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## The Push to Criminalize Aggression: Something Lost Amid the Gains?

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## THE PUSH TO CRIMINALIZE AGGRESSION: SOMETHING LOST AMID THE GAINS?

Mark A. Drumbl\*

*The International Criminal Court has jurisdiction over the crime of aggression, but the Rome Statute fails to define the crime. A Special Working Group on the Crime of Aggression, however, has made considerable progress in developing a definition. The consensus that has emerged favors a narrow definition. Three characteristics animate this consensus: (1) that state action is central to the crime; (2) that acts of aggression involve interstate armed conflict; and (3) that criminal responsibility attaches only to very top political or military leaders. This Article normatively challenges this consensus. I argue that expanding the scope of the crime of aggression in terms of both the impugned acts as well as who can be prosecuted could carry considerable expressive value. Such an expansion also would better reflect the diversity of contemporary threats to stability, security, sovereignty, and human rights interests.*

### INTRODUCTION

Article 5(1) of the Rome Statute provides the International Criminal Court (ICC) with jurisdiction over the crime of aggression. In accordance with general principles of criminal law, however, the ICC is unable to prosecute anyone for aggression until the crime is precisely defined. The 1998 Rome Diplomatic Conference failed to reach agreement on a definition of aggression for the ICC's purposes. It also failed to reach agreement on conditions for the exercise of ICC jurisdiction over the crime. Assuredly, aggression is taken to be a crime under customary international law to which

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\* Class of 1975 Alumni Chair of Law and Director, Transnational Law Institute, Washington & Lee University, School of Law. This paper was presented at a symposium at Case Western Reserve School of Law entitled "The International Criminal Court and the Crime of Aggression." I thank all participants in the symposium and subsequent Experts' Meeting for their input and the productive conversations. For helpful suggestions on earlier versions of this paper, I thank John Knox, Hari Osofsky, Kevin Jon Heller, Sonja Starr, Noah Weisbord, Dan Bodansky, and commentators at presentations I made at International Law Weekend 2007, the Southeastern Association of American Law Schools 2008 Annual Meeting, a faculty workshop at the University of Illinois College of Law, and the International Law Colloquium at Temple Law School.

individual criminal responsibility attaches.<sup>1</sup> However, until the Rome Statute itself defines the crime, the ICC cannot prosecute it.

The Rome Statute charts a way forward by permitting an amendment that would define the crime and set out the conditions for the exercise of jurisdiction. In this regard, the Rome Statute creates an “opt-in” system for jurisdiction over aggression.<sup>2</sup> Resolution F of the Final Act of the Rome Conference requested that the Preparatory Commission develop proposals for a provision on aggression to be presented to the Assembly of States Parties for consideration at a Review Conference. In 2002, the Assembly of States Parties established a Special Working Group on the Crime of Aggression (Special Working Group). The Special Working Group has industriously issued a series of discussion papers.

The Review Conference looks like it will take place in 2010. In anticipation, the Chairman of the Special Working Group circulated a Discussion paper in mid-2008 that, in its Annex, proposes a definition of the crime of aggression.<sup>3</sup> This Discussion paper proposes specific draft amendments to the Rome Statute and is without prejudice to the positions of delegations. Whereas consensus is emerging within the Special Working Group in terms of the definition, consensus remains elusive in terms of the exercise of ju-

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<sup>1</sup> ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 262–63 (2007); Claus Kress, *The Crime of Aggression before the First Review of the ICC Statute* 3 (monograph dated 2007, on file with the author); R. v. Jones [2006] UKHL 16, ¶¶ 12, 19, 44, 59, 96, 97, 99 (U.K. House of Lords finding unanimously that aggression is a customary international crime notwithstanding the ongoing discussion of the specifics of the crime and lack of agreement for the conditions of ICC jurisdictional exercise). There is a dearth of law-in-practice, however, regarding actual prosecutions for aggression. M. Cherif Bassiouni and Benjamin Ferencz posit that, owing to this dearth, the enforcement of aggression has fallen into *desuetude*; accordingly, “it is hard to argue that aggression constitutes a crime under international law, either under conventional law or customary law.” M. Cherif Bassiouni & Benjamin B. Ferencz, *The Crime Against Peace and Aggression: From its Origins to the ICC*, in 1 INTERNATIONAL CRIMINAL LAW 45 (3d ed. 2008). This position is *contra* to the majority opinion among international law publicists and jurists.

<sup>2</sup> CRYER ET AL., *supra* note 1, at 275.

<sup>3</sup> *Discussion Paper on the Crime of Aggression Proposed by the Chairman (revision June 2008)*, Draft Amendments to the Rome Statute of the International Criminal Court, Annex, International Criminal Court, Assembly of States Parties, Resumed sixth session, New York (2–6 June 2008), ICC-ASP/6/SWGCA/2 (14 May 2008) [hereinafter *Discussion Paper*]. The Special Working Group plans to finish its work in the spring of 2009. Anja Seibert-Fohr, *The Crime of Aggression: Adding a Definition to the Rome Statute of the ICC*, ASIL Insight (Vol. 12, Issue 24, Nov. 18, 2008). In fact, as this Article went to press in the spring of 2009, the Special Working Group issued the report of its final session. *Report of the Special Working Group on the Crime of Aggression* (Seventh session, second resumption, New York, 9–13 February, 2009), ICC-ASP/7/SWGCA/2 (February 20, 2009). The contents of this report reflect only minor changes (none of which are germane to this Article) to the contents of the 2008 Discussion Paper. Conversations regarding the crime of aggression now move to an informal inter-sessional meeting to be held in June 2009 and the Review Conference (scheduled to be held in Kampala 2010) and preparatory work thereto.

risdiction. The 2008 Discussion paper suggests several alternatives for the exercise of jurisdiction. The procedure for the entry into force of any amendment to the Rome Statute also remains unresolved.

The definitional consensus that has emerged is grounded on the assumption that a narrow definition of aggression stands a more realistic chance of securing state approval. Three characteristics animate this definitional consensus and contribute to its narrowness: (1) that state action is central to the crime; (2) that acts of aggression involve interstate armed conflict; and (3) that criminal responsibility only attaches to very top political or military leaders. The 2008 Discussion paper proposes a new Article 8 bis to the Rome Statute that defines the crime of aggression as follows (footnotes omitted):

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

(2) For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

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

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

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

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

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

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

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The Discussion paper also proposes a new Article 25(3bis) to the Rome Statute that provides as follows: "In respect of the crime of aggression, the provisions of this article [n.b. Article 25] shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State."<sup>4</sup>

Despite the pragmatic attraction and political soundness of proceeding conservatively, however, the opportunity to define the crime of aggression for the purposes of a permanent international justice institution also presents a moment for out-of-the-box thinking. In my remarks, I hope to contribute to this thinking by offering a lesson from the past, raising a concern for the present, and asking a question for the future. Principally, I suggest an expansion in the scope of the crime of aggression, both in terms of the impugned acts as well as in terms of who can be prosecuted. I draw from two examples of crimes against the peace prosecutions in the wake of the Second World War that have received scant attention in the Special Working Group. I also draw from the nature of contemporary threats to transnational stability, security, sovereignty, and human rights interests. In my opinion, many of these threats depart from the classic model of interstate armed conflict.

Mine is a normative project. It is not one that is principally concerned with pragmatics. This does not mean, however, that I am oblivious to the considerable resources that have been invested in consolidating a consensus regarding the definition of aggression. I recognize that discussions regarding the contours of the crime of aggression have occurred off-and-on for many decades. The reality is that a narrow understanding of the crime seems to be what negotiators want and constitutes shared common ground. That said, nothing precludes codification of the pre-existing consensus while actors within and/or outside of the Rome Statute framework push, either collaterally or subsequently, for the scope of the crime of aggression to expand in a manner that more accurately reflects the interests that criminalization purports to promote as well as the deeply collective nature of the crime. The following sequence concerns me: (1) the Special Working Group proposes a narrow crime of aggression; (2) the Rome Statute is amended to include this narrow crime; (3) the Special Working Group packs up its tent; and (4) the conversation about what exactly aggression should proscribe simply loses momentum and ends. Such an outcome, which arises from a

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<sup>4</sup> *Discussion Paper, supra* note 3 (footnote omitted).

push to codify, might compromise the longer-term expressive value and effective legitimacy of the crime of aggression to future generations, especially in the developing world.

