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Which of the Preparatory Commission's Latest Proposals for the Definition of the Crime of Aggression and the Exercise of Jurisdiction Should Be Adopted into the Rome Statute of the International Criminal Court?*

I. INTRODUCTION

On July 17, 1998, the final draft of the Rome Statute of the International Criminal Court (Rome Statute)¹ at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) was completed. The Rome Statute established the existence of an International Criminal Court (ICC),² "a permanent institution" that has "the power to exercise its jurisdiction over persons for the most serious crimes of international concern"³

Crimes that fall within the ICC's jurisdiction include genocide,⁴ crimes against humanity,⁵ war crimes,⁶ and the crime of aggression.⁷ These crimes are included because they are the "most serious crimes of concern to the international community as a whole."⁸ Except for the crime of aggression, the elements of each admissible crime are defined in the Rome Statute.⁹ Apparently, because no consensus for a definition of the crime of aggression could be agreed upon at a time near the desired completion of the final draft, a qualification was set forth in Article 5(2) of the Rome Statute stating that the ICC could "exercise" its jurisdiction over the crime of aggression once a provision was enacted which "de-

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1. *Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) [hereinafter *Rome Statute*].

2. See Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?* 19 N.Y.L. SCH. J. INT'L & COMP. L. 413 (2000) (citations omitted).

3. *Id.* *Rome Statute*, *supra* note 1, art. 1.

4. See *Rome Statute*, *supra* note 1, art. 5(1)(a).

5. See *id.* art. 5(1)(b).

6. See *id.* art. 5(1)(c).

7. See *id.* art. 5(1)(d).

8. *Rome Statute*, *supra* note 1, at art. 5(1).

9. Articles 6, 7, and 8 contain definitions of the terms *genocide*, *crimes against humanity*, and *war crimes*, respectively. See *id.* art. 6-8.

fin[ed] the crime and set[] conditions” of jurisdiction “with respect to this crime.”¹⁰ During the drafting of the Rome Statute, the U.S. strongly opposed the inclusion of the crime of aggression because “[t]his issue alone could fatally compromise the ICC’s future credibility.”¹¹

This comment briefly describes some of the provisions of the Rome Statute that the U.S. opposes along with its reasoning. As demonstrated above, the crime of aggression is one of the United States’ primary reasons for not signing the Rome Statute.¹² A brief history surrounding this crime and an analysis of the latest three proposals set forth by the Preparatory Commission for the International Criminal Court (Preparatory Commission) for the definition of aggression and its jurisdiction will be discussed. In addition, the question of whether the crime of aggression should be excluded altogether will be addressed. Finally, this comment will conclude with a discussion about issues surrounding the definition of aggression and its jurisdiction, along with the ratification of the Rome Statute as a whole.

II. UNITED STATES’ CONCERNS WITH THE ROME STATUTE

A. Article 12: Personal Jurisdiction

The United States strongly opposes the far-reaching jurisdiction of the ICC over individuals. Currently, the ICC may exercise jurisdiction over an accused individual if the alleged perpetrator is a member of a state party or if the alleged crime occurred in the territory of a state party.¹³ Due to this provision, any state that has ratified the Rome Statute may refer an admissible crime to a prosecutor of the ICC regardless of whether the accused individual is a member of a state that ratified the Rome Statute.¹⁴ Thus, not only does the “treaty expose[] nonparties in ways that parties are not exposed,”¹⁵ but the Rome Statute also contradicts customary international law which provides that only parties to a treaty are bound to its provisions.¹⁶ Furthermore, due to the broad jurisdiction of Article 12, an incentive exists for states to more willingly abstain from intervention in those “lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and

10. *Id.* art. 5(2).

11. David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 21 (Jan. 1999).

12. See generally *id.*

13. See *Rome Statute*, *supra* note 1, art. 12(1)(a).

14. See Scheffer, *supra* note 11, at 18.

15. *Id.*

16. See *id.*

world peace so desperately seek from the United States and other military powers."¹⁷

B. Article 13: Subject Matter Jurisdiction

Under Article 13, a state party¹⁸ or the Security Council, pursuant to Chapter VII of the United Nations Charter,¹⁹ may refer to an independent prosecutor of the ICC cases in which it appears that admissible crimes have occurred.²⁰ In addition, a prosecutor may self-initiate and investigate the possible occurrence of a crime.²¹ One problem inherent in allowing either a prosecutor of the ICC to investigate crimes or a state party to refer crimes is that such accusations may be politically motivated against certain states, including the United States.²² Because of its widespread military involvement in the last century, the United States is an easy target for those opposed to its foreign policy. Thus, although the Rome Statute has set forth provisions to eliminate this concern,²³ these procedural safeguards²⁴ are ambiguous and do not provide adequate protection for the United States.

