[PRE]DETERMINING THE CRIME OF AGGRESSION: HAS THE TIME COME TO ALLOW THE INTERNATIONAL CRIMINAL COURT ITS FREEDOM?

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ABSTRACT

The Assembly of States Party of the International Criminal Court is currently discussing the crime of aggression. It was postponed during the negotiations for the Treaty of Rome because of the contentious nature of the crime, jurisdiction and trigger mechanisms. One of the present discussion points includes the requirement of the Security Council to make a determination of an act of aggression before the International Criminal Court can have jurisdiction over the crime. This Article critiques the necessity for a Security Council determination as a precondition. The determination by the Security Council will allow for the continued dominance by the powerful veto states of the council. It will also give the Security Council a quasi-judicial role for which it was not designed nor capable of because of its political nature and unbalanced representation. Certain states in the negotiations have argued that the primary function of the Security Council is to make determinations on aggression referring to Article 39 of the UN Charter. Article 39 deals with actions of the council, not the determination of criminal liability. This predetermination also ignores the independence of the court and sets a new precedent for one specific crime. It not only undermines the value of an international court, it creates due process problems such as the right to a fair trial at the ICC if a UN body has already made a determination. The predetermination by the Security Council has broad ranging consequences, none so important as lack of equity and fairness in international criminal law application.

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I. INTRODUCTION

The prohibition on acts of aggression is often traced back to Nuremberg where it was defined in the International Military Charter as a “crime[] against peace.” It was sometimes referred to as the “supreme crime.” “That attack on the peace of the world is the crime against international society which brings into international cognizance crimes in its aid and preparation which otherwise might be only internal concerns.” The United Nations General Assembly (GA) Resolution 95 in 1946 adopted the principles of international law recognized from the International Military Tribunal, including the crime against peace. In fact, during 1947, the International Law Commission adopted the work of the original Committee of Seventeen to prepare a draft of the code


4 G.A. Res. 95 (I), at 188, U.N. Doc. A/64/Add.2 (Dec. 11, 1946) (“Affirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal . . . .”).
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against the peace and security of mankind. This was early in the
development of the United Nations (UN), when World War II was
fresh in the memory of member states, and the main function of the
UN was to develop a structure that would prevent any further wars
or acts of aggression.

Several attempts to specifically define aggression had not reached
maturity until 1974 when the Special Committee for the Definition
of Aggression did what it said on the tin, and proposed the
definition to form UN GA Resolution 3314. This resolution does
not have the same force as a binding Security Council (SC)
resolution made under Chapter VII, but the International Court of
Justice (ICJ) in Nicaragua stated that Resolution 3314, Article 3(g)
did reflect international customary law. Various international
writers also support the belief that Resolution 3314 is part of
customary law. This is not to say that it has solved the problem of
acts of aggression throughout the world, indeed because of the lack
of states’ adherence to customary law and the prohibition use of
force in the UN Charter there has been increasing momentum to
codify aggression in the Statute of Rome. This is reminiscent of
the old argument that stronger enforcement mechanisms lead to
adherence of international law.

The crime of aggression was included but not defined in the
Statute of Rome, due to the lack of agreement by the negotiating

Directs the Committee on the codification of international law established by the
resolution of the General Assembly of 11 December 1946, to treat as a matter of primary
importance plans for the formulation, in the context of a general codification of offences
against the peace and security of mankind, or of an International Criminal Code . . . .
6 Report of the Special Committee on the Question of Defining Aggression, at 11, U.N.
7 See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103–04 (June
27); see also Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda),
8 See, e.g., Mohammed M. Gomaa, The Definition of the Crime of Aggression and the ICC
Jurisdiction over that Crime, in THE INTERNATIONAL CRIMINAL COURT AND THE CRIME OF
AGGRESSION 55, 74 (Mauro Politi & Giuseppe Nesi eds., 2004) [hereinafter CRIME OF
AGGRESSION]; Muhammad Aziz Shakri, Will Aggressors Ever be Tried Before the ICC?, in
CRIME OF AGGRESSION, supra, at 33, 35; Ioana Gabriela Stancu, Defining the Crime of
Aggression or Redefining Aggression?, in CRIME OF AGGRESSION, supra, at 87, 90.
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
states. Unlike the other core crimes, including war crimes, genocide, and crimes against humanity, which have seen more emphasis in recent years with the International Criminal Tribunals of Rwanda and Yugoslavia,\(^\text{10}\) the crime of aggression is a representation of state power and force and is perceived to be of less of a direct concern for international humanitarian law. Defining the crime of aggression within the Statute of Rome is also seen as a possible threat to those states that have or are likely to commit these acts against other states. Powerful states fear the potential for politically motivated prosecutions similar to the calls for Tony Blair and George Bush to be prosecuted as war criminals after the invasion of Iraq in 2003.\(^\text{11}\)