### I. BACKGROUND

The Statutes of the Nuremberg and Tokyo International Military Tribunals (IMTs) were the first to criminalize crimes against peace and aggressive war and attribute individual criminal responsibility therefore. Article 6(a) of the Nuremberg IMT Statute (the London Charter, August 8, 1945) criminalized the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”<sup>5</sup> The Allies included this crime in the IMT’s jurisdiction despite the fact that, at the time, there was “considerable doubt about the customary basis for charges of aggressive war.”<sup>6</sup> That said, the Nuremberg IMT dismissed the retroactivity argument. It endeavored to demonstrate that crimes against the peace had been part of customary international law prior to 1939.<sup>7</sup> The Nuremberg IMT emphasized the pre-existing nature of the crime as reflecting treaty law that emerged in the wake of the First World War, including the Kellogg-Briand Pact.<sup>8</sup> The Nuremberg IMT went so far as to call aggressive war the “supreme international crime.”<sup>9</sup> It convicted 12 defendants on charges of conspiracy to wage aggressive war (Count I) or crimes against peace (Count II) (8 defendants

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<sup>5</sup> Article 5(a) of the Charter for the Tokyo IMT (Jan. 19, 1946) proscribed crimes against the peace in a manner that was differently phrased in places but essentially identical to the Nuremberg IMT’s provision.

<sup>6</sup> ROBERT CRYER, *PROSECUTING INTERNATIONAL CRIMES* 242 (2005). Prior to the London Charter, a number of international instruments had referred to aggression as a crime. Some of these were not ratified. Others were non-binding “soft law.” The one instrument with the greatest normative force was the 1928 Kellogg-Briand Pact, which renounced war as an instrument of national policy. Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343. The Nuremberg IMT judgment referred to the Kellogg-Briand Pact. Nuremberg IMT Judgment, reproduced at 41 AM. J. INT’L L., 172 (1947) [hereinafter *Nuremberg IMT Judgment*]. That said, the Kellogg-Briand Pact never actually criminalized aggression, nor did it establish individual criminal responsibility therefore. Kellogg-Briand Pact, *supra* note 6.

<sup>7</sup> See Nuremberg IMT Judgment, *supra* note 6, at 186. Dissenting Judges Pal and Röling at the Tokyo IMT opined that the crime of aggression was not part of international criminal law.

<sup>8</sup> The Nuremberg IMT also viewed conspiracy to commit aggressive war as an independent crime. In *Hamdan v. Rasul*, 548 U.S. 557, 608 (2006), Justice Stevens, writing for a plurality of the United States Supreme Court, held that conspiracy to commit aggressive war constituted an international crime, unlike conspiracy to commit war crimes. See also *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 453 F. Supp. 2d 633, 663 (S.D.N.Y. 2006) (citing this point).

<sup>9</sup> Nuremberg IMT Judgment, *supra* note 6, at 186.

were convicted of Counts I and II, 4 defendants were acquitted of Count I but convicted of Count II).<sup>10</sup> The Tokyo IMT convicted 24 defendants of Class A offenses (crimes against the peace).

Although not designed for the major war criminals, Allied Control Council Law No. 10 included a very similar definition of crimes against the peace than that found in the London Charter. Control Council Law No. 10 added “invasions” to “war” in the definition of aggression. Several crimes against the peace prosecutions occurred under Control Council Law No. 10, but in only one case were convictions entered. American Military Tribunals conducted the following crimes against peace cases under Control Council No. 10: *I.G. Farben*, *Krupp*, *High Command*, and *Ministries*. A number of other Control Council Law No. 10 cases referenced the existence of an aggressive war, but did not actually charge the crime. In *I.G. Farben*, 24 high-level industrial officers were charged *inter alia* with aggressive war. All were acquitted because they were found merely to have aided the war effort instead of planning and leading it. *Krupp* involved 12 industrialists. The defense filed a motion to dismiss the charges based on insufficient evidence, which was granted. In the *High Command* case, 14 defendants (13 generals and one admiral) were charged with crimes against the peace. One defendant committed suicide during the proceedings, and all of the remaining thirteen were acquitted of this charge insofar as they were found not to be operating on the policy-making level.<sup>11</sup> In the *Ministries* case, 17 of 21 defendants (high-level officials in the government or Nazi Party) were charged with crimes against the peace. The Tribunal initially convicted five and acquitted nine of the 14 defendants who went to trial (the Tribunal earlier had dismissed the charges against 3 defendants). Following a request for correc-

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<sup>10</sup> *Historical Review of Developments Relating to Aggression*, Secretariat for the Preparatory Commission for the International Criminal Court, Working Group on the Crime of Aggression 29 (Jan. 24, 2002), PCNICC/2002/WGCA/L.1 [hereinafter *Historical Review of Developments Relating to Aggression*].

<sup>11</sup> The German High Command Trial, 12 THE U.N. WAR CRIMES COMM'N LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1949) [hereinafter *The German High Command Trial*]. The United States Military Tribunal held that criminal responsibility for the waging of an aggressive war is to be confined to policy-makers. *Id.* at 67. The accused senior officers fell below that level. Where to draw the line between guilt and innocence? The United States Military Tribunal responded: “Somewhere between the Dictator and Supreme Commander of the Military Forces of the nation and the common soldier is the boundary between the criminal and the excusable participation in the waging of an aggressive war by an individual engaged in it.” *Id.* In order to convict for aggressive war, there must be proof of actual knowledge that an aggressive war is intended and that, if launched, it will be an aggressive war; there also must be proof that “the possessor of such knowledge, after he acquires it shall be in a position to shape or influence the policy that brings about its initiation or its continuance after initiation, either by furthering, or by hindering or preventing it.” *Id.* at 68. In the *German High Command* trial, eleven defendants were convicted of war crimes and crimes against humanity and sentenced to terms ranging from two years to life. *Id.* at 1.

tion of any alleged errors of fact or law, the Tribunal reversed two of the convictions but affirmed the other three.<sup>12</sup> Finally, in the *Roehling* case in the French Zone of Occupation, the Supreme Military Government Court overturned the conviction for crimes against the peace that had been entered by the General Tribunal.

Numerous developments have since consolidated the place of aggression in international law. The paragraphs that follow survey some of these developments.<sup>13</sup>

The Charter of the United Nations prohibits acts of aggression and empowers the Security Council to determine their existence. Article 1 of United Nations General Assembly Resolution 3314 (a Declaration on the Definition of Aggression, December 14, 1974, and adopted by consensus) defines aggression as “the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.” Article 3 of this Resolution lists some specific examples of what activity could constitute aggression. These examples effectively track those in proposed Article 8 bis and, in this sense, reflect Article 8 bis’ alignment with Resolution 3314. The Discussion paper suggests that Resolution 3314, which is directly referenced in the text of Article 8 bis(2), be appended in an Annex to the Rome Statute itself.<sup>14</sup> In Article 4, Resolution 3314 notes that “the acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the [United Nations] Charter.”

Resolution 3314 eliminates justifications for aggression (art. 5(1)) and, in article 5(2), states that: “A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.” Article 5(2) underscores the dual nature of aggression—namely, as crime as well as delict. A war of aggression, in which participation triggers individual criminal responsibility (and, presumably, state responsibility), differs from aggression generally, which engages only state responsibility. The use of armed force must be of utmost gravity to entail individual criminal responsibility under international law.<sup>15</sup> Nina Jørgensen observes that: “In Article 5(2) the General Assembly confirmed a distinction between wars of aggression, which were considered to have a criminal status, and other acts of aggression short of war. All acts of aggression are international delicts

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<sup>12</sup> *Historical Review of Developments Relating to Aggression*, *supra* note 10, at 56.

<sup>13</sup> For a much more comprehensive discussion of these developments, see Bassiouni and Ferencz, *supra* note 1.

<sup>14</sup> Discussion Paper, *supra* note 3, at explanatory note 8.

<sup>15</sup> U.N. PREP. COMM’N FOR THE INT’L CRIM. CT., WORKING GROUP ON THE CRIME OF AGGRESSION, *Proposal Submitted by Germany: The Crime of Aggression: A Further Informal Discussion Paper*, ¶ 20, U.N. Doc. PCNICC/2000/WGCA/DP.4 (Nov. 13, 2000).



entailing state responsibility.”<sup>16</sup> There also is a third distinction, namely between aggression (whether subject to penal responsibility or state responsibility), on the one hand, and the unlawful use of force, on the other. Not all instances of the unlawful use of force constitute aggression. According to Bassiouni and Ferencz, the Security Council has never relied on Resolution 3314 to label any armed attack as being tantamount to aggression.<sup>17</sup>

Contemporary international or internationalized criminal tribunals have not prosecuted anyone for aggression. This is unsurprising, in that aggression is not proscribed by the Statutes of the *ad hoc* criminal tribunals. Nor is it included in the Statute of the Special Court for Sierra Leone or the Statute of the Extraordinary Chambers in the Courts of Cambodia. Although not an international tribunal, one noteworthy exception is the Statute of the Iraqi High Tribunal (IHT). This Statute includes aggression, but not as an international crime. Aggression is proscribed by Part 5 (entitled “Violations of Stipulated Iraqi Laws”), where it is limited under article 14(c) to “[t]he abuse of position and the pursuit of policies that may lead to the threat of war or the use of the armed forces of Iraq against an Arab country [in accordance with domestic law].” Aggression charges have yet to be brought against any IHT defendants. The International Court of Justice (ICJ), which has jurisdiction over disputes between states, has ruled on questions regarding the unlawful use of force. In the *Nicaragua* case (1986), it held that article 3(g) of the Resolution 3314 definition was declaratory of customary international law. In *Case Concerning Armed Activities on the Territory of the Congo* (2005), the ICJ found Uganda responsible for the unlawful use of force in the DRC, but did not hold that Uganda’s conduct rose to the level of aggression.<sup>18</sup>

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<sup>16</sup> NINA H.B. JØRGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* 240 (2000).