C. Complementary Regime

During the course of negotiations, the United States stressed the importance of state sovereignty and the need for the ICC to not impinge upon this right.²⁵ A protective device is set forth in Article 17, which prohibits the ICC from proceeding with any case within the jurisdiction of an implicated state unless the state is incapable or unwilling to determine if prosecution is necessary.²⁶ In addition, Article 18 imposes further restrictions on the ICC's authority to go beyond a state's ability to prosecute.²⁷ However, even with these restrictions, the possibility of the ICC usurping power from states remains. The larger the territory and the greater the number of individuals over which a court may exercise juris-

17. *Id.* at 19.

18. *See Rome Statute, supra* note 1, art. 13(a).

19. *See id.* art. 13(b).

20. *See id.* art. 13.

21. *See id.* art. 13(c).

22. *See infra* text accompanying note 151.

23. *See* Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, AM. SOC'Y INT'L L. INSIGHT, (Aug. 1998) <<http://www.asil.org/insigh23.htm>>.

24. *See Rome Statute, supra* note 1, art. 18 (explaining that before a prosecutor can investigate, his or her complaint must be approved by three-judge pre-trial chamber, which approval may be subject to an interlocutory appeal to an appeals chamber).

25. *See generally* Scharf, *supra* note 23.

26. *See Rome Statute, supra* note 1, art. 17.

27. *See id.* art. 18.

diction, the greater the power and potential for abuse. Thus, when creating an international court, state sovereignty must remain clearly intact. State sovereignty is a vital protection to people and their representation and its ideals need to be more strictly safeguarded than currently provided for in the Rome Statute.

D. Amendment Provisions

Articles 121 and 123 set forth the provisions for adding or revising the text of the Rome Statute seven years after its enforcement date.²⁸ Article 121 provides that a two-thirds majority of state parties is required to approve such an amendment.²⁹ Once ratified by seven-eighths of the State Parties, the enforcement of an amendment may begin one year later.³⁰

One United States concern with these amendment provisions is that in the future, more "serious" crimes could be added to the statute that the United States may oppose.³¹ Of even greater concern is the fact that if a state party does not accept an amendment relating to a new or revised crime, the ICC cannot exercise jurisdiction when "committed by that State Party's nationals or on its territory."³² Thus, although a state party can opt out of new or revised crimes amended into the Rome Statute, a nonparty state can be subject to such crimes via Article 12.³³ These provisions also violate customary international law because state parties that have signed the treaty become immune to jurisdiction of new or revised crimes while its provisions bind nonparties.

E. Manner of Finalization

The United States delegation proposed many changes to the draft of the Rome Statute during the Rome Conference. Many of the proposed changes were not made or even addressed. In addition, on the final day of the conference, a small number of delegates (not including any U.S. delegates) met behind closed doors, making final changes to the Rome Statute and finishing at two o'clock in the morning.³⁴ Some of the text of the draft statute was changed, including portions previously approved by the Committee of the Whole.³⁵ Thus, fearing that numerous issues had

28. *See id.* art. 121(1).

29. *See id.* art. 121(3).

30. *See id.* art. 121(4).

31. *See Scheffer, supra* note 11, at 18.

32. *Rome Statute, supra* note 1, art. 121(5).

33. *See Scheffer, supra* note 11, at 20.

34. *See id.*

35. *See id.*

not been sufficiently scrutinized, the United States was concerned with the “‘take it or leave it’ text for a permanent institution of law [that] was not subjected to the rigorous review of the Drafting Committee or the Committee of the Whole and was rushed to adoption hours later on the evening of July 17 without debate.”³⁶ In other words, “[s]o many issues of fundamental importance remained open in April 1998 that [David Scheffer and U.S. delegates] could only approach Rome with ‘cautious optimism.’”³⁷

III. PROCEDURAL STATUS OF THE CRIME OF AGGRESSION

Resolution F of the Final Act of the Rome Conference determined that the Preparatory Commission, among other tasks, would be responsible for drafting a proposed provision for the crime of aggression.³⁸ Once 60 members have ratified the Rome Statute, the International Criminal Court becomes effective.³⁹ Once this occurs, proposals regarding the crime of aggression must be completed by the end of the first meeting of the Assembly of State Parties.⁴⁰ The Preparatory Commission’s latest proposals for a definition and jurisdiction pertaining to the crime of aggression were released on July 6, 2000.⁴¹

IV. HISTORY OF THE CRIME OF AGGRESSION

A. Background

Throughout history, the question of whether one group of individuals has a moral right to commit an act of aggression against another group has existed.⁴² With the onset of the industrial revolution, the world became smaller as technology increased, increasing the need to answer this question.⁴³ In 1899, the First Hague Convention responded by attempting

36. *Id.*

37. *Id.* at 14.

