THE CRIME OF AGGRESSION: SHOULD AGGRESSION BE PROSECUTED AS A CRIME IN THE ICC?

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I. Introduction

Being a head of State is a hard job, regardless of which state you lead. But leading a State signatory to the Rome Statute of the International Criminal Court (ICC)[1] is all the more difficult, because that leader can end up being prosecuted as a criminal in the ICC. The ICC was established in 1998, and was given international jurisdiction over war crimes and crimes against humanity.[2] But recently a troubling development emerged, and the crime of aggression has been defined and enacted into the Rome Statute.[3]

To demonstrate how troubling that development is, consider the following hypothetical scenario: The head of the Armed Forces of Malta (AFM) delivers a special intelligence report to the Maltese Prime Minister (PM), stating that a Libyan ship filled with terrorists from The Islamic State in Iraq and Syria (ISIS) disguised as tourists is making its way to the Maltese territorial waters. Once there, the head of the AFM

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[1] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

[2] *Id.*

[3] Assembly of State Parties Res. RC/Res. 6 (June 11, 2010) , http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf [hereinafter Kampala Amendments].

reports, the terrorists plan to strike a deadly series of terrorist attacks on Maltese soil and infiltrate Europe's main continent in order to continue the terror attacks. Additionally, the head of the AFM says that members of the Libyan army are operating the ship, commanded by a Libyan admiral with connections to the regime. There is no time for politics; Malta has to act if it wants to stop the attack.

After much deliberation and discussion between the PM and his close cabinet of ministers, the PM orders the AFM to strike the ship in international waters, so the terrorists will not reach the Maltese shores. In a heroic military operation, three pilots of the Air Wing of the AFM drop six bombs on the Libyan ship, sinking it with all passengers and crew. The PM and his cabinet have prevented the attack.

Malta is a signatory state to the Rome Statute, and in January of 2015, Malta signed and ratified an amendment to the Rome Statute that defined the crime of aggression and granted the ICC jurisdiction over it.[4] And so, the PM of Malta could find himself on the defendant's bench of the ICC, charged with committing a crime of aggression for doing what he thought was necessary for his country. That unwanted—but possible—outcome and its ramifications will be the focus of this article.

The State parties to the Rome Statute have tried to include a definition for the crime of aggression from the time of its drafting.[5] In 2010, the work was completed, and the Assembly of States Parties ended more than a decade of legal void by amending the Rome Statute with a definition for the crime of aggression.[6] But, it seems that the parties have taken a step too far, and created a crime that could prove more harmful than beneficial to the States.

There is no doubt the parties to the Rome Statute were seeking to promote international peace and security by criminalizing unjust wars when they included the crime of aggression within the ICC's jurisdiction. However, the outcome is far from perfect, and the current definition of

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[4] Rome Statute of the International Criminal Court, art. 5(2), July 17, 1998, 2187 U.N.T.S. 90.

[5] *Id.* The original text of the Rome Statute included the crime of aggression, but did not include a definition for it. It merely stated that "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime." *Id.*

[6] Kampala Amendments, *supra* note 3.

"aggression" as a crime is lacking in many aspects. The crime of aggression stands in contradiction to basic principles of international law—the principles of legality, head of State immunity, and the inherent right to self-defense.[7] Those contradictions raise the question: should the crime of aggression even be a crime under the jurisdiction of the ICC? Is criminal enforcement the right way to prevent aggression? This article will discuss those contradictions, propose that the crime of aggression be left out of the Rome Statute, and argue that efforts to prevent unjust wars and acts of aggression be left in the diplomatic field.

This article will begin by examining the three principles of international law that stand in direct contradiction to the new crime of aggression in Part I. Part II of this article will provide a brief overview of the concept of aggression within the history of international law and in various international agreements, as well as provide an overview of the work that led to the enactment and adoption of the new definition to the crime of aggression. Part III will examine the principle of legality and discuss how the new crime of aggression contradicts it, while Part IV will analyze the principle of heads of State immunity, and the difficulties in prosecuting heads of States based on the current definition. The right of self-defense will be the focus of Part V, and it will argue that the crime of aggression limits and narrows the State parties' inherent right of self-defense. Finally, Part VI will conclude that the crime of aggression is not a viable crime, and argue that addressing aggression should be left to the diplomatic field.

II. The History of Aggression

Before discussing the different elements of the new crime of aggression and how it stands in direct contradiction to some of the basic principles of international law, one must understand the origins of the term "aggression," how it developed over the years, and the different rationales behind it.

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[7] *See* Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L. J. 119, 122 (2008); RAMONA PEDRETTI, IMMUNITY OF HEADS OF STATE AND STATE OFFICIALS FOR INTERNATIONAL CRIMES 1 (2015); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 189 (5th ed. 2011).

A. Early Attempts to Define Aggression

The first major international document that used the term aggression is the 1924 Covenant of the League of Nations (LN)[8]. The LN, established after World War I, made it a declared goal to "promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war."[9] Article 10 to the Covenant states:

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

The term aggression is not defined in the Covenant. However, from the context of Article 10, it is evident that aggression is considered a breach of a State's territorial integrity, or existing political independence, by another State. It is important to note that the term aggression was distinguished from the term "war," which is the subject of Article 11 of the Covenant.[11] That is to say, not every act of aggression is an act of war, and although both are disfavored by the LN, aggression is somewhat less aggravating.[12]

In 1928, another important step in outlawing war was made when

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[8] The League of Nations (LN) was an international organization created as part of the Paris Peace Conference of 1919 that ended the First World War. *See The League of Nations, 1920*, U.S. DEP'T OF STATE OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1914-1920/league (last visited July 12, 2016). During the conference, the Treaty of Versailles was drafted and signed which included the planned formation of the LN. *Id.* The LN was to provide a forum for resolving international disputes. *Id.*

[9] *Id.* preamble.

[10] *Id.* art. 10.

[11] *Id.* art. 11 ("Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.").

[12] This is due to the fact the while war is "a matter of concern to the whole League, and the League shall take any action . . . to safeguard the peace of nations". *Id.* Aggression only leads "the Council [to] advise upon the means by which this obligation [to avoid aggression] shall be fulfilled." *Id.* art. 10.

several States signed the Kellogg-Briand Pact,[13] which "condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it, as an instrument of national policy."[14] The word aggression was not mentioned in the Kellogg-Briand Pact, but it was central in later attempts to define the term.

And so, since its inclusion in the Covenant of the LN, the term aggression remained untouched by the international community. Although several definitions were suggested by individual countries and were debated in international forums, none gave rise to a widely accepted definition for aggression.[15]

B. The Nuremberg Trials

In the aftermath of World War II, it was clear that the steps taken to stop wars up to that point were insufficient. The allied forces convened in London to form what is commonly referred to as the Nuremberg Charter,[16] in which the International Military Tribunal (IMT) for the prosecution of the major war criminals of the European axis was established.[17] It was the first time an international tribunal was convened to hold individuals criminally accountable for acts done in the name of a State.

The Nuremberg Charter granted the IMT authority to judge individuals who committed "crimes against the peace," which were

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[13] General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

[14] *Id.* art. 1.

[15] Vernon Cassin et al., *The Definition of Aggression*, 16 HARV. INT'L. L. J. 589, 589–90 (1975) (outlining the various attempts to define aggression in the years 1924–1945). *But see* Convention for the Definition of Aggression, art. II-III, July 3, 1933, 147 L.N.T.S. 67 (defining an aggressor as "the State which is first to commit . . . [a] declaration of war upon another state . . ." and goes on to declare that "[n]o political, military, economic or other considerations may serve as an excuse or justification for the aggression . . .").

[16] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

[17] The International Military Tribunal (IMT) was established in the Nuremberg Charter by the four signatories: the United Kingdom, the United States, France and the Union of Soviet Socialist Republics. *See id*. at Preamble. Its purpose was to try individuals from Nazi Germany who committed war crimes during World War II. *Id.*

considered to be the equivalent to the modern crime of aggression.[18] Crimes against the peace were defined as: "namely, planning, preparation, initiation or waging of a war of aggression[,] . . . 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."[19]

Much like previous attempts to define aggression, the definition provided by the Nuremberg Charter was general in nature, and did not elaborate what a war of aggression was, nor what the elements of such a crime were.[20] Moreover, the crime itself did not reflect any existing principle in customary international law from which an interpretation could be learned.[21] This broad and entirely new definition was the target of extensive criticism, mainly from American jurists who considered it an *ex post facto* determination of "uncertain foundation and uncertain limits."[22] It is no wonder that the IMT's main challenge in prosecuting the crimes against the peace was not gathering evidence, but establishing the legitimacy and the elements of the crime.[23]

However, one can distill some basic ideas from the Nuremberg Charter's definition. First, a war of aggression is not a war "in violation of international treaties, agreements or assurances."[24] Second, similarly to the definition in Article 10 of the Covenant of the LN, the definition implied that not all wars are wars of aggression. Third, based on some of the suggestions made by individual countries prior to the enactment of the Nuremberg Charter,[25] one can assume that an act of aggression can be attributed to the State who first used an armed force.[26]

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[18] Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71, 74 (2010).

[19] Nuremberg Charter, *supra* note 16, Annex art. 6(a).

[20] Roger S. Clark, *Nuremberg and the Crime Against Peace*, 6 WASH. U. GLOBAL STUD. L. REV. 527, 529–31 (2007).

[21] *See* DINSTEIN, *supra* note 7, at 128.

[22] Charles E. Wyzanski, Jr., *Nuremberg-A Fair Trial? A Dangerous Precedent*, ATLANTIC, Apr. 1946, (citing Glennon, *supra* note 18, at 74–77 (providing the opinion of additional jurists criticizing the crime)).

[23] Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L. J. 161, 165 (2008).

[24] Nuremberg Charter, *supra* note 16, Annex art. 6(a).

[25] Cassin et al., *supra* note 15, at 589–90 (1975) (outlining the various attempts to define aggression in the years 1924–1945).

[26] *See, e.g.*, Convention for the Definition of Aggression, art. II-III, July 3, 1933, 147 L.N.T.S. 67. *See also* Robert H. Jackson, *Report of Robert H. Jackson—United States Representative to the International Conference on Military Trials* (Dep't of State 1945), at 375 (cited in Clark, *supra* note 20, at 530).

The Tribunal itself did not give a clear answer to what aggression was in its judgment of the major war criminal of the European axis. The Tribunal was faced with both the argument that aggression was never defined properly and that it was an *ex post facto* crime created by the Nuremberg Charter. The IMT's ruling on those arguments was general and vague in nature,[27] but it relied heavily on the Kellogg-Briand Pact as reflecting customary international law and banning wars of aggression:

> All these expressions . . . reinforce the construction which the Tribunal placed upon the [Kellogg-Briand Pact] that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world finds its expression in the series of pacts and treaties to which the Tribunal has just referred.[28]

This can be read to say that the roots of the crime of aggression lay in the Kellogg-Briand Pact, and that the ban on war as an instrument of national policy is considered to reflect customary international law. It is important to note, however, that the trials following World War II were the first and only time that such a crime has been prosecuted.[29]

C. The United Nations

The Charter of the United Nations (UN), which came to life in 1945 after the atrocities of World War II, is another important milestone in understanding aggression.[30] The UN Charter states that one of the purposes of the UN is "[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."[31]

Even though the UN Charter does not define aggression, one can

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[27] Clark, *supra* note 20, at 543.

[28] *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 220 (1947) [hereinafter *Nuremberg Judgment*].

