
Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus

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Abstract

In the course of recent years, the Special Working Group on the Crime of Aggression has prepared the ground for a final political decision to be made in Kampala in 2010. This symposium will hopefully constitute a useful contribution to the comprehensive debate that is necessary in order to enable the political leaders to make their choice in an informed manner. This article argues that there are no compelling policy reasons against allowing the International Criminal Court to exercise its jurisdiction over the crime of aggression, which already forms part of customary international law. In particular, there is no compelling reason for not reflecting the co-existence of the jus contra bellum and the jus in bello on the secondary level of international criminal law and international criminal justice. While the definition contained in the Draft amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression is imperfect in some respects, it constitutes a reasonable and workable compromise which, on a somewhat closer inspection, proves to be much more determinate than it may seem at first glance. In light of this achievement and the unlikelihood of the emergence of a magic formula for a perfect definition, this article takes the view that the window of opportunity which will be open in Kampala should be used because otherwise it may be closed for a very long time. The 2010 Review Conference should therefore mark the historic occasion on which state leaders eventually form the collective will to allow for the prosecution of the most serious violations of the jus contra bellum and hereby to complete the new system of permanent international criminal justice.

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1 A Necessary Debate

Andreas Paulus is right: ‘a debate is indispensable when the very foundations of the international legal (un)order are at stake’. Indeed, there can be no doubt about the fundamental importance of ‘defining the crime [of aggression] and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime’.¹ It is in light of this particular importance of the subject-matter that the Special Working Group on the Crime of Aggression (Special Working Group) was open not only to states parties to the ICC Statute, but to all states and a quite considerable number of non-state parties, including China, the Russian Federation, India, and many Arab states, have taken an active part in the discussions of recent years. This debate will continue and probably intensify during the lead-up to the First Review Conference on the ICC Statute (to be held in May 2010 in Kampala) because, and contrary to what Paulus perhaps fears, the decision to allow the Court to exercise jurisdiction over the crime of aggression is no ‘done deal that merely hinges on technicalities’.

The Special Working Group has sought to do what it could to prepare the ground for the final decision. This decision must and will be a political one. The completion of the Special Working Group’s work² and the submission of ‘Draft amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression’³ and ‘Draft Elements of Crimes’⁴ do not anticipate the political decision which remains to be made. However, the work of the Special Working Group makes such an (informed) decision possible. No doubt, the final decision will not only be about those (not merely technical) questions that remain open, i.e., the proper role of the Security Council and the procedure governing the entry into force of any agreed text. Instead, the ultimate decision must and will be based, as Paulus suggests, on an overall assessment of the merits and shortcomings of the respective drafts and any possible repercussions of their application in practice on the international legal landscape and world public order.

There is little reason to fear that the debate will be confined to the ‘usual circles of international criminal lawyers’ (whatever those circles are). Most members of the Special Working Group were public international law experts sent from capitals or from the permanent missions in New York. It is not difficult to predict that public international lawyers will continue to play an influential part in the final political decision-making process which will soon start. The debate which Paulus wants to

¹ Art. 5(2) of the Statute of the International Criminal Court (ICC Statute).

² For a brief account of this work see Barriga, ‘Against the Odds: The Results of the Special Working Group on the Crime of Aggression’, in R. Bellelli (ed.), *International Criminal Justice* (2009, forthcoming); for a more detailed account see Weisbord, ‘Prosecuting Aggression’, 49 *Harvard Int’l LJ* (2008) 161; on the work of the Working Group on Aggression within the Preparatory Commission for the International Criminal Court see Fernández de Gurmendi, ‘The Working Group on Aggression at the Preparatory Commission for the International Criminal Court’, 25 *Fordham Int’l LJ* (2001–2002) 589.

³ Doc ICC-ASP/7/20/Add. 1, at 30.

⁴ Doc ICC-ASP/8/INF. 2, at 12.

stimulate is thus a necessary one. It should, however, be borne in mind that it is not an entirely new one. The modern debate about the law and politics of the crime of aggression spans about a century and is extremely rich.⁵ Also, on close inspection, the latest chapter of the discussion, starting in 1995 with the opening of the formal negotiation process on the establishment of the ICC and intensifying greatly with the many years of intensive work within the Special Working Group, reveals an extremely lively exchange of arguments which took place in almost complete transparency⁶ and was accompanied by quite a considerable number of scholarly contributions which were by no means confined to the legal niceties of the subject.⁷ Sceptical and even decisively

⁵ For a recent account of this long and fascinating story see O. Solera, *Defining the Crime of Aggression* (2007); for a monumental study of the aggression debate from 1920 to 1975 see B.B. Ferencz, *Defining International Aggression – The Search for World Peace: A Documentary History and Analysis* (1975), 2 vols; for a useful and more recent account see United Nations (ed.), *Historical Review of Developments relating to Aggression* (2003).

⁶ In particular, the intensive informal debate during the ‘Princeton meetings’ is fully documented through a sequence of detailed reports (available at: www.icc-cpi.int/Menus/ASP/Crime+of+Aggression/); expert conferences have accompanied the process, such as the ones held in Turin (see Bellelli, *supra* note 2) and Cleveland (see Scharf and Hadji, ‘Symposium: The International Criminal Court and the Crime of Aggression’, 41 *Case Western Reserve J Int’l L* (2009) 267).