Since the Statute of Rome came into force, the Assembly of States Party established the Special Working Group on the Crime of Aggression (SWGCA) in order to agree on the inclusion of the crime in the statute at the Review Conference in 2009. Several issues are contentious in the current negotiations of the SWGCA, such as its exact definition of the crime,\(^\text{12}\) the distinction between state and individual responsibility, and, for the purposes of this discussion, the issue of whether there should be a determination by the SC before the International Criminal Court (ICC) can have jurisdiction. This is a key concern for the negotiations since determinations by consistent with the relevant provisions of the Charter of the United Nations.


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the SC for acts of aggression in the past have been rare.\textsuperscript{13} The problem in making the ICC dependent on the SC for a determination is the removal of the court’s independence as an international judicial body and its subordination to the SC. The proposal for a prior determination not only devalues the competency of the ICC, but it is also in opposition to the intended role of the SC. The determination gives the SC a quasi-judicial function for which it is ill-suited because it is a political organ. The SC also suffers from the dominance of the veto states. Further, certain past SC resolutions have placed more emphasis on the maintenance of peace and security instead of human rights and/or other general principles of international law.\textsuperscript{14}

This Article will contend that a determination by the SC before the ICC has jurisdiction over the crime is not judicious for several reasons. First, it will introduce a political element into the analysis. Second, there is the distinct possibility of SC inaction or the toning down of acts of aggression based on its previous history. There is also the possibility of violating the due process principle once the SC has made a determination; any determination or lack thereof made by the SC may influence the ICC’s decision making. Finally, the requirement for the SC to determine acts of aggression as stated by Article 39 is part of its primary function (Article 24) in order to act to maintain peace and security, but it is not its exclusive right.\textsuperscript{15} Article 39 does not prohibit other bodies from making a determination. The main distinction between these interpretations of Article 39 is the necessary distinction between the function of the maintenance of peace and security and the function of criminal

\textsuperscript{13} See discussion on the Maintenance of Peace and Security versus Criminal Justice on the use of term “act of aggression” in SC resolutions infra Part IIA.


This analysis will also examine the major area of debate in the current negotiations, which highlight the contentious nature of the proposed determination by the SC. This is followed by a discussion about the problems with other possible scenarios for a determination by other bodies in the UN framework besides the SC, such as the GA or the ICJ. The GA has the advantage of being more representative and the ICJ is not a political body; however, each have disadvantages for a determination of an act of aggression. These disadvantages would not only inhibit the work of the ICC but also influence the process of international criminal justice. It is essential that if the crime of aggression is to be adopted as anticipated in the review conference in 2009, it does not enhance the faulty international mechanisms that we have today. In other words, it should not be a determination based on power allocation.

II. MAINTENANCE OF PEACE AND SECURITY VERSUS CRIMINAL JUSTICE

A. The Security Council’s Hesitancy with Determining Aggression

The World Conference in 2005 did not result in any of the much debated reform of the SC. The Council is a time specific reflection of powerful states and so too are the contentious veto powers of the permanent members with the subsequent resolutions reflecting this reality. These are the powerful states, not only within the UN structure itself, but also economically and militarily. Sanctioning powerful states and/or their close allies for an act of aggression can become a problematic tale for international diplomacy. This does not reinforce the “principle of the sovereign equalit[ies] of all its Members” as stated in Article 2, Paragraph 1 of the UN Charter. The SC often “understate[s] . . . the situation” in order to gain a consensus from the members, according to Giorgio Gaja. Throughout the history of the SC, there have only been three