[29] Glennon, *supra* note 18, at 74–75. These include trials before the International Military Tribunal for the Far East, established by the allied forces to prosecute Japanese war criminals after World War II. *Id.*

[30] U.N. Charter art. 1, ¶ 1.

[31] *Id.*

assume from the language of the Charter that it is a form of breach of the peace.[32] A closer look on the UN's approach toward international peace provides one of the basic principles of international law in the UN era:

> All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[33]

The UN Charter does provide two exceptions to the prohibition on the threat or use of force,[34] both laid out in Chapter VII to the Charter, titled *Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression*.[35] Although the title hints that the chapter defines what aggression is, it simply states: "[t]he Security Council[36] shall determine the existence of any threat to the peace, breach of the peace, or act of aggression."[37]

And so, while it is clear that according to the UN Charter, any breach of the peace is prohibited, the Charter does not provide a definition of aggression, or explain how it is different from other breaches of the peace. However, the UN did try to define aggression as early as 1967. In its twenty-second session, the United Nations General Assembly[38]

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[32] Such assumption is made even clearer due to the language included in the Nuremberg Charter that classified the "planning, preparation, initiation or waging of a war of aggression" as a crime against the peace. *See* Nuremberg Charter, *supra* note 16, Annex art. 6(a).

[33] U.N. Charter art. 2, ¶¶ 3–4.

[34] U.N. Charter arts. 42, 51. Those exceptions are actions by the United Nations Security Council (UNSC) and actions in self-defense. *Id*.

[35] *Id.* ch. 7.

[36] The UNSC is an organ of the United Nations (UN) comprised of five permanent members—the United States, the United Kingdom, the Republic of China, France, and Russia—and ten temporary members elected every two years. *Id.* art. 23, ¶¶ 1–2. The UNSC's primary responsibility is to maintain international peace and security. *See id.* art. 24, ¶ 1. In order for the UNSC to perform its responsibility, it is granted specific authorities throughout the Charter. *Id.* chs. 6, 7, 8, 12. Decisions of the UNSC are binding upon members of the UN. *Id.* art. 25.

[37] *Id.* art. 39.

[38] The United Nations General Assembly (UNGA) is the main deliberative, policymaking and representative organ of the United Nations. *See Main Organs*, UNITED

(UNGA) adopted Resolution 2330, which recognized "there is still no generally recognized definition of aggression"[39] and stressed "the need to expedite the definition of aggression."[40] To do that, the UNGA established a special committee to prepare and submit a definition of aggression to the UNGA[41].

Eventually, in 1974, the UNGA adopted a definition of aggression in Resolution 3314.[42] The definition contains several interesting points, but it does not provide a clear understanding of what aggression really is.[43] On one hand, the resolution considers aggression to be "the most serious and dangerous form of the illegal use of force,"[44] implying that not every use of force will amount to an act of aggression. But on the other hand, the resolution goes on to define aggression simply as "the use of armed force by a State against . . . another State, or in any other manner inconsistent with the Charter of the United Nations."[45] It even concludes that "[t]he first use of armed force by a State . . . shall constitute *prima facie* evidence of an act of aggression."[46]

However central, Resolution 3314 did not provide a clear and final definition of aggression. Instead, it only supplied listed examples of acts that would qualify as acts of aggression, subject to a decision of the UN Security Council (UNSC) that maintained its authority to declare what is and is not an act of aggression. To this day, the resolution has not been used by the UNSC in declaring an act of State as an act of aggression,[47] although the International Court of Justice (ICJ) did recognize Resolution 3314 as reflective of customary international law.[48]

NATIONS, http://www.un.org/en/sections/about-un/main-organs/index.html (last visited July 12, 2016). All 193 member States are represented in the UNGA, making it the only United Nations body with universal representation. *Id.* However, its decisions and resolutions are not binding on the member States. U.N. Charter art. 10.

[39] G.A. Res. 2330 (XXII), Preamble (Dec. 18, 1967).

[40] *Id.* ¶ 1.

[41] G.A. Res. 2330 (XXII), ¶¶ 2-3 (Dec. 18, 1967).

[42] G.A. Res. 3314 (XXIX) (Dec. 14, 1974), http://www.un-documents.net/a29r3314.htm.

[43] Benjamin B. Ferencz, *The United Nations Consensus Definition of Aggression: Sieve or Substance*, 10 J. INT'L L & ECON. 701, 709 (1975).

[44] G.A. Res. 3314 (XXIX), Annex, preamble, ¶ 5 (Dec. 14, 1974).

[45] *Id.* art. 1.

[46] *Id.* art. 2.

[47] Weisbord, *supra* note 23, at 161, 169.

[48] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 (June 27), cited at Dr. Troy Lavers, *(Pre)determining the Crime of Aggression: Has the Time Come to Allow the International Criminal Court Its Freedom?*, 71 ALB. L. REV. 299, 301 (2008).

D. The Rome Statute of the ICC

The Rome Statute of the ICC brought a groundbreaking change into international law in 1998. For the first time in history, an international criminal tribunal was established not for a specific war or hostilities, but to serve as a permanent court to try individuals responsible for international crimes.

The original text of the Rome Statute included four core crimes that fell under the jurisdiction of the court, including the crime of aggression. But, unlike the other three crimes that are thoroughly defined in the Statute,[49] the original text of the Statute stated, "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime."[50] This shows the States parties to the Rome Statute intention to grant jurisdiction to the ICC over aggression, even if aggression could not be properly defined at the time.

Following the original text of the Rome Statute, and in order to properly define aggression, the assembly of States parties to the Rome Statute established the Special Working Group on the Crime of Aggression (SWGCA) to "submit proposals . . . with a view to arriving at an acceptable provision on the crime of aggression."[51] The SWGCA dealt not only with the definition of the crime of aggression, but with various legal issues, like the application of general criminal principles on the crime of aggression and how other provisions of the Rome Statute effect the crime or are affected by it.[52]

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[49] *See* Rome Statute, *supra* note 1, art. 6 (defining the crime of genocide); *see also id.* art. 7 (defining crimes against humanity); *id.* art. 8 (defining war crimes). These three crimes are often referred to as the core crimes. Lavers, *supra* note 48, at 303.

[50] Rome Statute of the International Criminal Court, art. 5(2), July 17, 1998, 2187 U.N.T.S. 90.

[51] Assembly of the States Parties Res. ICC-ASP/1/Res.1, art. 3 (Sept. 9, 2002), https://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-01-ENG.pdf. The Special Working Group on the Crime of Aggression (SWGCA) continued the work of a Preparatory Commission that submitted a draft definition for the crime of aggression earlier in 2002. Preparatory Comm'n Int'l Criminal Court, Report of the Preparatory Commission for the International Criminal Court (Continued), Addendum, Part II, PCNICC/2002/2/Add.2 (July 24, 2002).

[52] Most of the discussions about the actual definition of the crime of aggression were made in the informal inter-sessional meeting during the fifth session of the SWGCA. Assembly of the States Parties ICC-ASP/5/SWGCA/INF.1 (Sept. 5, 2006), https://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-5-SWGCAINF1_English.pdf [hereinafter Informal Inter-Sessional Meeting].

The work of the SWGCA culminated in a proposal for several new articles for the Rome Statute defining the crime of aggression[53] and also establishing procedural rules for referring cases to the ICC.[54] The proposal contained a change to the Elements of Crimes document[55] and included an additional document containing several understandings regarding the exercise of jurisdiction by the ICC on cases concerning the new crime.[56]

Those amendments, along with other minor additions, were viewed as a single amendment package that was brought before a review conference held in 2010, in Kampala, Uganda.[57] During the Kampala conference, the State parties to the Rome Statute voted to accept the SWGCA's proposal, and amend the Rome Statute as proposed.[58] According to the amendment, the ICC's jurisdiction over the crime of aggression will begin no sooner than January 1, 2017.[59]

The definition of the crime of aggression that was eventually amended to the Rome Statute consisted of two main parts: the conduct of the individual and the conduct of the state.[60] The conduct of the individual is the *crime of aggression* itself, and is "the planning, preparation, initiation or execution . . . of an act of aggression which . . . constitute[s] a manifest violation of the Charter of the United Nations."[61] The conduct of the state, or the *act of aggression*, is "[t]he use of armed force by a State against the sovereignty, territorial integrity[,] or political independence of another State . . . ."[62] The Article defining the crime of

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[53] Rome Statute, *supra* note 1, art. 8 *bis*.
[54] *Id.* art. 15 *bis*, 15 *ter*.
[55] Kampala Amendments, *supra* note 3, annex II. The Elements of Crimes is a document supplemented to the Rome Statute that is meant to "assist the [ICC] in the interpretation and application of articles 6, 7, 8 and 8 *bis*." Rome Statute, *supra* note 1, art. 9. The Elements of Crimes were adopted and amended by the assembly of the States parties to the Rome Statute. *See* Assembly of the States Parties ICC-ASP/1/3; Corr. 1, § II.B (Sept. 9, 2002), http://legal.un.org/icc/asp/1stsession/report/first_report_contents.htm.[hereinafter Elements of Crimes]
[56] Kampala Amendments, *supra* note 3, Annex III.
[57] DINSTEIN, *supra* note 7, at 132–33.
[58] Kampala Amendments, *supra* note 3.
[59] *Id.* art. 3(3) (stating that the ICC will exercise its jurisdiction only "subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute").
[60] *See* Informal Inter-Sessional Meeting, *supra* note 52, ¶¶ 7-50, 84–95 (discussion made by the SWGCA were divided to separately define both those parts).
[61] Rome Statute, *supra* note 1, art. 8 *bis*(1).
[62] *Id.* art. 8 *bis*(2).

aggression also lists seven examples of acts that qualify as an act of aggression "in accordance with the UNGA Resolution 3314."[63]

As mentioned previously, the new amendment also includes a unique mechanism for referring cases concerning the crime of aggression. A prosecutor can initiate an investigation[64] concerning an alleged crime of aggression only if the UNSC has previously determined that an act of aggression was committed by a State.[65] If such a declaration was not made, the investigation can proceed only after the pre-trial chamber of the ICC authorized it.[66]

To summarize, the new definition of the crime of aggression holds several elements: the conduct of a state, meaning that an act of aggression is made by a state, and that such an act is declared as an act of aggression by either the UNSC or the ICC's pre-trial chamber; the conduct of the individual, meaning that the act was planned, prepared, initiated, or executed by an individual in a position of power; and the gravity of the violation of the UN Charter, meaning that a manifest violation has occurred.

III. The Principle of Legality

After reviewing the history of the concept of aggression, as well as the development of the Rome Statute's crime of aggression, this article turns to discuss the first principle that the crime of aggression contradicts—the principle of legality. It will be shown that the crime of aggression is not properly defined as a criminal offense, and does not give potential violators an opportunity to direct their behavior and avoid being aggressors.

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[63] *Id.*

[64] Criminal procedures before the ICC can only be initiated by the prosecutor's decision to investigate a matter that was referred to her by either a State party to the Rome Statute or by the UNSC. *Id.* art. 13-15. The prosecutor also has authority to initiate investigations by her own initiative (*proprio motu*). *Id.*

[65] Rome Statute, *supra* note 1, art. 15 *bis*(6)–(10).