38. See *First Session of the Preparatory Commission (February 16-26, 1999)*, INT’L CRIM. CT. MONITOR (visited Sept. 12, 2000) <<http://www.iccnw.org/html/monitor.htm>> (section entitled “Introduction”).

39. See Carl M. Nesser, *First Session of the Preparatory Commission (February 16-26, 1999)*, INT’L CRIM. CT. MONITOR (visited Sept. 12, 2000) <<http://www.iccnw.org/html/monitor.htm>> (section entitled “Aggression”).

40. See *id.*

41. See U.N. Preparatory Commission for the International Criminal Court, 5th Sess., at 1, U.N. Doc. PCNICC/2000/L.3/Rev.1 (2000) [hereinafter Proposed Statute].

42. See Linda Jane Springrose, *Aggression as a Core Crime in the Rome Statute Establishing an International Criminal Court*, 1999 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 151, 153 (citing I M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW, 167-174 (1986)).

43. See *id.* (citing 1 BENJAMIN B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION, THE SEARCH FOR WORLD PEACE 4 (1975)).

to curb aggression between states.⁴⁴ Although not specific in the procedures to be employed, this treaty provided not only for states to try to co-exist peaceably with one another, but also encouraged settlements of disputes through the process of either mediation or arbitration before a Permanent Court of Arbitration.⁴⁵ Such provisions became more detailed in 1910 during the Second Hague Convention. However, because the jurisdiction of the Permanent Court of Arbitration was compulsory, many countries did not submit disputes to it.⁴⁶ Although the League of Nations, which outlawed war, was formed in part to prevent states from incurring the type of destruction imposed upon many nations in World War I, it did not prevent the occurrence of World War II.⁴⁷

B. Nuremberg

A new approach was implemented at Nuremberg. Instead of imposing a Versailles-type treaty on all of Germany collectively (as was done after World War I), military leaders responsible for the atrocities of World War II were tried individually.⁴⁸ The Charter of the International Military Tribunal (IMT) of Nuremberg was the governing document used, providing for crimes against peace (aggression), crimes against humanity, and war crimes.⁴⁹ In addition, the Charter stated that those individuals tried could not claim as a defense that they were only following superior orders.⁵⁰ The German defense of *nullum poena sine lege* was raised along with the criticism that the crime of aggression was an *ex post facto* law.⁵¹ The IMT rejected these notions by citing the precedence of past laws and other historic attempts to curb aggression.⁵² In addition, the IMT distinguished the crime of aggression from other crimes by stating, “[T]o initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”⁵³ The Tokyo War Crime Tribunal in the Far East tried Japa-

44. *See id.* at 154.

45. *See id.*

46. *See id.*

47. *See id.* at 155.

48. *See* Springrose, *supra* note 42, at 155.

49. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 1945 U.S.T. 1, 7-8 [hereinafter Nuremberg Charter].

50. *See id.* at 8-9.

51. *See* Springrose, *supra* note 42, at 156-57.

52. *See id.* at 157.

53. *Id.* (quoting Benjamin B. Ferencz, *An International Criminal Code and Court: Where they Stand and Where They're Going*, 30 COLUM. J. TRANSNAT'L L. 375, 452 (1992)).

nese leaders for the same crimes as in Nuremberg with similar provisions pertaining to the crime of aggression.⁵⁴

C. *The United Nations and the Security Council*

In 1945, the United Nations Charter was signed,⁵⁵ and in 1951 the first United Nation's draft regarding the creation of a permanent international criminal court was written.⁵⁶ However, instead of trying persons on an individual basis, the U.N. Charter and subsequent U.N. resolutions advanced the notion that aggression involves acts of a state entity.⁵⁷

Certain U.N. provisions outline the use of force and aggression along with the proper role of the Security Council in regulating such force. Article 33 of the U.N. Charter provides that

parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.⁵⁸

In addition, the U.N. Charter allows the Security Council, in its judgment, to attempt to persuade parties in a dispute to resolve such matters by the same means.⁵⁹ If the Security Council determines that a threat to peace exists, it may, at its discretion, take action⁶⁰ and encourage the states involved⁶¹ in the dispute to remedy the situation through the use of sanctions or by the imposition of other methods of non-force.⁶² To use force, the Security Council must first determine that such force is essential to maintain or restore peace.⁶³ Once this requirement is met, the Security Council may use force as a source of compliance if an aggressive state will not settle the dispute through peaceful means⁶⁴ and if peaceful means cannot adequately remedy the situation.⁶⁵

In the case of an armed attack by a state, the U.N. Charter allows the attacked state to defend itself. However, the attacked state must cease its

54. *Id.*

55. *See id.* at 159.