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occasions where the term of an act of aggression or act of armed aggression has been used, one concerning South Africa and Angola in 1976, and another concerning the Israeli bombing of the headquarters of the PLO in Tunisia. The third was a SC resolution condemning the “act of armed aggression perpetrated against the People's Republic of Benin.” Several SC resolutions have identified situations and conflicts not as acts of aggression, but as “threat[s] to international peace and security,” without making a determination of aggression. These resolutions have applied to cross border military invasions, such as the Argentinean invasion of the Falklands in 1982 and the Iraqi invasion of Kuwait in 1990. More recently, the post 9/11 focus on terrorism has resulted in SC determinations that constitute a “threat[] to international peace and security” as opposed to a breach, specifically the resolutions aimed at the Taliban authorities in Afghanistan. Threats to international peace and security have included more than just terrorism issues. They have spanned situations having international repercussions, such as the conflicts in South Rhodesia in 1966, the situation in the former Yugoslavia in 1991, and other humanitarian crises. Whereas the conflict in the former

Yugoslavia in 1998 was only deemed to be “a threat to peace and security in the region,” as opposed to “a threat to international peace and security.”

The SC’s resistance to use of the term “act of aggression” in certain cases is surprising. Cross border invasions that have not been considered acts of aggression include invasions such as Iraq’s invasion into Kuwaiti territory in 1990, and the coalition’s invasion of Iraq in 2003. These are either determined as a “breach of international peace and security,” as in the case of Kuwait, or no threat at all, as in the controversial 2003 war in Iraq. The obvious international repercussions to the war in Iraq can now be seen not only in the current sectarian violence but also in the criticism of Iran over allegations of funding Shiite militants in Iraq. The political influence of the veto states in the SC coupled with the language of diplomacy in times of crisis have appeared to result in a tendency to avoid determinations of aggression except in a few cases. The reluctance by the SC to avoid the reality of acts of aggression since 1945 does not create a positive outlook for fighting acts of aggression by any state, let alone acts committed by powerful states or their allies.

III. POLITICAL INFLUENCES ON THE SECURITY COUNCIL: THREATS TO INTERNATIONAL LAW?

The political nature of the SC has been problematic in the past, which can be seen in certain decisions and/or resolutions besides aggression or threats to international peace and security. Individual resolutions have been identified as potentially violating international humanitarian law, customary law, and the UN Charter itself. For example, the contentious SC Resolution 1422 gave immunity to UN peacekeepers that were nationals from non-party states from “investigation or prosecution” by the ICC.
Another example includes the complaints made by the Committee on Economic, Social and Cultural Rights about the violation of human rights caused by SC sanctions. 35 Nigel White acknowledges the ICJ’s decision in Namibia, which restricts the court’s ability to judicially review a SC resolution that has been “properly constituted,” 36 but refers to the earlier opinion in the Admissions case that states the “political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.” 37 He argues that “Resolution 1422 is the clearest example of a decision that is extremely difficult if not impossible to reconcile with UN law.” 38 This does not provide a link between accountability and good governance, as it should in such an important and powerful international organization. This is clearly not an organ within the UN system to be confused with a legal court such as the ICJ or the ICC.

The right to a fair trial without political influence is another issue raised with a determination by the SC for the crime of aggression. The “[c]onditions for the exercise of jurisdiction” for the crime of aggression were proposed in 2002 during the SWGCA meeting that would require the ICC to first ascertain whether the SC has made a determination of aggression before proceeding with an investigation. 39 The question for the Assembly of States Party was, shall this precondition be part of the trigger mechanisms for the crime, or should there be “an explicit ‘go ahead’ . . . for the ICC to

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37 WHITE, supra note 35, at 194 (quoting Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion, 1948 I.C.J. 57, 64 (May 28)).


exercise jurisdiction?"  

Placing the ICC in a subordinate position to the SC concerning the jurisdiction of the crime of aggression is not new. It was discussed by the International Law Commission during the negotiations for the Statute of Rome, but was rightly criticized as potentially prejudicing the possibility of a fair trial of a defendant if a predetermination had already been made.  