[66] *Id.* It is important to note that according to Article 15, the prosecutor is obligated to inform the UNSC of her intention to initiate an investigation and must ascertain whether the UNSC has declared an act of aggression has occurred. *Id.* If such a declaration is not made within six months of the prosecutor's notification to the UNSC, the question is brought before the pre-trial chamber of the ICC. *Id.*

A. Legality: an Overview

1. The Principle of Legality in General

The principle of *nullum crimen sine lege*, or no crime without law, is rooted in legal tradition and can be traced as far as ancient Greek and Roman law.[67] Broadly speaking, the principle is meant to prevent *ex post facto* laws, and to give notice or "fair warning" to the population that a certain act is prohibited and punishable.[68] By prohibiting *ex post facto* laws, the principle of legality is considered a protection for citizens against arbitrary actions of their government and possible judicial discretion from courts.[69]

The principle of legality usually refers to four basic notions: first, criminal offenses should be a part of a written law; second, the principle of specificity, meaning that the criminal prohibition must be sufficiently precise and specifically defined to determine the criminal conduct and distinguish it from permissible conduct; third, criminal prohibition cannot be retroactive, so that a person can only be punished for actions that were illegal at the time the conduct was undertaken; and fourth, resort to analogy in applying criminal rules is prohibited.[70]

In an attempt to summarize the principle of legality in simple words, consider the following:

> Today, the principle will apply to exclude criminality unless it is shown that, at the time at which the act was done, the conduct complained of gave rise to the crime with which the accused stands charged. The fact that the conduct of the accused "would shock or even appal [sic] decent people is not enough to make it unlawful in the absence of a prohibition.[71]

The principle is therefore directed at both legislatures and judicial agents. It calls for legislatures to carefully articulate prohibitions in

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[67] Van Schaack, *supra* note 7.

[68] J. Benton Heath, *Human Dignity at Trial: Hard Cases and Broad Concepts in International Criminal Law*, 44 GEO. WASH. INT'L L. REV. 317, 348 (2012).

[69] ANTONIO CASSESE ET AL., CASSESE'S INTERNATIONAL CRIMINAL LAW 24 (3d ed. 2013).

[70] CASSESE ET AL., *supra* note 69, at 23–24.

[71] Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT'L CRIM. JUST. 1007, 1010 (2004).

order to achieve specificity, and to publish those prohibitions in order for citizens to know which behaviors are prohibited. The principle of legality also demands that judicial agents comply with specific definitions and refrain from analogies or interpretations that amount to judicial law-making, in order to provide defendants with certainty.[72] In that regard, the principle of legality is considered as strengthening the rule of law by restraining the power of the state over its subjects.[73]

Most democratic states uphold the principle of legality as a basic principle in their legal system.[74] In the United States, the U.S. Constitution explicitly prohibits the legislators of both state and federal government from passing *ex post facto* laws.[75] The Supreme Court of the United States has repeatedly stressed that "fair warning" is part of due process, stating:

> Reviewing decisions in which we had held criminal statutes "void for vagueness" under the Due Process Clause, we noted that this Court has often recognized the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." . . . Deprivation of the right to fair warning, we continued, can result both from vague statutory language and from an unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face.[76]

2. Legality in International Law and the Doctrine of Substantive Justice

Unlike in domestic legal systems, the scope of the principle of legality in international criminal law (ICL) is not as clear, and although it was recognized by past tribunals, it was not explicitly formulated until

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[72] *See* Van Schaack, *supra* note 7, at 173–74 (arguing that the principle of legality is primarily aimed at protecting defendants' rights, and that international criminal judges who disregard it are trampling on the rights of criminal defendants in their rush to advance international law).

[73] Cian C Murphy, *Counter-Terrorism and the Culture of Legality: The Case of Special Advocates*, 24 KING'S L. J. 19, 20 (2013).

[74] CASSESE ET AL., *supra* note 69, at 23.

[75] U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1.

[76] Rogers v. Tennessee, 532 U.S. 451, 457 (2001).

the Rome Statute. The approach toward the principle of legality in ICL was based on the doctrine of substantive justice. Under that doctrine, the main goal of the legal system is protecting society from the atrocities of crime, and so it must prohibit and punish any conduct that is potentially dangerous to society, regardless of whether or not that conduct was prohibited by law at that time.[77] As such, the doctrine of substantive justice is considered to favor society over the individual.[78]

The doctrine of substantive justice was used heavily in the trials of the major war criminals before the IMT, in which legality was the main defense against charges of crimes against the peace.[79] Although the IMT ruled that the principle of legality "is in general a principle of justice,"[80] it eventually neutralized it with a series of logical leaps,[81] ruling simply that "it would be unjust if [the aggressor's] wrong were allowed to go unpunished."[82]

The doctrine of substantive justice is also evident in many cases in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Ruanda (ICTR).[83] In one case, the ICTY's Trial Chamber dismissed a motion in which the defense argued that the principle of legality had been violated.[84] The chamber ruled:

> In interpreting the principle of *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance . . . . In order to meet the principle

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[77] CASSESE ET AL., *supra* note 69, at 22.
[78] *Id.* at 24–26.
[79] Van Schaack, *supra* note 7, at 126.
[80] *Nuremberg Judgment*, *supra* note 28, at 217.
[81] Van Schaack, *supra* note 7, at 127–29.
[82] *Nuremberg Judgment*, *supra* note 28, at 217.
[83] *See, e.g.*, Prosecutor v. Kepreškić, Case No. IT-95-16, Judgment, ¶ 563 (Int'l Crim. Trib. For the Former Yugoslavia Jan. 14, 2000); Prosecutor v. Karemera, Case No. ICTR-98-44-T, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, Andre Rwamakuba and Mathieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise (Int'l Crim. Trib. For Rwanda May 11, 2004).
[84] Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction (Int'l Crim. Trib. For the Former Yugoslavia Nov. 12, 2002).

> of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission.[85]

This narrow interpretation of the principle of legality requires only that the act will be foreseeably and accessibly criminalized. The various judicial decisions that adopted such narrow interpretation can be attributed to the very nature of ICL. Although ICL is developing and becoming better defined, a great deal of uncertainty is still part of its nature.[86] This uncertainty conflicts with the principle of legality, and forces judges to limit its scope in order to reach the desired outcome of prohibiting dangerous conduct.

Moreover, until the formation of the ICC, international criminal tribunals were established *ex post*, and therefore could not promote deterrence in the boundaries of their own jurisdiction.[87] However, other goals of criminal justice that are still present in ICL—such as retribution; the compensation, satisfaction, and rehabilitation of victims; and the public condemnation of injurious behavior—can still be advanced where legality is de-emphasized.[88] This drove judges to minimize the effects of the principle of legality, and interpret it in a narrow manner so that it will not deny the achievement of those other goals.

3. Strict Legality and the Rome Statute

Although dominant in early international criminal tribunals, the doctrine of substantive justice was gradually replaced in ICL with the doctrine of strict legality, which is similar to the one applied in most domestic legal systems.[89] As part of this shift, international criminal

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[85] *Id.* ¶ 62. It is interesting to note that the International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber refers to the Rome Statute's provision concerning legality as strengthening its interpretation. *Id*.

[86] Caroline Davidson, *Explaining Inhumanity: The Use of Crime-Definition Experts at International Criminal Courts*, 48 VAND. J. OF TRANSNAT'L L. 359, 363–70 (2015) (stating that the reasons for this uncertainty are(1) the fact that ICL represents a blend of different areas of law; (2) the fact that judges are facing crimes never before prosecuted in an international tribunal; (3) the fact that judges are dealing with cases of unfamiliar cultures and contexts; and (4) the pressure to condemn international crimes).

[87] *E.g.*, the IMT was established after WWII was over, and its outcome could not prevent the atrocities committed by Nazi Germany. Van Schaack, *supra* note 7, at 147.

[88] *Id*.

[89] CASSESE ET AL., *supra* note 69, at 26.

tribunals focused more on the different notions of the principle of legality, e.g., specificity and prohibition on retroactivity. For example, the ICTY ruled in one of its cases:

> From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time.[90]

The shift to strict legality was further promoted by the adoption of the Rome Statute, which explicitly applies the principle in procedural rules before the court. Article 22 of the Rome Statute, titled *nullum crime sine lege*, states:

> 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
>
> 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted[,] or convicted.[91]

The Rome Statute further states that any person convicted by the court can only be punished according to the Statute,[92] and that no person shall be criminally responsible under the Statute for acts committed prior to the Statute's entry into force.[93]

The Rome Statute may apply only to procedures before the ICC, and

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[90] Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 193 (Int'l Crim. Trib. For the Former Yugoslavia Nov. 29, 2002).
[91] Rome Statute, *supra* note 1, art. 22.
[92] *Id.* art. 23.
[93] *Id.* art. 24.

it does not formally change the scope of the principle of legality in international law at large. However, as ICL matures and the rate of change in its code slows down, judges will have more clarity and less room to innovate and challenge the principle of legality.[94] Since the ICC is meant to be the only international criminal tribunal, and with the explicit mention of the principle of legality in the Rome Statute, the Rome Statute will surely have an effect on the way the principle of legality will be interpreted in the future. With the effects of the Rome Statute and other developments in international law, strict legality must be complied with in international criminal tribunals.[95]

B. Analyzing the Definition of Aggression

With the principle of legality in mind, and since the crime of aggression is a relatively new crime, there is no doubt it should be applied using the doctrine of strict legality, albeit with some modifications that are recognized by international law.[96] This means that the definition of the crime of aggression must be clear and concise, to allow "fair notice" of what conduct is prohibited, and avoid retroactive enforcement of the law. But does the Rome Statute's definition comply with the notions of the principle of legality? To answer that, one must examine the definition and try to distill its components and elements.

1. Actus Reus

As mentioned above, the definition of the crime of aggression is comprised of two major parts; the conduct of the individual and the conduct of the State. In order for an individual to commit a crime of aggression, the State of which he is a national must commit an *act* of aggression.[97]

The conduct of the individual is worded in the Rome Statute as,

> [T]the planning, preparation, initiation or execution, by a

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[94] Van Schaack, *supra* note 7, at 190.
[95] CASSESE ET AL., *supra* note 69, at 27; Glennon, *supra* note 18, at 82–86.
[96] *See id.* at 27.
[97] Elements of Crimes, *supra* note 55, elements, ¶ 3 (stating that committing an act of aggression is one of the elements of the crime of aggression).

> person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[98]

As far as the individual conduct, there are three cumulative conditions for the crime of aggression: that the individual prepared, initiated or executed an act of aggression; that the individual is in a position of power;[99] and the act of aggression is a manifest violation of the UN Charter. The first two conditions, however vague in nature, are relatively defined in a way that allows a court to rule in a specific case whether they were met.[100] On the other hand, the third condition, which calls for a "manifest violation" of the UN Charter, is an unexplained term and the Rome Statute does not provide a way to interpret it.

First, the question of the mere violation of the UN Charter is not an easy one to answer. The UN Charter does not include any provision clarifying what qualifies as a violation of the Charter. Furthermore, different States interpret the UN Charter differently, along with the exceptions to the ban on the use of force. Considering the hundreds of cases in which States have used force since the entry into force of the UN Charter, with only few UNSC resolutions or international tribunal opinions condemning those as violating the UN Charter, there is no objective legal tool to help assess which act is in fact a violation of the UN Charter.[101]

Second, the term manifest is even vaguer, and is open to disputed interpretations.[102] The term "manifest" is used only once in the Rome Statute with no further explanation. The term was not used before in

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[98] Rome Statute, *supra* note 1, art. 8 *bis*(1).

[99] The original text calls for the individual to be "in a position effectively to exercise control over or to direct the political or military action of a State." *Id.* art. 8 *bis*(1). For ease of reference, this article will refer to it as a position of power.