<sup>17</sup> Bassiouni & Ferencz, *supra* note 1, at 44–45.

<sup>18</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. 1 (Dec. 19). In this judgment, the ICJ held that Ugandan military activities in the Democratic Republic of the Congo (DRC) between August 1998 and June 2003 constituted unlawful armed activity that violated the principle of non-use of force in international relations and the principle of non-intervention, and gravely violated the prohibition on the use of force expressed in Article 2(4) of the United Nations Charter. *Id.* ¶ 165. The ICJ also held that Uganda had committed massive violations of international humanitarian law and international human rights law. *Id.* ¶ 179. The ICJ held that Uganda was obliged to make reparation to the DRC for the injury caused. *Id.* ¶ 259. The ICJ did not adjudicate the DRC’s claim that Uganda had committed aggression. *See id.* The *Armed Activities* case does not provide much clarification about which instances of unlawful use of force actually rise to the level of aggression.

## II. LESSONS FROM THE PAST: THE *GREISER* AND *SAKAI* PROSECUTIONS

The Special Working Group has extensively considered many of the sources of law discussed in Part I, in particular IMT aggressive war prosecutions and Control Council Law No. 10 prosecutions in the American and French military zones. These prosecutions constitute the starting point of the conversation for the Special Working Group and for the crime of aggression generally. However, other courts and tribunals also adjudged aggression in the wake of the Second World War. Part II takes up two cases that led to convictions: *Greiser* (Supreme National Tribunal of Poland, Poznan, July 1946) and *Sakai* (Chinese War Crimes Military Tribunal, Nanking, August 1946). These cases have received comparatively little attention and are not discussed in the otherwise comprehensive *Historical review of developments relating to aggression*, undertaken by the Secretariat for the Preparatory Commission for the International Criminal Court, Working Group on the Crime of Aggression (January 24, 2002).<sup>19</sup> I examine these two cases insofar as they offer some insight regarding what crimes against the peace/aggression prosecutions might look like (and what they might achieve) when they involve perpetrators below the top military or political leadership. These judgments pre-date the Nuremberg and Tokyo IMT judgments. However, they explicitly or implicitly reference the London and Tokyo Charters, along with other international legal instruments, and thereby underscore the influence of international materials on the substance of national proceedings.

### A. *Takashi Sakai*

On August 29, 1946, the Chinese War Crimes Military Tribunal of the Ministry of National Defense in Nanking convicted Takashi Sakai (1887-1946), a lieutenant general in the Imperial Japanese Army, of crimes against the peace, war crimes, and crimes against humanity.<sup>20</sup> Sakai was a military commander in China during WWII and in the antecedent Japanese-Chinese conflicts. He was involved in the brutal conquest of Hong Kong in 1941 (he also served as Japanese Governor of Hong Kong for a short period). The judgment is somewhat unclear whether Sakai's conviction was

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<sup>19</sup> *Historical Review of Developments Relating to Aggression*, *supra* note 10 (analyzing the various judgments of the Nuremberg IMT, tribunals established pursuant to Control Council No. 10, and the Tokyo IMT, along with activity by the United Nations Security Council, United Nations General Assembly, and the International Court of Justice). *See also Historical Review of Developments Relating to Aggression*, Annex, Preparatory Commission for the International Criminal Court, (18 Jan. 2002) PCNICC/2002/WGCA/L.1/Add.1. This document also omits discussion of the *Sakai* and *Greiser* cases.

<sup>20</sup> Trial of Takashi Sakai, 14 THE U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1-2 (1949).

based on his hostile activities in China prior to World War II (1931-1939), or his activities during the War (1939-1945) itself, or both. Prior to World War II, Sakai was a commander of the Japanese 23<sup>rd</sup> army; during World War II he was a Regimental Commander of the 29 Infantry Brigade. Sakai's defense, which was rejected as a matter of law, was that he had acted upon the orders of his government.

The Tribunal found Sakai guilty "of *participating* in the war of aggression."<sup>21</sup> He also was found guilty of war crimes and crimes against humanity (principally for inciting or permitting his subordinates to commit acts of atrocity). He was sentenced to death and was executed in 1946.

The Chinese Tribunal conducted its process under the terms of the Chinese Rules Governing the Trial of War Criminals. Article I of these Rules identifies the primary source of substantive law for these tribunals to be international law, supplemented by the Rules and the Chinese Penal Code. The Notes on the *Sakai* Case state that "[t]he Tribunal's verdict on the count of crimes against peace was made with regard, though without express reference, to rules which were explicitly formulated in the latest development of international law in this sphere . . . . [T]he Tribunal's verdict on this count was entirely based upon rules of international law . . . ."<sup>22</sup> The Notes make specific mention of the London Charter, the Tokyo Charter, Allied Control Council Law No. 10 (Article II(1)(A)) (which indicated that responsibility for crimes against the peace is not confined to high State administrators), and Articles I of the Nine Power Treaty and of the Kellogg-Briand Pact. The Notes also indicate that the Tribunal also relied upon non-aggression treaties that Japan had signed.

Sakai was found guilty of aggression because "he had taken part in the war of aggression against China."<sup>23</sup> According to the Notes: "No further qualifications can be found in the Judgment beyond this point, so that it would seem that, according to the Chinese Tribunal, the accused's liability lay in no other circumstances than in the fact that he had conducted military operations which formed part of a war of aggression."<sup>24</sup> Although the Tribunal found, as a matter of fact, that Sakai "participated in the war on the orders of his Government,"<sup>25</sup> it rejected the defense of following orders as a matter of international as well as Chinese law. According to the Notes, the Tribunal was influenced by the fact that there was a "firmly established rule that to commit crimes upon superior orders, including those of a Government, does not relieve the perpetrator from penal responsibility, but may be

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<sup>21</sup> *Id.* at 2 (emphasis added).

<sup>22</sup> *Id.* at 3, 7.

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 5.

taken in mitigation of punishment.”<sup>26</sup> Although Sakai was ordered to participate in the aggressive war effort, perhaps somewhat paradoxically the Tribunal also noted that he was “one of the leaders who were instrumental in Japan’s aggression in China.”<sup>27</sup> That said, his leadership role was not evident in the Tribunal’s legal finding that it was Sakai’s participation, upon orders, in the war effort that served as the basis for his culpability.

*B. Artur Greiser*

The Supreme National Tribunal of Poland (sitting in Poznan) convicted Artur Greiser (1897-1946) of a series of extraordinary international crimes, including crimes against the peace, in July 1946.<sup>28</sup> First a member of the Nazi Party, then a Deputy, Greiser became President of the Danzig Senate in the mid 1930’s and, ultimately, the *Gauleiter* (Governor) of the Warthegau, a Polish region attached to the Third Reich following the 1939 invasion of Poland. Greiser served as “one of the leaders of” the Nazi Party in Danzig.<sup>29</sup> Together with other Danzig leaders, and in conspiracy with central Reich authorities, Greiser was alleged to have prepared, directed, and put into effect aggressive measures against Poland. His conduct was alleged to span from 1930 to 1945. While *Gauleiter*, Greiser “wanted to rid his region of Poles and replace them with *Volksdeutsche* (ethnic Germans). He took away Polish property, placed Polish orphans with ‘Aryan’ families, terrorized the clergy, and limited cultural and educational programs. From 1939-1945 he kicked out 630,000 Jews and Poles and replaced them with 537,000 ethnic Germans.”<sup>30</sup> The notorious Chelmno death camp was under the direct command of SS and Police leadership in the Warthegau which, in turn, acted in cooperation with Greiser.<sup>31</sup>

In terms of the substantive law regarding aggression, the Polish Tribunal relied upon international treaties, the Covenant of the League of Nations, the London Charter, and in particular a non-aggression pact signed

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1.

<sup>28</sup> Trial of Gauleiter Artur Greiser, 13 THE U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 70 (1949).

<sup>29</sup> *Id.* at 70 (discussing the indictment).

<sup>30</sup> SHOAH Resource Center, The International School for Holocaust Studies, Yad Vashem, *Greiser, Arthur* (document on file with the author).

<sup>31</sup> Holocaust Education & Archive Research Team, Chelmno Death Camp (2007), <http://www.holocaustresearchproject.org/othercamps/chelmno.html>. “Greiser visited Chelmno death camp personally to thank the Commando on their work . . .” *Id.* The monument at the site of the camp today states that 180,000 Jews were murdered there, along with 4,300 Gypsies. *Id.* The charges against *Greiser* alleged that “[i]t must be taken that more than 300,000 persons perished in Chelmno.” Trial of Gauleiter Artur Greiser, 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS at 95.

between Germany and Poland in 1934. It primarily based itself in municipal Polish law, however, including Polish decrees passed in the wake of the Second World War. In terms of the facts, the *Greiser* judgment offers an exceptionally detailed account of Nazi aggression against Poland (as well as of Nazi atrocity in Poland).