⁷ The following is just a selection: Ferencz, ‘Ending Impunity for the Crime of Aggression’, 41 *Case Western Reserve J Int’l L* (2009) 281; Schaeffer, ‘The Audacity of Compromise. The UN Security Council and the Pre-conditions to the Exercise of Jurisdiction by the ICC with Regard to the Crime of Aggression’, 9 *Int’l Criminal L Rev* (2009) 411; Clark, ‘The Crime of Aggression and the International Criminal Court’, in M.C. Bassiouni (ed.), *International Criminal Law: Sources, Subjects and Contents* (2008), at 243; L May, *Aggression and Crimes Against Peace* (2008); Weisbord, *supra* note 2; Blokker, ‘The Crime of Aggression and the United Nations Security Council’, 20 *Leiden J Int’l L* (2007) 867; Cassese, ‘On Some Problematic Aspects of the Crime of Aggression’, 20 *Leiden J Int’l L* (2007) 841; McDougall, ‘When Law and Reality Clash – the Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court’s Jurisdiction over the Crime of Aggression’, 7 *Int’l Criminal L Rev* (2007) 277; Solera, *supra* note 5; Kreß, ‘The Crime of Aggression before the First Review of the ICC Statute’, 20 *Leiden J Int’l L* (2007) 851; Stein, ‘The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council Power to Determine Aggression?’, 16 *Indiana Int’l and Comp L Rev* (2005) 1; M. Politi and G. Nesi (eds), *The International Criminal Court and the Crime of Aggression* (2004); Kreß, ‘Strafrecht und Angriffskrieg im Licht “des Falles Irak”’, 115 *Zeitschrift für die gesamte Strafrechtswissenschaft* (2003) 294; Nsereko, ‘Defining the Crime of Aggression: An Important Agenda Item for the Assembly of States Parties to the Rome Statute of the International Criminal Court’ [2003] *Acta Juridica* 265; Westdickenberg and Fixson, ‘Das Verbrechen der Aggression im Römischen Statut des Internationalen Strafgerichtshofes’, in J.A. Frowein *et al.* (eds), *Verhandeln für den Frieden: Liber Amicorum Tono Eitel* (2003), at 483; Griffiths, ‘International Law, the Crime of Aggression and the Ius Ad Bellum’, 2 *Int’l Criminal L Rev* (2002) 301; Clark, ‘Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court’, 15 *Leiden J Int’l L* (2002) 859; Trahan, ‘Defining “Aggression”: Why the Preparatory Commission for the International Criminal Court has Faced such a Conundrum?’, 24 *Loyola U LA Int’l and Comp L Rev* (2002) 439; M. Hummrich, *Der völkerrechtliche Straftatbestand der Aggression* (2001); Meron, ‘Defining Aggression for the International Criminal Court’, 1 *Suffolk Transnat’l L Rev* (2001) 1; Müller-Schieke, ‘Defining the Crime of Aggression under the Statute of the International Criminal Court’, 14 *Leiden J Int’l L* (2001) 409; Springrose, ‘Aggression as a Core Crime in the Rome Statute Establishing an International Criminal Court’, 5 *St Louis-Warsaw Transatlantic LJ* (1999) 167; A. Ronneberg, *Der Tatbestand des Verbrechens gegen den Frieden* (unpublished Ph.D. thesis, 1998).

critical voices were continuously heard.⁸ This symposium is thus timely and necessary, but we should be modest enough to recognize that the debate started long ago.⁹

2 The Common Starting Point

Paulus and I start from the same premise, a premise which has recently been confirmed by the English House of Lords:¹⁰ The inclusion of the crime of aggression in the list of crimes covered by the ICC Statute and the formulation of the mandate to work towards enabling the ICC to exercise its jurisdiction over the crime¹¹ were no hazardous decision because the crime of aggression, as much as genocide, crimes against humanity, and war crimes, is a crime under general customary international law.¹²

⁸ Zimmermann, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, 2008), Art. 5 marginal n. 16 ff; Stein, 'Aggression als Verbrechen im Statut des Internationalen Strafgerichtshofs – "A Bridge too Far"?' in H. Müller-Dietz et al. (eds), *Festschrift für Heike Jung* (2007), at 935; Boehring, 'Aggression, International Law and the ICC: An Argument for the Withdrawal of Aggression from the Rome Statute', 43 *Columbia J Transnat'l L* (2005) 557; Paulus, 'Peace through Justice? The Future of the Crime of Aggression in a Time of Crisis', 50 *Wayne L Rev* (2004) 1; Fife, 'Criminalizing Individual Acts of Aggression by States', in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden. Essays in Honour of Asbjorn Eide* (2003), at 53; Schuster, 'The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword', 14 *Criminal L Forum* (2003) 1.

⁹ The title of the very first Res adopted by the Assembly of States Parties to the ICC, 'Continuity of work in respect of the crime of aggression', underlines the long-term nature of the negotiations.

¹⁰ *R. v. Jones et al.* [2006] UKHL 16, at paras 12 and 19 (Lord Bingham), 44 and 59 (Lord Hoffmann), 96 (Lord Rodger), 97 (Lord Carswell), and 99 (Lord Mance).

¹¹ Res F, at para. 7, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/10.