[100] *See* Noah Weisbord, *The Mens Rea of the Crime of Aggression*, 12 WASH. U. GLOBAL STUD. L. REV. 487, 492–93 (2013). However, even those conditions give rise to numerous ambiguities, as the definition uses general broad terms that are not further defined. Glennon, *supra* note 18, at 98–100.

[101] Glennon, *supra* note 18, at 100–01 (arguing that a person of common intelligence would necessarily have to guess whether a use of force by a State violates the UN Charter).

[102] Johan D. van der Vyver, *Prosecuting the Crime of Aggression in the International Criminal Court*, 1 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 1, 28 (2011).

either the UN Charter, UNGA Resolution 3314,[103] or any other major treaty, so its meaning cannot be learned from another source.

In an attempt to elaborate, the Elements of Crimes states that "the term 'manifest' is an objective qualification."[104] The additional understandings concerning the crime of aggression further define that for a manifest violation to occur "the three components of character, gravity and scale must be sufficient to justify a 'manifest' determination. No one component can be significant enough to satisfy the manifest standard by itself."[105]

Those documents do not help in clarifying the term manifest. One can only assume that at least two of the three components listed must be present in order for an act of aggression to be a manifest violation of the UN Charter.[106] However, it is unclear what the standards are by which those components will be measured, as the Rome Statute does not clarify either the term manifest, or the terms "character, gravity and scale" of a violation.[107]

By adopting a new, unexplained term, the Rome Statute's definition allows too much room for interpretation. The prohibited conduct for individuals is unclear, and heads of State cannot use it to fully understand what actions they can take without the risk of being prosecuted. This fully contradicts the doctrine of strict legality.

In fact, since the term manifest violation does not appear in any other major international document, even the doctrine of substantive justice will have trouble justifying its broad and vague nature. One cannot foresee what conduct will fall under the term manifest violation, and no accessible interpretation exists to assist a head of State in planning his steps accordingly. The definition might be easily applicable in cases of extremely blunt violations of the UN Charter, i.e., invading another State in explicit violation of a peace treaty with a clearly visible intent to annex its territory. However, other conduct—even conduct in violation of the UN Charter—does not clearly, or foreseeably, fall within this definition.

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[103] Drew Kostic, *Whose Crime is it Anyway? The International Criminal Court and the Crime of Aggression*, 22 DUKE J. COMP. & INT'L L. 109, 120 (2011).
[104] Elements of Crimes, *supra* note 55, Introduction, ¶ 3.
[105] Kampala Amendments, *supra* note 3, Annex III, ¶ 7.
[106] Kostic, *supra* note 103, at 120.
[107] Glennon, *supra* note 18, at 101.

The conduct of the State is worded in the Rome Statute as:

> [T]he 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[.][108]

The article then lists seven acts of use of force. such as the following: "[t]he invasion or attack by the armed forces of a State of the territory of another State," "[b]ombardment . . . or the use of any weapons by a State against the territory of another State," and "[a]n attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State."[109] The Rome Statute defines those acts as acts of aggression while referring to the UNGA Resolution 3314.[110]

The conduct of the State must meet the following two conditions to constitute an act of aggression: the State must use armed force; and it must direct it against the sovereignty, territorial integrity, or political independence of another State. It is important to note that according to the definition, the use of force is not required to be inconsistent with the UN Charter.[111] This means that the known exceptions to the ban on use of force that exist in the UN Charter are not recognized in this definition for *act* of aggression.[112] The use of armed force by a State in self-defense is therefore considered an act of aggression by the Rome Statute.[113]

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[108] Rome Statute, *supra* note 1, art. 8 *bis*(2).
[109] *Id.* art. 8 *bis*(2)(a), (b), (d).
[110] *Id.* art. 8 *bis*(2).
[111] This is due to the phrasing "*or* in any other manner inconsistent with the Charter of the United Nations." *Id.* art. 8 *bis*(2) (emphasis added). *See also* Glennon, *supra* note 18, at 89.
[112] Glennon, *supra* note 18, at 88–89 (applying the Rome Statute's definition of act of aggression to acts by the U.S. government to show its broad approach that is inconsistent with international law).
[113] Although such act of aggression must constitute a manifest violation of the UN Charter in order for it to constitute a crime of aggression. Rome Statute, *supra* note 1, art. 8 *bis*(1).

This makes the language of the definition all the more confusing. The terms used in the definition are general and broad in nature, and are subject to various conflicting interpretations.[114] The fact that even a lawful use of force by a State falls under the definition of an act of aggression raises questions regarding the boundaries of those already broad terms. For example, is a legal use of force in self-defense against a State that initiated an armed attack considered a violation of that state's sovereignty? Is an armed attack permitted by the UNSC according to Chapter 7 of the UN Charter against a State a violation of that State's political independence? This lack of clarity creates more questions than it answers.

Another important aspect of the definition of act of aggression is the reference to the UNGA Resolution 3314. This reference immediately raises the question whether the Rome Statute in fact incorporated UNGA Resolution 3314 into the definition of act of aggression.[115] The answer to this question is not clear from the words of the definition, and arguments can be made to both possible answers.[116]

As mentioned above, UNGA Resolution 3314 includes a definition of aggression that is identical to the Rome Statute's definition of act of aggression, but also includes other important provisions.[117] Perhaps the most important is Article 2, according to which "[t]he first use of armed force by a state in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression."[118] This provision, if incorporated into the Rome Statute's definition, will have a significant effect on future cases of the crime of aggression, because it creates a presumption of aggression that the defendant will have to disprove.

Another important article that could prove relevant to the Rome Statute's definition is Article 5, according to which "[n]o consideration of whatever nature, whether political, economic, military or otherwise,

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114 Glennon, *supra* note 18, at 96–97.
115 *Id.* at 97.
116 *Id. But see* van der Vyver, *supra* note 102, at 24–25 (arguing that the UNGA Resolution 3314 is incorporated into the definition); Jennifer Trahan, *A Meaningful Definition of the Crime of Aggression: A Response to Michael Glennon*, 33 U. PA. J. INT'L L. 907, 944 (2012) (arguing that the UNGA Resolution 3314 most likely is not incorporated into the definition).
117 G.A. Res. 2330 (XXII), ¶ 1 (Dec. 18, 1967).
118 *Id.* ¶ 2 (Dec. 18, 1967).

may serve as a justification for aggression."[119] If indeed the resolution was incorporated fully into the Rome Statute's definition, it contradicts one of the understandings annexed to the Rome Statute's definition, according to which "a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case."[120]

Furthermore, such a provision will limit the ability of heads of State who are charged with a crime of aggression to argue that use of force by their State was justified and should not be prosecuted. Since the Rome Statute's definition for act of aggression does not recognize the exceptions to the ban on use of force, how can a defendant charged with a crime of aggression conduct his legal defense without bringing the circumstances of his State's actions before the ICC?

Most importantly, UNGA Resolution 3314 in itself is a vague document that does not have the clarity needed to properly define a criminal offense. The resolution was written more than thirty years before the SWGCA chose to rely on it for reference, and "[t]he entire [resolution] was a carefully balanced entity, containing negotiated compromises and deftly obscured clauses which were deemed necessary in the process of reaching a consensus."[121]

It is important to remember that the definition for act of aggression is part of the definition for crime of aggression. While this definition suited the UN's diplomatic approach, it does not contain any clarity as to what conduct constitutes an act of aggression. Since the two definitions are related, this uncertainty carries over to make the definition of the crime of aggression even more unclear.

2. Mens Rea

The Rome Statute includes a specific article that defines the mental element for all the crimes under its jurisdiction. According to the Rome Statute "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the

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[119] *Id.* ¶ 5(1).

[120] Kampala Amendments, *supra* note 3, Annex III, ¶ 6.

[121] Ferencz, *supra* note 43, at 709 (explaining also that the Resolution itself was adopted without putting it to vote, and that some States had objections to it).

material elements are committed with intent and knowledge."[122] The Rome Statute goes on to explain both intent and knowledge:

> For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.[123]

In order to satisfy the *mens rea* of the crime of aggression, the potential aggressor must fulfill all three conditions: he must intend to engage in the conduct; he must intend to cause its consequences or be aware that they will occur in the normal course of events; and he must be aware of the circumstances.[124]

However, the Rome Statute includes another provision relevant to *mens rea*, dealing with mistakes of fact and of law. The Rome Statute states that a mistake of fact by a defendant that negates his intent or knowledge of a crime will serve as grounds for excluding criminal responsibility.[125] However, "[a] mistake of law *may* . . . be a ground for excluding criminal responsibility if it negates the mental element required by such a crime."[126]

The Elements of Crimes document breaks down the mental elements specifically required for the crime of aggression. Some of the elements prescribed in the Elements of Crimes are dealing with the *actus reus*, and

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[122] Rome Statute, *supra* note 1, art. 30.
[123] *Id.*
[124] *Id.*
[125] *Id.* art. 32(1).
[126] *Id.* art. 32(2).

are fairly clear.[127] However, two of those elements are more intricate:

> The perpetrator was aware of the factual circumstances that established that [the] use of armed force [by his State] was inconsistent with the Charter of the United Nations.
> . . .
> The perpetrator was aware of the factual circumstances that established [] a manifest violation of the Charter of the United Nations.[128]

The introduction to the elements of the crime of aggression add two additional provisions that affect the *mens rea*. According to those provisions, "[t]here is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations . . . [or to] the 'manifest' nature of the violation of the Charter of the United Nations."[129]

Reading these provisions together shows that the required *mens rea* for the crime of aggression is intent and knowledge. However, the question remains: "intent and knowledge as to what?"[130] To return to the hypothetical example laid out in the introduction, does the Rome Statute require the PM of Malta to know his attack will later be declared an act of aggression? If so, how could he know that?[131] Does it require an intent to violate, manifestly or otherwise, the UN Charter—a document that is somewhat vague itself? What if the PM's legal advisors concluded that the attack will not violate the UN Charter, or at least will not constitute a manifest violation?[132] Will action by the Maltese PM constitute a mistake of law that excludes criminal responsibility?

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[127] *E.g.*, "The perpetrator planned, prepared, initiated or executed an act of aggression," Elements of Crimes, *supra* note 55, elements, ¶ 1 (Sept. 9, 2002). *See also* Weisbord, *supra* note 100, at 493–95.

[128] Elements of Crimes, *supra* note 55, elements, ¶¶ 4, 6.

[129] *Id.* Introduction, ¶¶ 2, 4.

[130] Roger S. Clark, *Negotiating Provisions Defining the Crime of Aggression, Its Elements and the Condition for ICC Exercise of Jurisdiction Over It*, 20 EUR. J. INT'L L. 1103, 1111 (2009).

[131] *See infra* Section C for a discussion of the process of declaring an act of State an act of aggression.

[132] *See* Oscar Solera, *The Definition of the Crime of Aggression: Lessons Not-Learned*, 42 CASE W. RES. J. INT'L L. 801, 815–19 (2010).

In fact, since the Rome Statute defines the *mens rea* so broadly, while indifferent to whether the perpetrator made a legal evaluation of the meaning of his actions, it makes the *actus reus* of the individual meaningless. That is because the *mens rea* only calls for an intent and knowledge of the use of force itself, and its natural consequences. Therefore, whenever an act of aggression is committed by any State, a fact that is not easy to determine as discussed above, and because "[c]rimes against international law are committed by men, not by abstract entities,"[133] the head of that State can almost automatically be convicted of a Crime of aggression.