Also, the lack of due process has been an issue for the SC before, specifically in the case of the resolutions that froze the assets of several Taliban terrorism suspects. The SC’s Al-Qaida and Taliban Sanctions Committee listed these individuals, which then meant that they were placed on the European Commission sanctions list, and subsequently had their assets frozen by the Swedish authorities. Three individuals subsequently filed a claim at the European Court of First Instance for interim relief because of a lack of a fair hearing. Although the interim relief was not granted because the claim did not satisfy the urgency requirement, the court stated that the majority of the Sanctions Committee were in favor of lifting the sanctions against them but were not able to “as a result of opposition on the part of three States.” This example is a representation of the dominance of powerful states over the SC. Only one of the applicants remained on the sanctions list and proceeded with the case. Ultimately, the court dismissed the action because the right to be heard by a court did not outweigh the public interest from the security threat to maintain peace and security. This decision may be a concern to human rights lawyers and activists, however, the court did note that there was a limit or

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40 Id. at paras. 4–5.  
42 See S.C. Res. 1267, ¶ 4, U.N. Doc. S/RES/1267 (Oct. 15, 1999) (freezing the funds of the Taliban as well as closing Taliban operated property off aircraft);  


45 Id. ¶ 90. The court also stated that Taliban Sanctions Committee does not conduct a review of the justifiable nature of the placing of the names on the list “since it is not a legal body but a political body.” Id. ¶ 64.  
restriction in international law to SC resolutions, “namely, that they must observe the fundamental peremptory provisions of *jus cogens*.” Without this adherence to *jus cogens*, the court stated that the resolutions would not bind the UN or any member state. In this case, the court was cautious because of the security threat of terrorism, but the decision illustrates the potential lack of legal accountability of the SC resolutions with regard to general principles of international law.

The reality of a predetermination by the SC could “bind subsequent judicial decision-making” at the ICC. This is a key aspect for the legitimacy of the ICC, creating a tension between the general principles of law regarding due process and the right of a fair trial with the possibility of a required SC determination. It would appear that the arguments for the predetermination by the SC of aggression could be seen as more of a “security blanket” for some powerful states operating on the international plane rather than an appropriate use of this organ of the UN.

**IV. INTERPRETING THE REQUIREMENTS OF THE UN CHARTER**

If the requirement for a determination by the Security Council is agreed upon, the independence of the ICC will be limited by the veto power of the dominant states, reinforcing the state-centered approach in international law. Some participating states at the SWGCA spoke in support of this proposal, citing Article 24 of the Charter. Article 24 states that the Security Council has “primary” authority for the maintenance of peace and security, but primary does not automatically mean “exclusive authority,” which is what the proponents of the predetermination are implying. The intention of the wording for the “primary authority” can be seen from the beginning of the article itself: “In order to ensure prompt and effective action by the United Nations . . . .” This authority is clearly based on the need to react to international situations as envisaged by the drafters, not to create an organ that is the sole

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47 Id. ¶ 281 (emphasis added).
48 Id.
49 Schabas, *supra* note 2, at 129.
50 U.N. Charter art. 24, para. 1 (“In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”).
51 Id.
52 U.N. Charter art. 24, para. 1.
arbiter of aggression or a substitute for the International Court of Justice. The duty to maintain international peace and security focuses on the political role of the SC in the area of aggression and use of force. It was intended that the SC could potentially intervene in international crises before they would spread and destabilize a region or area.\(^{53}\) Regardless of the intention, Article 24 has not resulted in quick action of the SC since its inception. If the other major crimes occur during an international act of aggression and they do not require a predetermination in order for the ICC to investigate or prosecute, then the logic for the SC determination in aggression cases is limited. According to Article 24, a determination by the SC is not a clear requirement. Also, it creates a new and unsteady role for the SC, that of a pseudo criminal “court.”

Proponents of the SC determination argument often point to Article 39, which deals with the enforcement actions of the SC in order to maintain peace and security.\(^{54}\) It specifically includes acts of aggression in the Chapter VII title. The wording has had an impact on the delegates negotiating the crime of aggression and is a sticking point for ICC independence on this crime. The Article states that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”\(^{55}\) This Chapter relates to “actions” and does not preclude other bodies from assigning responsibility as the ICJ has done in several cases. In the Nicaragua case,\(^{56}\) the ICJ decided that the United States’ use of armed militia amounted to an armed attack prohibited by customary law. It stated that the use of “armed bands, . . . which carry out acts of armed force against another State of such gravity as to amount to . . . an actual armed attack,” qualifies as an act of aggression,\(^{57}\) referring to the GA Resolution 3314 on aggression.\(^{58}\) The requirement of a determination by the SC can also be seen to conflict with the purpose of the UN Charter, specifically Article 2, Paragraph 4, prohibiting the threat or use of force against the

\(^{53}\) This would obviously exclude the crimes that are committed during an internal conflict.