Greiser raised in his defense that: (1) he opposed the war as an instrument to attain the goals of the Nazi party; (2) he submitted resignations, which were never accepted, on four occasions; (3) he acted upon the express orders of Hitler or Himmler and under the strict supervision of central German authorities; and (4) that he had only a restricted responsibility for general matters of policy.<sup>32</sup> He also sought to advance a claim that neither the ordinary police, nor the Gestapo, nor the S.S. were “ever subordinated to him in any way or measure [but] always took their orders and instructions directly from Berlin, and particularly from Himmler.”<sup>33</sup>

The Tribunal found him guilty of nearly all charges, including crimes against the peace. It found him to be “one of the chief instruments” in “the gradually unfolding plan for aggressive war on a world scale . . . and especially in Danzig . . . .”<sup>34</sup> It found Greiser “fanatically given over to the idea of a Greater Germany.”<sup>35</sup> Although the Tribunal linked Greiser to Hitler in a “conspiratory” sense, it also held that Greiser “successfully carried out the criminal order of his leader.”<sup>36</sup> In coming to this latter conclusion, the Tribunal seems to implicitly accept that Greiser was not a policy-maker or high-level leader, but still convicted him for crimes against the peace. Moreover, the Tribunal was minded that superior orders did not serve as a matter of penal theory as a defense to the charges against Greiser, including charges of crimes against the peace. In this regard, the Tribunal adhered to applicable municipal Polish law, where superior orders can only be considered as a mitigating factor in sentencing.<sup>37</sup>

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<sup>32</sup> Trial of Gauleiter Artur Greiser, 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS at 102–103. Specifically, Greiser claimed “for all matters of policy and measures applied and carried out in this territory the responsibility rested entirely and exclusively with Hitler and Himmler . . . in his actions [Greiser] was always strictly supervised by the central German authorities.” *Id.* at 102.

<sup>33</sup> *Id.* at 102. This latter argument flirts with questions regarding command responsibility. The Special Working Group has not yet considered whether Article 28 of the Rome Statute (responsibility of commanders and other superiors) “should be explicitly excluded with respect to of the crime of aggression.” Discussion Paper, *supra* note 3, at explanatory note 9.

<sup>34</sup> Trial of Gauleiter Artur Greiser, 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS at 104.

<sup>35</sup> *Id.* at 104.

<sup>36</sup> *Id.* at 105 (describing Tribunal judgment). The Polish approach in *Greiser* differs from the Nuremberg IMT approach, in that when convicting Hess the Nuremberg IMT emphasized he was in such close relationship with Hitler.

<sup>37</sup> Trial of Gauleiter Artur Greiser, 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS at 117. In commentary on the *Milch* trial, the LAW REPORTS OF TRIALS OF WAR CRIMINALS observe

Greiser was executed by hanging on July 21, 1946 in public in front of the Warthegau Governor's mansion. In addition, the Tribunal pronounced the loss of public and civic rights, and the forfeiture of all his property.

C. *Implications for the Leadership Requirement*

The Nuremberg IMT and military tribunals in subsequent proceedings in both the American and French military zones acquitted suspects based on rigorous understandings of the policy-making/leadership requirement to the crime of aggression. However, the *Greiser* and *Sakai* cases suggest that not all tribunals were so inclined. It is doubtful whether both defendants (in particular Sakai) would meet the policy-maker requirement subsequently elucidated in the American Military Tribunal's *High Command* judgment. Consequently, the Special Working Group, insofar as it believes the leadership requirement to be of great qualificatory relevance, would be well advised explicitly to underscore its importance to the crime of aggression. It looks like the Special Working Group will pursue a differentiated approach to the crime of aggression. This means that the crime of aggression is treated in the same way as the other crimes over which the ICC has jurisdiction.<sup>38</sup> If this path is pursued, it should follow that the definition of the crime, the elements of the crime, and/or general principles of law in the Rome Statute (e.g. Article 25) contain a clear leadership requirement, else a broader array of perpetrators may become implicated. The 2008 Discussion paper adheres to this advice in terms of its proposed new Articles 8 bis(1) and Article 25(3bis).<sup>39</sup> In the absence of such a clearly stipu-

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that this judgment is an instance of how "the illegal nature of aggressive war has been related to the principle that the plea of superior orders can only be effective if the orders were legal or if the accused was not aware, and could not reasonably be expected to be aware, of their illegality." 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 149 (1949).

<sup>38</sup> The differentiated approach contrasts with monistic approaches, where the crime of aggression is treated separately from the general principles of individual criminal responsibility within the Rome Statute. The differentiated approach is ascendant. That said, the leadership requirement, conditions for the exercise of jurisdiction, and the interface with admissibility render the crime of aggression, even if the differentiated approach were pursued, somewhat anomalous in terms of the operation of the Rome Statute.

<sup>39</sup> Discussion Paper, *supra* note 3, at explanatory note 3. The leadership requirement at the IMT largely was jurisprudential, in that "[i]n the Nuremberg Charter the range of persons liable to prosecution and punishment for crimes against peace is defined in the first and last paragraph of Article 6. It includes any person implicated in its commission whether as an individual or a member of organizations, or as a leader, organizer, instigator or accomplice." Trial of Takashi Sakai, 14 THE U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS, at 4. Kevin Jon Heller, in an insightful article, remarks that the Special Working Group discussions thus far actually represent a "retreat from Nuremberg" in terms of the leadership requirement. Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT'L L. 487-480 (2007). Heller argues that the Special Working Group's attribution of the leadership requirement to individuals

lated requirement, co-perpetration or aiding and abetting could result in a situation where someone like Sakai is found individually criminally responsible for what *de facto* is simple participation in an aggressive war.

All that said, in Part IV of this Article I revisit the wisdom of an absolute leadership requirement. Although the approach of the Special Working Group has achieved consensus by guarding against the possibility of convictions such as those entered against Greiser or Sakai, I posit that this consensus presents certain drawbacks in terms of the normative value of international criminal law as well as the ICC's effectiveness.

### III. CONCERN FOR THE PRESENT: WHAT IS AN "ACT" OF AGGRESSION?

Although their work clearly was groundbreaking, the IMTs limited crimes against the peace prosecutions to Nazi and Japanese wars of aggression. Since then, the official understanding of what constitutes an act of aggression largely has hewed to the traditional paradigm of interstate armed conflict.<sup>40</sup> Within the Special Working Group, there has been debate about whether generic or specific approaches should be pursued,<sup>41</sup> but both posi-

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who "control or direct" the political or military action of a State is more restrictive than what he identifies as the "shape or influence" standard articulated at Nuremberg by both the Nuremberg IMT and the subsequent military tribunals. *Id.* at 478-479. Heller concludes: "[T]he relevant jurisprudence of the Nuremberg tribunal establishes three basic principles: (1) non-governmental actors can commit the crime of aggression; (2) aggression is a policy-level crime; and (3) an individual is at the policy level if he is in a position to 'shape or influence' a state's political or military action." *Id.* at 488. In particular, Heller expresses concern that the Special Working Group's consensus might omit the responsibility of industrialists as well as political or military officials in a state who are complicit in another state's acts of aggression. *Id.* at 479-480. In the report of its final session (February 9-13, 2009), the Special Working Group noted that "[t]he view was also expressed that the language of [article 25(3bis)] was sufficiently broad to include persons with effective control over the political or military action of a State but who are not normally part of the relevant government, such as industrialists." *Report of the Special Working Group on the Crime of Aggression, supra* note 3, ¶ 25. It is unclear how broadly shared this view actually is within the Special Working Group; also unclear is whether any legal interpretation of article 25(3bis) that would eventually be made by judges would accord with "the view" in light of Heller's examination of the proscriptive language in comparative historical context.

<sup>40</sup> The Chairman of the Working Group on Aggression stated in a press conference on January 31, 2007, that "aggression was defined as an act committed by a State against a State, but since the Rome Statute was a criminal one, it related to individual criminal responsibility." Press Conference, Chairman of Working Group on Crime of Aggression (Jan. 31, 2007) (document in the Conference Materials and on file with the author).