¹² The ILC confirmed this legal status of the crime of aggression by including it in its 1996 ILC 'Code of Crimes Against the Peace and Security of Mankind', UN Doc A/51/10, 26 July 1996, ILC Yearbook (1996 II (2)) 17. In her recent textbook treatise on the subject, Wilmshurst states: 'Aggression is widely regarded as a crime under customary international law . . .': 'Aggression', in R. Cryer, H. Friman, D. Robinson, and E. Wilmshurst (eds), *An Introduction to International Criminal Law and Procedure* (2007), at 262. In that sense see, e.g., Ambos, 'Strafrecht und Krieg: strafbare Beteiligung der Bundesregierung am Irak-Krieg?', in J. Arnold et al. (eds), *Menschengerechtes Strafrecht: Festschrift für Albin Eser zum 70. Geburtstag* (2005), at 674; I. Brownlie, *Principles of Public International Law* (2003), at 561; A. Cassese, *International Criminal Law* (2nd edn, 2008), at 155; Y. Dinstein, *War, Aggression and Self-Defence* (4th edn, 2005), at 121; Dumée, 'Le crime d'agression', in H. Ascensio, E. Decaux, and A. Pellet (eds), *Droit International Pénal* (2000), at 251; Gaja, 'The Long Journey towards Repressing Aggression', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002), i, at 430; Greppi, 'The Evolution of Individual Criminal Responsibility under International Law', 835 *Int'l Rev Red Cross* (1999) 531; Griffiths, *supra* note 7, at 308; Hummrich, *supra* note 7, at 90; Kreß, 'Strafrecht und Angriffskrieg', *supra* note 7, at 295; Meron, *supra* note 7, at 6; Müller-Schieke, *supra* note 7, at 409, 414; Nsereko, *supra* note 7, at 265, 266; Sadat and Carden, 'The New International Criminal Court: An Uneasy Revolution', 88 *Georgetown LJ* (2000) 381, at 437 n. 341; Aziz Shukri, 'Will Aggressors Ever be Tried Before the ICC?', in Politi and Nesi, *supra* note 7, at 35; Triffterer, 'Establishment of the Court', in Triffterer, *supra* note 8, at 40; G. Werle, *Principles of International Criminal Law* (2005), at 393; Westdickenberg and Fixson, *supra* note 7, at 500; Wilmshurst, 'Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?', in Politi and Nesi, *supra* note 7, at 95. For a different view see Bassiouni and Ferencz, 'The Crime Against Peace and Aggression: From Its Origins to the ICC', in Bassiouni, *supra* note 7, at 242; Schuster, *supra* note 8, at 13; Ronneberg, *supra* note 7, at 202. The correct majority position of the customary status of the crime of aggression can best be explained on the basis of 'modern positivism'

In Kampala, states will thus not be invited to traverse new legal ground, even though adding to the Statute for the crime of aggression may technically require the Statute to be amended. Article 5(2) merely calls for the Statute's completion by fully transposing the accumulated body of customary international criminal law into the form of a treaty text.

3 Two Fundamental Objections against Adjudicating the Crime of Aggression

Paulus raises two objections which place a question mark behind the very idea of criminalizing and prosecuting individuals for participating in aggression. In that respect at least, Paulus' argument does challenge the decisions taken in Nuremberg¹³ and Tokyo¹⁴ internationally to criminalize aggression. For the sake of analytical clarity, I shall deal with those two fundamental objections first.

A *Jus contra bellum* and *jus in bello*

Paulus fears that the Court's exercise of jurisdiction over the crime of aggression could lead to a 'mingling between *jus ad bellum* and *jus in bello* issues'. This fear is unwarranted. The point raised resembles an argument which was made soon after the entry into force of Article 2(4) of the UN Charter. At the time, it was suggested that the fundamental principle of equal application of the law of international armed conflict could not co-exist with the prohibition on the use of force; the ILC even doubted the usefulness of continuing to study the law of international armed conflict after the major break-through in the field of the *jus contra bellum*.¹⁵ As is well known, these tendencies remained short-lived¹⁶ and the law of international armed conflict together with its basic principle of equal application is alive and healthy, notwithstanding the fact that the ban on the use of force has grown into a cornerstone of the international legal order. I find it difficult to see why the same co-existence should not be possible on the secondary level of international criminal law. I do not entertain any doubt that international judges will be capable of distinguishing between *jus contra bellum* and

(see Simma and Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts', 93 *AJIL* (1999) 302, at 306) which accounts for much of the recent development of international criminal law (for an analysis of the international criminalization of war crimes committed in non-international armed conflicts see Kreß, 'War Crimes Committed in Non-international Armed Conflicts and the Emerging System of International Criminal Justice', 30 *Israel Yrbk Human Rts* (2000) 103, at 104.

¹³ For an excellent summary of the effect of the 'Nuremberg legacy' on our subject see Clark, 'Nuremberg and the Crime of Peace', 6 *Washington U Global Studies L Rev* (2007) 527.

¹⁴ For an excellent recent reappraisal of the contribution of the Tokyo International Military Tribunal to the legal development on the crime of aggression see N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2008), at 115.

¹⁵ ILC Yearbook (1949) 51–53.

¹⁶ For an influential response to the sceptics of a possible co-existence between the two branches of law see H. Lauterpacht, 'The Limits of the Operation of the Law of War', 30 *British Yrbk Int'l L* (1953) 206.

jus in bello issues and will be prepared to adjudicate on war crimes on both sides of the conflict irrespective of any concurrent determination that crimes of aggression were committed.

Paulus also fears that the ICC's exercise of jurisdiction over the crime of aggression could reduce the pressure on those fighting on the side of the aggressor to follow the *jus in bello*. His important policy question is as follows: '[i]f the leadership of one party has already been singled out by the Court as the culprit for an armed conflict, what incentive does it have for upholding the *jus in bello*?'. Paulus' question is built upon only one possible effect of criminal law: deterrence, and a complete discussion of the matter would have to include considerations of criminal law theory.¹⁷ The following reaction will remain confined to the issue of deterrence. In that respect, Paulus' argument ignores the leadership character of the crime of aggression. This specificity of the crime implies that those who actually execute the state act of aggression and who are in a position directly to commit war crimes are under no threat of being prosecuted for the crime of aggression and retain every possible incentive derived from international criminal law not to commit war crimes. I would even argue that the retention of such incentive constitutes the best explanation of the existence of the leadership requirement.¹⁸ That does not mean that Paulus' argument fails completely, but it must be reformulated as follows: '[t]he leadership of the aggressor state, if under threat of prosecution for a crime of aggression, would no longer hesitate to *order* the commission of war crimes and the incentive for the subordinates derived from such orders will prove more powerful than the counter-stimulus flowing from the law against war crimes'. It is difficult to assess the strength of this reformulated argument. Statements about the deterrent effect of a rule of criminal law always involve a strong element of speculation. In our context, that speculation is complicated further because of the existence of two conflicting signals.¹⁹

But let us assume for the sake of argument that the criminalization of (participating in) aggression somewhat increases the likelihood that the aggressive leadership orders the commission of war crimes, and that such orders adversely affect the deterrent effect that the law against war crimes would otherwise have on the soldiers. Would that justify the decision to do without any criminal law deterrent with respect to aggression? I readily accept that the famous Nuremberg statement that aggression is the 'supreme international crime'²⁰ is open to doubt,²¹ and that the position taken by Yoram Dinstein that 'nowhere is the need for [meaningful] sanction more evident than in the domain of the *jus ad bellum*'²² may be debated. What should not be open to

¹⁷ For an analysis reflecting the considerable complexity of criminal law theory see M. A. Drumble, *Atrocity, Punishment and International Law* (2007), at 169 ff.