\(^{54}\) U.N. Charter art. 39.

\(^{55}\) Id.

\(^{56}\) Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27).

\(^{57}\) Id.

territorial integrity or political independence of any state. The reliance on Article 51, the right of self defense, has been used to justify actions in Iraq without the proportionality and necessity restriction outlined by the ICJ in the Nicaragua, Oil Platforms, and Congo v. Uganda cases.\textsuperscript{59} In these cases, the SC had made no determination that an act of aggression had occurred.\textsuperscript{60}

The ICJ has not been restricted from making a decision if an act of aggression has taken place in the past, nor should it; as its judicial function would require, it should be free to do so. The issue here is the varying nature of the main organs of the UN. A political organ is not the same in organization and/or function to a judicial organ. The main aim of the SC is to intervene, if possible, with the force of the UN to halt acts that may threaten international peace and security. Article 39 gives the SC the power to make a determination on an act of aggression in the context of its own decisions, for instance, a resolution calling for a state to cease its actions or to deploy UN peacekeepers in order to maintain or restore peace.\textsuperscript{61} The impact of international condemnation and other enforcement actions, such as sanctions stemming from the SC, may be ridiculed at times because they lack the overt enforcement mechanism when compared to the domestic state, but they should not be totally discounted. This was the intention of the drafters of the UN Charter. The ICJ’s function, however, is to solve disputes between states who consent to the jurisdiction of the court by judicial decision, and to give advisory opinions. It has dealt with acts of aggression in the past without the need for a determination by the SC. The two functions should not be mixed. A court cannot act as can the SC and the SC should never act as a court. If the ICC is to have any meaningful opportunity to prosecute the crime of


\textsuperscript{60} The closest the SC came was in S.C. Res. 1635, U.N. Doc. S/RES/1635 (Oct. 28, 2005), where it stated that “the situation in the Democratic Republic of the Congo . . . constitute[d] a threat to international peace and security.” Id. at para. 10. Although in 1983 regarding Nicaragua, the SC commented on the obligation of states “not to allow the territory of a State to be used for committing acts of aggression against other States.” S.C. Res. 530, para. 6, U.N. Doc. S/RES/530 (May 19, 1983).

\textsuperscript{61} These actions are “taken in accordance with Articles 41 and 42” of the Charter. U.N. Charter art. 39.
aggression, it needs to be devoid of political considerations, otherwise acts of aggression could be determined as breaches, or merely as threats, to international peace and security. Also, it is important to remember that the ICC will be investigating and prosecuting aggression for the purpose of individual criminal proceedings, something the SC cannot do within its scope.

V. PROPOSALS FOR THE DETERMINATION OF THE CRIME OF AGGRESSION

The meeting of the SWGCA had advanced to a stage in January 2007 that a new Chairman’s [non] paper was proposed for discussion.\textsuperscript{62} It outlines the possible clarified wording for the exercise of jurisdiction over the crime of aggression. Based on the Chairman’s [non] paper, this proposed Article 15 \textit{bis} of the statute would clarify the conditions for jurisdiction.\textsuperscript{63} The wording of Article 15 \textit{bis} in paragraph 1 and 2 appears to put the Pre-Trial Chamber of the ICC in the position of dealing with any initiation of an investigation by the prosecutor regardless of how it was referred to the court.\textsuperscript{64} The third paragraph outlines that the commencement of any investigation has either been (a) determined by the SC, (b) the SC has decided “not to object to the investigation,” or (c) a determination has been made by either the GA or the ICJ.\textsuperscript{65} There is a provision in the proposal allowing the Pre-Trial Chamber of the ICC to authorize the commencement of an investigation if no determination is made within a set time period.\textsuperscript{66}

It is difficult to tell from the official documentation from the summer 2007 meeting the amount of support for either option at this point because the specific delegations’ opinions are not listed. It would appear that there is at least some support for the option of the ICC’s ability to proceed with a case regardless of the SC’s


\textsuperscript{63} Id. ¶¶ 1–2.

