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I. BACKGROUND

1. The International Criminal Court (ICC), governed by the "Rome Statute",[1] is the first permanent, treaty based court established to help end impunity for the perpetrators of the most serious crimes of international concern namely, the Crimes of Genocide, Crimes against Humanity, and War Crimes. The Court will also have jurisdiction over the Crime of Aggression once a definition has been adopted by the Assembly of States Parties.[2] The Court may exercise jurisdiction over such international crimes only if they were committed on the territory of a State Party or by one of its nationals. These conditions however do not apply if a situation is referred to the Prosecutor by the United Nations Security Council, whose resolutions are binding on all UN Member States, or if a State makes a declaration accepting the jurisdiction if the Court.

2. The Statute was adopted on 17 July 1998 and entered into force on 1 July 2002,[3] is now a fully functional judicial institution. As of 1 November 2006, 103 countries are States Parties to the Rome Statute [4] which is a significant milestone in the long march of international law and justice. Out of 103 countries 28 are African States,[5] 12 are Asian States,[6] 15 are from Eastern Europe, 22 are from Latin America and the Caribbean, and 26 are from Western Europe and other States. On 1st November 2006, Chad deposited its instrument of ratification to the Rome Statute. This will bring the total number of States Parties to 104 on 1st January 2007.[7] The Statute will enter into force for Chad on 1st January 2007. The ICC is an independent, permanent judicial institution and not part of the United Nations.[8] Although, the Court's expenses are funded primarily by States Parties, it also receives voluntary contributions from governments, international organizations, individuals, corporations and other entities.[9]

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[1] Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by proces-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.

[2] http://www.icc-cpi.int/library/about/ataglance/ICC-Ataglance_en.pdf

[3] Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, vol. I; Final documents (United Nations publication, Sales No. E. 02.I.5), sect. A.

[4] http://www.icc-cpi.int/asp/statesparties.html

[5] Burkina Faso, 30 November 1998; **Senegal,** 2 February 1999; **Ghana,** 20 December 1999; Mali, 16 August 2000; Lesotho, 6 September 2000; **Botswana,** 8 September 2000; **Sierra Leone,** 15 September 2000; Gabon, 20 September 2000; **South Africa,** 27 November 2000; **Nigeria,** 27 September 2001; Central African Republic, 3 October 2001; Benin, 22 January 2002; **Mauritius,** 5 March 2002; Democratic Republic of the Congo, 11 April 2002; Niger, 11 April 2002; **Uganda,** 14 June 2002; Namibia, 20 June 2002; **Gambia,** 28 June 2002; **United Republic of Tanzania,** 20 August 2002; Malawi, 9 September 2002; Djibouti, 5 November 2002; Zambia, 13 November 2002; Guinea, 14 July 2003; Congo, 3 May 2004; Burundi, 21 September 2004; Liberia, 22 September 2004; **Kenya,** 15 March 2005; and Comoros, 18 August 2006. More information see http://www.icc-cpi.int/region&id=3.html

[6] Fiji, 29 November 1999; Marshall Islands, 7 December 2000; Nauru, 12 November 2001; **Cyprus,** 7 March 2002; Cambodia, 11 April 2002; **Mongolia,** 11 April 2002; **Jordan,** 11 April 2002; Tajikistan, 5 May 2002; Timor-Leste, 6 September 2002; Samoa, 16 September 2002; **Republic of Korea,** 13 November 2002; and Afghanistan, 10 February 2003. For more information see http://www.icc-cpi.int/region&id=4.html

[7] http://www.icc-cpi.int/asp/statesparties.html

[8] http://www.icc-cpi.int/library/about/ataglance/ICC-Ataglance_en.pdf

[9] http://www.icc-cpi.int/library/about/ataglance/ICC-Ataglance_en.pdf

3. The Statute recognizes that States have the primary responsibility for investigating and punishing these crimes and also the Court is complementary to the efforts of States to investigating and prosecutes international crimes. The Court is the focal point of an emerging system of international criminal justice which includes national courts, international courts and tribunals with both national and international components. There are currently four situations, which are under investigation by the Office of the Prosecutor of the ICC. Three States Parties have referred situations on their territories to the Prosecutor, and also the Security Council has referred one situation to Prosecutor for investigation.

4. It may be recalled that the Secretariat Report submitted for the consideration of the Forty-Fifth Session of the Organization, held at New Delhi, India (03rd – 08th April 2006) identified the topic "International Criminal Court: Recent Developments" as a non-deliberated item. Though the subject was a non-deliberated item at the Forty-Fifth Session the Secretary-General requested the Member States to submit their views on the non-deliberated items too.

5. The Delegate of Kenya while making his statements in the Second General Meeting of the forty-fifth Session supported the Office of the Prosecutor's prosecutorial policy, which emphasized the essential principles of complementarity to national jurisdictions and cooperation with States as the key principle for work of the Court and Evidence in guaranteeing fair, public trials consistent with internationally recognized human rights. The Delegate also welcomed the extensive discussions on whether the definition of the crime of aggression should be generic or specific. The delegate emphasized that the international criminal justice system would not be complete until the elements of the crime of aggression were fully defined.

6. The Secretariat Report for the Forty-Fifth Session elucidated upon the following[10]: AALCO's work programme on the ICC; Fourth Session of the Assembly of States Parties (ASP-IV); Inter-sessional meeting of the Special Working Group on the Crime of Aggression, 13-15 June 2005; consideration of the item at the Fourty Fourth Session of the Organization, as well as at the United Nations (General Assembly and Security Council) in the year 2005.

7. This Secretariat Report seeks to highlight the developments that have taken place after the Forty-Fifth Session of the Organization. The Report briefly highlights the Issues for focussed consideration during the Forty-Sixth Session; AALCO's Work Programme on the International Criminal Court in the previous years; Overview of the Concept of the Aggression; Report on Inter-sessional meeting of the Special Working Group on the Crime of Aggression held on 08 -11 June 2006; Report on the Fifth Session of the Assembly of States Parties (ASP-V); ICC President's report to UN General Assembly; and finally AALCO Secretariat Comments and Observations.

AALCO Secretariat's Comments and Observations:

8. The international legal order and respect for the rule of law at the global level were finally realized after the establishment of the International Criminal Court. But, we can say that this success is a partial one. Achieving the long-awaited political breakthrough on the "conditions of exercise" will not be sufficient if the applicability of basic principles of criminal responsibility, especially those in Part 3 of the Statute, are not addressed.

[10] AALCO/44/NAIROBI/2005/SD/S 10.

9. Focussing on basic principles of criminal law, and in particular thinking about elements of offences, concentrates the mind on the fundamental structure of the crime of aggression. The definition of the crime of aggression is so far an unresolved issue under the Rome Statute and this is one of the most important unresolved issues for developing countries too. Though the Rome Statute is supposed to have jurisdiction over the crime of aggression, it has not been defined yet. Work on elaborating an acceptable definition of the Crime of Aggression is in progress in the Special Working Group on the subject constituted by the Assembly of States Parties. The informal meeting of this group and later deliberations at ASP-V are important developments and further work of this requires a careful follow-up. After reviewing the work of the Special Working Group on the Crime of Aggression one can confidently say there is a clear chance of establishing a successful definition on crime of aggression, provided the signatory States should restrict the crime to its very essence.

II. ISSUES FOR FOCUSSED CONSIDERATION DURING THE FORTY-SIXTH SESSION

10. The Definition of Crime of Aggression is one of the core issues under the International Criminal Court. The crime of aggression is included in the Rome Statute under the Article 5, i.e., Crimes within the jurisdiction of the Court. Unfortunately, the Court cannot decide the aggression part when it is delivering its judgments unless and until the definition of aggression is accepted by the Member States. The same Statute also mentioned the time frame to establish a definition of the crime of aggression under the Article 121. According to this article the Statute can be reviewed after seven years of its entry into force, and a review conference shall convene with a view to consider any amendment to the Statute. In this Secretariat report the core issue "Concept of Aggression" is overviewed, and some of the issues have been identified for focussed consideration during the Forty-Sixth Session. They are:

- ***To what extent is the General Approach or Enumerative Approach of the concept of aggression accepted for the definition of Crime of Aggression?***
- ***How far the War of Aggression can be suitable under the definition of Crime of Aggression?***
- ***Which Wrongful Acts can be included under the definition of Crime of Aggression?***
- ***Individual Responsibility v. State Responsibility under the concept of Crime of Aggression.***
- ***How the International Criminal Court can play a Role in enhancing the Security Council's responsibility with regard to Maintenance of International Peace and Security?***
- ***What addition the ICC Statute brought to the concept of Crime of Aggression which is already in the UN Charter?***
- ***What is the alternative Mechanism in the case of Security Council's failure or decline to identifying the act of aggression?***
- ***What are the Legal effects on the functions of the Court upon the determination of the Security Council with regard to crime of aggression?***

III. AALCO'S WORK PROGRAMME ON THE INTERNATIONAL CRIMINAL COURT

11. The AALCO has been following the developments relating to the establishment of the ICC since its Thirty-Fifth Session (Manila, 1996). The initial discussions in the AALCO relating to the establishment of the International Criminal Court were first held at two Special Meetings convened within the framework of the Thirty–Fifth(Manila, 1996) and Thirty-Sixth (Tehran, 1997) Sessions of the AALCO.

12. The Organization at its Thirty-Seventh Session (New Delhi, 1998) noting that a Conference of Plenipotentiaries was to be held in Rome from 15th June to 17th July, 1998 directed the Secretariat to participate at the Conference and report on its outcome at the next session. Accordingly, the then Deputy Secretary General, Ambassador Dr. Wafik Zaher Kamil represented the AALCO at the said conference. Two meetings were organized by the AALCO parallel to the Rome Conference with the aim to collate the views of the AALCO's Member States on the contentious issues before the Conference. The views expressed at those two meetings were then forwarded to the Chairman of the Committee of the Whole, Mr. Philippe Kirsch.

13. At the Thirty-Eighth Session (Accra, 1999) the outcome of the Rome Conference was duly reported and the Secretariat was directed to monitor and report on the developments in the Preparatory Commission established pursuant to Resolution F adopted in the Rome Conference.

14. At the Thirty-Ninth Session (Cairo, 2000) the Secretariat reported on the developments in the First and Second sessions of the Preparatory Commission held during the year 1999. After detailed discussions the Organization in its resolution 39/7 requested the Secretariat to continue monitoring the work of the Preparatory Commission and report to the Fortieth Session.

15. At the Fortieth Session (New Delhi, HQ, 2001) the Secretariat reported on the developments in the Sixth and Seventh Sessions of the Preparatory Commission held during the years 2000 and 2001. After detailed deliberations, the Secretariat was directed to monitor the work of the Preparatory Commission vide resolution 40/7 and present a substantive report to its 41st Session.

16. At the Forty-First Session (Abuja, 2002) Deputy Secretary-General Amb. Dr. Ali Reza Deihim reported on the developments in the Eighth, Ninth and Tenth sessions of the Preparatory Commission, held during the years 2001 and 2002. After intensive deliberations, the Secretariat was directed to monitor the deliberations of the First Assembly of States Parties and in the subsequent meetings and present a substantive report on the developments at its Forty-Second Session.