¹⁸ For a similar view see Boister and Cryer, *supra* note 14, at 152.

¹⁹ For an inspiring debate about (the difficulties of measuring) deterrence in our context see Drumble, *supra* note 17, and May, *supra* note 7, at 329 ff.

²⁰ *Judgment of the International Military Tribunal for the Trial of German Major War Criminals*, Cmd. 6964, Miscellaneous No. 12 (1946) (1962), at 13.

²¹ In the same vein see Blokker, *supra* note 7, at 868.

²² Dinstein, *supra* note 12, at 117.

serious argument, however, is that it would be most desirable to increase the pressure on state leaders to refrain from aggression. Some of the doubts expressed right after the entry into force of the UN Charter, as to whether the 'laws of war' should survive, were based on the idea that all emphasis should be placed upon the strengthening of the Charter law *contra bellum*. Paulus' argument would appear to go some way in the opposite direction. Placing all emphasis on international humanitarian law and international human rights law and hereby reducing the importance of respecting the *jus contra bellum* entails the risk of downplaying the suffering of soldiers and civilians which will almost by necessity be caused even by such a use of armed force which fully respects international humanitarian law.²³ I would therefore plead for the reflection of the co-existence of the *jus contra bellum* and the *jus in bello* on the secondary level of international criminal law and international criminal justice.

B 'Lesser' Violations of the Prohibition on the Use of Force

The drafts proposed by the Special Working Group contain a narrow definition of the crime of aggression: there will be no individual criminal responsibility for aggression unless a state act of aggression has been completed²⁴ and the state's use of armed force will have to pass a certain quantitative and qualitative threshold.²⁵ Paulus fears that this restrictive approach to the secondary rule of criminal sanction will cause 'collateral damage' to the effectiveness of the more comprehensive primary rule of conduct, i.e. the prohibition on the use of force.²⁶ Yet, it is widely accepted, at least within liberal states, that criminal law is the *ultima ratio* of all legal sanctions, and the inevitable consequence is that many (primary) rules of conduct remain outside the ambit of the (secondary rules of) criminal law. The same must be true for the international legal order; in fact, the sovereignty of states makes the use of the criminal law instrument even more sensitive. The current state of international criminal law perfectly reflects that fundamental caution: Not all violations of the law of armed conflicts constitute war crimes under international law, and many human rights violations are not criminalized under international criminal law. With respect to those violations of international law, states continue to rely on the more traditional (and softer) means of enforcement. I fail to see why the situation should be fundamentally

²³ Human rights organizations, such as Amnesty International and Human Rights Watch, in particular, run this risk when they (rather astonishingly) explain their continuous silence regarding the crime of aggression by their 'limited mandate'.

²⁴ Illegal threats to use force and 'attempted' state acts of aggression are not covered by the proposed definition of the crime. In particular, the requirement of a completed state act of aggression also applies to those who (merely) plan and prepare such an act. While this may not be crystal clear from the language of draft Art. 8bis, it is placed beyond question by Element 3 of the draft Elements of the crime (ICC-ASP/8/INF.2, at 14). In my opinion, the provision on attempt in Art. 25(3)(f) of the ICC Statute, *supra* note 1, does not apply to a state's act of aggression. I have indicated the reasons in my Discussion paper 1; ICC-ASP/4/32, at 384.

²⁵ The quantitative threshold is established through the use of the words 'gravity and scale' in Art. 8bis. On the qualitative threshold see *infra* sect. 4B.

²⁶ For a similar question see Weisbord, *supra* note 2, at 220.

different with respect to the prohibition on the use of force. Here again, there are very good policy reasons to confine the use of the criminal law instrument to the *noyau dur* of the primary rule of conduct, and nothing prevents states from using all other available remedies where an illegal use of force does not pass the international criminal law threshold.

At one stage of the development one could perhaps try empirically to assess whether the use of the international criminal law instrument negatively impacts upon the effectiveness of international rules of conduct which remain outside the protective scope of international criminal law, and whether such a negative impact is not outweighed by the enhanced enforcement through international criminal law within its scope of application.²⁷ But I would submit that the question is essentially the same for all crimes under international law, and that compelling reasons should be given why the crime of aggression should receive special treatment.

4 The Proposed Definition of the State Act of Aggression

Paulus' critique of the proposed definition of the state act of aggression in draft Article 8bis of the ICC Statute is directed to the reference to the annex to GA Resolution 3314 and to the requirement that the act of aggression must constitute a 'manifest violation of the Charter of the United Nations'. I shall deal with those two points in turn.

A *The Reference to the Annex to GA Resolution 3314*

I agree with Paulus that the reference to the annex to GA Resolution 3314 (Resolution 3314) in the second sentence of paragraph 2 of draft Article 8bis of the ICC Statute is problematic, and that it would have been preferable to define the state component of the crime of aggression without reference to that document.²⁸ Ironically, the decision to refer to Resolution 3314 despite the fact that there was never a consensus to apply that Resolution as a statute of international criminal law²⁹ was strongly favoured by diplomats with a public international law background, who placed more importance upon relying on an agreed document than upon the difficulties of transposing that document into a criminal law context. The idea of using Resolution 3314 was by no means uncontroversial. Germany, in particular, had voiced its preference for an autonomous and generic definition throughout the drafting process. Unfortunately, a clear majority of delegations took a different view.