\textsuperscript{64} Id. ¶ 3.

\textsuperscript{65} Id. ¶ 5.

\textsuperscript{66} Id. ¶ 5.
determination from previous reports and the fact that it is an option of the discussion paper. However, it is clear from the Chairman’s [non] paper and that there does not appear to be significant room to move in the ICC’s control of jurisdiction without the SC’s influence or domination.

The content and flow of the discussion at the SWGCA has been influenced towards a determination by the SC since the negotiations on the crime of aggression began. It was suggested by the first coordinator’s paper, dating from 2002, that the predetermination by the “appropriate organ should be made a precondition for the exercise of the Court’s jurisdiction.”\textsuperscript{67} As mentioned earlier, the recent Chairman’s paper in 2007 has been adapted by the criticism against a predetermination to include an option for the court to proceed with an investigation without a SC determination.\textsuperscript{68}

The discussions from the New Jersey Conference in 2006 pointed to the SC’s current ability to refer a situation to the court under Chapter VII, as stated in Article 13(b) of the Statute of Rome.\textsuperscript{69} This would amount to a determination, however, some delegates preferred to have a determination open to either the GA or the ICJ. If so, this would be if there were a state referral,\textsuperscript{70} or an investigation initiated by the prosecutor of the ICC itself.\textsuperscript{71} At least one delegate expressed an objection to using different organs of the UN because it may lead to creating a “‘hierarchy’ among the [proposed] trigger mechanisms.”\textsuperscript{72} When the discussion turned to the question of whether the ICC should be able to act on its own, a


\textsuperscript{68} Discussion Paper Proposed by the Chairman, supra note 62, ¶¶ 3–4.


\textsuperscript{70} Id. There was concern that a state referring the matter to the ICC without any determination by any other organ of the UN was acceptable if it was a self referral and the state was unable to carry out its own investigation or trial; however, a referral by another state was seen to require a determination by some organ of the UN. Int’l Crim. Ct., Assemb. of States Parties, Fifth Sess., Special Working Group on the Crime of Aggression, Report of the Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, ¶ 61, I.C.C. Doc. ICC-ASP/5SWGCA/INF.1 (Sept. 5, 2006), available at http://www.icc-cpi.int/library/asp/ICC-ASP-5-SWGCA-INF1_English.pdf.

\textsuperscript{71} Rome Statute of the International Criminal Court art. 13(c), 2187 U.N.T.S. 90.

few delegates supported this proposal, rejecting the idea of a
determination by the SC. Of those delegates, however, one voiced
the opinion that it should be phrased as any organ of the UN.\footnote{Id. at 14.}
Finally, it is interesting to note that towards the end of the
discussion in New Jersey, the coordinator urged delegates to \textit{reflect on the issue of "self-referrals"} by states in order to avoid frivolous
politically motivated actions.\footnote{Id. at 22.} Thus, the concern over state
referrals seems to be important for the coordinator leading the
discussion as well as some delegates. This particular fear has
followed the ICC as an institution since its creation and will most
probably be heightened with inclusion of the crime of aggression.
Certain individual powerful states and concerned leaders will find
the ICC a difficult reality compared to the past where diplomatic
repercussions could amount to a slap on the wrist or, at worst,
economic sanctions from the SC for those who commit aggression.

\textbf{VI. POSSIBLE SCENARIOS}

The possibility of having a determination by another organ of the
UN is preferable to an exclusive requirement of a SC determination;
however, this option is not without problems. \textquote{[I]n the 2004 opinion
on the Legal Consequences of the Construction of a Wall in the
Occupied Palestinian Territory, the Court \ldots discuss[ed] the
competence of the General Assembly to request an opinion on a
matter that appeared to be within the primary responsibility of the
Security Council \ldots."}\footnote{WHITE, supra note 35, at 207; see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 145 (July 9) [hereinafter Legal Consequences].} The court decided the GA had the
competence to ask for an advisory opinion, stating that the
understanding of Article 12 of the UN Charter had evolved from its
previous, narrow interpretation.\footnote{Legal Consequences, 2004 I.C.J. at 149–50.} In this decision, the court made
reference to GA Resolution 377 (V), which was originally designed to
counter the possibility of the USSR blocking a SC determination on
recommendations for collective measures on any case that is "a
threat to the peace, breach of the peace, or act of aggression,” if the permanent states of the SC lack unanimity, and no decision can be taken.\footnote{Legal Consequences, 2004 I.C.J. at 150–51.  The ICJ noted the two conditions for this action by the GA, first that the SC has failed to exercise its primary responsibility for the maintenance of international peace and security as a result of a negative vote of one or more permanent members, and that the situation is one in which there appears to be a threat to the peace, breach of the peace, or act of aggression.  \textit{Id.}}