17. In the rationalization of agenda at the Forty-Second Session (Seoul, 2003), the item was considered as a deliberated item and the Deputy Secretary-General Amb. Dr. Ali Reza Deihim reported on the progress achieved on the item pertaining to the International Criminal Court after the entry into force of the Rome Statute. After intensive deliberations, the Secretariat *vide* Res/42/10 was directed to "follow-up the deliberations in the Second Meeting of the Assembly of States Parties and its subsequent meetings, and in the Working Group on the Crime of Aggression, and present a report at its forty-third session".

18. At the Forty-Third Session (Bali, 2004), the Deputy Secretary-General Amb. Dr. Ali Reza Deihim *inter alia* reported upon the work of the Second Session of the Assembly of States Parties, facts pertaining to the first possible cases before the ICC, the extension of UN peacekeepers immunity from the ICC's jurisdiction by the Security Council, as well as the bilateral immunity agreements entered into by the United States of America with other states. He also suggested for an exchange of views on AALCO's role in the context of the ICC, as he believed that exchange of information would definitely contribute to a better understanding of Rome Statute and its importance in the process of achieving international criminal justice against perpetrators of serious crimes against humanity, war crimes, genocide and in future crime of aggression.

19. At the Forty-Fourth Session (Nairobi, 2005) the agenda item on "The International Criminal Court: Recent Developments" was considered as a deliberated item. The Vice President of ICC Her Excellency Judge Akua Kuenyehia had appreciated Asian and African states for playing an important role in the Rome Conference. Her presentation focused on: the need for an ICC; the role of States and inter-governmental organization. The delegations from the different member states expressed their views on Definition of Aggression, Special working group on the Crime of Aggression and questioned Darfur issue to the ICC.

20. At the Forty-Fourth Session Resolution 44/S10 adopted *inter alia* directed the Secretariat to follow-up the deliberations in the "Special Working Group on the Crime of Aggression" with a view to expediting the elaboration of the definition of the crime of aggression, and the conditions under which the ICC can exercise its jurisdiction with regard to this crime. It also directs the Secretariat to follow-up the deliberations in the Fourth Session of the Assembly of the States Parties and its subsequent meetings, in the Special Working Group on the Crime of Aggression, and present a report in the Forty Fifth Session. The Secretary General was requested to "explore the feasibility of convening an inter-sessional meeting, *inter alia*, for promotion of human rights in the backdrop of the Rome Statute of ICC; the implementation of the Rome Statute through national legislative mechanisms; and the ways and means through which the AALCO Member States can contribute to the process of elaboration of the definition of the crime of aggression, and the conditions under which the ICC can exercise its jurisdiction with regard to this crime.

IV. THE CONCEPT OF CRIME OF AGGRESSION: AN OVERVIEW

21. Since the Nuremberg trial, the crime of aggression has played an important role in the international criminal law. In its widest context, the sources of international criminal law might be derived from the general principles of international law recognized by civilized nations; and therefore, found in customary law accepted by States, general criminal law recognized by nations, and treaties which govern particular conduct. But, in spite of the long history, the definition of "aggression" remains elusive. In this century, it has been a persistent argument among the international lawyers and who have tried to determine the merits of the concept and its usefulness to the development of the world order.[11] Although international criminal law has evolved dramatically over the past fifty years, legal thinking regarding the crime of aggression has not kept pace. The Rome Statute[12] bears testimony to this fact and the crime of aggression falls within the ambit of the Court's jurisdiction,[13] wherein no definition is provided, and the Court may not exercise the jurisdiction it has been given until agreement on such a definition has been reached.

22. The term 'aggression' as a legal concept in International law, began to develop meaningfully during the era of the League of Nations, which sought to control the limits of the legal license to engage in war.[14] The League of Nations made the prevention of aggression a core aim; and the post–World War II Allied tribunals regarded aggression as a crime under the rubric crimes against peace. The efforts have continued in the United Nations for prevention of illegality of aggression as one of the primary concerns of the UN Charter. The most authoritative definition comes from the UN General Assembly[15] in 1974, after the completion of a twenty-year project to define aggression. But this definition also not fully accepted by the Member States.

23. In 1994, the International Law Commission submitted a draft statute to the UN General Assembly for a permanent court and the Preparatory Committee started working on the basis of this draft statute. Finally, in 1998, the plenipotentiaries discussed the definition of Crime of Aggression at the Conference and decided to include in the Statute. Unfortunately, the Conference failed to accept the definition and adjourned the issue of definition of "crime of aggression" to a Review Conference.[16] The Review Conference would be taking place after seven years of the entry into force of the Statute. In this point of view, the discussion on the definition of the Crime of Aggression is very important and this part of the report highlighting the developments of the Crime of Aggression in the period of League of Nations; United Nations and also highlighting some of the important issues in the crime of aggression.

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[11] Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (The London Institute of World Affairs: Stevenson & Sons Limited, London, 1958), p. 1.

[12] Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by proces-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002.

[13] Article 5 of the Rome Statute reads as follows: Crimes within the jurisdiction of the Court: (1) The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this statute with respect to the following crimes: The Crime of Genocide; Crimes against Humanity; War Crimes; the Crime of Aggression. (2) The Court Shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

[14] Julius Stone, note 1, p. 15.

[15] The UN Charter never defines the term, instead banning the threat or use of force.

[16] UN Doc. A/Conf.183/C.1/L.59, 10 July 1998.

A. Developments in the Period of League of Nations:

24. The systematic efforts to define aggression were taken only after the foundation of the League of Nations and one of the purposes of the creation of the League of Nations was to investigate cases of aggression and taking appropriate action in the way of collective system of sanctions. The only explicit reference to "aggression" in the scheme of the League of Nations Covenant was in Article 10,[17] though inferential references were later to be spelled out of other Articles, such as Articles 11, 12, 15 and 16.[18]

25. In early 1917, in a Decree on Peace adopted at an All-Russian Congress, it was stated that aggressive war was a crime against mankind.[19] Though Article 10 was one in which the term "aggression" appeared, that article tended to be shunned by most League Members as a focus for the sought-for criteria of aggression.[20] On August 28, 1921, the International Blockade Committee of the League Assembly, considering the conditions under which sanctions under article 16 should be applied against a Covenant-breaking resort to war in breach of Covenant, interpreted[21] "resort to war" as the "undertaking of armed action". The Draft Treaty of Mutual Assistance to the Kellog-Briand Pact itself abstained from defining aggression, although Article-I declared aggressive war to be "an international crime" from which the Parties agreed to abstain. While the same article provided that certain wars to enforce third party decision against the non-complying State were not aggressive wars, it did not base any inference that all other wars were aggressive.

26. The problem was again discussed in connection with the draft Geneva Protocol adopted on October 2, 1924, by the League Assembly. Article 10 defined aggression as resort "to war in violation of the undertakings contained in the Covenant or in the present Protocol"; and Article 2 prohibited recourse to war "except in case of resistance to acts of aggression or when acting in agreement with the Council or the Assembly of the League of Nations in accordance with the provisions of the Covenant and of the present protocol". Certainly, as the world approached the Kellog-Briand Pact of 1928 League efforts had produced little advance towards State consensus on the criteria of aggression. In practice they did little more than attach the label "aggression" to resorts to war already caught by Article 16. Ceasefire techniques and Council action generally under Article 11, were directed to forestalling questions of "aggression" and "sanctions" under Articles 10 and 16.

27. The First Committee of the League Assembly, at the end of the first decade of search failed to find sufficient criteria of "aggression" even after the Paris Pact. The only thing it could really assure was that in the future no war of aggression would be waged-except in self-

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[17] Article 10 provided: The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

[18] Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression* (London: Stevens & Sons Limited, 1958), p. 27.

[19] Benjamin B. Ferencz, Defining Aggression: Where it Stands and Where it's Going, American Journal of International Law, vol. 66, No. 3 (1972), pp. 491-508. For more information see, Text on International Law, Academy of Sciences of U.S.S.R., Moscow, p. 403.

[20] Julius Stone, note 1, p. 27.

[21] Julius Stone, note 1 p. 29. For detailed information see, Report of the International Blockade Committee of Aug. 28, 1921. See L.N.Doc. A.14.1927.

defense.[22] M. Rolin came in his relevant report for that Committee in 1931 to the conclusion that neither the Pact nor the Covenant excluded the right of "legitimate self-defense", and that "the satisfactory enumeration of the distinctive characteristics either of aggression or of legitimate self-defense appears difficult and even impossible".[23] On February 6, 1933, the Soviet delegation offered a draft definition to the Committee, and the Committee's final report praised the Soviet initiative and adopted most of its terms. The essential fact needed to identify the aggressor objectively was to ascertain which party was the first to use armed force. A declaration of war, invasion, attack on territory, vessels or aircraft (even without a declaration of war) and supporting armed bands which invade another State, were other key indicators of aggression.

B. Developments within the United Nations:

28. The failure of the concept defining 'Aggression' in the League concentrated and pressurized the UN to take necessary steps to define the concept of 'aggression' and opened a lesson to read draftsmen of the United Nations Charter. The Charter came from their hands the full plenitude of peace enforcement powers of the Security Council arose on any threat to the peace or breach of the peace, whether or not aggression was present. The most powerful legal argument which is offered in support of the desire to insulate the question of aggression developed in the Charter of the United Nations was prohibition of threat of force, or resort to force with only two present exceptions namely, force used in self-defence against armed attack under Article 51, or under authority of the United Nations.[24]

29. The majority of the San Francisco Committee, however, regarded any preliminary definition of aggression as beyond both the possibilities of the Conference and the purposes of the Charter. Thus the text of Article 39 of the Charter left "aggression" undefined, and gave equal weight to the "threat to the peace, breach of the peace, or act of aggression", as regards the legal powers which the Security Council's determinations conferred. The other provisions of the Charter related to Aggression are: Article 51 reserving the liberty of self-defence against armed attack on a Member, Article 2(3) providing that "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered", and the still more critical Article 2(4), prohibiting "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".

30. In the first Committee of the General Assembly on November 6, 1950, the Soviet Union revived, under the item "Duties of States in the Event of the Outbreak of Hostilities", the substance of its draft definition of 1933, and this with related matters was submitted in due course to the International Law Commission for its review.[25] Following another Soviet initiative[26] in the First Committee of the Fifth General Assembly, the Assembly also adopted a resolution[27] which, after condemning "the intervention of a State in the internal affairs of another State for the purpose of changing its legally established government by the threat or use of force", re-affirmed that "any aggression, whether committed openly, or by fomenting

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[22] Benjamin B. Ferencz, *The United Nations Consensus Definition of Aggression: Sieve or Substance, Washington Conference on Law and the World* (October 1995), p. 2.
[23] L.N.O.J., Sp. Supp. No. 94 (1931) p. 146.
[24] Quincy Wright, "The Concept of Aggression in International Law", *American Journal of International Law*, vol. 29 (1935), pp. 373-375.
[25] G.A.O.R. VII, 308th Plenary Meeting, Nov. 17, 1950, Res.378B (V).
[26] To include the Agenda an item entitled, "Declaration on the removal of the threat of a new war…".
[27] Res. 380 (V).

civil strife in the interest of a foreign power, or otherwise, is the gravest of all crimes against peace and security through out the world".