56. *See id.* at 158.

57. *See* Springrose, *supra* note 42, at 15.

58. *Id.* (citing U.N. CHARTER art. 33).

59. *See id.*

60. *See id.* (citing U.N. CHARTER art. 39).

61. *See id.* (citing U.N. CHARTER art. 40).

62. *See id.*

63. *See* Springrose, *supra* note 42, at 15 (citing U.N. CHARTER art. 42).

64. *See id.* (citing U.N. CHARTER art. 41).

65. *See id.* (citing U.N. CHARTER art. 42).

defense once the Security Council intervenes and determines a course of action to be taken regarding the matter.⁶⁶ Thereafter, the Security Council may intervene⁶⁷ at its own discretion.⁶⁸

Although the above United Nations provisions furnish guidelines regarding the use of force, the definition of what constitutes an "act of aggression" was not determined until the General Assembly passed Resolution 3314 in 1974.⁶⁹ The definition includes "the use of armed forces by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the U.N., as set out in this definition."⁷⁰ The resolution details specific events that qualify as an act of aggression.⁷¹ In addition, this resolution only applies to acts of aggression committed by states.⁷² However, because the definition of an act of aggression was set forth in a resolution, the definition is not binding on its face on the member states of the United Nations.⁷³

D. Drafting the Statute for the ICC

Starting in 1992, the International Law Commission (ILC) explored the question of whether a permanent international court could actually exist.⁷⁴ Because the United States would sign a draft statute of the treaty if the provisions were sufficiently aligned with United States priorities, United States personnel followed the work of the ILC closely during 1993.⁷⁵ Chief among the United States' priorities included specifying definitions of war crimes and excluding the crime of aggression.⁷⁶ During 1997, the United States advocated that the crime of aggression should not be included unless the Rome Statute could "define and qualify its inclusion properly."⁷⁷ Although the United States advocated the position that the Security Council should refer all cases brought before the ICC,

66. *See id.* at 159-60 (citing U.N. CHARTER art. 51).

67. *See id.* at 159-60 (citing U.N. CHARTER art. 51).

68. *See id.* at 160 (citing U.N. CHARTER arts. 39-42).

69. *See* Springrose, *supra* note 42, at 160 (citation omitted).

70. G.A. Res. 3314, U.N. GAOR, 23d Sess., Supp. No. 31, at 392, U.N. Doc. A/9890 (1974) (reprinted in Springrose, *supra* note 42, at 160).

71. *See id.* art. 3.

72. *See* Springrose, *supra* note 43, at 160.

73. *See id.*

74. *See* Scheffer, *supra* note 11, at 12.

75. *See id.*

76. *See id.* at 12-13.

77. *Id.* at 13.

rather than through the initiation of a state prosecutor,⁷⁸ the U.S. did not receive enough support to sustain this position in the Rome Statute.

IV. ANALYSIS OF THE PREPARATORY COMMISSION'S THREE PROPOSALS FOR THE DEFINITION OF THE CRIME OF AGGRESSION

The Commission's latest proposals for a statement of jurisdiction and a definition of the crime of aggression were released on July 6, 2000.⁷⁹ The document consolidates various proposals for the crime of aggression.⁸⁰ The following will discuss the two proposed options along with their variations. The history necessary to comprehensively understand the significance of each proposal along with the respective strengths and weaknesses of each option will also be provided.

Two basic assumptions are made with respect to all of the options proposed, which, for the most part, have received widespread support.⁸¹ The first is "the principle under which the crime of aggression is committed by political or military leaders of a State."⁸² This assumption precludes the trial of any terrorist regime, non-state party group, or individual of a state that acts contrary to the beliefs or purported views of the state itself where no possibility of trial exists before the ICC can act as a deterrent.⁸³ Underlying this principle is the idea that a state is its own sovereign and thus has the power to discipline and deal justly with its own citizens.

The second assumption is "the principle that planning, preparation or ordering of aggression should be criminalized only when an act of aggression takes place."⁸⁴ Over the years, proponents have argued that by criminalizing aggression, many states will be prevented and deterred from committing such an act. However, under this assumption a person cannot be tried in the ICC for devising or scheming to commit a crime unless the planned act actually takes place.

78. *See id.* at 15.

79. *See Proposed Statute, supra* note 41, at 8-9.

80. *See id.* at 11.

81. *See id.*

82. *Id.*

83. *See Dawson, supra* note 2, at 444.

84. *Proposed Statute, supra* note 41, at 11.