In other words, since Malta's use of force was surely planned and executed by *someone* in a position of power, and since the *mens rea* calls only for intent to initiate the attack, the PM of Malta is at risk of criminal liability, regardless of his state of mind. Naturally, this makes it very hard for heads of State to understand what conduct is prohibited by the Rome Statute, or understand how they can use force lawfully—in a way that will prevent criminal liability.

C. The Role of the Security Council and the Problem of Progressive Developments

The amendment to the Rome Statute concerning the crime of aggression did not end with merely adding the definition itself. Another important addition to the Rome Statute in that context is Article 15 *bis*, which established a new mechanism for exercising jurisdiction by the ICC on the crime of aggression.

According to Article 15 *bis*, before the prosecutor can proceed with any investigation into allegations of a crime of aggression, she must "first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned."[134] The prosecutor must notify the UNSC of the situation before the court, and allow the UNSC a period of six months to make such a determination.[135] If the UNSC did not make a determination, proceedings can continue only after a pre-trial chamber of the ICC "has authorized the commencement of the investigation in respect of a crime of aggression

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[133] *Nuremberg Judgment*, *supra* note 28, at 221.
[134] Rome Statute, *supra* note 1, art. 15 *bis*(6).
[135] *Id.* art. 15 *bis*(6)–(7).

. . . and the Security Council has not decided otherwise."[136] The UNSC, acting under Chapter VII of the UN Charter, can also refer a case in which a crime of aggression "appears to have been committed."[137]

These provisions allow the UNSC to play a very active role in the process of investigating, and eventually prosecuting, crimes of aggression. No case concerning the crime of aggression can continue without either the UNSC or the ICC's pre-trial chamber declaring an act of aggression was committed by a State.

Arguably, this active role is consistent with the UNSC's central position in the UN Charter. According to the UN Charter the UNSC holds "primary responsibility for the maintenance of international peace and security,"[138] and its decisions are binding on all members of the UN.[139] The UNSC also has the authority to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and [to] make recommendations, or decide what measures shall be taken."[140] These provisions of the UN Charter, especially Article 39, suggest that the UNSC has *exclusive* competence to determine the occurrence of an act of aggression outside of the context of the Rome Statute.[141]

However, this active role is extremely problematic in light of the principle of legality. Although "[a] determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute,"[142] it is difficult to imagine a scenario in which the ICC would makes a decision contrary to an explicit determination of the UNSC. Such a determination would be implausible, as the UNSC is the organ primarily responsible—and perhaps

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[136] *Id.* art. 15 *bis*(8).
[137] *Id.* art. 13(b); U.N. Charter art. 39.
[138] U.N. Charter art. 24(1).
[139] *Id.* art. 25.
[140] *Id.* art. 39.
[141] Stefan Barriga & Leena Grover, *A Historic Breakthrough on the Crime of Aggression*, 105 AM. J. INT'L L. 517, 527 (2011); Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. 1, 14 (2001). Note that according to the UN Charter, the UNSC's competence is exclusive, unlike the Rome Statute, which gives competence for the pre-trial chamber to declare an act of aggression in the absence of such a declaration by the UNSC. Rome Statute, *supra* note 1, art. 15 *bis*(6)–(7). Some States argue that Article 15 *bis* therefore stands in contradiction to the UN Charter. Barriga & Grover, *supra*.
[142] Rome Statute, *supra* note 1, art. 15 *bis*(9).

exclusively competent—for determining acts of aggression.[143]

In that case, the criminal process lies in the hands of the UNSC, a political body that is not bound to basic legal principles like the principle of legality. Unlike the prosecutor of the ICC or the pre-trial chamber, who follows legal reasoning in their decisions, the UNSC can declare that an act of aggression has occurred based on strategic reasoning, a political agenda, or domestic public pressure. That determination, in turn, could translate into the conviction of an individual of the most heinous crime in international law.

The UNSC's active role also raises the problem of progressive developments.[144] Naturally, any definition worded with broad, vague terms creates a wide spectrum of possible interpretations, and allows for the adaptation and development of the law in the face of new events. This process is a welcome one for the UNSC, which is charged with the task of maintaining international peace and security. A broad definition of aggression allows the UNSC to consider every use of armed force by a State and apply the definition in the way best-suited to reach international stability and avoid conflicts.

However, "[i]t is necessary . . . to consider how far this development may proceed without collision with the principle of [legality]."[145] If the UNSC pushes the definition of aggression and applies it to more cases to help maintain international peace and security, it could trample defendants' rights in the ICC, who would have to pay the price of those progressive developments. While progressive development in the diplomatic field of the UNSC is encouraged, it can lead to judicial law-makings by the ICC due to the UNSC's active role in the process.

IV. Head of State Immunity

The idea of head of State immunity is widely recognized in international law. In the words of the United Kingdom (UK) House of Lords:

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143 *See* Glennon, *supra* note 18, at 105–06.

144 *See generally* Shahabuddeen, *supra* note 71 (using the term "progressive developments" to describe the judicial process of "develop[ing] the law by adapting it to changing circumstances . . . provided that the developed law retains the essence of the original crime"). *Id.* at 1012–13.

145 *Id.* at 1012.

> It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability. State immunity probably grew from the historical immunity of the person of the monarch. In any event, such personal immunity of the head of state persists to the present day: the head of state is entitled to the same immunity as the state itself.[146]

This type of immunity is used when a head of State is facing proceedings in another State, but may be relevant to international crimes as well. The Rome Statute includes specific provisions dealing with high ranking officials and head of State immunity.[147] However, unlike the principle of legality, the Rome Statute excludes this immunity from proceedings before the ICC.[148]

Although the Rome Statute's approach to head of State immunity seems to end the discussion on the subject, the new definition of the crime of aggression raises further questions. In this part, the article will analyze the principle of head of State immunity, and how the definition of the new crime of aggression stands in contradiction to its rationales.

A. Head of State Immunity in International Law

The idea of immunity for heads of States originates from the "sovereignty-oriented tradition of international law and shields the highest-ranking representatives of a State as well as official conduct from scrutiny by foreign States."[149] It is based on the immunity that a State possesses in customary international law, which prevents other States from interfering with its public acts.[150]

Generally, the immunity of heads of State can be divided into two

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[146] R. v. Bow St. Metro. Stipendiary Magistrate *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (HL) 201–02, [1999] UKHL 17, 1999 WL 250052.
[147] Rome Statute, *supra* note 1, art. 27.
[148] *Id*.
[149] PEDRETTI, *supra* note 7.
[150] Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407, 409 (2004).

types, each shielding different acts and persons, and each have a different rationale behind it.

1. Immunity Ratione Materiae*—Functional Immunity*

Naturally, a State cannot act on its own, and its actions are made by its organs and representatives.[151] However, since "[s]uch officials are mere instruments of a State . . . their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State."[152] Functional immunity stems from that idea, and bars a State from exercising legal sanctions against a foreign official acting in his official capacity. Functional immunity serves to shift the responsibility from such officials to the State on whose behalf they acted since their actions "were executed under the cloak of State authority."[153]

This type of immunity focuses on the act itself, and is therefore not limited to heads of State alone, but to all officials of a State acting on its behalf.[154] The immunity is also applicable to cases in which the State official is no longer in office, since it attaches itself to the act itself and not the person.[155]

Unlike other claims of immunity, which are often procedural bars for a court to exercise jurisdiction,[156] this type of immunity "gives effect to a substantive [defense], in that it indicates that the individual official is not to be held legally responsible for acts which are, in effect, those of the State."[157] Therefore, this immunity is considered "a defense for avoiding personal or individual responsibility by 'hiding' behind the veil of the State."[158]

It is important to note that functional immunity is more common in

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[151] *See Nuremberg Judgment*, *supra* note 28, at 221.

[152] Prosecutor v. Blaškić, Case No. IT-95-14, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 38 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 29, 1997).

[153] PEDRETTI, *supra* note 7, at 16–17.

[154] Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 825 (2010).

[155] *Id.* at 825.

[156] PEDRETTI, *supra* note 7, at 22.

[157] Akande & Shah, *supra* note 154, at 826.

[158] PEDRETTI, *supra* note 7, at 23.

civil than criminal cases. The reason is that most acts of State are performed within its territory, and State officials rarely exercise their State's authority outside their State's borders, and are less exposed to criminal proceedings.[159] Also, the scope of functional immunity, with regards to international crimes, is not fully clear. While functional immunity is considered a rule of customary international law,[160] it is not an absolute defense, and may not preclude legal proceedings against a State official alleged to have committed international crimes.

Those arguing against the application of functional immunity to international crimes claim that such crimes, considered to be *jus cogens*, cannot be considered official acts or in the sovereign authority of a State. Therefore, any State official committing an international crime cannot be shielded by functional immunity, since such an act is outside his official capacity.[161] For example, a head of State that orders his soldiers to slaughter civilians in enemy territory cannot be considered as having acted in his official capacity, and therefore will not be immune. Also, "it has been argued that because *jus cogens* norms supersede all other norms they overcome all inconsistent rules of international law providing for immunity."[162] However, the scope of this type of immunity—with regard to international crime—is still debatable.[163]

2. *Immunity* Ratione Personae—*Personal Immunity*

Unlike functional immunity that focuses on the act, personal immunity focuses on the individual performing the act. This type of immunity "forms a classic exemption from jurisdiction . . . only conferred on a restricted circle of high-ranking State officials who are the current holders of the respective offices."[164]

Personal immunity is granted to high-ranking state officials in order

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[159] Akande & Shah, *supra* note 154, at 826.

[160] PEDRETTI, *supra* note 7, at 57–95 (analyzing the status of this type of immunity in customary international law based on State practice and *opinio juris*).

[161] *See* Akande & Shah, *supra* note 154, at 828–32 (outlining the argument against the application of functional immunity to international crimes, and rejecting them for being unpersuasive).

[162] *Id.* at 828, 832–38 (rejecting the argument for being inaccurate and legally incoherent).

[163] *See id.* at 838–39 (suggesting the International Court of Justice's (ICJ) view is that such immunity is applicable even to acts constituting international crimes).

[164] PEDRETTI, *supra* note 7, at 25.

to allow heads of State "the freedom necessary to engage in negotiations, defend national interests and communicate with other representatives free from any foreign impairment."[165] Therefore, this type of immunity is limited to acting heads of State only, and does not apply to former heads of State.[166] However, the immunity is applicable to acts committed by the head of State prior to his entry to office.[167] Also, since personal immunity attaches itself to the person rather than the act, it applies to both official and personal acts of a head of State.[168]

Since personal immunity is granted in order to allow the smooth conduct of international relations, it is granted to a limited circle of high-ranking State officials only.[169] The ICJ stated that immunity can be attached to "certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs."[170] Unlike functional immunity, personal immunity is more widely agreed to be applicable to allegations of international crimes.[171] This idea is set forth by the ICJ, which ruled:

> [The court] has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to [heads of States], where they are suspected of having committed war crimes or crimes against humanity.[172]

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[165] *Id.* at 28.
[166] *Id.* at 29–30.
[167] Akande & Shah, *supra* note 154, at 819.
[168] R. v. Bow St. Metro. Stipendiary Magistrate *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (HL) 201–02, [1999] UKHL 17, 1999 WL 250052; PEDRETTI, *supra* note 7, at 25–26.
[169] *See* Akande & Shah, *supra* note 154, at 818.
[170] Arrest Warrant of Apr. 11, 2000 (Dem. Rep. Congo v. Belgium), Judgment, 2002 I.C.J. Rep. 3, ¶ 51 (Feb. 14) [hereinafter ICJ Arrest Warrant]. *See also* PEDRETTI, *supra* note 7, at 30–56 (analyzing the scope of State officials entitled to personal immunity based on the ICJ decision).
[171] *See* Akande & Shah, *supra* note 154, at 819–20.
[172] ICJ Arrest Warrant, *supra* note 170, ¶ 58. Note, however, that the ICJ does not limit its conclusion to personal immunity alone, and the same can be said with regard to functional immunity.