31. The International Law Commission studied the Soviet proposed definition of aggression[28] through eleven meetings.[29] That definition, like its earlier prototype of 1933, enumerated five main acts of State violence, the first commission of any of which would render the State concerned an "attacker". The International Law Commission reported to the General Assembly that "it was undesirable to define aggression by a detailed enumeration of aggressive acts, since no enumeration could be exhaustive", and that it was inadvisable unduly to "limit the freedom of judgment" of the competent organs by a "rigid and necessarily incomplete" list of acts of "aggression". It preferred, therefore, to seek "a general and abstract definition".[30]

32. The General Assembly on November 13, 1951, placed the Report of the International Law Commission's third Session on its agenda, referred to its Sixth Committee the question of defining aggression.[31] After eighteen meetings,[32] in which the questions whether any definition at all was possible or desirable figured prominently, the Committee, on January 21, 1952, took a position opposed on the whole to that of the International Law Commission, based on the view that it would be advantageous to provide "directives" for international bodies which "may be called on to determine the aggressor".[33] The Committee considered that, "although the existence of the crime of aggression may be inferred from the circumstances peculiar to each particular case, it is nevertheless possible and desirable, with a view to ensuring international peace and security and to developing international criminal law, to define aggression by reference to the elements which constitute it".[34]

33. In the light of views expressed in the Sixth Committee and the draft resolutions and amendments submitted on the matter the General Assembly instructed the Secretary-General to submit to its seventh session a report on the problem of defining aggression. It also requested the Member States to give more attention in their comments on the Draft Code of Offences against the Peace and Security of Mankind,[35] upon this request fourteen States commented upon the draft definition. The General Assembly referred the question of defining Aggression at its seventh session,[36] together with the Report of the Secretary General, to the Sixth Committee[37]. The Members like Afghanistan, Bolivia, Chile, People's Republic of China, Dominican Republic, El Salvador, Iran, Netherlands, Peru, and Yugoslavia prepared a joint draft resolution and proposed amendments for the Sixth Committee's resolution. On this basis of the above views the General Assembly appointed its first special Committee of fifteen members of 1953 on the "Question of Aggression" with the mandate to produce "draft

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[28] G.A.O.R. V, Ann. 2, Item 72, p.5, 1950.
[29] G.A.O.R. VI, Supp. No. 9, C.3 (A/1858).
[30] I.L.C. Report covering the …Third Session 16 May-27 July, 1951, c. III, p. 9.
[31] 342nd and 342nd Plenary Meetings, G.A.O.R. VI, Supp. No.9 and Supp. No. 20, p. xvii.
[32] From Jan. 5-22, 1952, G.A.O.R. VI, Ann., Item 49, pp.12.
[33] Ibid. p. 15.
[34] For a statement of the main U.K. arguments contrary to this view of the Sixth Committee, See G. G. Fitzmaurice, "The Definition of Aggression", *International and Comparative Law Quarterly* (1952), pp. 137-144.
[35] G.A.O.R. VI, Supp. No. 20, Res. 599 (VI), p. 84.
[36] October 17, 1952.
[37] On the base of the Soviet draft on the 'definition of Aggression', the Sixth Committee had seventeen meetings from November 19 to December 9, 1952.

definitions or draft statements of the notion of aggression", and study the problems arising "on the assumption of a definition being adopted" by Assembly resolution.[38]

34. The Five *ad hoc* submissions[39] received by the Special Committee in between August 24 to September 21, 1953 from the Soviet, Chinese, Mexican and Bolivian proposals on the "definition of Aggression". On the base of the different views expressed by the Member States, the possibility of defining the aggression was found very difficult to the Special Committee. On December 4, 1954 the Ninth Session of the General Assembly adopted a resolution drafted by the Sixth Committee appointed a further nineteen Members "Special Committee on the Question of Aggression".[40] The General Assembly had given the mandate to the Special Committee "to prepare a detailed report and the draft definition of aggression, with regard to the discussion at the ninth Session of the General Assembly and also include the ideas revealed by the Members in the Ninth Session".

35. The 1956 Special Committee for the Definition of Aggression took up 19 meetings from October 8 to November 9, 1956 and gathered different opinions from the Members. The conflict of views once again revealed the common positions among the Members of the United Nations on the preliminary question of "the possibility and desirability of a definition". The Twelfth General Assembly's Sixth Committee at its 514th Meeting held on October 7, 1957, began discussion of the Report of the 1956 Special Committee, some draft definitions including the Soviet being formally re-submitted. The renewed discussions thus underline the need for thorough examination of these obstacles to which the present work is devoted.

36. The General Assembly, declared that it was nevertheless "possible and desirable" to define aggression further, appointed successively the first Special Committee of 15 States which did substantial work from 1953 to 1956 and the Second Special Committee of 19 Members which worked even more intensively, especially in a series of 19 meetings from October 8 to November 9, 1956, against the dramatic background of the prevailing Suez Crisis.[41] The gist of the Second Special Committee's Report was that its members were unable to agree either on the question whether it was desirable to define aggression, or whether it would be feasible to define it. The General Assembly (XII) was sufficiently infected by these doubts so that when it established its Third Special Committee in 1957, the task it imposed was essentially that "of determining when it shall be appropriate for the General Assembly to consider again the question of defining aggression". This Committee found at meetings of 1959, 1962, 1965, and 1967, that the time was not yet ripe.[42]

37. The fourth Special Committee on this subject was established on a new Soviet initiative in 1967. This Committee held 100 meetings, of which the 100th, in May 1973, was at a five weeks session. Within the flexible frame of the Working Group, use was made of "Contact Groups" of Member States representative of the main points of conflict concerning

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[38] Julius Stone. Note 1, p. 54.
[39] G.A.O.R. IX, Supp. 11, pp. 13-15.
[40] The Member States of the Committee are China, Czechoslovakia, Dominican Republic, France, Iraq, Israel, Mexico, Netherlands, Norway, Panama, Paraguay, Peru, the Philippines, Poland, Syria, U.S.S.R., United Kingdom and the United States.
[41] Julius Stone, note. 1, p. 55-77.
[42] For an official summary of the work of these Committees, see Doc. A/AC.134/1, March 24, 1968, *Survey of Previous UN Action on the Question of Defining Aggression.*

certain broad divisions of the proposed definition.[43] And out of these procedures there emerged by the 106th meeting, on 28th May 1973, a report including, in addition to the original Soviet, Thirteen Power and Six Power drafts, a Consolidated Text of the reports of the Contact Groups. In this text, the extent of emergent agreement was presented by way of a draft of seven articles, followed by a series of note indicating points of persisting disagreement and competing or additional proposals,[44] from the various delegations on the Special Committee.[45] Finally, the Committee resumed its work after 22 years in the General Assembly Resolution 3314 (XXIX) of 14 December 1974 on the Definition of Aggression.[46] On the other hand based on the Nuremberg Principles and the principles of international law recognised under the Charter of Nuremberg the International Law Commission began to draft a Code of Offences against the Peace and Security of Mankind.

C. Importance of the Definition of Crime of Aggression under the ICC:

38. The Rome Statute of the International Criminal Court includes "aggression" a more contemporary formulation of the term "crimes against peace" within the subject matter jurisdiction of the new Court, but then makes prosecution subject to adoption of a definition and upon agreement on the conditions under which it shall exercise jurisdiction with respect to the crime. The international criminal prosecution began with the First World War through the Treaty of Versailles[47], and the prosecution before Allied Military tribunals of German combatants charged with "violation of the Laws and customs of war". On 20th October 1943 the UN War Crimes Commission was established at a Diplomatic Conference at the Foreign office in London. The Commission drafted the statute of a future international criminal court.[48] According to the official history of the United Nations War Crimes Commission, the most important issue of substantive law studied by the Commission and its legal Committee was the question of "whether aggressive war amounts to a criminal act".[49]

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[43] The first Contact Group, appointed on 2nd May 1973, consisted of Colombia, France, Ghana, Romania, Syria, Turkey, USSR and US to deal with the general definition of aggression including the terms "sovereignty" and "territorial integrity" (Art 1). It held four meetings to 25th May 1973.
The Second Contact Group, appointed on 8th May 1973, consisted of Bulgaria, Cyprus, France, Ghana, Romania, Syria, USSR and two States sponsoring the (Western) Six- Power Draft. Its agendum covered the list of acts of aggression, indirect force and self determination. This group held 11 meetings up to 25th May 1973.
The Third Contact Group, also appointed on 8th May 1973, consisted of Czechoslovakia, Egypt, France, Guyana, Mexico, Spain (later replaced by Ecuador), Turkey, USSR, and two States from sponsors of the (Western) Six Power Draft. Its assignment was questions of priority and aggressive intent (i.e., Article 2). It held meetings up to 25 May 1973.
The Fourth Contact Group, appointed on May 15, 1973, consisted of Czechoslovakia, France, Indonesia, Iraq, Romania, Spain, Turkey, Uganda, USSR and two member States from sponsors of the (Western)Six Power draft. This Contact Group was instructed to consider the legal issues of force and the legal consequences of aggression. It held four meetings.
A drafting Group appointed on 23 May, 1973, consisted of Chairman Broms, Canada, Egypt, France, Ghana, Iran, Spain, USSR and USA to prepare the Consolidated Text and related documents. It held two meetings.

[44] See A/AC.134/L.42, and Corr.1 and AD.1, A/AC.134/SR.106-109, and GAOR (XXVIII) No. 19 (A/9019), p.4, and Appendix A on pp. 15-21.

[45] See GAOR (XXVIII) No. 19 (A/9019) Appendix B, pp.22-28. The Consolidated Text had been preceded by a "comparative chart" prepared by the Secretariat staff for the 1970 General Session, setting out the differences and similarities of the main three proposed drafts (Doc.A/AC.134/L.22,24 July, 1970).

[46] UN Doc. A/RES/3314 (XXIX) (1974).

[47] Article 228 to 230 of Treaty of Versailles.

[48] UN War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War, London: His Majesty's Stationary Office (1948), pp. 107-118.

[49] UN War Crimes Commission, p. 180.

In the year 1944 first time the issue whether the "aggression" is fit within the overall mandate of the Commission is raised during the first sessions of the Legal Committee by Bohuslav Ecer of Czechoslovakia. Ecer prepared a proposal for the London International Assembly and it said that "Aggressive war is a crime, and by its character an international crime, because it aims against peace and international order…. Not only the aggressor States as such, but also their rulers and military leaders are personally responsible in the eyes of the law for the gigantic chain of crimes which compose this war and which are punishable under the criminal laws of the countries affected".[50] This proposal is included in the Legal Committee[51] of the UN War Crimes Commission's draft Resolution on the "Scope of the Retributive Action of the United Nations", where it was defined as "[t]he crimes committed for the purpose of preparing or launching the war, irrespective of the territory where these crimes have been committed". But this proposal was returned to the Legal Committee and a Sub Committee of the Legal Committee was established to pursue further study.

39. The work of the United Nations War Crimes Commission concluded on 8 August 1945 with the adoption of London Agreement.[52] The International Military Tribunal at Nuremberg initiated a war of aggression was the supreme international crime. Initiation or waging of a war of aggression was one of the elements of *crime against peace*[53] and the tribunal successfully tried the accused on this ground. On December 14, 1974, the General Assembly of the United Nations approved Resolution No. 3314 (XXIX) by consensus which contained a definition of the crime of aggression. Thereafter the International Law Commission presented its Draft for the Statute of International Criminal Court, it included aggression among the crimes falling within the jurisdiction of the Court. It defined aggression as follows:

> "Aggression means an act committed by an individual who as a leader or organizer is involved in the use of armed force by a state against the territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the UN.