A. Option 1

1. Text common to all three variations

Option 1 is comprised of a starting paragraph that branches into three variations. The text common to all three variations relies on the first assumption given above⁸⁵ as it states, “the crime of aggression means . . . any of the following acts committed by [an individual]⁸⁶ who is in the position of exercising control or capable of directing the political or military action of a state”⁸⁷

In addition, whether the Security Council will determine if the crime of aggression has been committed depends on the formula that is amended into the Rome Statute.⁸⁸ The United States wants the Security Council to be the entity that determines whether an act of aggression has been committed. One obvious reason includes the fact that the U.S. is a permanent member of the Security Council, and thus could veto any trial for the crime of aggression it deems unworthy of prosecution. Therefore, the United States’ concern over whether its military or political leaders would be subject to trial in the ICC for the crime of aggression would cease to exist.

2. Variation 1

Variation 1 of this option completes the definition by describing what the person in control must exactly initiate or carry out in order to qualify for committing a crime of aggression.⁸⁹ The result of Variation 1 is an overly-broad definition that fails to specify exactly what a person must do to be tried before the ICC.⁹⁰

85. See *supra* text accompanying note 89.

86. The brackets contained around words in the options for the crime of aggression demonstrate “different formulas than were suggested.” Proposed Statute, *supra* note 41, at 12.

87. *Id.* at 8.

88. See *id.*

89. Full text of Variation 1:

[an armed attack] [the use of armed force] [a war of aggression] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] against another State [against another State, or depriving other people of their rights to self-determination], in [manifest] contravention of the Charter of the U.N., to violate [to threaten or to violate] the [sovereignty,] territorial integrity or political independence of that State [or the inalienable rights of those people] [except when this is required by the principle of equal rights and self-determination of peoples and individual or collective rights of self-defense].

Id. at 8.

90. See *id.* at 11.

3. Variation 2

Unlike Variation 1 of Option 1, Variation 2 specifies that the act of aggression must be “an armed attack directed by a State” and initiated or carried out “with the object or result of establishing a military occupation of, or annexing, the territory of such other State or part thereof.”⁹¹ Under this variation, the definition of the crime of aggression is narrowed as the aim of the aggressor state must be to annex or occupy part of another state’s territory.⁹² Thus, this variation of the crime of aggression may be an attempt to narrow the scope of the definition to encourage agreement.

4. Variation 3

Variation 3 of Option 1 includes the general definition-based paragraph of Variation 1 and adds to it a paragraph that provides a specific list of acts which, when initiated or carried out by a control person, can be characterized as the crime of aggression.⁹³ The listing of these specific acts originate from General Assembly Resolution 3314, passed on December 14, 1974.⁹⁴ These acts provide concrete guidance by demonstrating what events may qualify persons to be tried for the crime of aggression. Among the listed acts listed are “[t]he invasion or attack by the armed forces of a State of a territory of another State,”⁹⁵ and the “bombardment”⁹⁶ or “blockade . . . of a State by the armed forces of another State”⁹⁷

Grant M. Dawson discusses why Resolution 3314 could be used to help define the crime of aggression in his article *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression?*⁹⁸ One reason he gives is that although the ICC tries individuals,⁹⁹ the act of an individual should not be disconnected from the act of a state.¹⁰⁰ The first assumption given above with respect to the options listed is that those persons tried must be political or military leaders of a state.¹⁰¹ As described

91. *Id.* at 8.

92. See Proposed Statute, *supra* note 41, at 11.

93. See *id.* at 9.

94. See *id.* at 11.

95. *Id.*

96. *Id.*

97. *Id.*

98. See generally Dawson, *supra* note 2.

99. See Rome Statute, *supra* note 1, art. 1.

100. See Dawson, *supra* note 2, at 435.

101. See *supra* note 82.

above,¹⁰² Resolution 3314 was enacted to provide guidelines for the Security Council in determining when a state had committed an act of aggression. Thus, by adopting Option 1, Variation 3, the specific acts derived from Resolution 3314 can "be a guide for when the individuals in charge of a state's actions have committed the acts required for a finding of aggression."¹⁰³

Another reason for adopting the provisions set forth in Resolution 3314 is the added uniformity created by the use of familiar legal language in the Resolution. For example, in the Resolution's definition of what constitutes prima facie evidence of an act of aggression,¹⁰⁴ the specific acts listed are similar to those found in a standard penal code.¹⁰⁵ Thus, although the acts listed originate from a non-binding General Assembly resolution, the language of the Resolution adds certainty and uniformity to an inherently vague and hard-to-define crime.