The ICJ has already made determinations on aggression in past cases, but waiting for an advisory opinion for each instance of potential aggression in the future may cause problems with the necessary ICC investigation. The delay may be unacceptable and, thus, hamper a criminal prosecution. Another important point made by one delegate was the difference in the evidentiary requirements of the two courts.\footnote{Report of the CICC Team, supra note 72, at 23–24.} The ICJ will not require the same level of evidence necessary for prosecution in a criminal liability case at the ICC, nor is it meant to. Determining if an act of aggression by a state has occurred is not the same as an individual criminal prosecution for aggression. Requiring the ICC to wait for an advisory opinion from the ICJ may also lead to duplication of effort, evidence, and trial that could have been handled by the more appropriate venue. In the commentary to Article 16 of the Draft Code of Crimes Against the Peace and Security of Mankind, the International Law Commission stated that a competent court could determine the state act of aggression.\footnote{Int’l Law Comm’n, Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, art. 16, ¶ 5, in Report of the International Law Commission on the Work of the Forty-Eighth Session, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996).  The action of a State entails individual responsibility for a crime of aggression only if the conduct of the State is a sufficiently serious violation of the prohibition contained in Article 2, paragraph 4, of the Charter of the United Nations. In this regard, the competent court may have to consider two closely related issues, namely, whether [such] conduct . . . constitutes a violation of Article 2, paragraph 4, of the Charter and whether such conduct [of the State] constitutes a sufficiently serious violation of an international obligation to qualify as aggression entailing individual criminal responsibility. The Charter and the Judgment of the Nürnberg Tribunal are the main sources of authority with regard to individual criminal responsibility for acts of aggression.  \textit{Id.}} The ICC can be that competent criminal court without any need for a predetermination.

If the requirement for a determination is broadened to include any UN organ, the possibilities here are numerous. The ICC could notify the SC if an act of aggression has taken place and then hold a majority vote to make a determination. This removes the veto
dominance within the SC, but still leaves the problem of determining an act versus a crime, which would be the focus of the ICC. Another possibility would be the reference to the GA instead of the SC, or after SC inaction for any reason. The SC may bow to pressure from the GA to make a determination, but it may also lead to tension if the SC does not make a fairly quick decision. This would also potentially create a hierarchy in the system of determination and reinforce the imbalance in the UN system, as well as leaving a lag time for the SC, which would have to be established beforehand. Or the GA may not wish to make a decision on a possible act of aggression if it not is politically and/or diplomatically popular among the majority of members; after all, the GA remains a political body.

Mark Stein has recommended another possibility: to placate those who are promoting the SC determination scheme.81 Although he argues against the SC exclusivity on the determination of an act of aggression, he suggests that Article 16 of the Statute of Rome should be amended to allow the SC to permanently suspend a prosecution or an investigation of the crime of aggression.82 This would be a change from the current power to suspend a prosecution or an investigation in the ICC for a one-year renewable term under a Chapter VII resolution.83 His recommendations that the amendments to Article 16 should also allow the SC to “vacate charges and even expunge convictions” in order to “completely subordinate [the ICC] to the [SC] as a body, though the ICC will not be subordinate to the veto of any one permanent member.”84

This proposal may appeal to those who wish to reinforce the power of the SC, or at least let the veto members have an opt out for their leaders when it comes to the crime of aggression, but the long-term effects of permanent subordination of the ICC to the SC will be great. It would also serve to extend the faulty international mechanisms that are currently in existence. This is more of a political solution for the concerned veto members and not a proposal that promotes good governance and accountability in international institutions. The issues surrounding the legitimacy of the ICC will remain, not only for the powerful states who fear an activist international court, but also for those who were promoting the

81 Stein, supra note 15, at 31.
82 Id.
83 Id.
84 Id. at 31–32.
function and aims of the ICC that might be severely curtailed by SC dominance.