Alternatively,

> The crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State against another state in contravention to the Charter of the U.N. by resorting to armed force, to threaten or violate that State's sovereignty, territorial integrity or political independence".[54]

40. While maintaining the crime of aggression as one of the crimes falling within the jurisdiction of the International Criminal Court, the Preparatory Commission left *three options* for the Member States to choose for the definition of aggression. *Firstly,* the generic approach, i.e., a general definition of aggression as stated in Article 1 of Resolution 3314

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[50] Bohuslav Ecer, "The Punishment of War Criminals", confidential document dated 10 October 1942 submitted to the London International Assembly, Commission II on the Trial of War Criminals, reprinted in George J. Lankevich (ed.), *Archives of the Holocaust*, vol.16 (New York and London: Garland, 1990), p. 1-4.

[51] The Legal Committee met in the year March 1944.

[52] The London Agreement annexed with the Charter of the International Military Tribunal.

[53] The Tribunal considered "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreement or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing" as the elements of the crime against peace. For more information see UN Treaty Series 1951, p. 288.

[54] M. Cherif Bassiouni, *The Statute of the International Criminal Court: A Documentary History*, (Transnational Publishers, Inc., Ardsley, NY, 1998), pp. 469-470.

while converting the text of said Resolution to fit the act of the individuals committing that crime. The *Second* one, practically copied Resolution 3314 including the list included there in; and *thirdly* aggression to the use of force amounting to the establishment of a military occupation of or annexing the territory of another state or part thereof by the armed forces of the attacking State.[55]After much debate on these three options without reaching any decisive conclusion the crime of aggression was practically dropped from the Draft Statute.

D. Discussion in the Preparatory Commission and the Special Working Group on the Crime of Aggression:

41. The Preparatory Commission met five times in accordance with General Assembly Resolutions 53/105 of 8th December 1998 and 54/105 of 9th December 1999. The work of the Preparatory Commission focussed on two essential instruments necessary for the functioning of the Court, namely the Rules of Procedure and Evidence; and the Elements of Crimes and the Crime of Aggression included under the Elements of Crime. During the Fifth Session on 30th June 2000, the Preparatory Commission adopted its report containing finalized draft text of Rules of Procedure and Evidence and Elements of Crimes, as regards to the jurisdiction of the Court over the crimes of genocide, crimes against humanity and war crimes. On the definition of crime of Aggression the Working Group continued discussion of the various proposals[56] and views on the definitional aspects of the crime.

42. During its Sixth Session (27 November – 8 December 2000) and the Seventh Session (26 February – 9 March 2001) the work of the Crime of Aggression continued without any kind of decisions. During the Eighth Session (24th September – 5th October 2001) the discussion fully focussed on definition part of the Crime of Aggression and the conditions under which the Court could exercise its jurisdiction over that crime. Again in the Ninth and Tenth Sessions the discussion on definition of Crime of Aggression continued. Moreover, this topic was considered as outstanding issue for the meeting of the Assembly of States Parties. It decided that the negotiations for the Crime of Aggression will continue through a Special Working group with the goal of achieving a definition to be presented to a Review Conference in seven years for its adoption as an amendment by the Assembly of States Parties.

43. The Special Working Group on the Crime of Aggression held on 21-23 June 2004 at Princeton University, US discussed the following issues: 1. Incorporation and Placement of the provisions on the Crime of Aggression in the Statute; 2. Complementarity and admissibility with regard to the Crime of Aggression; 3. *Neb is idem* with regard to the crime of aggression; and the General Principles of Criminal Law.[57] The Special Working Group on the Crime of Aggression held on 13-15 June 2005 at Princeton University, US continued the discussion on the base of the previous meetings issues and added some of the discussion papers namely Crime of Aggression and Article 25 paragraph 3 of the Statute;[58] The

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[55] Muhammad Aziz Shukri, "Will Aggressors Ever be Tried before the ICC?" in *The International Criminal Court and the Crime of Aggression* (ed.), Mauro Politi and Giuseppe Nesi (Ashgate Publishing Limited), UK, p. 36.

[56] For detailed information see Doc. PCNICC/2000/WGCA/RT.

[57] ICC-ASP/3/SWGCA/INF.1

[58] ASP/4/SWGCA/NP.1.

conditions for the exercise of jurisdiction with respect to the Crime of Aggression;[59] and Definition of aggression in the context of the Statute of the ICC.[60]

E. Issues under the definition of Crime of Aggression:

(i). General Approach v. An Enumerative Approach

44. After going through the developments in the definition of Crime of Aggression we can identify two generally distinct approaches. They are, *first,* the definition of the crime in *general terms* provided for in the Charter of Nuremberg, and *second*, the *enumerative approach* taken by the General Assembly in Resolution 3314.[61] With regard to a definition, even today, the Working Group on the Crime of Aggression discussing the question of the "approach" as a core issue.[62] The convincing arguments rule out an enumerative definition in general, and especially the suggestion that General Assembly Resolution 3314 can act as a directive for the wording. A definition of the crime should reflect the very core of customary international law, but the Resolution 3314 is not able to fulfil that requirement. Because, the drafting history clearly reveals that it was a mirror of 1960s and 1970s, and its content was dominated by the political struggles of the Cold War. Its purpose was to serve as a guideline for the Security Council, a political body, not as a definition in the sphere of criminal law.

45. On the basis of the substantive principle *nullum crimen sine lege,*[63] in 1991 the majority of the International Law Commission members raised the same argument, when an earlier definition of the crime of aggression within the Draft Code of Crimes against the Peace and Security of Mankind was simply replaced by the complete text of the 1974 definition.[64] Notwithstanding the advantage of a short and general definition that is precise enough to respect the principle of *nullum crimen* but flexible enough to leave the classification of a certain case to the discretion of the Court, the Statute itself grants the possibility to make a reference in clear-cut cases to Resolution 3314. Even though in the first place, according to Article 21, the Court shall apply the Statute, in the second place, and where appropriate, it can refer to "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict".

(ii). The Meaning of War of Aggression

46. The Statute of the International Criminal Court in its Article 5(2) calls for consistency of the crime with the relevant provisions of the Charter of the United Nations. The Charter itself sets up a scale of illegitimate forms of force. Whereas Article 2(4) condemns recourse to the threat or use of force in international relations, Article 39 refers to a threat to the peace, breach of the peace, and an act of aggression as a precondition for deciding upon collective measures against the investigating states. Finally, Article 51, providing for the right of individual or collective self-defence, sets the highest threshold:

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[59] ASP/4/SWGCA/NP.2.
[60] ASP/4/SWGCA/NP.3.
[61] UN Doc. A/RES/3314/XXIX (1974).
[62] Suggestions made orally by Italy on 13 March 2000 with regard to a structure for discussion on the crime of aggression, PCNICC/2000/WGCA/DP.3, at para. 5(a).
[63] It means "no punishment without existing and clear provision".
[64] See, e.g., Summary records of the meetings of the 47th Session of the ILC, 1995 *YILC*, vol. I, p.3.

self-defence is allowed against an armed attack occurring against a member state. And that is indeed the meaning of a war of aggression: one State launching a military attack on the territorial integrity or political independence of another State without any justification of self-defence or as part of collective measures under the Charter.

(iii). The Wrongful Acts

47. With the establishment of the Charter of the United Nations the ban on aggression once again reviewed and found its place in international law.[65] Moreover, Article 6 of the Nuremberg Charter defined crime against peace as the "planning, preparation, initiation or waging of a war of aggression, or 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".[66] The 1974 General Assembly definition condemned acts of aggression in general and, moreover, enlarged the scope of illegitimate acts to several forms of indirect aggression. It has given more vigorous definition and stressed the ban on aggression. Even this definition drew a distinction between the consequences of a *war of aggression* and mere *acts of aggression*. According to Article 5(2) of Resolution 3314 a war of aggression was said to constitute a crime against international peace and thus entailed international criminal responsibility. On the contrary, acts of aggression solely gave rise to international responsibility of the State.

48. Here, we can see the clear difference of *acts of aggression* and *war of aggression* and to define the actions which constitute the crime of aggression is the core of the issue. The signatory States should be aware that effective prosecution can only be guaranteed if the scope of the crime is firmly established in customary international law.[67] The scope has to be traced back to the narrowest compromise possible. Such a compromise can be reached by restricting the crime to the prosecution of *wars of aggression*. This view corresponds to numerous international agreements in the area: the Nuremberg Charter, the Allied Control Council Law No. 10 and the General Assembly Resolution 3314, to name but a few. In addition, by reducing the *actus reus* content to a *war of aggression*, a definition would meet the requirement of Article 5 of the Rome Statute that the jurisdiction of the Court shall be limited to the "most serious crimes of concern to the international community as a whole." Thus read, it corresponds to the threshold set by the other crimes under the Court's jurisdiction.

(iv). Individual Criminal Responsibility

49. After going through the historical overview of the aggression we can point out that the aggression emanates as an act of state. On the other hand we can also point out the real fact is that aggression is carried out by its agents. There is no need for any further reasoning in this day and age to the effect that an individual can be held responsible for having committed such an act. The well known judgment of the Nuremberg Tribunal mentioned that, "Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be

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[65] Article 2(4) of the UN Charter reads: "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".
[66] 82 *UNTS* 279–300 (1951).
[67] Proposal submitted by Germany, PCNICC/2000/WGCA/DP.4, para. 5 (2000).

enforced". [68] Yet, not every individual from the ordinary combatant fighting on the battlefield, to the head of State giving the final order to launch an attack on another State, can reasonably be prosecuted. On the other hand, the responsibility cannot only be restricted to the head of State either. Due to the special nature of the crime, low ranking officials or soldiers who are not in the position of formulating or executing State policies and are rather receiving and carrying out orders would not fall within the circle of possible offenders. Hence, before coming to the conclusion with regard to inclusion of individuals' responsibility in the definition part, it should consider the pros and cons of this particular issue.

(v). Responsibility of the State

50. The crime of aggression can only be committed in the context of an international armed conflict because, it essentially represents a state crime. Customary international law has certainly not developed to the extent of perceiving aggressive conduct of non-state entities as a punishable offence.[69] The *opinio iuris* has moved forward concerning other international crimes, enlarging the application of, for example, crimes against humanity to internal armed conflicts. Whereas, the Statutes of the International Criminal Tribunal for the former Yugoslavia and the Tribunal for Rwanda substantially contributed to this development, they equally demonstrate that the scope of the crime of aggression could not follow that path. Both Statutes did not include any reference to the crime as a punishable offence. There are twofold consequences in this, *firstly*, an attack of the government of a state on an ethnic group within that state,[70] does not, as yet, constitute a crime of aggression punishable under public international law. *Secondly*, initiators of a non-state entity launching a military attack on the legitimately elected government of that same state also cannot be held responsible for the crime of aggression. However, the above said facts may be considered before finalizing the definition of crime of aggression.

(vi). Role of the International Criminal Court in enhancing the Security Council's responsibility with regard to Maintenance of International Peace and Security

51. The primary responsibility for the maintenance of international peace and security was conferred upon the Security Council. It is a political body whose principal concern is not justice, but the preservation of factual international peace through collective action, based on a decision engaging multiple interests. Chapter VII of the UN Charter defines the Security Council's central role in the maintenance of international peace and security. But the Court approaches a situation from a strictly legal point of view. Its operations are necessarily based on the principles of independence and impartiality. If its judges have the reputation of being biased, the credibility and integrity of the Court as such would be placed in doubt. Basic principles such as equality before the law and the presumption of innocence have to be respected and guaranteed by a court, those principles being of even greater relevance bearing in mind the heinous crimes the members of the bench have to judge in the context of international criminal law.