²⁷ The *renaissance* of international criminal law since the 1990s and the entry into force of the ICC Statute in 2002 are so recent that the appropriate moment in time for such an assessment has not yet come; for the same view see May, *supra* note 7, at 323.

²⁸ For a different view see Strapatsas, 'Rethinking General Assembly Resolution 3314 (1974) as a Basis for the Definition of Aggression under the Rome Statute of the ICC', in O. Olusanya (ed.), *Rethinking International Criminal Law: The Substantive Part* (2007), at 190.

²⁹ Suffice it to refer to the distinction between (acts of) aggression as listed in Art. 3 and 'wars of aggression' as referred to in the first sentence of Art. 5(2) of Res 3314; for a succinct analysis see Wilmshurst, 'Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?', in Politi and Nesi, *supra* note 7, at 94.

What are the problems with the reference to Resolution 3314 and what is their significance? Articles 2 and 4 of the Resolution reserve special powers to the UN Security Council which are perfectly acceptable within the Resolution's proper context, i.e. the application of Article 39 of the UN Charter, but which are misplaced in the realm of *substantive* criminal law. Moreover, Article 2 of Resolution 3314 creates a presumption which, if transposed into the definition of a crime, could barely be reconciled with the fundamental guarantee of the accused enshrined in Article 67(1)(i) of the ICC Statute.³⁰ Contrary to what Paulus suggests, the reference to Resolution 3314 in draft Article 8bis of the ICC Statute does not explicitly 'omit[. . .] the opt-in and opt-out clauses of Articles 2 and 4'. Yet, I am confident that prosecutors and judges will interpret the reference contained in the second sentence of paragraph (2) of Article 8bis of the ICC Statute in line with accepted principles of criminal law and procedure, and therefore not apply Articles 2 and 4 of Resolution 3314.

The transposition of the list of state acts of aggression in Article 3 of Resolution 3114 causes problems in two respects: It may be doubted whether the acts described in letters (c) and (e) will, as a rule, reach the gravity threshold required for the crime of aggression. This problem, however, can be solved through the application of the special gravity threshold in draft Article 8bis(1) of the ICC Statute. The act of aggression referred to in letter (f) is more problematic because, as Paulus recognizes, it can be criticized for confusing a state's use of force with a state's act of assistance to the use of force by another state. It is difficult to predict how international judges would react to the transposition of this internal inconsistency of Resolution 3314 into the international criminal context. How significant a shortcoming this uncertainty is depends on what is thought of the idea of criminalizing the leadership of a state which (merely) renders assistance to an aggressor state.³¹

Finally, Paulus rightly notes that the reference to Resolution 3314 in the second sentence of draft Article 8bis(2) of the ICC Statute, leaves open the question whether the following list of acts of aggression is exhaustive or not. I do not consider the possibility that judges might construe the list as being merely of an exemplary nature as a flaw, and certainly not as a violation of the principle of legal certainty. As in other areas of criminal law, the scope of this principle should not be overstretched. The list of acts of aggression in the second sentence of Article 8bis(2) of the ICC Statute is 'semi-open' at best, because every act of aggression must fall within the generic definition in the first sentence of draft Article 8bis(2) of the ICC Statute. I seriously doubt whether the principle of legal certainty requires a more stringent definition.

B The Requirement of a Manifest Violation of the Charter of the United Nations

Arguably, Paulus' most important critique of the proposal submitted by the Special Working Group refers to the qualification that the state's act of aggression must 'by its

³⁰ For a similar view see Meron, *supra* note 7, at 7 ff.

³¹ For a more detailed discussion of the problem in the context of Germany's alleged participation in the 2003 Iraq War see Kreß, 'The German Chief Federal Prosecutor's Decision not to Investigate the Alleged Crime of Preparing Aggression against Iraq', 2 *J Int'l Criminal Justice* (2004) 251.

character, gravity and scale, constitute . . . a manifest violation of the Charter of the United Nations'. This qualifier has been under discussion within the Special Working Group, but its inclusion is supported by a clear majority of delegations, and for quite a few states the adoption of the 'qualifier' constitutes a *conditio sine qua non* for accepting the definition as a whole. Paulus' critique, if I understand it correctly, can be deconstructed into three distinct objections: (1) the ambiguity of the word 'manifest'; (2) the application of the 'qualifier' to controversial cases of the use of force; (3) the (possible) effect of making the definition of the crime a 'dead letter'. Again, I shall try to deal with the issues in turn.

As Paulus recognizes, one effect of the 'qualifier' is to pose a *quantitative* threshold. There is widespread agreement within the Special Working Group that the ICC shall not intervene in border skirmishes (and the like), and the words 'gravity and scale' clearly express the drafter's intent to that effect. The second function of the 'qualifier', which is of paramount importance for quite a few states, is to pose a *qualitative* threshold by excluding legally controversial cases from the scope of the definition. The word 'manifest' is, I concede, less clear in that respect, and perhaps not all states represented in the Special Working Group would concur with this interpretation. Still, there are compelling arguments in support of such a reading of the 'qualifier'. Despite its relative openness, the word 'character' already suggests that the requirement of a 'manifest violation of the United Nations Charter' does not impose merely a quantitative threshold. Furthermore, the *travaux préparatoires* reveal that those who support the inclusion of the 'qualifier' understand it to pose both a quantitative and a qualitative threshold. For example, paragraph 24 of the 2008 Report of the Special Working Group reads as follows:

Delegations supporting this threshold clause noted that it would appropriately limit the Court's jurisdiction to the most serious acts of aggression under customary international law, thus excluding cases of insufficient gravity and falling within a grey area. This approach would garner the widest possible support for the definition of the crime of aggression, which was necessary for achieving universality.³²

In light of this negotiation record and the requirements contained in Article 22(2) of the ICC Statute to construe the definitions of a crime strictly and, in case of genuine doubt, in favour of the person being investigated, prosecuted or convicted, it would seem almost inconceivable that an international judge would reduce the legal significance of the 'qualifier' to a quantitative threshold. Moreover, only by accepting also a 'qualitative' threshold will it be possible to keep the crime of aggression within the confines of customary international law and hereby to respect the fact that 'one of the major guiding principles in the elaboration of the definitions of the crimes [listed in Article 5(1) of the ICC Statute] was that these definitions should be reflective of customary international law'.³³

³² ICC-ASP/6/20Add. 1; there is a clear connection with the language of 'manifest violation of the United Nations Charter' and the requirement 'clearly without justification under international law' in Germany's proposal of 13 Nov. 2000; PCNICC/2000/WGCA/DP.4, 7 (para. 24).