B. Option 2

Option 2 states, "For the purposes of the present Statute and subject to a prior determination by the U.N. Security Council of an act of aggression by the State concerned, the crime of aggression means any of the following acts: planning, preparing, initiating or carrying out a war of aggression."¹⁰⁶ Under this alternative and as discussed later, the Security Council determines whether an act of aggression by a state has occurred. The Security Council applies this determination to a definition of aggression derived from Article 6(a) of the Charter of the IMT of Nuremberg.¹⁰⁷ Thus, this alternative integrates both the role of the Security Council along with the definition used in the Nuremberg trial.

A problem inherent in Option 2 is its vague definition of what acts constitute aggression—a definition taken nearly word for word from Article 6(a) of the Charter of Nuremberg. What constitutes "planning, preparing, initiating, or carrying out a war of aggression"¹⁰⁸ is subject to various interpretations. If only the above definition is used in determining whether a crime of aggression has occurred, then certain individuals may be dismissed while others who committed the same action are tried

102. See *supra* note 69.

103. Dawson, *supra* note 2, at 435.

104. See *id.* at 435-36; see also G.A. Res. 3314, *supra* note 70, art. 2.

105. See Dawson, *supra* note 2, at 436 (referring to G.A. Res. 3314, arts. 1 & 3).

106. Proposed Statute, *supra* note 41, at 9.

107. See *id.* at 11. Article 6(a) of the Nuremberg Charter states that crimes against peace include the "planning, preparation, initiation or waging of a war of participation in a common plan . . ." Nuremberg Charter, *supra* note 49, at 7.

108. Proposed Statute, *supra* note 41, at 9.

before the ICC for purely political (or other) reasons. On the other hand, the Security Council may provide a check on the potential lack of uniformity as it must determine whether an act of aggression has occurred before an individual can be tried before the ICC.¹⁰⁹ In addition, by assuming that an act must actually have been committed before an individual may be prosecuted before the ICC for committing the crime of aggression,¹¹⁰ much of the uncertainty and the potential for lack of uniformity under this definition is diminished.

C. *Alternative 3: To Not Define Aggression*

Even while reviewing and being involved with the draft statutes, the United States opposed the inclusion of a qualitative definition of the crime of aggression.¹¹¹ The crime is hard to define and to categorize. In addition, the argument can be made that, pursuant to Chapter VII, the Security Council can punish states for aggression and the leaders of those states can be tried for other war crimes already defined in the Rome Statute.¹¹² Thus, due to overlap, the crimes already defined in the Rome Statute negate the need to define the crime of aggression.¹¹³ However, including aggression as a crime encapsulates the history of international disapproval of waging aggressive war.¹¹⁴ In fact, the IMT intentionally included and distinguished aggression from other crimes at Nuremberg.¹¹⁵ This viewpoint asserts that by excluding the crime of aggression, the Rome Statute will not "take into account the value of the criminalization of the aggression itself."¹¹⁶

Another argument for the inclusion of the crime of aggression advocates that "[a]ggressive war itself can lead to other core crimes, thus the initial prevention of war could accelerate compliance with other international law."¹¹⁷ However, the current proposals for a definition of the crime of aggression will not accelerate compliance because the assumption made by all the proposed options is that the act must be committed before one can be tried for the crime.¹¹⁸

109. *See id.* at 9.

110. *See supra* note 82.

111. *See Scheffer, supra* note 11, at 12-13.

112. *See Dawson, supra* note 2, at 446.

113. *See id.*

114. *See id.*

115. *See supra* note 53.

116. Dawson, *supra* note 2, at 446.

117. *Id.* at 447.

118. *See supra* note 82.

V. ANALYSIS OF THE PREPARATORY COMMISSION'S THREE PROPOSALS FOR THE EXERCISE OF JURISDICTION IN RELATION TO THE CRIME OF AGGRESSION

The report issued with respect to the Preparatory Commission's latest proceedings at the Fifth Session attempts to consolidate into three options the views pertaining to the conditions for the exercise of jurisdiction for the crime of aggression.¹¹⁹ All of the proposals attempt to address the authority of the Security Council to determine that an act of aggression of a state has occurred within the jurisdiction of the ICC by an individual purported to have committed the crime of aggression. In all three options, before the ICC may proceed against an individual, the Security Council must first have the discretion to determine whether the related state has committed an act of aggression.