52. Both an International Criminal Court and the Security Council undertake to effect restorative measures for the maintenance of international peace and security. But, there is an

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[68] Nuremberg Judgment, p. 221.
[69] R. Rayfuse, The Draft Code of Crimes against the Peace and Security of Mankind: Eating Disorders at the International Law Commission, *Criminal Law Forum,* vol. 8 (1997), p. 60.
[70] Yugoslavia's attack on Kosovo in spring 1999,

important difference between the approach of the two bodies: the latter applies measures of collective security to reach 'factual' international peace, the former 'legally' establishes international peace by judicial instruments. Although, the Statute clearly mentioned that the Court is completely independent from any kind of the pressure tactics from the UN Security Council or other Member States, but it should maintain the independence nature in its proceedings.

(vii). Relationship between Statute of the ICC and Charter of the United Nations with regard to Crime of Aggression

53. The Rome Statute clearly mentioned the independent nature of the Court and the relationship between the UN and ICC as well. Now the main question is that to what extent the Statute of the International Criminal Court and the Charter of the United Nations related to each other in general and especially in respect of the crime of aggression? The crime of aggression constitutes the "paradigmatic crime of State"[71] for which an individual can be held responsible. Thus, there seems to be an irresolvable situation. One hand, the court exercises jurisdiction over individuals on the crime of aggression. In order to fulfil its task with due diligence it has an irrefutable need for independence. On the other hand, the crime of aggression presupposes the occurrence of an armed attack by a state. It is the Security Council which has the exclusive responsibility for establishing the existence of an act of aggression. Thus, a political body takes its role within the frame-work of the court.[72] It has to be accepted that the bridge between responsibility of the State for an act of aggression and the individual responsibility of its organs crosses the Security Council.

54. Paragraph 7 of the Preamble of the Statute reaffirms "the purposes and principles of the Charter of the United Nations […]." More specifically in this context, Article 5(2) of the Statute stipulates that the definition of the crime of aggression "shall be consistent with the relevant provisions of the Charter of the United Nations". It is Article 39 of the Charter that determines the role and authority of the Security Council in this regard. It is the competent organ to decide on the occurrence of a threat to the peace, breach of the peace or an act of aggression committed by a state. Furthermore, Article 103 postulates the prevalence of the Charter "in the event of a conflict between the obligations of the members of the United Nations under the Charter and their obligations under any other international agreement". Thus, the Charter virtually reads as an international constitution that all other inter-national agreements have to be compared to because the Charter cannot be altered by any Statute.

55. The trigger mechanism has to recognise the primary responsibility of the Security Council to establish an act of aggression in accordance with the relevant provisions of the Charter. In view of the unusual nature of the crime a prior consideration of a situation by the Council of its own decision or upon referral by the Court is a necessary prerequisite[73] of the exercise of the Court's jurisdiction. It is in no way objectionable. In the same way, it has to be accepted that the Court is barred from the initiation or continuation of investigations if the Council calls for a halt.[74]

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[71] J. Crawford, The ILC's Draft Statute for an International Criminal Tribunal, 88 *AJIL,* vol. 88 (1994), p. 147.

[72] Discussion paper proposed by the Co-ordinator on the consolidated text of proposals on the crime of aggression, PCNICC/1999/WGCA/RT.1, at 6 (1999).

[73] See also the debate within the International Law Commission on the Draft Code of Offences Against the Peace and Security of Mankind, Summary records of the 47th session of the ILC, 1995 *YILC*, vol. I, p. 6.

[74] Article 16 of the Statute provides, "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter

(viii). Alternative Mechanism in the case of Security Council's failure or decline to identifying the Act of Aggression.

56. After analyzing the practice of the Security Council, it would be illusory to believe that the Court might serve as a catalyst for a clear pronunciation by the Council on the concept of aggression. Although unambiguous cases of aggression have occurred, the Council has persistently refrained from using the term 'aggression' in its resolutions[75] with regard to Korean Disputes and Kuwait's invasion by Iraq.[76] Notwithstanding the refusal to employ the notion of 'act of aggression' in its resolutions, the Security Council's response to the disturbance of international peace and security was always effective, bearing in mind that, as events showed, an armistice agreement was signed between North and South Korea, and that Kuwait was liberated from dictatorship by Iraq.

57. On the other hand, we can say, the attitude adopted by the Council inevitably has implications on the trigger mechanism of the Court's jurisdiction. Whether the Council avoids the wording of 'act of aggression' but decides instead to pass a resolution whereby it identifies a state of having committed a "breach of the peace" or whether it utterly declines to pronounce itself at all on a conflict situation, the prosecutor must be granted the right to commence investigations on his own initiative. The responsibility of the Council is certainly primary, but it cannot create an overall barrier to every other international body performing its duty in that field.[77] This assumption has been equally supported by the International Court of Justice in its Advisory Opinion on the *Case of Certain Expenses of the United Nations* where it stated, although in relation to Article 24 of the Charter, that the responsibility of the Security Council in the matter was primary, however it was not exclusive.[78] Similarly, in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*[79] the International Court of Justice did not consider itself precluded from deciding whether certain facts constituted the use of force prohibited by the Charter of the United Nations and customary international law.

58. Moreover, the system of the United Nations is not actually built on the concept of strict separation of powers exists as prevails under national democratic systems. There is no institutional hierarchy between the Security Council and the International Court of Justice, as these two bodies serve distinct functions[80] but they are functionally parallel in the sense that they pursue the same objective, namely compliance with the principles and purposes of the United Nations. This also applies in respect to the International Criminal Tribunal for

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VII of the Charter of the United Nations, has requested the court to that effect; that request may be renewed by the Council under the same conditions".

[75] North Korean armed forces invaded South Korean territory without prior warning on 25 June 1950. In this time the Security Council did not use the word "aggression" in its Resolutions namely, UN Doc. S/RES/1501 (1950); UN Doc. S/RES/1511 (1950); UN Doc. S/RES/1588 (1950); UN Doc. A/RES/377 (V) (1950); UN Doc. A/RES/498 (V) (1951); UN Doc. S/RES/1501 (1950); UN Doc. S/RES/1511 (1950); UN Doc. S/RES/1588 (1950); UN Doc. A/RES/377 (V) (1950); UN Doc. A/RES/498 (V) (1951).

[76] UN Doc. S/RES/661 (1990); UN Doc. S/RES/662 (1990); and UN Doc. S/RES/678 (1990).

[77] See also the proposal submitted by Greece and Portugal, PCNICC/2000/WGCA/DP.5, (2000), p. 3.

[78] Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, 1962 ICJ Rep.151.

[79] Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment of 27 June 1986, 1986 *ICJ Rep*. p. 14.

[80] The Security Council employs political considerations and the ICJ acts according to strictly legal rules.

the former Yugoslavia.[81] Hence, this principle should be followed equally with respect to the International Criminal Court.[82]

(ix). Legal effects on the functions of the Court upon the determination of the Security Council

59. The Security Council may only refer a 'matter' to the Court, i.e., an abstract situation, and not a 'case,' meaning concrete allegations against specific individuals.[83] The question of the legal weight of such a determination becomes crucial for the Court and obviously has to face some of the questions: to what extent would the Court be bound by the Council's determination? Would the accused be deprived of the possibility of challenging the decision of the latter? For the accused, a fundamental right, the presumption of innocence, is at stake.[84] What at first sight looks like a subordination of the Court to the Council proves to be no contradiction when examined more closely. Taking the situation that the Council passes a resolution condemning a state for having committed an act of aggression, the Court could still exempt an individual person from the verdict of guilt on the basis that he in particular did not belong to the group of possible instigators, or because he lacked intent to launch an armed attack on another state. Equally, it could reach the conclusion that "although an act of aggression might have occurred, it did not constitute a war of aggression.

V. REPORT OF THE ASSEMBLY OF STATES PARTIES

[81] C. Greenwood, The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia, *Max Planck Yearbook of United Nations* Law (1999), pp. 102–106; *Prosecutor v. Dusko Tadic*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995; ILR 105, (1997), p. 419.
[82] Proposal submitted by Greece and Portugal.
[83] Report of the ILC on the work of its 46th Session, 1994 *YILC,* vol. II (Part Two), p. 44, para. 2.
[84] Report of the ILC on the work of its 46th Session, 1994 *YILC*, vol. II (Part Two), p. 44, para. 2.

60. The Assembly of States Parties is the management oversight and legislative body of the International Criminal Court and Part 11 of the Rome Statute provides for the Assembly of States Parties (ASP). It is composed of representatives of the States that have ratified and acceded to the Rome Statute. Each State Party is represented by a representative who is proposed to the Credential Committee by the Head of the State of the government or the Minister of Foreign Affairs.[85] Moreover, each State Party has one vote and every effort has to be made to reach decisions by consensus. If consensus cannot be reached then decisions are taken by vote.[86] Other States, which have either signed the Statute or signed the Final Act of the Rome Diplomatic Conference, may sit in the Assembly as Observers. On the basis of the principles of equitable geographic distribution and the adequate representation of the principal legal systems of the world, the Bureau of Assembly of States Parties consisting of a President, two Vice Presidents and 18 members elected by the Assembly for a three-year term. The Assembly is responsible for the adoption of the normative texts and of the budget, the election of the Judges and of the Prosecutor and the Deputy Prosecutor. It meets at least once a year. The reports of the previous Sessions of the Assembly of States Parties (ASP-I to ASP IV) were reported in the earlier reports of AALCO.[87]

A. Report of the Fifth Session of the Assembly of State Parties (ASP V):

61. The fifth Session of the Assembly of States Parties held in The Hague from 23 November to 1 December 2006 and its resumed Session will take place from 29 January to 1 February 2007 at New York. The President of the Assembly, Mr. Bruno Stagno Ugarte[88] in accordance with Rule 92 of the Rules of Procedure[89] invited all States Parties to the Rome Statute to participate in the Session and other States that had signed the Statute were also invited to participate as observers. At the meeting, the Assembly adopted the following agenda[90] for the discussion: States in arrears; Credentials of representatives of States Parties at the fifth session; General debate; Report on the activities of the Bureau; Report on the activities of the Court; Consideration and adoption of the budget for the fifth financial year; Consideration of the audit reports; Appointment of the External Auditor; Report of the Board of Directors of the Trust Fund for Victims; Election of the members of the Board of Directors of the Trust Fund for Victims; Report of the Special Working Group on the Crime of Aggression; Long-term budgetary consequences of the pension scheme regulations for judges; Conditions of service and compensation of the Prosecutor and Deputy Prosecutors; Premises of the Court; Staffing estimation and Strategic Plan of the Court; Decisions concerning dates of the next session of the Assembly of States Parties; Decisions concerning dates and venue of the next session of the Committee on Budget and Finance; and finally Other matters.