<sup>41</sup> "It was recalled that a generic definition was one which does not include a list of acts of aggression, while a 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." Assembly of States Parties, *Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression*, Doc. ICC-ASP/5/SWGCA/INF.1, ¶ 7 (Sept. 5, 2006). Expanding the range of acts of aggression might be compatible with both approaches: for the generic approach by interpretation, for the specific approach by adding explicit references.

tions share in common the assumption that an act of aggression anchors within the classic paradigm of the illegal interstate use of armed force. Proposed Article 8 bis(2), potentially a compromise between these positions, continues to reflect this assumption by clearly and narrowly presenting aggression as involving an international war that violates the *jus ad bellum*. Article 8 bis(2) is deeply state-centric and, in practical terms, covers bombings, invasions, and soldiers and munitions crossing international borders. The Special Working Group's proposed definition of the crime of aggression is a throwback to Nuremberg and Tokyo and a return to the 1974 General Assembly Declaration which, in fact, is posited by the Special Working Group as constituting "the basis for" the contemporary definition.<sup>42</sup>

The current conversation at the Special Working Group thereby continues to frame an act of aggression quite conservatively. There are important instrumental reasons for proceeding in this manner. One reason is that, simply put, proceeding conservatively offers an easier path to consensus. The ground is settled at the core; it is considerably more controversial on the perimeter. The ICC's work already may be plagued by enough controversy.<sup>43</sup> Why add more, especially when the Special Working Group has effected concrete progress in the direction of defining the crime of aggression?<sup>44</sup> Theodor Meron, in the United States' statement regarding the crime of aggression, underscores how the "prudence displayed in Rome has prov-

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In order to respect important principles of legality, however, any expansion of the acts constitutive of aggression should proceed through the specific and explicit inclusion of offenses in the Rome Statute language, in particular for non-customary offenses. Proceeding along these lines would minimize the potential for judicial activism and overreach, while also discouraging vagueness challenges by potential defendants. *See generally* Kenneth S. Galant, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 407 (2009) ("[I]t is extremely difficult to see how a definition of aggression that included acts other than the planning, ordering, or leading of attacks by one sovereign state on territory within the jurisdiction of another sovereign state for the purpose of conquest – essentially the World War II-type of situation – could be considered a current customary international criminal law definition of aggression as an individual crime.")

<sup>42</sup> Discussion Paper, *supra* note 3, at explanatory note 4.

<sup>43</sup> For example, the Prosecutor's application for an arrest warrant for Sudanese President al-Bashir has prompted new conversations among several permanent members of the United Nations Security Council about the possibility of a deferral under article 16 of the Rome Statute.

<sup>44</sup> Assuredly, to varying degrees consensus has eluded the Special Working Group among a number of other important areas, such as: the amendment process, trigger mechanism, conditions for the exercise of jurisdiction, whether a determination by the Security Council that an act of aggression has occurred is a threshold determination or necessarily binds the ICC Prosecutor or the judges, and the delimitation of what, exactly, constitute exceptions to aggression (i.e. humanitarian armed intervention). This Article does not consider these issues. It is possible that controversy regarding these issues would be exacerbated were the Special Working Group, or Review Conference, to revisit what otherwise appears to have been settled.



en wise . . . . [O]ne of the reasons why the list of crimes in the Statute of the ICC has attained such a credibility and why that list has had such a significant impact on national legislations is exactly because of the high level of comfort that the general conformity of Articles 7-8 [*n.b.* has] with customary law . . . .”<sup>45</sup> And “[u]nder customary law is it only aggressive war that founds individual criminal responsibility.”<sup>46</sup> Moreover, simply defining a crime of aggression—however narrow—for the purpose of the ICC would represent a major step forward in establishing aggression as part of international legal practice and in taking a spirited stand against the horrors of “unauthorized war-making.”<sup>47</sup> Discussing and codifying law beyond the parameters of custom may be controversial and may chip away at the ICC’s legitimacy, at least in the short term.

That said, I wonder if international criminal lawyers should think twice about limiting the act to this narrow, conventional proscription. I would like to gently challenge this conventional wisdom by pointing to the dialogic, expressive, and discursive value of a broader conversation regarding acts of aggression. That conversation might begin with the following question: What are the international interests we hope to protect by criminalizing aggression? I posit that there are four such interests: (1) stability, (2) security, (3) human rights, and (4) sovereignty.<sup>48</sup> If we are agreed as to the interests at play, then the question follows whether criminalizing *only* interstate armed attacks that flagrantly violate the *jus ad bellum* captures the key stability, security, human rights, and sovereignty challenges that the international community currently faces. I think that the answer to this question is ‘no.’ Consider the following:

- internal armed conflict;
- attacks by states against their own populations/civilians;
- non-state actor violence, for example systemic attacks by terrorist groups—such as Al-Qaeda—or by narco-terrorist syndicates;<sup>49</sup>

<sup>45</sup> Crime of Aggression: Statement by the United States (Theodor Meron) (Dec. 6, 2000).

<sup>46</sup> CRYER ET AL., *supra* note 1, at 273.

<sup>47</sup> Benjamin B. Ferencz, *Enabling the International Criminal Court to Punish Aggression* 6 WASH. U. GLOBAL STUD. L. REV. 551, 566 (2007).

<sup>48</sup> Assuredly, these various interests may overlap with each other, may reinforce each other, or may even stand in tension with each other in a given case. See LARRY MAY, *AGGRESSION AND CRIMES AGAINST PEACE* (2008) (positing that aggression should be defined as a first wrong that violates human rights). May writes largely within a state-centric framework to cast aggression as prosecutable “when one State undermines the ability of another State to protect human rights.” *Id.* at 3.

<sup>49</sup> M. Cherif Bassiouni, Professor, DePaul University College of Law, Keynote Address at the Case Western Reserve University Frederick K. Cox International Law Center: The International Criminal Court and the Crime of Aggression (Sept. 26, 2008) (exploring how the internal command and control structures of terrorist organizations are quite different than those of a classic army). According to Professor Bassiouni, terrorist organizations have no

- massive cyber-attacks; and widespread, long-term, severe, and deliberately inflicted environmental harms.

Each of these phenomena—to varying degrees—presents major threats to all four protected interests. These threats rival those posed by interstate armed conflict. They are occasioned intentionally by leaders of states or non-state actors. Hence, this category of threats—which I identify as the *first category*—is readily capable of analogy to the threats proscribed by the Special Working Group’s current understanding of the acts constitutive of the crime of aggression. However, the narrow framing of the crime of aggression keeps all of these first-category threats off the discussion table *despite* the fact that each of them could well cause the kinds of *effects* normally associated with war among states.<sup>50</sup>

I also posit a *second category* of threats that includes phenomena that are significantly less capable of analogy to either inter-state armed conflict or the first-category threats I list above. I include climate change and public health pandemics among these threats. In the case of climate change, which arises from ordinary human activity, reputable scientists posit that, if left unchecked, its effects might include the submerging of territory underwater (even of entire small island states), the triggering of massive refugee movements, and the exacerbation of desertification. If we assume the accuracy of these scientific predictions, these effects if left unchecked would thereby arise not intentionally but, rather, from willfully blind, negligent, or innocent failure to act by a number of actors, including states (for example, in terms of curbing greenhouse gas emissions). I flag these second-category threats *en passant* insofar as in certain regions of the world the sovereignty, security, human rights, and stability effects of unchecked climate change upon affected populations are significant in light of the great difficulty among populations to adapt thereto.<sup>51</sup> In the end, however, it seems most

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(or limited) centralized command and control structure, deploy power in a deeply asymmetrical context, and are composed of subordinate members who operate with considerable independence. For a discussion of the security threats posed by non-state actors and environmental threats, see U.S. National Defense Strategy (June 2008), available at <http://www.defenselink.mil/news/2008%20national%20defense%20strategy.pdf>.

<sup>50</sup> Although discussions regarding the scope of an act of aggression are longstanding, many of the threats discussed in the Part are newer entrants to formal international law-making discourse. Accordingly, many have not yet been comprehensively contemplated within the framework of aggression and thereby represent some discontinuity with prior discussions. Assuredly, individual participation in some of the enumerated first-category threats may be captured by other crimes within the ICC’s jurisdiction or by transnational criminal law. This overlap also arises in the case of criminalizing interstate armed attacks, insofar as it is highly probable that such conduct would also involve the commission of atrocity crimes as proscribed by the ICC.

<sup>51</sup> Are these second-category threats the kinds of phenomena that ought to fall within the definition of “acts” of aggression and, hence, for which penal or civil responsibility ought to flow? There are self-evident reasons not to extend responsibility in this direction. First, the

sensible to begin the conversation about revisiting the parameters of acts of aggression with first-category threats alone. The remainder of this article focuses only on these first-category threats.

In the case of these first-category threats, although the Special Working Group's conservative framing may facilitate consensus, it may simultaneously sacrifice a forthright dialogue about the major peace and order challenges faced by the global community, in particular by developing nations. Many of these challenges do not flow from international armed conflict (though they may in turn create conditions that encourage international armed conflict). It remains unclear whether, as a matter of practice, interstate armed attacks today singularly constitute the gravest and most widespread violations of collective security interests. As the nature of the threats to collective interests shifts, might the law shift as well? If so, might the direction of the change be one that expands, instead of contracts, what, exactly, constitutes an act of aggression?