A. *Option 1*

1. *Text common to the two variations*

Option 1 states that the Security Council shall determine whether an act of aggression has been committed according to the rules of the U.N. Charter before any proceedings take place in the ICC.¹²⁰ It also states that jurisdiction over the crime of aggression is governed by Article 13 of the Rome Statute.¹²¹ Under Article 13, the Security Council, pursuant to Chapter VII of the U.N. Charter, may refer certain situations to the ICC in which it appears that admissible crimes have occurred.¹²² Similarly, a state party may refer matters to the ICC in which admissible crimes have been violated under Article 14.¹²³ Furthermore, a prosecutor may take the initiative and investigate whether crimes have been committed.¹²⁴ However, after either receiving a referral from a state party or after an investigation has been initiated by an independent prosecutor, the ICC may not proceed under this option until the Security Council "first make[s] a decision establishing that an act of aggression has been committed by the State whose national is concerned."¹²⁵ Thus, the difference between jurisdiction over other admissible crimes of the ICC and the crime of aggression is that, under all three options, the Security Council must first

119. See Proposed Statute, *supra* note 41, at 12.

120. See *id.* at 2.

121. See *id.* at 10.

122. See *Rome Statute*, *supra* note 1, art. 13(b).

123. See *id.* art. 13(a).

124. See *id.* art. 13(c).

125. Proposed Statute, *supra* note 41, at 10.

determine that an act of aggression by a state has been committed before the ICC may proceed.¹²⁶ Once a complaint regarding the crime of aggression has been received, the Security Council has either six or twelve months to determine whether the alleged act occurred.¹²⁷

The underlying assumption of Option 1 is the “attempt to reflect views seeking to reconcile the prerogatives of the Security Council with the independence of the Court.”¹²⁸ In addition, Article 5(2) of the Rome Statute states that jurisdiction over the crime of aggression shall be exercised in harmony with relevant provisions of the U.N. Charter.¹²⁹ Thus, although the ICC “exercises its jurisdiction over persons on the *crime of aggression*,”¹³⁰ the Security Council must first establish “the existence of an *act of aggression*.”¹³¹ The reasoning includes that under Article 39 of the U.N. Charter, the Security Council is the entity responsible “for establishing the existence of an *act of aggression*.”¹³² Therefore, under this option, the Security Council should first determine that an act of aggression by the state has occurred before permitting a trial by the ICC for the crime of aggression.¹³³

2. Variation 1

Variation 1 simply adds that if the Security Council does not determine whether an act of aggression was committed within the time-frame allotted, the ICC may prosecute without the Security Council’s approval.¹³⁴ Also included in this variation is the assurance that, once decided, the Security Council’s determination of whether an act of aggression has occurred is totally separate and independent of the ICC’s jurisdiction over the crime of aggression.¹³⁵

3. Variation 2

If the Security Council does not make a decision within the allotted time-frame, Variation 2 of Option 1 allows the ICC to request that the General Assembly, under Articles 12, 14, and 24 of the U.N. Charter, de-

126. *See id.* at 10.

127. *See id.*

128. *Id.* at 12. As discussed above, relevant articles in the U.N. Charter and General Assembly Resolution 3314 provide a framework for the Security Council to determine when an act of aggression has occurred.

129. *See id.* at 12; *see also Rome Statute, supra* note 1, art. 5(2).

130. Proposed Statute, *supra* note 41, at 12 (emphasis added).

131. *Id.* (emphasis added).

132. *Id.* (emphasis added).

133. *See id.*

134. *See id.* at 10.

135. *See id.*

termine whether an act of aggression has occurred.¹³⁶ If the General Assembly does not make any recommendation within the proposed twelve-month allotment, the ICC may then proceed without any consent.¹³⁷ This variation goes one step further than Variation 1 by providing that the ICC may proceed only after *both* the Security Council and General Assembly have failed to make a decision concerning the occurrence of an act of aggression. However, such a decision becomes susceptible to political maneuvering because the General Assembly is composed of delegates from the government of each member state of the U.N. and decisions are determined by majority vote with each delegate casting one vote. Thus, whether one favors this variation depends upon one's political views on the subject of representation by a majority vote and whether or not one believes that the current majority view in the General Assembly is agreeable to the state with which one is affiliated.

B. Option 2

The provisions of this option provide that the Security Council will determine whether a state committed an act of aggression in relation to Article 39 of the U.N. Charter.¹³⁸ Article 39 states that the Security Council, at its discretion, may take action when peace among parties ceases to exist.¹³⁹ If not already determined by the Security Council, the ICC will request that the Security Council decide whether the state related to the crime of aggression in question has committed the act when a complaint of that crime is brought before it.¹⁴⁰ If the Security Council has not made a determination within twelve months after the ICC's request and has not renewed the request under Article 16 of the Rome Statute, the ICC may then proceed and exercise jurisdiction over the person.¹⁴¹

Thus, this option is similar to Option 1, Variation 1 in the sense that both basically provide for a prior Security Council determination if certain time constraints are met.