B. The Irrelevance of Official Capacity in the Rome Statute

The immunity granted for heads of State, whether functional or personal, is applicable when a head of State faces proceedings in another *State*. However, its applicability in international tribunals is less than obvious. After World War I, when facing the outcomes of the war and the international crimes committed through its course, a commission was established by the allied forces in order to establish guilt in perpetrating the war and bring those found guilty to justice. In its report, the commission stated:

> [T]here is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states . . . . [Head of State immunity], where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.[173]

This different point of view mentioned in the commission's report was not further developed, because no one was tried after World War I.[174] However, it seemed to pave the road for future international criminal tribunals. The Nuremberg Charter of the IMT included specific provisions, stating, "[t]he official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."[175] The statutes of the ICTY and the ICTR included similar provisions excluding head of States immunity from proceedings before

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[173] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, 14 AM. J. INT'L L. 95, 116 (1920).

[174] The commission did find that Germany and Austria, along with their allies Turkey and Bulgaria, premeditatedly waged the war. *See id.* at 98–107. However, the German Emperor William II could not be prosecuted because he escaped to the Netherlands, which refused to extradite him to the Allied forces. *See* CASSESE ET AL., *supra* note 69, at 242.

[175] Nuremberg Charter, *supra* note 16, art. 7.

the tribunals.[176]

The Rome Statute followed the same direction by excluding head of State immunity from proceedings before the ICC. Article 27 of the Rome Statute, titled *Irrelevance of Official Capacity*, states:

> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
>
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[177]

It is evident from the wording of the Article that the Rome Statute not only declared the official capacity of potential defendants irrelevant, but specifically excluded any type of head of State immunity from proceedings before the ICC. This is interpreted to exclude both functional immunity and personal immunity.[178]

By ratifying the Rome Statute, State parties essentially waived their head of State immunity.[179] Perhaps better described, since every State holds the power to prosecute their own heads of State, the State parties to the Rome Statute are allowing another entity—the ICC—to act on their behalf and prosecute their leaders in their stead. However, the Rome Statute's new definition for the crime of aggression raises several legal issues that make this waiver problematic in a way that undermines State sovereignty.

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[176] *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, UNITED NATIONS art. 7(2) (Sept. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; *Statute of the International Criminal Tribunal for Rwanda*, UNITED NATIONS art. 6(2) (Jan. 31, 2010), http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf.

[177] Rome Statute, *supra* note 1, art. 27.

[178] *See* PEDRETTI, *supra* note 7, at 246.

[179] *Id.*

C. Heads of States Immunity and the Crime of Aggression

Upon its face, the drafters of the Rome Statute made it clear that the official capacity of perpetrators will not serve as a defense before the court, and that head of State immunity is excluded from proceedings in the ICC. But the crime of aggression is different from the other crimes of the Rome Statute, and its definition conflicts with the mere exclusion of this immunity.

1. The Unique Nature of the Crime of Aggression

Nothing can testify better to the unique nature of the crime of aggression than the years it took to adopt its definition. However, there is another distinction between the crime of aggression and the other crimes of the Rome Statute, which warrants a different analytical approach. Unlike other crimes, a use of force by a State against another State could be, under certain conditions, lawful.[180]

In the context of heads of State immunity, this distinction is important, as it undermines the exclusion of the immunity. Other crimes under the Rome Statute have no justification and no exception; the rape and murder of enemy civilians or the torture of prisoners of war are prohibited under any circumstances.[181] Those acts cannot be regarded as official actions for purposes of functional immunity, or as actions needed for free inter-State relations for purposes of personal immunity. The exclusion of head of State immunity from those crimes is reasonable, and even desirable.[182]

The crime of aggression, on the other hand, is essentially a use of force by a State against another State, and therefore could be justified under certain conditions. The Rome Statute attempts to criminalize only those uses of force that constitute a manifest violation of the UN Charter,

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[180] Although the Rome Statute consider every use of force by a State against another State as an act of aggression, the use of force pursuant to a UNSC resolution or in self-defense is lawful. U.N. Charter art. 42, 51.

[181] Rome Statute, *supra* note 1, art. 7-8.

[182] *See* Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility*, 5 J. INT'L CRIM. JUST. 638, 639 (2007) (explaining the importance of holding leaders responsible for international crimes that are often carried out by foot-soldiers, but are directed or allowed to occur by those leaders who bear a greater share of moral responsibility).

but this term is ill-defined as discussed above. Because of this justification, one cannot ignore that a crime of aggression may be either an official act of State sovereignty or an action needed as part of inter-State relations, however undesired. Due to its unique nature, the exclusion of head of State immunity from aggression is unreasonable.

To illustrate, had the PM of Malta ordered his troops to execute every Libyan tourist in Malta, or to bomb every mosque in Libya in response to the approaching ship, he could not be considered as having acted in his official capacity or as part of legitimate inter-State relations. In this case, his prosecution would be a desired outcome. However, because use of force by Malta may be justified, it should be considered an official act. To deny the PM of Malta immunity as head of State would limit his ability to exercise his leadership role in a way that contradicts the rationale of the immunity.

2. Is Official Capacity Really Irrelevant?

The nature of the crime of aggression is not its only unique characteristic. A crime of aggression can only be committed "by person[s] in a position effectively to exercise control over or direct the political or military action of a State."[183] The crime of aggression was defined as "a leadership crime,"[184] and as such, it curtails special responsibility on heads of State and other officials in a position of power for the actions of their State.[185] Since the State is the one committing the actual *act* of aggression, and only a person in a position of power can be held accountable for it, the definition of the crime of aggression serves as recognition that the acts of a State should be attributed to its leaders and vice versa.

The situation in which actions of the State and the actions of its leaders are attributed to one another is unique to the crime of aggression, since no other crime under the Rome Statute demands that the

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[183] Rome Statute, *supra* note 1, art. 8 *bis*(1).

[184] Informal Inter-Sessional Meeting, *supra* note 52, at 15–16; CASSESE ET AL., *supra* note 69, at 140–41.

[185] This responsibility is different from command responsibility. The crime of aggression lists the leadership role as part of the *actus reus*. Rome Statute, *supra* note 1, art. 8 *bis*(1). Command responsibility is a form of criminal liability "on the basis of an *actus reus* that is an omission," meaning that the leader did not commit any action, but simply allowed his subordinates to act. Martinez, *supra* note 182, at 642.

perpetrator be in a position of power, or involves State conduct. This situation is also the rationale behind functional immunity—because actions of a head of State and other officials are attributed to the State, they should not be held accountable. How can the same situation rationalize both granting immunity to heads of State and criminalizing their behavior?

This double standard is evident in the provisions of the Rome Statute itself. While Article 27 states that the Rome Statute "shall apply equally to all persons without any distinction based on official capacity," Article 8 *bis* limits its applicability only to "person[s] in a position effectively to exercise control over or direct the political or military action of a State."[186] There is a direct contradiction between the Rome Statute's aspiration to apply its provisions equally to all persons and its focus on heads of State as the only possible perpetrators of the crime of aggression.

3. The Democracy Problem

Another problem that illustrates the contradiction of excluding head of State immunity from the crime of aggression is what will be referred to in this article as the "democracy problem." In modern, liberal democracies, the power and control over the State is separated into three different branches—the legislative, executive and judicial—in order to prevent a power-centralized totalitarian regime.[187] The separation of powers creates a political system in which it is hard to attribute an action of the State to only one branch, since their actions are intertwined and their responsibilities are shared.[188] This is different from a dictatorship, in which there is only one leader who controls the State.

The PM of Malta, for example, is not a lone actor in the Maltese political system. A number of ministers, advisors, and military commanders advise the PM; a parliament of legislators is allocating funds to allow the execution of his decisions; and a court system oversees his actions. An official action of the PM, like striking the

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[186] Rome Statute, *supra* note 1, art. 8 *bis*(1), 27.
[187] Ron Merkel, *Separation of Power—A Bulwark for Liberty and a Rights Culture*, 69 SASK. L. REV. 129, 129 (2006).
[188] *See* Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 29–31 (2003).

Libyan ship, cannot be attributed to one individual, or even to a group of individuals. This is the reason State officials are granted functional immunity.

The Rome Statute's definition of the crime of aggression seems to ignore these notions by criminalizing individuals for the conduct of their State in a manner that ignores the rationale for granting them immunity. It may be suitable in this context to prosecute dictators, since every act of their State can be attributed to them personally and exclusively due to their absolute power. However, what good is the crime of aggression if it cannot apply equally to all forms of States and governments? The fact that the definition of the crime of aggression ignores the democratic problem demonstrates that it is flawed.

V. The Right of Self-Defense

The concept of self-defense "has been sanctified in domestic legal systems since time immemorial."[189] Tracing the exact point in time in which the concept of self-defense was created is impossible,[190] and some scholars argue that it originated from natural law.[191] States also have a right to act in self-defense,[192] which is deeply connected to the crime of aggression.

In today's legal reality, "[u]nder no circumstances can the actual use of force by both parties to a conflict be lawful simultaneously."[193] Therefore, if one State is acting in lawful self-defense, the other State must have committed an act of aggression.[194] But the definition of the crime of aggression makes this connection a contradictory one, and threatens to narrow the right of self-defense, deterring States from exercising it.

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189 DINSTEIN, *supra* note 7, at 188.

190 *See generally* Eustace Chikere Azubuike, *Probing the Scope of Self Defense in International Law*, 17 ANN. SURV. INT'L & COMP. L. 129 (2011).

191 *See generally* Major John J. Merriam, *Natural Law and Self-Defense*, 206 MIL. L. REV. 43 (2010) (arguing that the basis of a State's right of self-defense is natural law).

192 *See id.* at 54–57.

193 DINSTEIN, *supra* note 7, at 190.

194 Recall that the Rome Statute defines an act of aggression as "the use of armed force by a State against . . . another State." Rome Statute, *supra* note 1, art. 8 *bis*(2).

A. Self-Defense in Modern International Law

The concept of self-defense as a justification for a State to use armed force is relatively new, since war was considered a legitimate recourse for any State, such that no justification was needed.[195] For that reason, a State's right of self-defense developed parallel to the prohibition to use force.[196] Although the right of self-defense is considered part of customary international law, the exact circumstances in which a State can act in self-defense is subject to much debate.[197]

Today, it is common to view the right of self-defense as "enshrined in Article 51 of the UN Charter."[198] Article 51 states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-[defense] if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-[defense] shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[199]

An important point in Article 51 is the assertion that the right of self-defense is an inherent right. The UN Charter does not define the scope of the right of self-defense, and does not explain the meaning of "inherent." However, it is common to view this expression as an acknowledgment that the right of self-defense predates the UN Charter, and is a part of customary international law.[200]

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[195] *See* DINSTEIN, *supra* note 7, at 188.

[196] *See Report of the international Law Commission on the Work of its thirty Second Session (5 May–25 July 1980)*, II(2) Y.B. INT'L L. COMM'N. 1, 54 (1980).