³³ Robinson and von Hebel, 'War Crimes in Internal Conflicts: Article 8 of the ICC Statute', 2 *Yrbk Int'l Humanitarian L* (1999) 208; in the same vein see Meron, *supra* note 7, at 8.

Among those who have devoted more detailed studies to the subject, there is widespread agreement that the crime of aggression under customary international law, as it has evolved from the 'creative precedents' of Nuremberg and Tokyo, covers only the *noyau dur* of the prohibition on the use of force,³⁴ and the record of the ongoing negotiations reveals that there is no other *opinio iuris communis* among states.³⁵ Scholars have made a number of quite similar suggestions to capture this *noyau dur* directly through the formulation of a *specific collective intent* requirement.³⁶ According to Gerhard Werle such intent must be directed to the (partial) annexation of territory or subjugation of the victim state;³⁷ Antonio Cassese holds the view that the illegal use of force must be directed to the acquisition of territory, the coercion of the victim state to change its government or its political regime, or else its domestic or foreign policy, or to the appropriation of assets belonging to the victim state;³⁸ and Oscar Solera suggests that the use of force must have the purpose of changing the *status quo* in another state by attacking its military, governmental, or economic structures.³⁹ In the course of the negotiations, Germany proposed language to that effect,⁴⁰ and this resulted in the bracketed option of the 2002 Coordinator's paper pursuant to which the act of aggression must have 'the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof'.⁴¹

³⁴ See, in particular, Cassese, *supra* note 7, at 156 ff; Solera, *supra* note 5, at 405 ff; Dinstein, *supra* note 12, at 125 ff; Werle, *supra* note 12, at 390 ff; Wilmshurst in Politi and Nesi, *supra* note 7, at 95 ff; Kreß, *supra* note 31, at 249 ff; Hummrich, *supra* note 7, at 147 ff, 239 ff; Meron, *supra* note 7, at 3 ff; Müller-Schieke, *supra* note 7, at 147 ff. In its 1996 'Code of Crimes Against the Peace and Security of Mankind', the ILC held that 'only a sufficiently serious violation of the prohibition contained in Article 2, paragraph 4, of the United Nations Charter' gives rise to individual criminal responsibility for the crime of aggression: ILC Yearbook (1996 II (2)) 43.

³⁵ In June 2000, the UK made the following intervention in the Preparatory Commission (on file with the author): '[T]here is nothing in international law to say that participation in any [unlawful] use of force by an individual amounts to the crime of aggression. An act of aggression which is not part of an aggressive war (whether declared or undeclared) may give rise to State responsibility. But my delegation remains to be convinced that it constitutes a crime for an individual under international law'; on 26 June 2000, the delegation of the USA to the Preparatory Commission seconded this view as follows (on file with the author): '[t]he importance of articulating existing customary international law in the definition cannot be overemphasized. . . . Furthermore, as noted by the U.K. representative and expressly recognized by UNGA Resolution 3314, not all uses of force rise to the level of the crime of aggression'. On 13 Nov. 2000, Germany stated (PCNICC/2000/WGCA/DP.4, 6 (para. 23)): 'It has been stressed . . . that a solution for a generally acceptable definition of the crime of aggression must be firmly based on established customary international law. On that basis, an aggressive, large-scale armed attack on the territorial integrity of another State, clearly without justification under international law, represents indeed the very essence of this crime'.

³⁶ On the concept of collective intent in our context see Kreß, *supra* note 31, at 256 ff.

³⁷ Werle, *supra* note 12, at 395 (marginal n. 1170).

³⁸ Cassese, *supra* note 12, at 160.

³⁹ Solera, *supra* note 5, at 427.

⁴⁰ PCNICC/2000/WGCA/DP.4, 6 (para. 10).

⁴¹ ICC-ASP/2/10, 234. For a critique of the collective intent to establish a military occupation and the suggestion to exclude those instances of the use of force from the definition which pursue the objective to enforce international law see Kreß, *supra* note 31, at 256 ff.

Yet, it has proven impossible to reach agreement about the appropriate wording of a specific collective intent requirement. Against this background, the qualitative threshold posed through the requirement of a ‘manifest violation of the Charter of the United Nations’ must be seen as the more modest attempt to reach essentially the same goal by excluding those cases of the use of force from criminalization under international law the legality of which is the subject of genuine legal debate. If compared with the abovementioned variants of a specific collective intent requirement, the ‘pragmatic’ threshold in draft Article 8bis of the ICC Statute is probably somewhat more inclusive. It can therefore be argued that the proposed definition goes slightly beyond existing customary international law. Yet, we are here confronted with a situation where there is no absolute clarity about the applicable definition in customary international law, and hence there is some legitimate scope for ‘refining’ and thereby ‘crystallizing’ customary international law. The decision to formulate a pragmatic ‘qualitative’ threshold rather than a more ambitious one would not seem to exceed the limits of ‘crystallizing custom through clarification’.