Alternately, if such a dialogic enlargement simply were unworkable, one response might be for the Special Working Group to contemplate expanding the concept of the unlawful use of force to cover these sorts of threats, with consequent state, organizational, or tortious civil responsibility

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drafters of the Rome Statute avoided criminalizing negligent behavior and also opposed strict liability. Any expansion of a crime to cover situations that may include recklessness or willful disregard intersects brusquely with the nature of the other crimes within the ICC's jurisdiction, as well as the assumption of gravity that underpins the institution's operational legitimacy. See, e.g. Margaret M. DeGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L. J. (forthcoming 2009), draft paper available at <http://ssrn.com/abstract=1257612> ("The gravity of the crimes it adjudicates represents the principal normative justification for the jurisdiction of the International Criminal Court."). That said, taking responsibility need not presuppose being blameworthy. Jeffrey Blustein, *THE MORAL DEMANDS OF MEMORY* (2008). Second, extending the scope of international criminal law to these threats might promote excessive alarmism and securitization that, in turn, may induce states to respond to such threats through the use of force or humanitarian military intervention, thereby liberalizing the recourse to violence in international relations. On the other hand, normatively couching these threats in the language of international criminal law might inject some urgency to regulatory enforcement and treaty negotiations, while also enhancing administrative supervision in these areas more generally. If the Security Council is determined to be a trigger mechanism for the ICC's exercise of jurisdiction over the crime of aggression, the existence of a broader definition of potential acts of aggression also could enrich the kinds of conversations within the Security Council regarding what, exactly, constitutes aggression, threats to, or breaches of the peace. That said, it remains contested and unclear whether climate change and other collective action problems are well-served by being framed as breaches of the global trust instead of as regulatory concerns. Perhaps the security implications of inaction on climate change and public health are better left to issue-specific regulatory frameworks that mix sticks and carrots or to aspirational human rights frameworks. But it would seem more convincing to arrive at such a conclusion after having carefully considered other ways to frame state decisions not to act in regard to these phenomena, including proscription by international criminal law, and having discarded these other frames.

or liability *outside of* the ICC jurisdictional regime as currently structured. Certainly, as the ICJ intoned in the *Bosnia v. Serbia* Genocide Convention litigation, individual penal responsibility does not extinguish broader notions of state civil or declaratory responsibility.<sup>52</sup> Might the Special Working Group consider the interface of criminalizing such threats with the prohibition of the unlawful use of force generally? One initiative in this regard would be to explore how the ICC might co-ordinate with the work of the ICJ. At this juncture, it is valuable to recall that, in 2005, the ICJ attributed state responsibility to Uganda for its unlawful use of force against the DRC (although it resisted ruling on the DRC's aggression claim). Another initiative would connect the discussion with economic sanctions or punitive measures for which, perhaps, institutions such as the World Trade Organization could be deployed. In making such connections, scholars and jurists would need to revisit the interface between international economic law and international criminal law. Economic sanctions present a tricky situation. On the one hand, economic sanctions can impose great hardship on ordinary citizens of targeted states, who may have no ability to influence their offending governments. On the other hand, economic sanctions constitute a useful tool to bring states into compliance with international obligations.<sup>53</sup>

Since one of the Rome Statute's major legacies is its spill-over effect in terms of domestic incorporation of international crimes, an expanded conversation at the level of the Special Working Group could spark greater interchange at national levels. Insofar as most states have not yet criminalized aggression in their domestic laws (only 27 states have proscribed the crime of aggression in national jurisdictions and, other than cases of new states, all of these precede the adoption of the Rome Statute),<sup>54</sup> states will

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<sup>52</sup> See generally Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Serbia*), 2007 I.C.J. General List No. 91 (Feb. 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

<sup>53</sup> Cuba had raised the prospect that economic sanctions could constitute an act of aggression. In response, criminalizing the use of economic sanctions might inhibit certain kinds of civil and state responsibility mechanisms that could be useful in sanctioning (or even preventing) aggression. If the definition of aggression were expanded to include economic sanctions, how would sanctions geared to the common good (*i.e.* stigmatizing abusive regimes) be distinguished from purely punitive sanctions that have a harmful effect on populations?

<sup>54</sup> Conversation with Conference Participant Astrid Reisinger-Coracini Regarding her Research, Sept. 26, 2008. Interestingly, Reisinger-Coracini notes that some of these states adopted domestic proscriptions on the crime of aggression in order to protect themselves from potential leadership decisions that would entangle them as aggressors in wars that they might either lose or that would inflict great suffering on their populations. To this end, the assumption that states are hostile to an expanded crime of aggression does not fully square with the rationale why states in some cases have included the crime of aggression in domestic jurisdictions. Just as states may fear that codification of the crime of aggression may inhibit their ability to use force in the national interest, so too may states fear that a failure to

look to the Rome Statute definition for guidance—meaning that now might be an opportune time for progressive development of the law regarding aggression and unlawful use of force. Although the principal purpose of the Rome Statute is to delimit the jurisdiction of the ICC, it also plays a much larger law reform, discursive, and codification function, the potential of which the Special Working Group certainly recognizes.

Assuredly, there is another side to this debate. For one, this entire conversation may be practically futile insofar as there is no indication of any will in the Special Working Group negotiations to transcend interstate armed acts as the singular kinds of acts of aggression.<sup>55</sup> Furthermore, even in cases of first-category threats, what I propose would likely expand the Rome Statute's definition of aggression beyond that found in customary international law, thereby running afoul of Meron's sage advice (and also diminishing the likelihood that the United States ever joins the ICC). If the Special Working Group casts the first-category threats I have identified as aggression, perhaps states would respond through backlash and fears of overlegalization, thereby occasioning withdrawal from a variety of international regimes (*e.g.* those proscribing terrorism or addressing *jus in bello* in non-international armed conflict) instead of incentivizing state adherence to these regimes. Too broadly expanding the category of aggression might place the crime at odds with the depraved moral gravity of the other crimes within the ICC's jurisdiction, such as genocide and crimes against humanity. In response, the first-category threats do seem to share similar moral gravity and, certainly, similar intentionality of conduct. When it comes to questions whether a state can commit aggression against its own people, or whether non-state actors can commit aggression, or whether military deployments other than classic use of force (*i.e.* cyber attacks) could constitute aggression, issues of causation, attribution, and moral responsibility are analogous to those implicated by the illegal interstate use of force.

If the purpose of the criminalization of aggression is to protect security, stability, sovereignty, and human rights interests, crimping the conversation by focusing only on the core prohibitions that emerged six decades ago leaves a significant array of serious threats outside the framework of international criminal law or the law of state responsibility for serious breaches of *erga omnes* obligations. As such, amid its instrumental benefits, the path chosen by the Special Working Group also triggers opportunity costs. This path effectively pursues a least common denominator approach

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codify this crime may leave unchecked the ability of their governments to launch them into aggressive wars.

<sup>55</sup> E-mail from Roger Clark, Board of Governors Professor of Law, Rutgers School of Law, to Mark A. Drumbl, Class of 1975 Alumni Chair of Law and Director, Transnational Law Institute, Washington and Lee University, School of Law (Oct. 25, 2007) (on file with the author) ("I'm sure that it has never been discussed in the ICC aggression context.").

that represents only the base-line that all state-parties accept. Although there is considerable value in getting a core definition in place, there also are plentiful reasons for looking beyond. Incidentally, these two goals are not mutually exclusive. There can be more than one lane ahead.

#### IV. QUESTIONS FOR THE FUTURE: PUNISHING THE AGGRESSOR

International criminal tribunals, along with their constitutive instruments, evoke a number of justifications for why they punish perpetrators of extraordinary international crimes. These justifications include retribution, deterrence, and expressivism; and, on a subaltern level, rehabilitation, reintegration, reconciliation, and incapacitation. To some degree, these justifications inform the aggravating and mitigating factors that affect the quantum of sentence. I have elsewhere argued that international criminal law experiences considerable difficulty in attaining retributive or deterrent goals, but that it is somewhat more successful in operationalizing its expressive aspirations.<sup>56</sup> I provide the following working definition of expressivism:

The expressivist punishes to strengthen faith in rule of law among the general public, as opposed to punishing simply because the perpetrator deserves it or because potential perpetrators will be deterred by it. Expressivism also transcends retribution and deterrence in claiming as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public.<sup>57</sup>

What is more, “[f]rom an expressivist perspective, punishment proactively embeds the normative value of law within the community.”<sup>58</sup>

The purpose of this Part is not to revisit the general debate over the role of sentencing and punishment in international criminal law; nor is it to unpack whether the sentences actually awarded by international punishing institutions attain the avowed aspirations.<sup>59</sup> Rather, my purpose is to ask: what are the penological objectives of punishing aggression and sentencing an aggressor? Resolution 3314, for its part, raises deterrence as a punitive rationale.<sup>60</sup> Given the difficulty that international punishment for genocide,

<sup>56</sup> See MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 173–179 (2007).

<sup>57</sup> *Id.* at 173.

<sup>58</sup> *Id.* at 61.

<sup>59</sup> See, e.g., *id.*; see also Jens David Ohlin, *Towards a Unique Theory of International Criminal Sentencing* (Sept. 11, 2008) (unpublished manuscript on file with author) (arguing that international criminal justice is predicated on retributive notions and that its sentencing policy must follow suit and heed offense-gravity proportionality).