[197] Amos N. Guiora, *Self-Defense—From the Wild West to 9/11: Who, What, When*, 41 CORNELL INT'L L. J. 631, 638 (2008).

[198] DINSTEIN, *supra* note 7, at 189.

[199] U.N. Charter art. 51.

[200] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 176 (June 27).

Another key point is that the right of self-defense can be either individual or collective. A State could exercise its right of self-defense in response to an attack directed at *another* State, because "[t]he security of various States is frequently interlocked."[201] Moreover, a State could use force in self-defense in the aid of another State even if there is no treaty between them.[202]

B. Conditions for Exercising the Right of Self-Defense

Article 51 of the UN Charter does not define the scope of the right of self-defense, and does not regulate States' exercise of the right. However, the right of self-defense as an exception to the prohibition on the use of force should be used only when several conditions, recognized in customary international law, are met.[203]

If a State's use of force fails to meet those conditions, "the use of force is not justified under the doctrine of self-defense, and may in fact be unlawfully retaliatory or punitive."[204] The other side of the coin, however, is that once use of force by a State is "properly impressed with the legal stamp of self-defense," it extends to all measures taken by that State.[205] In other words, the conditions for exercising self-defense are a crucial factor, for a State's use of force—as massive as it is—could be considered lawful self-defense if it meets the conditions; it could also be considered an act of aggression if it does not, even if it is a small-scale use of force.

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[201] DINSTEIN, *supra* note 7, at 278 (outlining four different categories of self-defense: "(i) individual self-defense individually exercised; (ii) individual self-defense collectively exercised; (iii) collective self-defense individually exercised; and (iv) collective self-defense collectively exercised").

[202] Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 457 (1991) (referring to the UNSC Resolution 661 that recognized for the first time the right of collective self-defense in a particular situation—the Iraqi invasion of Kuwait).

[203] *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 176 (June 27) for the conditions of necessity and proportionality.

[204] Katherine Slager, *Legality, Legitimacy and Anticipatory Self-Defense: Considering an Israeli Preemptive Strike on Iran's Nuclear Program*, 38 N.C. J. INT'L L. & COM. REG. 267, 286 (2012).

[205] DINSTEIN, *supra* note 7, at 260.

1. An Armed Attack as a Condition

The first condition to the right of self-defense is also the most contested one. Article 51 of the UN Charter states that the right of self-defense exists only "if an armed attack occurs."[206] Many scholars argue that this limitation of the right of self-defense does not exist in customary international law, which recognizes a State's right to act in non-reactive self-defense, meaning prior to an actual armed attack.[207] This notion of relying on self-defense before an armed attack occurs is illustrated by the *Caroline* incident.[208] The language of the article raises the question of whether the UN Charter can limit the scope of that right by creating the requirement of an armed attack, and whether an actual armed attack is a condition precedent to the exercise of the right of self-defense.

Those questions generated many answers that "can generally be divided into two camps: restrictionist and expansionist."[209] While the first argue that Article 51 should be read to applying restrictions on the right of self-defense,[210] the latter argue that the right of self-defense is broader than the confines of Article 51, which cannot restrict or limit it.[211] Although there are indications of recognition for non-reactive self-defense in the international community,[212] there are no clear answers to those questions. This legal debate creates ambiguity in the law, and makes it impossible to reach a clear conclusion whether non-reactive self-defense is lawful.[213]

2. Necessity and Proportionality

The use of force in self-defense must also be necessary and

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206 U.N. Charter art. 51.

207 David A. Sadoff, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT'L L. 523, 553–56 (2009) (classifying the two types of self-defense—reactive and non-reactive—and further dividing non-reactive acts of self-defense to interceptive, anticipatory, and preemptive).

208 *See generally* Martin A. Rogoff & Edwards Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493 (1990).

209 Slager, *supra* note 204, at 277–83 (2012).

210 *See* DINSTEIN, *supra* note 7, at 196–98.

211 Sadoff, *supra* note 207, at 553–56.

212 *Id.* at 557–75.

213 Slager, *supra* note 204, at 321.

proportional.[214] These two conditions are considered to reflect customary international law.[215] The condition of necessity could be summarized in simple words: "force should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile."[216] In its essence, necessity calls for the use of armed force to be a last resort rather than a first course of action in the face of an armed attack. Necessity to use force in self-defense could also arise "in the case of an imminent threat."[217]

The condition of proportionality demands that "[a]cts done in self-defense must not exceed in manner or aim the necessity provoking them."[218] Proportionality is often viewed "as a standard of reasonableness in the response to force by counter-force,"[219] and is applied with some degree of flexibility to different conflicts and their circumstances.[220] This is mainly due to the fact that it is impossible to measure the proportionality of a response before it occurs and the damage can be determined.[221]

3. Imminency

Many scholars add another condition to the exercise of a State's right of self-defense—the condition of imminency, or immediacy.[222] This condition states that "there must not be an undue time-lag between the armed attack and the exercise of self-defense in response."[223] That is not to say that a State must respond instantly to an armed attack; States are allowed a reasonable time to assess the situation and decide on a course of action.[224]

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214 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 176 (June 27).
215 *Id.*
216 Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984).
217 Schachter, *supra* note 216, at 1634 (presenting the condition of necessity as comprising the condition of imminency). *See also* Slager, *supra* note 204, at 315–16.
218 Schachter, *supra* note 216, at 1637.
219 DINSTEIN, *supra* note 7, at 232.
220 *See* Schachter, *supra* note 216, at 1637. *See also* DINSTEIN, *supra* note 7, at 232.
221 DINSTEIN, *supra* note 7, at 262.
222 *Id.* at 230–31.
223 *Id.* at 233.
224 *Id.* (adding that a reasonable time is also needed if a State wishes to fully comply with the condition of necessity, and consider the possibility of acting in a peaceful manner).

Naturally, this condition conflicts with the concept of non-reactive acts of self-defense that are exercised by the defending State *before* an actual armed attack occurs. However, it is widely recognized that a State can "use armed force in self-defense prior to an actual attack but only where such an attack is imminent 'leaving no moment for deliberation.'"[225]

Even though the condition of immanency seems quite clear, it is said that "the concept of imminence is the most problematic variable . . . . It is currently rather unclear when an attack is sufficiently 'imminent' to justify military action."[226] The problematic nature of imminency is demonstrated by the U.S. standing rules of engagement, according to which "imminent does not necessarily mean immediate or instantaneous."[227]

4. Assessing the Fulfillment of the Conditions

Laying out the conditions for exercising self-defense is important, but not enough. A common way of assessing the fulfillment of those conditions, along with an agreed upon standard for every condition, is needed in order to thwart false claims of self-defense. It is sufficient to mention Nazi Germany's fabricated claim of self-defense in invading Poland to realize that use of force by a State cannot be labeled an act of lawful self-defense simply because that State contended it was.[228]

However, in the face of an armed attack or an imminent threat that warrants an act of self-defense, "[t]he State under attack . . . cannot afford the luxury of waiting for any juridical (let alone judicial) scrutiny of the situation to run its course."[229] In an attempt to balance this dilemma, Article 51 of the UN Charter creates a two-phase rule.[230] The

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[225] Schachter, *supra* note 216, at 1635.

[226] Dominika Švarc, *Redefining Imminence: The Use of Force Against Threats and Armed Attacks in the Twenty-First Century*, 13 ILSA J. INT'L & COMP. L. 171, 182 (2006).

[227] CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENTS/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES enclosure A, para. 3, § g. (13 June 2005). *See also* Major Eric D. Montalvo, *When Did Imminent Stop Meaning Immediate? Jus In Bello Hostile Intent, Imminence, and Self-Defense in Counterinsurgency*, ARMY LAW., Aug. 2013, at 24.

[228] *See* DINSTEIN, *supra* note 7, at 233 n.1379.

[229] *Id.*

[230] *Id.* at 234–36; U.N. Charter art. 51.

first phase of the assessment remains in the hands of the defending State, which "determines whether the occasion calls for the use of forcible measures in self-defense, and, if so, what specific steps ought to be taken."[231] In the second phase, a State that acted in self-defense must report its action to the UNSC, which is tasked with the "review of self-defense claims made by Member States."[232]

However, the two-phase rule does not help in answering numerous legal questions that a State who wishes to use force in self-defense faces. For example, in the hypothetical case of the Libyan ship, Malta must determine whether the approaching Libyan ship constitutes an actual armed attack. If not, Malta will have to form an opinion whether self-defense can be exercised in a non-reactive way, and whether the situation constitutes a sufficiently imminent threat to justify the use of force. Malta will also have to determine whether the use of force is necessary, and whether the proposed response—aerial bombing—is proportionate. To complicate the matter even more, if Malta has valid information that the Libyan ship is heading to the shores of nearby Italy, the analysis could be entirely different.

The answer to these questions is complex—as is oftentimes the case in international law. Opinions are so diverse that "[r]egrettably, we are left with little more than a soupy complexion and a lot of guesswork."[233] Malta will be forced to decide, without a globally agreed-upon standard, whether the conditions to exercise its right of self-defense have been met, and have that decision reviewed by the UNSC should Malta choose to use armed force.[234] The crime of aggression adds to this already complex situation in a way that narrows and limits the right of self-defense.

C. The Crime of Aggression as Narrowing the Right of Self-Defense

The Rome Statute does not mention the right of self-defense; it treats every use of force by a State as an act of aggression, while only those that "constitute[] a manifest violation of the Charter of the United

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[231] DINSTEIN, *supra* note 7, at 234.
[232] *Id.*
[233] Sadoff, *supra* note 207, at 582.
[234] *See* DINSTEIN, *supra* note 7, at 234–36.

Nations" is considered . . . a crime of aggression.[235] The Rome Statute also does not mention whether a breach of Article 51 of the UN Charter would constitute a manifest violation. These questions are of extreme importance to a State that contemplates whether to use force in self-defense, since the Rome Statute may consider it as an act of aggression, and potentially as a crime of aggression.

The Rome Statute also gives a very active role to the UNSC. A determination by the UNSC that a State has committed an act of aggression is an initial condition for a proceedings before the ICC.[236] Due to its active role, combined with its authority to review acts of alleged self-defense according to Article 51 of the UN Charter, the UNSC has the power to shape the crime of aggression and affect future cases.

With this in mind, the article now turns to discuss whether the definition of the crime of aggression and the mechanism that gives the UNSC an active role contradicts the right of self-defense.

1. The Standard of Determining Self-Defense

The principle of self-defense is not unique to international law. Most domestic legal systems developed a doctrine of self-defense in their penal code.[237] As a legal principle in domestic criminal law, self-defense has a fairly clear standard by which a person acting in alleged self-defense is measured.[238] Some legal systems adopted a completely subjective standard upon which a person acting in self-defense is measured; other systems adopted an objective "reasonable person" standard to measure behavior.[239]

However, international law contains no standard at all, either

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[235] Rome Statute, *supra* note 1, art. 8 *bis*(1)-(2).
[236] *Id.* art. 15 *bis*(6)-(8). However, note that although a declaration by the UNSC is a condition, it is possible to proceed with an investigation without such a declaration, pursuant to a decision by the pre-trial chamber. Even in such a case, the UNSC can "decide otherwise", in which case the investigation cannot continue. *Id*.
[237] *See generally* Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475 (2006).
[238] *See* Seth Diamond, *Criminal law: The Justification of Self Defense*, 1987 ANN. SURV. AM. L. 673 (1987).
[239] *Id.* at 675.

subjective or objective. Adopting a subjective standard might be consistent with the inherent nature of the right of self-defense, but it contradicts the role of the UNSC—a third party to any conflict—in reviewing acts of self-defense. An objective standard is no less problematic, since a "reasonable State" is a completely theoretical concept. Many, if not all, of the principles and conditions of the right of self-defense are highly contested, making it impossible to distill a "reasonable State's" behavior. Needless to say, the Rome Statute provides no standard.