C. Option 3

This option is the same as the second option listed under the proposals for the definition of the crime of aggression¹⁴² in that under both, the definition and the exercise of jurisdiction are intertwined and co-exist in

136. See Proposed Statute, *supra* note 41, at 10 & 12.

137. See *id.* at 12.

138. See *id.* at 11.

139. See U.N. CHARTER art. 39.

140. See Proposed Statute, *supra* note 41, at 11.

141. See *id.* at 12.

142. See *supra* text accompanying note 106.

this option.¹⁴³ The Nuremberg definition¹⁴⁴ for the crime of aggression is adopted “subject to a prior determination by the U.N. Security Council of an act of aggression by the State concerned.”¹⁴⁵ As with the other two options, the exercise of jurisdiction over the crime of aggression is subject to a prior determination by the Security Council that an act of aggression by the related state has occurred. However, under this option, no provisions are made which indicate whether the ICC may proceed if the Security Council fails to determine that an act of aggression by a state has occurred. Thus, the ambiguity surrounding this option could potentially lead to a misuse of power.

The idea underlying all of the Preparatory Commission’s proposals is that the Security Council should make a prior determination that an act of aggression by a state has occurred before the ICC may proceed. By doing this, the ICC recognizes the function of the Security Council regarding the use of force and reconciles the state concept underlying the crime of aggression by which an individual may be charged.

D. Alternative 4: No Security Council Determination

Although not proposed in the Preparatory Commission’s report at the Fifth Session, many have argued that the Security Council need not determine whether the state concerned has committed an act of aggression with respect to a person tried before the ICC. Historical precedent for such an argument arises from the successful Nuremberg and Tokyo trials.¹⁴⁶ In addition, the International Court of Justice (ICJ) ruled that the U.S. had committed an act of aggression against Nicaragua in 1986 without any determination of state aggression by the Security Council.¹⁴⁷ Furthermore, because it is not deemed an international agreement, General Assembly Resolution 3314, which defines an act of aggression, is not binding law.¹⁴⁸ Thus, under this proposal, the crime of aggression would be subject to the same jurisdictional limitations as other admissible crimes under the Rome Statute.

Those in favor of this alternative could also argue that a prior Security Council determination would shift the exercise of jurisdiction over this crime from an independent and neutral court (the ICC) to a political body (the Security Council or, perhaps, the General Assembly). However, due to the uncertainty regarding provisions pertinent to an inde-

143. See Proposed Statute, *supra* note 41, at 11 n.2.

144. See Nuremberg Charter, *supra* note 49, at 4.

145. Proposed Statute, *supra* note 41, at 11.

146. See Springrose, *supra* note 42, at 167.

147. See *id.*

148. See *id.* at 166.

pendent state prosecutor, the ICC has the potential to become a political entity itself.¹⁴⁹ Thus, if a prior determination must be made by the Security Council before a state party may refer a matter to the ICC or an independent prosecutor may itself investigate a potential claim, an added check is provided to help prevent the ICC from becoming political and corrupt.

Another concern raised by requiring a prior Security Council determination is that, due to the veto power of the five permanent members of the Security Council,¹⁵⁰ any permanent member could preclude an "accused" person from adverse ICC action. This result seems likely, as the Security Council has rarely functioned efficiently or effectively in the past due to the diverse economic and political views of the five permanent members.¹⁵¹ Thus, although the Security Council has been instrumental in determining whether an act of aggression has occurred in the past, many arguments have been made against such a future ICC determination.

VI. CONCLUSION

Although many states disapprove of aggression, history has demonstrated that agreement upon what constitutes aggression is very difficult. Currently, Option 1, Variation 3 of the Preparatory Commission's proposal provides the most guidance because it lists specific events that may qualify and help codify the crime.

In addition, the latest proposals of the Preparatory Commission provide for a determination by the Security Council that an act of aggression of a state has occurred before the ICC may exercise jurisdiction over the crime. By doing this, the ICC recognizes the function of the Security Council regarding the use of force and links the state concept of aggression to the individual who may be tried before the ICC for that crime.

149. See *supra* note 24 and accompanying text.

150. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 505 (3d ed. 1999). See generally U.N. CHARTER arts. 23-32.

151. See Springrose, *supra* note 42, at 161 (citation omitted). For an example of stagnancy in the Security Council during the Korean War once a permanent member disagreed with the stance taken, see LAWRENCE ZIRING ET AL., *THE UNITED NATIONS: INTERNATIONAL ORGANIZATION AND WORLD POLITICS* 150-53 (3d ed. 2000).

Before the crime of aggression can ever be adopted into the Rome Statute, the definition must not only be detailed and expressed in a manner that will enforce the idea that aggression is an inherent evil, it must also prevent the definition from being subject to political erosion. If amended into the Rome Statute, the crime statute's ability to perform its function is highly doubtful due to the inherent ambiguities and uncertainty associated with both the definition of aggression and the Rome Statute's provisions regarding jurisdiction and amendments.

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