Paulus argues that the pragmatic ‘qualitative threshold’ is too indeterminate to be reliably applied because ‘any lawyer of some quality [can] find reasons why almost everything is legal or illegal under prevailing circumstances’. I respectfully beg to differ. It is no secret among international lawyers that the law on the use of force suffers from what I shall call, in taking up the language used in the ‘Princeton Report’, a ‘grey area’. The existence of such a grey area is not a new fact, but, on closer inspection, it has accompanied the United Nations Charter since its inception.⁴² Most importantly, reasonable international lawyers will find it comparatively easy to identify those instances of the use of force which fall within the grey area. If one studies the more recent treatises on the subject, one will almost invariably find the same list of controversial cases. Elizabeth Wilmschurst gives a fair account of this list when she mentions anticipatory self-defence, forcible reactions to a ‘minor’ use of force of another state, armed interventions to rescue nationals, the extraterritorial use of force against a massive non-state armed attack, and genuine humanitarian intervention.⁴³

Yes, the international legality of a genuine humanitarian intervention, such as the 1999 NATO air campaign in Kosovo, is also open to genuine debate, and is thus excluded from the scope of draft Article 8bis of the ICC Statute.⁴⁴ The ICC is not the proper organ to decide whether Paulus and many other international lawyers are right to hold that ‘recent attempts to “legalize” humanitarian intervention seem to

⁴² Suffice it to refer to the almost canonical debate between D. Bowett, *Self-Defence in International Law* (1958) and I. Brownlie, *International Law and the Use of Force of States* (1963).

⁴³ Wilmschurst, ‘Aggression’, *supra* note 12, at 268 ff; compare this with, e.g., C. Gray, *International Law and the Use of Force* (3rd edn, 2008); R. Kolb, *Ius contra bellum. Le droit international relative au maintien de la paix* (2003); T. Franck, *Recourse to Force* (2002).

⁴⁴ An explicit exception, as suggested in Leclerc-Gagné and Byers, ‘A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention’, 41 *Case Western Reserve J Int’l L* (2009) 379, is thus not necessary.

have failed' as long as a reasonable international lawyer may hold the opposite view.⁴⁵ The 'qualifier' would enable the Court to recognize that the legal evaluation of a genuine humanitarian intervention raises difficult and controversial issues of identifying and weighing the more recent pertinent international practice in light of fundamental principles which underlie the present evolution of international law in general. This would not amount to an implicit endorsement of the legality of such a use of force;⁴⁶ the Court would simply recognize that there is no individual criminal responsibility in light of the controversial state of the *jus contra bellum* in point.⁴⁷ It is very hard to dispute that such a finding would be consonant with existing customary international criminal law because, in the case of a genuine humanitarian intervention, a specific collective intent in whatever variant referred to above is conspicuously absent. Paulus seems to doubt that a 'court of law' can make a finding as to whether or not a given use of force was driven by the genuine will to stop atrocities. Yet, the need to establish a certain collective intent arises quite often in international criminal law proceedings, and prosecutors and judges have at their disposal means to meet the challenge. Where doubts persist, the proper decision will be an acquittal.

According to Paulus, the debate about the 2003 use of force against Iraq demonstrates that 'any lawyer of some quality can find reasons why almost everything is legal'. I do not think that this does justice to both the complexity and sincerity of the discussion that was led about the 2003 war. While I share the majority view among international lawyers that the use of force against Iraq was illegal, I do indeed accept, as Paulus anticipates, that the arguments advanced by Sir Christopher Greenwood in support of the legality of the invasion⁴⁸ cannot be fully refuted.⁴⁹ In fact, the debate about Iraq demonstrates that reasonable international lawyers are capable of distinguishing between an arguable case and a manifestly erroneous justification for a use of force. An argument that the 'Coalition of the Willing' was entitled to act in 'pre-emptive self-defence' would have been manifestly wrong not

⁴⁵ For the purpose of this comment it is not necessary to rehearse the abundant literature on the subject; for a very nuanced analysis of the legal intricacies of the issue see Murphy, 'Criminalizing Humanitarian Intervention', 41 *Case Western Reserve J Int'l L* (2009) 241; for one of the best arguments in support of a limited right to a genuine humanitarian intervention see Greenwood, 'Humanitarian Intervention: The Case of Kosovo', 10 *Finnish Yrbk Int'l L* (2000) 141.

⁴⁶ If, *arguendo*, a genuine humanitarian intervention is illegal under current international law, I am doubtful whether the exclusion of such a use of force from draft Art. 8bis of the ICC Statute will substantially contribute to its legalization; for a different view see Murphy, *supra* note 45.

⁴⁷ After a very stimulating philosophical argument, May, *supra* note 7, at 296, reaches a very similar conclusion: '[h]umanitarian intervention will remain very controversial at the level of asking about whether States should be condemned and sanctioned for engaging in them. But it is less controversial concerning prosecutions, since there are many reasons to think that State leaders and other individual human persons should not be convicted in humanitarian intervention cases'.

⁴⁸ Greenwood, 'International Law and the Pre-emptive Use of Force: Afghanistan, Al-Quaida, and Iraq', 4 *San Diego Int'l LJ* (2003) 7.

⁴⁹ I have set out my view on the illegality of the 2003 Iraq war in Kreß, 'Strafrecht und Angriffskrieg', *supra* note 7, at 294.

only on the facts, but also as a matter of international law, as there is no tenable basis under current international law for arguing for a right to self-defence before an armed attack is at least imminent. The ‘Coalition of the Willing’ was thus well-advised not to rely on this argument in the official justifications of its use of force. Instead, as is well known, Australia, the United Kingdom, and the United States of America relied on a Security Council mandate to carry out their attack.⁵⁰ As I said, on balance I do not find the explanation advanced by the Coalition convincing, but at the same time I do recognize the existence of an arguable case to the contrary, and it is the latter determination that should have been decisive had the issue arisen before an international criminal judge. Whether or not I am right in my legal evaluation of the 2003 Iraq war is not decisive for the sake of this comment, and I readily admit that an international judge may face a borderline case even when applying the requirement of a manifest violation of the United Nations Charter. My main point is that international legal method is advanced enough to enable reasonable lawyers to distinguish between a spurious attempt to justify an illegal use of force and an arguable case.