(i). Report on the activities of the Bureau

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[85] According to the Chapter IV of the Rules of Procedure of the Assembly of States Parties.
[86] Rome Statute article 112 (7).
[87] Refer AALCO Report on "International Criminal Court: Recent Developments" 2003/SD/S 10; 2004/SD/S 10; 2005/SD/S 10; and 2007/SD/S 102006/SD/S 10. For more information regarding the ASP-I to ASP IV refer www.icc.cpi-int.
[88] The President had been elected, by acclamation, for the fourth to sixth sessions during the third session of the Assembly.
[89] Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, *First session, New York, 3-10 September 2002 (United Nations publication, Sales No. E.03.V.2 and* corrigendum), part II.C.
[90] ICC-ASP/5/11

62. The Assembly took note of the oral report of its President, Mr. Bruno Stagno Ugarte (Costa Rica), on the activities of the Bureau. In his report, the President noted that during the period between the end of the resumed fourth session of the Assembly in January and 20 November 2006, the Bureau had held nine meetings in order to assist the Assembly in carrying out its activities under the Rome Statute. The President indicated that in December 2005, the Bureau had re-established its two Working Groups in The Hague and in New York, which had allowed for their active involvement in areas relating to the Court.

63. The Working Group in The Hague had made considerable progress on issues such as the permanent premises of the Court and the Strategic Plan of the Court. Furthermore, it had been actively involved with advancing the consideration of the interim premises of the Court, the political dialogue at ambassadorial level, the issuance of visas for Assembly participants and the draft headquarters agreement between the Court and the host State.

64. The Secretariat of the Assembly had provided The Hague Working Group and the Committee on Budget and Finance with independent substantive servicing, had assisted in organizing the inter-sessional meeting of the Special Working Group on the Crime of Aggression held in Princeton, New Jersey, United States of America, and had organized the resumed fourth session of the Assembly at United Nations Headquarters at the end of January 2006 devoted to the election of judges. In addition, the Secretariat had formed part of the Court team involved in negotiating with the host State the draft headquarters agreement, in which important provisions had been included regarding the Assembly and the representatives of States.

(ii). Report on the activities of the Court

65. The Report of the activities of the Court generally included the overview of developments at the International Criminal Court since the fourth session of the Assembly of States Parties and in particularly highlighting the Judicial Activities,[91] Office of the Prosecutor (proceedings and investigations),[92] Registry,[93] Activities involving the whole Court and finally the Conclusion. During the reporting period, the Court continued to be seized of situations in Uganda, the Democratic Republic of the Congo and the Central African Republic – which were referred to the Court by the States Parties themselves and of the situation in Darfur, Sudan–which was referred to the Court by the United Nations Security Council.

66. Pre-trial proceedings continued in all three situations under investigations. The persons subject to the warrants of arrest that were unsealed in the situation in Uganda in October 2005 have not been surrendered to the Court. In the situation in the Democratic Republic of Congo, the first person arrested pursuant to a warrant of arrest issued by the Court was surrendered in March 2006. The surrender was made possible by the cooperation received from States Parties and from the United Nations. In the case of the *Prosecutor v.*

[91] Judicial Activities included the thorough information about the Pre-Trial Chamber I, Chamber II, Chamber III, Appeals Chamber, Presidency, and Divisions and Chambers.
[92] The Office of the Prosecutor included the thorough information about the Proceedings, Investigations, Outreach, Referrals and communications, Building international co-operation, and Strategic planning.
[93] Report of the Registry explains the Field operations, outreach, Defence, victims, premises, Administration, and Building international co-operation.

Thomas Lubanga Dyilo, pre-trial proceedings took place on issues related to *inter alia*, preparation for the confirmation of charges, disclosure of evidence, and the participation of victims. The Office of the Prosecutor conducted investigative activities into the situations in Uganda, the Democratic Republic of the Congo and Darfur, Sudan. The Court conducted outreach to local populations and carried out its statutory responsibilities with respect to victims and witnesses in the field.

67. Significant developments at the Court since the fourth session of the Assembly includes:

- Continuation of investigations and pre-trial proceedings in the situations in the Democratic Republic of the Congo, Uganda and Darfur.
- Arrest and surrender of Mr. Thomas Lubanga Dyilo
- Pre-trial proceedings in the case of the Prosecutor v. Thomas Lubanga Dyilo
- Lack of arrest and surrender of the persons subject to arrest warrants in the situation in Uganda
- Increased outreach activities in Uganda and the Democratic Republic of the Congo
- Further refinement of field office needs
- Conclusion of international cooperation agreements with States on the relocation of witnesses
- Conclusion of a cooperation agreement with the European Union and negotiation of a cooperation agreement with the African Union; and
- Adoption of the Court's first Strategic Plan and completion of the Court Capacity Model Planning tool.

(iii). Consideration and adoption of the budget for the fifth financial year

68. The Assembly, through its Working Group, considered the proposed programme budget for 2007 on the basis of the draft proposal submitted by the Registrar, the reports of the Committee on Budget and Finance and the reports of the External Auditor. Moreover, the Assembly also adopted programme budget [94] in relation to the following: (a) Programme budget for the year 2007; (b) Working Capital Fund for 2007; (c) Scale of assessments for the apportionment of the expenses of the International Criminal Court; and (d) Financing of appropriations for the year 2007.

(iv). Election of the members of the Board of Directors of the Trust Fund for Victims

69. The Bureau of the Assembly of States Parties decided to open the period for nomination for the second election of members of the Board of Directors of the Trust Fund for Victims, to run from 5 June to 27 August 2006.[95] In accordance with its resolution[96] of 9 September 2002, at its 6th meeting, on 30 November 2006, the Assembly proceeded to elect four members of the Board of Directors of the Trust Fund for Victims. In accordance with paragraph 10 of resolution[97] the Assembly dispensed with a secret ballot and elected by acclamation one member each from the Group of African States, the Group of Eastern European States, the Group of Latin American and Caribbean

[94] Resolution ICC-ASP/5/Res.4
[95] ICC-ASP/5/28.
[96] ICC-ASP/1/Res.7
[97] ICC-ASP/1/Res.7

States, and the Group of Western European and Other States. The term of office of three years began to run for each member of the Board from 1 December 2006. At the end of the nomination period, no candidate had been nominated for the Group of Asian States. At its 6th meeting, the Assembly decided to defer the election for the seat allocated to the Group of Asian States to the resumed fifth session of the Assembly, to be held at the end of January 2007.

(v). Report of the Special Working Group on the Crime of Aggression

70. The Assembly took note of the report of the Special Working Group on the crime of Aggression[98] and decided that the report of the intersessional meeting contained in document ICC-ASP/5/SWGCA/INF.1 should be annexed to the proceedings of the fifth Session of the Assembly.[99]

(vi). Premises of the Court

71. The Assembly took note of the report of the Working Group on the Permanent Premises.[100] On 1st December 2006 at its 7th meeting, the Assembly adopted resolution ICC-ASP/5/Res.1 whereby it, *inter alia*, recalled resolution ICC-ASP/4/Res.2, which emphasized that the Court, as a permanent judicial institution, requires functional permanent premises, and requested the Court, without prejudice to the prerogative of the Assembly to make a final decision in this matter, to focus only on purpose-built premises on the Alexanderkazerne site, with a view to allowing the Assembly to take an informed decision at its next session.[101] In this connection, the Assembly requested the Bureau, the host State and the Court to take additional steps and to provide further information.[102]

(vii). Decisions concerning dates and venue of the next Session of the Committee on Budget and Finance

72. The Assembly decided that the Committee on Budget and Finance would hold its eighth session in The Hague from 23 to 26 April 2007, and a further five-day session on dates to be determined by the Committee.[103]

VI. INTER-SESSIONAL MEETING OF THE SPECIAL WORKING GROUP ON THE CRIME OF AGGRESSION, 08-11 JUNE 2006, LIECHTENSTINE

[98] ICC-ASP/5/SWGCA/INF.1
[99] For detailed information see annex II of ICC-ASP/5/32
[100] ICC-ASP/5/WGPP/1.
[101] Resolution ICC-ASP/5/Res.1, para.1, in part III of the report.
[102] Ibid.
[103] Resolution ICC-ASP/5/Res.3, para. 48, in part III of the report.

INSTITUTE ON SELF-DETERMINATION, WOODROW WILSON SCHOOL, PRINCETON UNIVERSITY, PRINCETON, UNITED STATES OF AMERICA.

73. At the invitation of the Government of Liechtenstein and pursuant to a recommendation by the Assembly of States Parties, an informal inter-sessional meeting of the Special Working Group on the Crime of Aggression was convened at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 8-11 June, 2006. Invitations to participate in the meeting were sent to all States, as well as, to representatives of civil society. It is pertinent to note that 16 Member States from the Asian-African regions[104] also participated in the meeting. Amb. Christian Wenaweser (Liechtenstein) chaired the meeting. The agenda for the meeting is contained in Annex II[105], and list of participants in Annex IV.[106] The participants in the informal inter-sessional meeting expressed their appreciation to the Governments of Canada, Finland, Liechtenstein, the Netherlands, Sweden and Switzerland for the financial support they had provided for the meeting and to the Liechtenstein Institute on Self-Determination at Princeton University for hosting and giving financial support for the event.

74. A brief note on issues discussed at afore stated meeting is given herein below.[107] Views expressed at that meeting did not necessarily represent the views of the Governments of the participants. The aim of the meeting was to continue the discussions held at the previous inter-sessional meeting in June 2005,[108] at the fourth Session of the Assembly of States Parties in November/ December 2005 in the context of the "Virtual Working Group". Thus, the work in Princeton focused on five items on the agenda of the meeting: (i) the "crime" of aggression – defining the individual's conduct; (ii) the conditions for the exercise of the jurisdiction; (iii) the "act" of aggression – defining the act of the State; (iv) other substantive issues; and (v) future work of the Special Working Group on the Crime of Aggression.[109]

A. The act of aggression – Defining the conduct of the State:

(i). Generic versus specific approach

75. There was extensive discussion of whether the definition of the "act of aggression" at the State level as referred to in section 1, paragraph 2 of the 2002 Coordinator's paper should be generic or specific. It was recalled that a generic definition was one which does not include a list of acts of aggression, while the specific definition was accompanied by such a list, for example the one contained in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.[110]
Several participants favoured a generic definition. It was argued that such an approach was the most pragmatic as it would be impossible to capture all instances in which the crime of

[104] People's Republic of China, India, Indonesia, Jordan, Kenya, Malaysia, Mongolia, Nepal, Oman, Philippines, Republic of Korea, Senegal, Sierra Leone, Syria, Tanzania and Turkey.
[105] ICC-ASP/5/SWGCA/INF. 1, which is an excerpt from PCNICC/2002/2/Add.2
[106] ICC-ASP/5/SWGCA/INF.1
[107] Report of the inter-sessional meeting contained in ICC-ASP/5/SWGCA/INF.1
[108] AALCO/45/HEADQUARTERS SESSION (NEW DELHI)/2006/SD/S 10, pg. 5-11
[109] Particular attention was devoted issues identified in discussion paper 1 entitled "The crime of aggression and article 25, paragraph 3, of the Statute, discussion paper 2 entitled "The conditions for the exercise of jurisdiction with respect to the crime of aggression" and 3 "Definition of aggression in the context of the Statute of the ICC. All these were primarily based on the discussion paper proposed by the Coordinator in 2002.
[110] For more information see page number 15 of this Brief.

aggression would be applicable. The point was made that the option of an illustrative list, such as that contained in the General Assembly resolution 3314 (XXIX), was difficult to reconcile with the need to respect the principle of legality. Reference was made in this context to the example of article 7 of the Rome Statute dealing with crimes against humanity, which combines a generic chapeau with a specific by open-ended list.[111] Those participants who favoured a specific approach felt that a detailed list was more likely to ensure legal clarity and consistency with the definitions of the crimes in articles 6 to 8 of the Rome Statute. It was stressed that a specific definition was essential in light of the importance of the crime and the requirements set forth in article 22 of the Statute. Regarding the definition of the crime of aggression, it was suggested that a comprehensive definition be included, making reference to all relevant precedents.[112]

(ii). Description of the act of aggression

76. Discussion focused on how to describe the aggression by a State, whether to use the words "use of force", "act of aggression", or "use of armed force". It was recalled that the Charter of the United Nations uses a variety of notions (Article 2 (4), Article 39, Article 51) and that all the terms listed above qualify of the act (as opposed to the intensity of the act, which is encompassed in the "qualifiers"," flagrant" or "manifest". Many participants preferred to retain the notion "act of aggression" in paragraphs 1 and 2 of the 2002 Coordinator's paper and the reference there in to GA Resolution 3314 (XXIX), any departure from this resolution should be considered with caution. It was suggested that that the term "act of aggression" was necessary to link the collective act of the State to the crime committed by the individual. It was suggested that the word "collective" could be added to underline the distinction between the act of the State and the individual crime of aggression. However, a point was made that as all four words used in the above mentioned GA resolution, the difference in wording and meaning would only become material if a generic approach were to be chosen.