<sup>60</sup> Definition of Aggression, G.A. Res. 3314 Annex, U.N. GAOR, 29th Sess., 2319th plen. mtg. (Dec. 14, 1974), available at <http://www.un.org/documents/ga/res/ares29.htm> (“Con-

war crimes, and crimes against humanity experiences in generally deterring such crimes, it simply may not be realistic to expect that things would be different when it comes to aggression. For the sake of argument, however, let's assume that would-be aggressors would in fact be deterred. In that case, a new set of concerns arises—namely, whether we are deterring the right kind of use of force. In other words, do we necessarily wish to deter humanitarian armed intervention or on-the-ground deployments that could decelerate (or even prevent) genocide or crimes against humanity? Noah Weisbord echoes the warning that criminalizing aggression “may deter the wrong sort of violent actions, actions that reduce human suffering such as the unauthorized use of force to prevent genocide.”<sup>61</sup> In response, the Special Working Group may find it prudent to except *bona fide* humanitarian actions from the scope of aggression.

On a broader note, should the penological rationales for the crime of aggression parallel those of genocide, crimes against humanity, and war crimes? Is aggression of a different offense-gravity than these other crimes?<sup>62</sup> Is aggression still the “supreme international crime”<sup>63</sup> (in the words of the Nuremberg IMT) and, if so, should it be punished more harshly than the other crimes within the jurisdiction of the Rome Statute? That said, even the Nuremberg sentences do not support this line of deduction. At Nuremberg, one defendant was convicted only of aggression charges (counts I and II) and several were convicted only of war crimes or crimes against humanity (counts III and IV). Hess, convicted only on counts I and II, was given a life sentence; the six defendants convicted only on counts III and/or IV were given four death sentences (Bormann [in absentia], Frank, Kaltenbrunner, and Streicher) and two sentences of 20 years' imprisonment (Speer and von Schirach). Moreover, insofar as genocide has

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vinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor . . . .”). Although not explicitly stated as such, the kind of deterrence contemplated by Resolution 3314 appears to be general deterrence. *See also* Kevin Jon Heller, *Situational Gravity Under the Rome Statute* 18 (unpublished manuscript on file with the author) (noting that the ICC Office of the Prosecutor “has recognized the importance of deterrence, adopting it as the ‘third principle’ guiding its prosecutorial strategy”).

<sup>61</sup> Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L. J. 161, 220 (2008).

<sup>62</sup> International criminal law has distinguished genocide and crimes against humanity from armed conflict (even though generally these atrocity crimes arise during times of armed conflict) and has constructed them as something that can transcend or run independently from a war effort. Aggression, on the other hand, is the criminalization of the war effort itself. Accordingly, it is a deeply collective crime (so, too, is genocide and crimes against humanity, although there may be some important differences among these crimes as to their collective nature).

<sup>63</sup> Nuremberg IMT Judgment, *supra* note 6, at 186 (“To initiate a war of aggression . . . 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”).

since become the “crime of crimes” (in the words of the ICTR), it may no longer be accurate to describe aggression as the “supreme international crime” unless superlative status somehow can be shared.

Another complicating factor arises: it is unclear whether the ICC would prosecute the crime of aggression in the absence of evidence that atrocity crimes—namely genocide, crimes against humanity, or widespread war crimes—also had been committed in the situation in question or, even, in the case of an individual accused.<sup>64</sup> *Sakai* and *Greiser* both involved grievous atrocity crimes in addition to aggressive war. Expressive goals still could be attained in multiple prosecutions, so long as the charges were set out separately and signaled out for independent denunciation. However, it seems doubtful that an additional layer of prosecution for aggression could deter or serve retributive purposes, particularly in cases where a defendant already, by dint of convictions on atrocity charges, would approach or reach the maximum available sentence. Regarding the expressive value, the *Sakai* and *Greiser* cases relate a broader account of the structure and implementation of aggressive war and its effects on civilians. These cases thereby weave a broader narrative tapestry that adds considerable value.

As the Special Working Group advances in its project of criminalizing aggression, it might consider some of the questions this Part raises and discuss guidelines for sentencing, mitigating and aggravating factors, and a heuristic in which to assess why, exactly, one aggressor should receive a longer term of imprisonment than another.

I believe the expressive value of criminalizing aggression justifies moving ahead with defining the crime so as to include it within the ICC’s operations. Moreover, expressive justifications, as well as the reality of contemporary security threats, ought to push us toward defining the crime beyond the inter-state aggressive war paradigm. If part of the purpose of international criminal law is to stigmatize and denounce conduct that threatens core stability, security, human rights, and sovereignty interests, then it would seem valuable to frame the discourse of aggression in a wider fashion.

I also wonder, if the expressive goal is pursued, whether one option might be—notwithstanding the consensus within the Special Working Group in its favor—to thaw the leadership requirement so that *more* individuals could be prosecuted.<sup>65</sup> Implicating defendants other than those who effectively exercise control over the political or military action of a state would create a broader narrative with heightened didactic potential. After

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<sup>64</sup> MAY, *supra* note 48, at 3–4 (arguing that aggression charges should be pursued only if the defendant’s acts involved serious human rights violations).

<sup>65</sup> For the argument that the Special Working Group’s leadership requirement is more onerous than that developed jurisprudentially at Nuremberg, *see Heller, supra* note 39.



all, the *Greiser* and *Sakai* cases relate important stories. Lowering the leadership requirement might permit more of these kinds of stories to be told. One thing is clear: without the committed support of the mid to upper-level ranks, there would be no war effort at all. To be sure, as the *I.G. Farben* and *Krupp* judgments noted, reaching down and criminally implicating *everyone*, including the foot soldier, who somehow assists in the war effort would be tantamount to mass punishment.<sup>66</sup> However, there is room for including upper and senior ranks in a way that falls outside of the absolutely high leadership requirement but does not begin to approach mass punishment.

Furthermore, insofar as one of the main legacies of the Rome Statute is its catalyzing effect on substantive criminal law in national jurisdictions, the crimes as defined in the Rome Statute will likely become transplanted into domestic judicial structures, where they would be applied to a broader array of suspects. Too onerous a leadership requirement might inhibit the ability of national courts (or other accountability mechanisms) to root out the deeper, systemic causes of aggression. One concern with the combined effect of proposed Article 8bis(1) and proposed Article 25(3bis) lies in its anchoring of an absolute leadership requirement, which effectively bestows collective innocence on all involved in aggressive war below the levels of the state political and military elite. Were this definition incorporated into domestic law, it would immunize all the smaller fish from criminal responsibility. Is this inoculation necessarily desirable? The requirement that only top leaders can commit the crime of aggressive war<sup>67</sup> distinguishes

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<sup>66</sup> The *I.G. Farben* Trial, 10 THE U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 37–38 (1949) (“To depart from the concept that only major war criminals—that is, those persons in the political, military, and industrial fields, for example, who were responsible for the formulation and execution of policies—may be held liable for waging wars of aggression would lead far afield. Under such circumstances there could be no practical limitation on criminal responsibility that would not include, on principle, the private soldier on the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces, or the housewife who conserved fats for the making of munitions.”); The *Krupp* Trial, 10 THE U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS, at 127–128 (Judge Anderson’s concurring opinion) (also underscoring deterrence as a penological goal of proscribing aggressive war).

<sup>67</sup> Discussion Paper, *supra* note 3, at explanatory note 3. Although the law-in-practice is still nascent, leadership requirements *de facto* animate the ICC Office of the Prosecutor’s work in prosecuting other crimes. However, in cases of other crimes these requirements do not go to the theoretical question whether the defendant can commit the crime but, rather, go to questions of admissibility. Even if in his practice the ICC Prosecutor only were to prosecute genocidal leaders, there is no substantive leadership requirement to the crime of genocide, meaning that underlings actually can commit the crime—unlike underlings in the service of an aggressive war. Similarly, even if a position of leadership might serve as a factor for the ICC to consider in issuing an arrest warrant for crimes against humanity, this position is not a condition precedent for an individual to have committed the crime. *See generally* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for an Arrest Warrant (Feb. 10, 2006).

the crime from others in the Rome Statute. This requirement portends an absence of prosecutions, or other forms of accountability at the national level, insofar as national courts would have to amend the Rome Statute language if they wished to prosecute a broader array of defendants. Another disjuncture that arises is that, whereas under the Rome Statute superior orders can not serve as a defense to genocide or crimes against humanity,<sup>68</sup> most anyone who receives an order can not be prosecuted for aggression under the current Special Working Group's framework.<sup>69</sup>

To this point, my concerns with the leadership requirement have been conceptual. But a top leadership requirement also presents operational concerns for the ICC Prosecutor. At the *ad hoc* and internationalized tribunals, prosecutors have availed themselves of a number of strategies, including to convict lower- to mid-level operatives for genocide, crimes against humanity, and war crimes. These convictions help authenticate an evidentiary record that, in turn, can assist in cases made against senior officials whose convictions, in turn, can help implicate top leadership. These convictions may secure testimony against higher-ups through plea bargains or hopes for clemency in sentencing. If only the very top leadership can be prosecuted for aggression, then the Prosecutor will be unable to rely on the trials and convictions of senior officers as part of the process of making a case against a top leader. If individuals outside of top leadership never can commit aggression, a prosecutor cannot threaten to indict them and, thereby, loses a bargaining chip in the process of obtaining their testimony. The leadership requirement also clashes with a 2003 policy paper in which the ICC Prosecutor recognized that “[i]n some cases the focus of an investigation . . . may go wider than high-ranking officers . . . [to] . . . certain types of crimes of those officers lower down the chain of command [which may be] necessary for the whole case.”<sup>70</sup> Trials against heads-of-states, or top generals, are among the most complex and delicate that an international criminal tribunal can conduct. It is much easier for such a trial to proceed within a context of established facts, the legitimacy of lower-level convictions, and pre-existing inculpatory testimony, instead of proceeding in a vacuum.<sup>71</sup>

<sup>68</sup> Under certain circumstances, the Rome Statute permits superior orders to serve as a defense to charges of war crimes.