Stein also proposed that a solution to the SC determination scheme is to have the question of what organ should make the determination settled by an advisory opinion of the ICJ. This option has merit and would result in an interesting analysis of the UN organs and powers. He suggests that the ICJ can deal with either several proposals emanating from the SWGCA on the determination scheme, or just one single question as to whether the requirement for a SC determination is consistent with the Charter.

It is important to remember that individual states make a determination on the crime of aggression on their own for the purposes of self-defense under Article 51 of the Charter, and through national prosecutions as per the principle of complementarity in the Statute of Rome. It is inconsistent that there will be an exception on the international plane. Also, the SC currently has the power to suspend any investigation and/or prosecution for up to one year through a Chapter VII resolution. Giving the SC the responsibility to determine acts of aggression before the ICC can have jurisdiction is against the main purpose of the court in the first place. Proponents for a SC determination rely on a narrow reading of Article 39 of the Charter, but it is this argument that will put a permanent political tag on the ICC’s foot.

VII. CONCLUSION: THE BEST CASE SCENARIO

The solution to the current negotiations will probably be a compromise agreement. A strong possibility would be to refer a situation to the SC and have a waiting period of about six months for a determination. In the alternative, without a decision from the SC, the ICC may be allowed to go ahead with consent of either the majority of the SC or the GA. Perhaps the ICJ may consent to give an advisory opinion on the ICC’s ability to have jurisdiction, without a SC determination, and whether this right is compatible with the Charter. However, this would be more about convincing minds and

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85 Id. at 36.
86 Id.
less about the necessity of the legal opinion.

The best way forward, taking into account all possible scenarios, is for the ICC to have full competence in initiating an investigation and/or a prosecution, like with the other core crimes. This will mean there is no chance or appearance of interference in the court’s decision from any other political body, nor will it mean duplication and delay if the ICJ is to be consulted first. The independence of any judiciary is key to a court’s legitimacy, and an essential element of good governance. The ICC must not be subordinate to other principal organs any more than it is already with Article 16. The proponents of the SC determination scheme may wish to point out that a determination does not interfere with a criminal prosecution, however, this is a rather formalistic interpretation of the effect it may have on the court. Whereas in reality, it will be practically impossible to proceed without a specific SC determination, and more difficult not to if a determination is made. The true fear of politically based referrals and trials is increased with the SC determination.

The possibility of a requirement for notification, when an investigation is initiated (and a notification only), should not impede the court’s progress, and will keep at least some harmony within the UN system. After all, the ICJ has made determinations on aggression in various cases even though the SC has not, or has downgraded aggression to threats to peace and security, and this did not diminish the power of the SC. The main point in having different organ bodies in the UN is so they can serve different purposes and functions. The ICC’s function is that of criminal justice, not diplomacy or politics, or that of an interstate dispute mechanism.

The focus on criminal justice, as opposed to the maintenance of peace and security, is the most fundamental aspect to the outcome of the negotiations. The act belongs to the SC, while the crime belongs within the jurisdiction of the ICC. The SC can refer cases to the ICC, but it should not control those that come either through a state referral or by the initiation of the prosecutor. The need to see this contentious issue through the lens of international criminal justice means the criteria of a truly independent judiciary, adherence to due process principles, and the appropriate

89 Thomas M. Franck, Fairness in International Law and Institutions 34–37 (1995); see also White, supra note 35, at 189–230.
evidentiary requirement should be the outcome of the negotiations. This will be essential in years to come when any ICC convictions must be able to stand up to the highest level of scrutiny.

The difficulty with a SC determination scheme is the enduring difficulty with states, especially the powerful states. States seek to protect their own goals first, before the rights of the individual and before the rights of other states, as a functional necessity. When this goes too far, international law should be the restraining factor. International criminal law has its heritage in international humanitarian law, which was developed to offer legal redress for the individuals against the illegal actions of state entities. The crime of aggression at the ICC will be another step towards this ongoing development in the codification of international criminal law. The ICC is a new and modern reality for the international system. It is a new fit for the dated, state-centered approach to the UN system, but one that reflects the reality of international law as it stands now and in the future.