielded from prosecution. It is important to note that especially at the international level, there are many political aspects to this crime. The US, for instance, will not

74 Bring, Mahmoudi, Wrange, *Sverige och folkrätten*.
75 See documentary, *Iraq war*, Dick Cheney made the statement that they did not go through the UN a second time due to the Iraq war 2003 in order not to appear weak as military state and in general.
accept a referral of the SC to prosecution before the ICC. Rather, the veto will simply be used while a non-state party would have no similar way out. That being said, as the world becomes more accustomed to prosecutions and indictments of the Crime of Aggression, and as state leaders begin to see the benefits of deterring their potential aggressive neighbor, the credibility of the law will grow. As its credibility grows, American nonparticipation will either milden or if it persists, its effects will be attenuated. The balance of capital and economy in the world is moving away from North America and Europe and giving other continents more social and political capital. As this continues to occur, the need for consensus on the Crime of Aggression will become more and more obvious as a tool for protecting everyone's interests.
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