<sup>69</sup> See Int'l Crim. Ct., Special Working Group on the Crime of Aggression, *Report of the Special Working Group on the Crime of Aggression*, ¶¶ 17–21, ICC-ASP/6/20/Add.1 (June 6, 2008). This result is contrary to findings of law in both the *Sakai* and *Greiser* cases.

<sup>70</sup> Int'l Crim. Ct., Office of the Prosecutor, *Paper on Some Policy Issues*, at 3 (Sept. 2003), available at [http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf).

<sup>71</sup> Assuredly, it may be that aggression only becomes prosecuted in contexts where atrocity crimes also are prosecuted. It would be somewhat awkward, however, to bargain away atrocity charges against a perpetrator in exchange for his tendering inculpatory evidence against a leader accused of aggression.

To this end, expanding the conversation about the *kinds of activities* that constitute aggression energizes a conversation about *who can commit* aggression. In this latter conversation, regard could be had for the catalytic participation not only of military and political leaders, but also economic, business, organizational, and industrial leaders/profiteers. Aggression is a deeply collective crime. It is unclear whether the Special Working Group's focus only on persons who must effectively exercise control over the political or military action of a state captures industrialists, arms traders, or arms smugglers. To this end, as Heller points out and despite the Special Working Group's "view" to the contrary, the Discussion Paper's language appears, at first blush, even more restrictive than the jurisprudence emerging from Nuremberg.<sup>72</sup> Moreover, the decentralized and fragmented groups that pose major security threats today do not proceed in the highly organized and hierarchical lines of the Wehrmacht or Imperial Army and, accordingly, an absolute leadership requirement may not square so cleanly with fighters whose call to arms is not animated by a strict sense of national obligation but, rather, in some cases by a more independent assertion of agency.

The *German High Command Trial* proceeded on the assumption that the ordinary officer should be spared individual criminal guilt. The Tribunal noted that:

We do not hesitate to state that it would have been eminently desirable had the Commanders of the German Armed Forces refused to implement the policy of the Third Reich by means of aggressive war. It would have been creditable to them not to contribute to the cataclysmic catastrophe. This would have been the honourable and righteous thing to do; it would have been in the interest of their state. Had they done so they would have served their fatherland and humanity also. But however much their failure is morally reprimandable, we are of the opinion and hold that international common law, at the time they so acted, had not developed to the point of making the participation of military officers below the policy-making or policy influencing level into a criminal offense in and of itself.<sup>73</sup>

There is considerable cause to debate whether it is proper, in context of system criminality such as that of aggression, to absolve such a broad swath of officers (whose participation is a condition precedent to the massive nature of the crime) of all penal responsibility. Even more questionable is whether the officers' "morally reprimandable" failure should be spared any consequence at all. The collectivization of innocence on individuals in the aggressive war effort may create an odd set of incentives, insofar as there is nothing to be gained for these officers to resist the war effort. In

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<sup>72</sup> See *supra* note 39.

<sup>73</sup> The German High Command Trial, 12 THE U.N. WAR CRIMES COMM'N LAW REPORTS OF TRIALS OF WAR CRIMINALS, at 69.

fact, if we assume (as the Special Working Group does) that law motivates behavior, whether directly or by omission, then this vast set of officers might effectively be incentivized to *partake in* the war effort because they would never be criminally responsible for their conduct in the event the aggressive effort failed or became judicialized. My argument here is not that the criminal prosecution of participants in aggressive war necessarily leads to justice. I have often underscored the many limits to criminal trials in the aftermath of human tragedy. But I am concerned that the inability of anyone below the level of the absolute leader to commit the crime of aggression might have broader implications for the responsibility of those officials in the context of other accountability mechanisms. In other words, bestowing collective innocence upon this vast array of individuals might inhibit the ability of truth commissions, public inquiries, reparations, restitution, reintegrative processes, and other forms of justice at the national level actually to implicate them in an accountability process.

In this vein, it may be opportune to inquire whether aggression is the kind of crime for which collective sanctions might be suitable—for example, sanctions on military officers and political appointees. Mark Osiel raises this prospect in the context of atrocity law, where he posits that collective monetary sanctions on the officer corps would heighten peer supervision.<sup>74</sup> Osiel specifically argues that holding all officers of a similar or higher rank financially liable when one of their peers commits atrocity serves a supervisory function. Looking beyond Osiel's framework: might the prospect of collective monetary sanctions for members of the officer corps incentivize them *ex ante* to resist being used in the service of aggression? Might this prospect dissuade officers from joining in the embryonic stages when conflict entrepreneurs sow the seeds of future aggressive war? These are important lines of inquiry, not currently on the table, that could help expand the reach of international criminal law and its interface with other international regulatory structures in the areas of obligation, tort, and civil responsibility. The ascendancy of individual culpability in international law should not come at the expense of collective responsibility for criminal, tortious, or delictual conduct that constitutes a serious breach of the prohibition of the unlawful use of force.

In the end, I hope the extant consensus within the Special Working Group around an absolute leadership requirement does not foreclose normative discussion of the impact of such a requirement on protecting the stability, security, human rights, and sovereignty interests that should animate the proscription of aggression.

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<sup>74</sup> Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1761 (2005).

## V. CONCLUSION

If the goal of criminalizing aggression is to denounce human rights abuses, promote stability, protect legitimate assertions of sovereignty, and foster security, then the Special Working Group faces a choice. It can proceed to successfully criminalize a narrow set of conduct—interstate armed attacks—that forms only a small part of the threats to these interests. As part of this process, the Special Working Group can focus only on the top-level leaders of such conduct. It can include these crimes within the Rome Statute at a time when the ICC is merely beginning its activities.<sup>75</sup> And it can stop there.

Alternately, the Special Working Group can uncork a larger conversation that is less focused on criminalizing something narrow but, instead, recognizes the breadth of security threats which populations everywhere, particularly in the developing world, face. This more robust conversation can occur now. Or it can occur later in time. After all, the development of a definition of the crime of aggression can proceed iteratively – first with the core, and then expand outwards. The Special Working Group could propose a core definition of aggression limited to inter-state armed attacks, but then continue its work and chart broader parameters. It might be possible to dovetail some of this discussion with the collateral process of determining the elements of the crime, a process that requires considerably more attention.<sup>76</sup>

A third possibility is a hybrid approach. Here, the Special Working Group would stick to the narrow path in terms of the criminal law, but open a debate about broader sanctions and accountability outside the criminal law context—for example within the concept of responsibility for the unlawful use of force. Opening this debate could germinate a vibrant discourse that could be continued at the national level, within the International Law Commission, and within academic circles.

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<sup>75</sup> The Review Conference is scheduled for 2010. Int'l Crim. Ct., Coalition for the International Criminal Court, *The Rome Statute: Future Perspectives and Challenges*, ¶ 18 (July 3, 2008) (prepared by William R. Pace). I earlier contended that the present moment is a suitable time to progressively revisit the definition of aggression. But let's play devil's advocate: let's take a different perspective, and imagine different timing. What if the Special Working Group waited several years and proposed including the definition once the ICC has established a track-record, greater legitimacy, assuaged fears, and demonstrated its effectiveness and competence? Might this be a more propitious moment for the crime of aggression to enter the ICC's operational framework? To be sure, pragmatic pressure may encourage pushing through a crime of aggression at this point in the ICC's development. In the event the ICC's law-in-practice assuages critics and satisfies supporters, however, conditions might become more conducive to including a more comprehensive and wide-ranging crime of aggression in the Rome Statute.

<sup>76</sup> Discussion Paper, *supra* note 3, at explanatory note 9 (warning that “[t]hese elements have not been thoroughly discussed in the past. Given the progress in other parts of the discussion, they are likely to create more confusion than clarity”).

In sum, it would be disappointing were the push to define aggression to prematurely and hurriedly close our thinking about what, exactly, we hope to protect by criminalizing grave threats to transnational security, sovereignty, human rights, and stability interests.