(iii). Qualifying the State's act as "flagrant" or "manifest" violation of the Charter

77. Discussions also took place about the phrase "which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the Charter of the United Nations" in section 1, paragraph 1 of the 2002 Coordinator's paper. Some participants stressed that there was no need for an additional qualifier of the term "violation of the Charter" It was argued that an act of aggression entailed an attack against the 'sovereignty, territorial integrity or political independence of another State, and would be taken into account in the practice of the Court. Both the terms intended to be used were uncertain and difficult to distinguish in substance; a qualifier should therefore rather refer to the gravity of the act. Some participants continued to support the retention of the phrase, as it would serve to exclude some borderline cases. A general preference was noted for the term "manifest" rather than "flagrant" if a qualifier was to be retained.

(iv). Limiting jurisdiction to acts amounting to "war of aggression"

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[111] Article 7 (I)(k) of the Rome Statute.

[112] The Nuremberg Charter, as affirmed by GA resolution 95(1), Principle VI of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the judgment of the Tribunal, adopted by the ILC in 1950, GA resolution 3314 (XXIX), and the draft Code of Crimes against the Peace and Security of Mankind, adopted by ILC in 1996.

78. It was noted that the concept of limiting the jurisdiction to acts amounting to a "war of aggression" was based on the Nuremberg precedent. The predominant view was that the inclusion of a reference to a "war of aggression" in the definition would be too restrictive, in particular in light of the acts specified in GA resolution 3314 (XXIX), and that option 3 of paragraph 1 of the 2002 Coordinator's paper was therefore preferable.

(v). Relevance of object or result of an act of aggression

79. Discussion took place on whether the object or result of an act of aggression should be relevant. Options 1 and 2 of paragraph 1 of the Coordinator's paper contain such references. Most participants voiced a preference for not including the object or result in this paragraph. The reasons for not doing so included; the fact that the object extended into the *ius in bello*, whereas the crime of aggression fell within the *ius ad bellum*; the difficulties in making an exhaustive enumeration of the objects or results; the fact that articles 3 and 5 of GA resolution 3314 (XXIX) only included military occupation or annexation as examples of aggression, and the fact that the Security Council did not refer to the object or result in its decisions relating to aggression. With regard to differentiating between the crime of aggression and the act of aggression, it was stressed that the definition of the act of aggression should be contained in section 1, paragraph 2 of the 2002 Coordinators paper.

(vi). The reference to General Assembly resolution 3314 (XXIX)

80. It was also discussed as to how and to what extent the provision on aggression should make reference to the definition of aggression under the above mentioned GA resolution. Three options were mentioned: (i) a generic reference to resolution 3314 (XXIX), such as the one contained in section 1 paragraph 2 of the 2002 Coordinators paper; (ii) reference only to specific parts of resolution 3314 (XXIX), in particular its articles 1, 3 and 4; or (iii) reproduction of parts of the text of the resolution in the provision itself.

(vii) Attempt of aggression by a State

81. It was noted that the question of whether an attempt of an act of aggression by a State should be included had not been reflected clearly in the 2002 Coordinator's paper and that the question had only arisen at the 2005 inter-sessional meeting in connection with the discussion on an individual's attempt to commit the crime of aggression.[113] After examining pros and cons it was stated that including the concept of threat would create complications, the word threat was contextual, not necessarily having the same meaning in one situation as in another.

B. Conditions for exercise of jurisdiction:

82. At the 2005 inter-sessional meeting of the Special Working Group on the Crime of Aggression[114], a substantive discussion was held on the conditions for the exercise of jurisdiction. The issues were examined further in discussion paper No. 2[115]. Following the suggestion contained in that paper, further discussions were held to clarify the issues involved, with the aim fir later agreement.

(i). Prior determination of an act of aggression by an organ outside the Court

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[113] See AALCO/45/HEADQUARTERS SESSION (NEW DELHI)/2006/SD/S 10. pp. 8-9
[114] Ibid. pp. 10-11.
[115] See International Criminal Court publication ICC-ASP/4/32, annex II.C

83. Opinions differed as to whether the exercise of jurisdiction should be conditioned on a prior determination of the act of aggression by the Security Council or another body outside the Court. Views expressed in this regard were that there was no need for any special provision on a prior determination of an act of aggression by the Security Council, since articles 13 and 16 of the Rome Statute dealt sufficiently with the role of the Security Council under the Statute. In this context, reference was also made to Article 103 of the Charter of the United Nations in relation to the obligations under the Rome Statute. Some participants argued that a predetermination of an act of aggression by another organ was a possible scenario, but should not constitute a precondition for the exercise of jurisdiction by the Court. The roles of the General Assembly or the International Court of Justice were not well defined in this regard.

84. In order to reconcile the different views regarding the respective roles of the Security Council and the Court, it was suggested that different solutions might be found for each of the three scenarios set out in article 13 of the Statute. Under article 13 (a), a State could make a self referral to the Court in the event of its being unable to conduct the trial at the national level. In such a case, it might be easier to accept the Court's jurisdiction without involvement of another organ. It would, however, be necessary to make a distinction between a self referral and other referrals made by the States. Under article 13(b) the Security Council could refer a situation to the Court which might involve all crimes under the Court's jurisdiction, including the crime of aggression. In such a case, the Security Council might consider it beneficial to leave the issue to the Court instead of making its own determination at that stage. Under this option, it might be more acceptable to give the Court greater autonomy in the determination of an act of aggression, since the Security Council itself would have referred the situation to the Court. Under article 13(c) the Prosecutor would initiate an investigation *proprio motu*. This seemed to be the only scenario envisaged by the 2002 Coordinator's paper. It was therefore suggested that a distinction be made between the different scenarios in paragraph 4 of the 2002 Coordinator's paper.

(ii). Options for Security Council decisions regarding aggression

85. Three types of decision were identified. The Security Council could: (a) determine that an act of aggression had occurred and refer the situation to the Court in accordance with article 13(b) of the Rome Statute; (b) determine that an act of aggression had occurred; (c) refer a situation to the Court without making a determination of an act of aggression. It was pointed out that in scenarios (a) and (b) no difficulty arose but in (c) required further discussion.

(iii). Binding nature of the determination of an act of aggression

86. A distinction was held as to whether a determination of an act of aggression by another organ should be conclusive and therefore binding on the Court. Many participants strongly supported the preference for a determination that was open for review by the Court, in particular in order to safeguard the defendant's right to due process. Reference was made to the rights of the accused, in particular article 67, paragraph 1(i), of the Statute. It should always be possible for the defense to challenge the case of the Prosecutor on all grounds.

C. The crime of aggression-defining the individual's conduct:

87. The discussions on this issue were guided by the growing support at the 2005 inter-sessional meeting to move from a "monistic" approach to a "differentiated" approach. Under the differentiated approach, the definition of the crime of aggression would be treated in the same manner as the other crimes under the jurisdiction of the Court: the definition of the crime would be focused on the conduct of the principal perpetrator, and other forms of participation would be addressed by article 25, paragraph 3,[116] of the Statute. However, it was also agreed that the viability of the differentiated approach needed further exploration and that the monistic approach therefore needed, to be retained in the Coordinator's paper.

D. Future work of the Special Working Group on the Crime of Aggression:

88. In view of the fact that the Assembly of State Parties at its fourth session decided that in the years 2006 to 2008 the Special Working Group should be allocated at least 10 exclusive days of meetings in New York during resumed sessions, and hold inter-sessional meetings as appropriate, it was requested that the Chair convey a request to the ASP for additional time during the first trimester of 2008. This was important for the implementation of resolution ICC-ASP/4/32Res.4, operative paragraphs 37 and 53, especially as the Special Working Group decided to conclude its work at least 12 months prior to the Review Conference. The Working Group expressed its appreciation to the contribution made by the participants in the "Virtual Working Group" on the crime of aggression, established in 2005, and said it was necessary to build upon the progress attained in that group. The participants were also informed that the Italian Government had suggested the holding of a "Conference on International Criminal Justice in Turin, Italy, from 2-11 October 2006, to complement the work carried out at Princeton.

[116] See AALCO/45/HEADQUARTERS SESSION (NEW DELHI)/2006/SD/S 10, pg 7-8

VII. ICC PRESIDENT'S REPORT TO THE UNITED NATION'S GENERAL ASSEMBLY AND COOPERATION WITH AALCO

89. The second annual report of the International Criminal Court (herein after "the Court") was submitted to the General Assembly (A/61/217), in accordance with the provisions of article 6 of the Relationship Agreement between the United Nations and the Court.[117] It covered the period from 1 August 2005 to 1 August 2006. It included the main developments of relevance to the relationship between the Court and the United Nations. During this period the Court continued to be seized of the situations in Uganda, the Democratic Republic of Congo and the Central African Republic, all of which had been referred to the Court by the Security Council. Pending commencement of trial, each situation was assigned to a Pre-Trial Chamber comprised of three Judges. During this period, the situations in Uganda, Democratic Republic of Congo and Darfur, the Sudan, were under investigation by the Prosecutor. No investigation was opened the Central African Republic.

90. The Court unsealed its first arrest warrants in October 2005. The first person arrested pursuant to a warrant issued by the Court was surrendered to the Court's custody in March 2006. Pre-Trial and appeals proceedings were held, in anticipation of trials beginning in late 2006 or early 2007.[118]

91. The Court's investigations were carried out by the Prosecutor, during the reporting period, the office investigated the situations in the Democratic Republic of Congo and Uganda, both of which had been referred to the Court by the States themselves, pursuant to article 14 of the Rome Statute, and the situation in Darfur, which had been referred to the Court by the Security Council resolution 1593 (2005), pursuant to article 13 (b) of the Statute. Through outreach and public information activities, the Court engaged in dialogue with local populations and the public about its role, proceedings and investigations. In addition to the three ongoing investigations, the Office of the Prosecutor conducted a series of intensive analysis in order to determine whether to open an investigation into seven situations Two of those situations were dismissed (Venezuela and Iraq) and five remain under analysis, which include situations in the Central African Republic and in Cote d' Ivoire.