In the diplomatic arena, the ambiguity of the standard is neither problematic nor perhaps even much needed; it gives the UNSC the flexibility it needs to effectively maintain global peace and security by declaring a State's act as self-defense (or aggression) based on its assessment of the situation as a whole. However, it is highly problematic when criminal proceedings are on the line.

The UNSC is a political body that is not bound by legal principles, and has no clear and uniform standard for self-defense. By relying on the UNSC to declare whether a use of force constitutes lawful self-defense, the Rome Statute fails to create a clear standard for States to follow. If Malta wants to use force against the Libyan ship, it must decide whether the conditions for exercising self-defense were met. The UNSC will review Malta's decision without any clear standard—an understandable situation in the diplomatic field. However, if the UNSC rejects Malta's claim of self-defense and declares it an aggressor, Malta faces an uphill battle in arguing otherwise before the ICC, since there is no standard in the Rome Statute.

This makes the UNSC's role even more central. Naturally, every act of aggression that was committed by a State had a person in a position of power that "plan[ned], prepar[ed], initiat[ed,] or execut[ed] the act."[240] Because of this, a declaration of aggression by the UNSC can easily result in that person's conviction of a crime of aggression, since the main question—the occurrence of aggression—was already answered by the UNSC, and there is no legal standard in the Rome Statute that would allow a State to contest the UNSC's declaration. It is doubtful that the drafters of the UN Charter intended to grant the UNSC the power to effectively convict a State's leader.

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[240] Rome Statute, *supra* note 1, art. 8 *bis*(1).

Furthermore, the lack of standard in the Rome Statute might cause heads of State to unnecessarily limit the exercise of their right of self-defense, and decide to forfeit that right even in cases that might warrant it in fear of criminal proceedings against them. If in the past, the consequences of holding a legal position different from that of the UNSC were left in the diplomatic field, it could now result in criminal consequences due to the lack of standard for self-defense in the Rome Statute and the active role of the UNSC.

For example, if Malta's analysis that its response was proportional is contrary to the UNSC's future decision, it may have an effect personally on the PM and others in a position of power. The UNSC, after reviewing Malta's actions, can retroactively label the bombing of the ship an illegal use of force, and thus potentially cause for the conviction of Malta's PM. In that regard, the crime of aggression acts as a legal deterrent from exercising self-defense. Due to the inherent nature of the right of self-defense, clearly, the definition of the crime of aggression is flawed.

2. The UNSC's Inability to Declare (Lack of) Aggression

The lack of a common standard to measure a State's actions in self-defense is only half of the problem in relying on the UNSC to define acts of aggression as part of the criminal process. The UNSC is a political body, comprised of States with political and moral agendas. Its declarations, to include those concerning acts of aggression, are affected by those agendas.

Moreover, the permanent members of the UNSC hold the right to veto decisions on matters other than procedural.[241] In the context of aggression, this calls for a majority of members of the UNSC, including *all* five permanent members, to declare an act as aggression. This mechanism may serve as a safeguard from promoting agendas of any one State and as a way to maintain stability. But it also makes it unlikely that acts of aggression will be declared by the UNSC, as such wide agreement on matters of international security is seldom achieved.[242]

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[241] U.N. Charter art. 27(3).

[242] *See, e.g.*, Dr. Simon Adams, *Failure to Protect: Syria and the UN Security Council*, GLOBAL CENT. RESP. PROTECT (Mar. 2015), http://www.globalr2p.org/media/files/Syria paper_final.pdf.

It is also highly unlikely that the UNSC will "decide otherwise,"[243] or positively declare that an act is not aggression. This is of great significance, since the Rome Statute allows for the prosecutor to commence with proceedings pursuant to the pre-trial chamber's decision, unless the UNSC decided otherwise. But due to the political nature of the UNSC and its permanent members' veto power, such a decision is highly improbable. This leaves the task of declaring an act of aggression in the hands of the ICC, a task it is not authorized to do,[244] and does not have the proper tools to do.

To illustrate this problem, assume Malta's use of force is a legitimate response in self-defense, but Libya alleges that Malta was the aggressor and asks the prosecutor of the ICC to investigate. A lack of declaration of aggression by the UNSC in this case could mean one of two things: one, either the UNSC does not consider Malta's actions as aggression; or two, the UNSC could not reach the needed majority, perhaps due to a veto by one of the permanent members.[245]

If one of the permanent members in the UNSC has an interest in assisting Libya, or has a very narrow view of the right of self-defense that is not in line with customary international law that it wishes to promote, the UNSC might not declare Malta's actions as aggression. But it also will not be able to decide otherwise if the ICC pre-trial chamber decides to proceed with the investigation.

Again, such outcomes might be acceptable in diplomatic relations, but if the Maltese PM faces criminal proceeding by deciding to act in self-defense, the mechanics of the Rome Statute may push him to focus more on the balance of power in the UNSC rather than on the well-being of his State. The Rome Statute's definition of the crime of aggression makes the exercise of self-defense, especially in contested cases in which the belligerent States blame each other, a question of who has the bigger allies in the UNSC.

3. The Need to Justify Self-Defense

Article 51 of the UN Charter imposes on the UNSC the role of

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[243] Rome Statute, *supra* note 1, art. 15 *bis*(8).
[244] U.N. Charter art. 39. Meron, *supra* note 141.
[245] *See* Glennon, *supra* note 18, at 107.

reviewing State conduct and taking "such action as it deems necessary in order to maintain or restore international peace and security."[246] Naturally, this means that States acting in self-defense should report and justify their actions to the UNSC in some way.

This procedure is obviously not part of the *inherent* right of self-defense, since clearly it was created by the UN Charter, unlike the right itself.[247] However, a State that either fails to report its actions to the UNSC, or fails to justify its actions altogether, could be labeled as an aggressor by the UNSC. This could have significant implications on a State, regardless of any criminal tribunal.[248]

The new crime of aggression turns this question of State aggression into a step in a criminal process. In the event there is no UNSC declaration of aggression, the ICC—a judicial body—will have to review the State's actions and decide if it was justified by the right of self-defense, based on valid evidence presented to it. Such evidence may be classified or imperative to the State's national security, and the State may not be willing or able to present it. The State's failure to present favorable evidence could be devastating because the consequences of the ICC's judicial review are not limited to the State, but may have a personal effect on the head of State.

To illustrate, suppose Malta based its actions on an intelligence report that came from an agent aboard the Libyan ship, or from sensitive technology that allows surveillance of suspicious ships in international waters. In the past, Malta could decide what information it should disclose to the UNSC in order to justify its actions. Perhaps Malta would never be asked to justify its actions if it had strong allies in the UNSC. However, in the era of the new crime of aggression, failing to produce evidence might result in the Maltese PM's conviction for aggression. The PM would face a horrible choice of endangering Malta's national security by disclosing the information to the ICC, or increasing his personal risk of criminal conviction by failing to disclose the evidence.

But the problem is broader than the dilemma over what evidence to

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246 U.N. Charter art. 51.

247 *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 ¶ 235 (June 27).

248 *See* CASSESE ET AL., *supra* note 69, at 144. Note, however, that the Rome Statute does not state whether a breach of Article 51 of the UN Charter constitutes a manifest violation.

present. Under the new definition of the crime of aggression, the ICC can decide if a State's action is lawful self-defense, although it is clearly not the right forum for such a review. As illustrated above, the scope of the right of self-defense is highly contested, and is ground for an endless legal debate. Unlike other international crimes that have a more factual *mens rea*,[249] the legality of the use of force in self-defense is a highly complicated question, that may not have a "right or wrong" answer for a court to adopt. This evidentiary problem illustrates that the ICC is not the right body to determine the legality of a State's use of force.

By turning the process of judging the legitimacy of a State's use of force in self-defense into a step in the criminal process, the Rome Statute transforms the inherent right of self-defense into an evidentiary question before a forum that is ill-suited for the task. Questions of Malta's security and its right of self-defense will be limited by what it can prove in the courtroom, and will be answered by a judicial body that lacks the broader point of view needed for such decisions. This dilemma will serve as deterrence for heads of State from exercising their right of self-defense, at least until valid public evidence could be obtained.

VI. Conclusion

The Rome Statute's definition of the crime of aggression is far from perfect. The definition itself is obscure and vague, and does not provide a potential defendant with clear notice of prohibited conduct. The construction of the crime of aggression is applicable only to individuals in a position of power and contradicts both the Rome Statute's aspiration to apply equally to all people, and the general principle of head of State immunity. Finally, the crime of aggression narrows the inherent right of self-defense by considering all use of force aggression, and by creating a mechanism of judicial scrutiny of a State's conduct.

These problems are not new to the Rome Statute's crime of aggression. The Nuremberg Charter's crimes against peace were the target of similar criticism for being too vague and allowing political

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[249] *See, e.g.*, Rome Statute, *supra* note 1, art. 6 (defining genocide as committing acts with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, then listing five acts that constitute genocide such as killing or causing bodily harm to a member of the group); *id.* art. 8 (defining war crimes as "[g]rave breaches of the Geneva Conventions of 12 August 1949," or other serious violations out of a list of twenty-two acts that constitute war crimes).

prosecutions.[250] It is interesting to note that, when describing the law of the Nuremberg Charter, the IMT felt obliged to state that "[t]he Charter is not an arbitrary exercise of power on the part of the victorious Nations," as if answering anticipated criticism.[251]

The creation of a criminal charge of "crimes against the peace" in the Nuremberg Charter,[252] and the subsequent term "aggression" that was developed in ICL and left undefined to this day, may have been the right thing to do from a moral ground. However, both of those crimes lack a legal basis in either customary international law or any existing treaty. As illustrated by one scholar,

> [t]he first question that needs to be addressed is: what is it that is being defined? I have stated elsewhere that efforts should be directed at determining what aggression is, not "wars of aggression," "acts of aggression," or similar notions. The reason is that all these concepts—wars, acts, etc.—always refer to or qualify the concept of aggression.[253]

The contradictions between the crime of aggression and the basic principles in international law cannot be solved by amending the Kampala Amendments. The scope and quality of those contradictions suggest that perhaps criminal law is not the right tool for preventing aggression. The logical thing to do from a purely legal perspective would be to give up the entire notion of prosecuting individuals for a State's aggression. It is far better to maintain international peace and security through diplomacy and the balance of power between States than through criminal enforcement.

Such enforcement may be suitable for *relatively* simple and factual crimes like genocide or war crimes. But aggression, or any State's use of force, is a complex matter that exceeds a simple factual question and involves State conduct, security considerations, diplomacy, and international politics. Such questions are simply not fit to be answered in a criminal court, as competent as it is. The possibility that the fictionalized PM of Malta could be convicted as an aggressor, a

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250 *See* Clark, *supra* note 20, at 527–28.
251 *Nuremberg Judgment*, *supra* note 28, at 216.
252 Nuremberg Charter, *supra* note 16, art. 6(a).
253 Solera, *supra* note 132, at 812.

possibility that is all too real, should worry the entire international community, and not just the PM himself.