92. In all phases of its activities, the Court relied upon the cooperation from States, the United Nations, other international organizations and civil society. The Court does not have its own police force to carry out its decisions or orders. Thus, it needs the assistance of others in, *inter alia*, gathering evidence, providing logistical support to operations in the field, relocating witnesses, arresting and surrendering persons and enforcing the sentences of the convicted.

93. The Court and the United Nations continued to build on the relationship Agreement.[119] Developing substantially the mutual cooperation between the two independent

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[117] See A/58/874, annex and paragraph 12 of the GA resolution 60/29

[118] on 17 March 2006 Mr. Lubanga from Democratic Republic of Congo was arrested and surrendered to the Court.

[119] Official Journal of the International Criminal Court, Number ICC-ASP/3/Res. 1, annex; UN doc A/58/874 approved by the General Assembly in resolution 58/318 of 13 September 2004.

institutions. The Court also engaged with States,[120] other international organizations,[121] including regional organizations (during the past year, the Court also concluded negotiations on agreements with the African Union and with the **Asian-African Legal Consultative Organization,** and anticipates concluding both agreements in the near future), and civil society to facilitate necessary cooperation. Nonetheless, substantial challenges to obtaining sufficient support remain. Over one has passed since the Court issued its first arrest warrants and the five subjects of the warrants remain at large. If trials are to be held, States and international organizations would have to assist the Court by arresting those persons and surrendering them and others for whom warrants are issued in the future.

94. It was stressed that the Court today is becoming the centerpiece of an emerging system of international criminal justice, involving national, international and hybrid tribunals, as well as such international organizations as the United Nations. The interrelationships between those different institutions has continued to develop, as it is clear by the Court's assistance to the Special Court for Sierra Leone and other efforts directed towards international justice.

[120] On 27 October 2006, the Court entered into an agreement with Austria establishing a framework for acceptance of persons sentenced by the Court. On 10 April 2006, the Court concluded a cooperation agreement with the European Union.

[121] On 29 March 2006, the Court signed an agreement with the ICRC governing visits by ICRC to persons deprived of liberty pursuant to the jurisdiction of the Court.

VIII. Annex

Table I
Status of the ratification of Rome Statute of the International Criminal Court by AALCO Member States*

S. No	Member State	Status	
		Signature	**Ratification Acceptance (A) Approval (AA) Accession (a)**
1.	Arab Republic of Egypt	26 December 2000	—
2.	Bahrain	11 December 2000	—
3.	Bangladesh	16 September 1999	—
4.	Botswana	8 September 2000	8 September 2000
5.	Brunei Darussalam	—	—
6.	Cyprus	15 October 1998	7 March 2002
7.	Cameroon	---	---
8.	Democratic Peoples' Republic of Korea	—	—
9.	Federal Republic of Nigeria	1 June 2000	27 September 2001
10.	Gambia	4 December 1998	28 June 2002
11.	Ghana	18 July 1998	15 May 2002
12.	Hashemite Kingdom of Jordan	7 October 1998	11 April 2002
13.	India	—	—
14.	Indonesia	—	—
15.	Islamic Republic of Iran	31 December 2000	—
16.	Japan	—	—
17.	Kenya	11 August 1999	15 March 2005
18.	Lebanon	—	—
19.	Libyan Arab Jamahriya	—	—
20.	Malaysia	—	—
21.	Mauritius	11 November 1998	5 March 2002
22.	Mongolian Peoples' Republic	29 December 2000	11 April 2002
23.	Myanmar	—	—
24.	Nepal	—	—
25.	Pakistan	—	—
26.	Palestine	—	—

* The information stated in the above table is compiled from the following website: http://www.icc-cpi.int/asp/statesparties.html visited 27 November 2006.

27.	Peoples' Republic of China	—	—
28.	Philippines	28 December 2000	—
29.	Republic of Iraq		
30.	Republic of Korea	8 March 2000	13 November 2002
31.	Republic of Singapore	—	—
32.	Republic of Uganda	17 March 1999	14 June 2002
33.	Republic of Yemen	28 December 2000	—
34.	Saudi Arabia		—
35.	Senegal	18 July 1998	2 February 1999
36.	Sierra Leone	17 October 1998	15 September 2000
37.	Somalia	—	—
38.	Sri Lanka	—	—
39.	State of Kuwait	8 September 2000	—
40.	State of Qatar	—	—
41.	Sudan	8 September 2000	—
42.	Sultanate of Oman	—	—
43.	Syrian Arab Republic	29 November 2000	—
44.	Thailand	2 October 2000	—
45.	Turkey	—	—
46.	United Arab Emirates	27 November 2000	—
47.	United Republic of Tanzania	29 December 2000	20 August 2002
48.	South Africa	17 July 1998	27 November 2000

Inferences from the above table: Following inferences as regards the participation of the AALCO Member States in the International Criminal Court may be drawn:

- Twenty-six AALCO Member States are Signatories to the Rome Statute.
- Fifteen Member States have ratified the Statute. Thus, less than one-third AALCO Member States have ratified the Rome Statute.
- Out of the Fifteen Member States, eleven Member States, namely Botswana, Federal Republic of Nigeria, Gambia, Ghana, Kenya, Mauritius, Republic of Uganda, Senegal, Sierra Leone, South Africa and United Republic of Tanzania are from Africa. The four Member States from Asia are: Cyprus, Hashemite Kingdom of Jordan, Mongolian People's Republic and Republic of Yemen.
- Blank column indicates that the concerned Member State has not taken the requisite treaty action (i.e. signature or ratification).

ADDENDUM

A. Report of the Resumed Fifth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, 29th January – 1st February 2007

1. The resumed Fifth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court was held at the United Nations Headquarters from 29th January to 1st February 2007. This Session was presided over by Mr. Bruno Stagno Ugarte (Costa Rica), President of the Assembly of States Parties.

2. The Secretariat of the Assembly invited all States Parties, other States which had signed the Statute or the Final Act, representatives of Intergovernmental Organizations and other entities that had received a standing invitation from the General Assembly pursuant to its relevant resolutions, [122] as well as representatives of Regional Intergovernmental Organizations and other international bodies, invited to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court,[123] accredited to the Preparatory Commission for the International Criminal Court, or invited by the Assembly of States Parties to the Rome Statute, to participate in the resumed Fifth Session.

3. At its 8th meeting on 29th January 2007, the Assembly adopted the agenda[124] for discussions. It included Adoption of the agenda, States in arrears, Credentials of representatives of States Parties at the resumed Fifth Session, Organization of work, Election of the Members of the Board of Directors of the Trust Fund for Victims, Report of the Special Working Group on the Crime of Aggression and other matters including judicial vacancies, pension scheme regulations for judges, Trust Fund for the participation of the least developed countries and other developing States in the work of the Assembly, and Equitable geographical representation and gender balance in the recruitment of staff.

4. At its 9th meeting, on 1st February 2007, the Assembly elected Mr. Bulgaa Altangerel (Mongolia) as the fifth member of the Board of Directors of the Trust Fund for Victims. In this same meeting the Assembly also took note of the report of the Special Working Group on the Crime of Aggression[125] and on the recommendation of the Special Working Group, decided that the report be annexed to the proceedings of the resumed Fifth Session of the Assembly.[126] Under the Chairmanship of Ambassador Christian Wenawesser (Liechtenstein), the Special Working Group on the Crime of Aggression of the Assembly of

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[122] General Assembly resolutions 253 (III), 477 (V), 2011 (XX), 3208 (XXIX), 3237 (XXIX), 3369 (XXX), 31/3, 33/18, 35/2, 35/3, 36/4, 42/10, 43/6, 44/6, 45/6, 46/8, 47/4, 48/2, 48/3, 48/4, 48/5, 48/237, 48/265, 49/1, 49/2, 50/2, 51/1, 51/6, 51/204, 52/6, 53/5, 53/6, 53/216, 54/5, 54/10, 54/195, 55/160, 55/161, 56/90, 56/91, 56/92, 57/29, 57/30, 57/31, 57/32, 58/83, 58/84, 58/85, 58/86, 59/48, 59/49, 59/50, 59/51, 59/52, 59/53 and decision 56/475.

[123] Rome, June/July 1998.

[124] ICC-ASP/5/24/Rev.1.

[125] ICC-ASP/5/SWGCA/3.

[126] For more information see Annex II – ICC-ASP/5/35.

States parties to the Rome Statute held six meetings on 29th, 30th, 31st January and 1st February 2007. At the first meeting of the Group, the Chairman introduced the revised discussion paper, replacing the 2002 Coordinator's paper.[127] In this meeting Delegations welcomed the revised discussion paper which was widely acknowledged as reflecting the progress made since 2002 and the existing views, while providing a sound basis for further discussion. The discussions included: the crime of aggression – defining the individual's conduct, the act of aggression – defining the conduct of the State, qualifying the nature or object and result of the State act of aggression, the reference to General Assembly resolution 3314 (XXIX), conditions for the exercise of jurisdiction, and finally, the Procedural options in the absence of Security Council determination.[128]

5. While discussing the 'crime of aggression – defining the individual's conduct' based on the chairman's paper, broad support was expressed for the so-called "differentiated approach". It was argued that this variant would preserve consistency among the crimes contained in the Statute and with the "General Principles of Criminal Law" contained in Part 3 of the Statute, in particular article 25, paragraph 3. The main advantage of this approach was that the existing provisions of the Statute would be applicable to the greatest extent possible.

6. Regarding the act of the State ('act of aggression' or 'armed attack') broad support was expressed for the term 'act of aggression' which reflects the 'specific definition'. It was recalled that the notion of 'act of aggression' was used in Article 39 of the UN Charter and was defined in General Assembly resolution 3314 (XXIX), which could provide guidance in the definition of the crime of aggression. The term 'armed attack' (reflecting the 'generic definition'), on the other hand, was specifically linked to the concept of self-defence under Article 51 of the UN Charter, and lacked a specific definition in the Charter or in other universal treaties.

7. Regarding the discussion on reference to General Assembly resolution 3314 (XXIX) in paragraph 2 of the Chairman's paper, broad support was expressed for the retention of that reference.

8. Moreover, the resumed Fifth Session of the Assembly of States Parties adopted two resolutions.[129] One, Procedure for the nomination and election of Judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court: amendment to operative paragraph 27 of resolution ICC-ASP/3/Res.6 [130] and two conditions of service and compensation of judges of the International Criminal Court: amendment to the pension scheme regulations for judges of the International Criminal Court.[131]

B. Republic of Yemen Ratified Rome Statute of ICC

9. The Yemeni Council of Representatives voted for ratification of the Rome Statute on 24th March 2007. As of 27th March 2007, 104 States have ratified the Rome Statute – over half of the international community. After depositing its instrument of accession with the

[127] Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifth Session, The Hague, 23 November – 1 December 2006 (ICC publication, ICC-ASP/5/32).
[128] For more information see Annex II – ICC-ASP/5/35.
[129] By consensus Adopted at the 9th plenary meeting on 1 February 2007.
[130] Resolution ICC-ASP/5/Res.5
[131] Resolution ICC-ASP/5/Res.6

Secretary-General of the United Nations, Yemen would be the 105th State party and Twenty-seventh AALCO Member State to have ratified the Rome Statute of the International Criminal Court.