Paulus concludes that ‘it will be almost impossible for the Court to apply the Working Group definition to the “hard cases” of international life’. If the words ‘hard cases’ mean ‘seriously controversial cases as a matter of international law’, I would agree. I would add, however, that it is the very purpose of the ‘qualitative threshold’ to enable the international prosecutor and the international judges to arrive at this conclusion, and that is for two reasons: first, in order to remain within the confines of existing customary international law, and, secondly, in order not to decide major controversies about the content of primary international rules of conduct through the back door of international criminal justice.⁵¹

This does not mean that draft Article 8*bis* of the ICC Statute would remain a ‘dead letter’. There is agreement that Hitler’s and Saddam Hussein’s aggressive wars would have come within the definition, and I suspect that the same applies with respect to some other uses of force since 1945. It is true, though, that the requirement of a ‘manifest violation of the Charter of the United Nations’ will make successful proceedings for a crime of aggression an exceptional event. But what is wrong with this consequence? Is international criminal law (*stricto sensu*) not an instrument for exceptionally grave assaults upon the international legal order to be applied with utmost restraint? An expansionist resort to international criminal law must lead to its trivialization. This is true for the crime of aggression as it is for all other crimes under international law.⁵²

⁵⁰ For the respective letters of 20 Mar. 2003 sent to the Security Council see S/2003/352; S/2003/351, and S/2003/350.

⁵¹ For an eloquent elaboration of the same view see Fife, *supra* note 8, at 73.

⁵² On the need to construe the crime of genocide restrictively see Kreß, ‘The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber’s Decision in the *Al Bashir* Case’, 7 *J Int’l Criminal Justice* (2009) 297.

5 The Role of the Security Council

I agree with Paulus, with the majority of international lawyers, and, most importantly, with the vast majority of states that there is no legal requirement to make the institution of proceedings for the crime of aggression before the ICC dependant on a prior determination by the Security Council that an act of aggression has occurred. I equally share Paulus' view that no such requirement should be agreed upon in Kampala for reasons of legal policy. The legal arguments have been set out most forcefully by others,⁵³ and there is no need to restate them in this comment.

In view of my agreement with Paulus, I shall also not attempt to deal comprehensively with the matter from a perspective of legal policy.⁵⁴ I simply wish to make what I think is the crucial point: the ICC constitutes a turning point in the history of international criminal justice because its establishment marks the decisive step towards adherence to the principle of equal application of international criminal law. With the birth of the ICC, the international community attempted to cut the cord that linked international criminal justice to the critique of 'victor's justice' and 'policy in the disguise of law' which previously plagued it.⁵⁵ Adherence to the principle of equal application of the law must now be considered as a minimum requirement of legitimacy for a system of permanent international criminal justice. To subject the ICC to the veto power of the permanent members of the Security Council falls foul of meeting this basic requirement. Robert Jackson could not avoid developing a strong feeling for this basic truth when he famously stated in his opening speech at Nuremberg 'that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment'.⁵⁶ It is to be greatly deplored that the permanent members of the Security Council are not yet prepared to pay heed to Jackson's powerful promise.

The central policy argument in support of a strict procedural requirement of a prior Security Council determination of a state act of aggression runs as follows: '[to] ask the ICC, in the absence of a determination by the Security Council, to decide that an act of aggression has taken place would force the ICC to become immersed in political controversies between states. Such an immersion would endanger the ICC's judicial role

⁵³ For detailed expositions of the correct legal view see Schaeffer, *supra* note 7, at 412 ff; McDougall, *supra* note 7, at 279 ff; Stein, *supra* note 7, at 5 ff; for further references see Kreß, 'The Crime of Aggression', *supra* note 7, at 860 (n. 54); for the contrary view see Ferencz, 'Enabling the International Criminal Court to Punish Aggression', 6 *Washington U Global Studies L Rev* (2006) 13; Schuster, *supra* note 8, at 35 ff; Meron, *supra* note 7, at 12 ff.

⁵⁴ For a somewhat more detailed argument see Kreß, 'The Crime of Aggression', *supra* note 7, at 862; for a similar view see May, *supra* note 7, at 225 ff.

⁵⁵ Kreß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), at 143.

⁵⁶ Opening speech of the American Chief Prosecutor, reprinted in *Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany* (2001), at 45.

and image.’⁵⁷ One possible answer to this argument is that it strongly overemphasizes the ‘specificity’ of the crime of aggression.⁵⁸ Criminal proceedings against those allegedly most responsible for crimes under international law will often require judgments about state policies. Take the case of Darfur and the preliminary question whether there was a policy of the state of Sudan to launch a genocidal or at least widespread or systematic attack upon innocent human beings. In such a situation, the application of international criminal law will almost inevitably be accompanied by political controversies, and it is hard to see why the challenge of such controversies should be so much greater when it comes to the crime of aggression. The second answer is that the inclusion of the ‘qualifier’ in the definition precisely serves the goal of preventing the ICC from entering into the controversial grey area of the *jus contra bellum*. It is thus the definition of the crime itself which ensures that the ‘judicial role and image’ of the Court will not be endangered. In a case of a massive state act of aggression in manifest violation of the Charter of the United Nations, however, the ‘judicial role and image’ of the ICC would be rather damaged if the Court were to remain passive because of the politically motivated veto of one or more permanent members of the Security Council.

6 Time for Decision

Paulus cautions against making too hasty a decision. He argues that ‘much more research is needed’ and that ‘the time may not be ripe for giving the International Criminal Court jurisdiction over the crime of aggression as long as the disagreement within the international community on *jus ad bellum* issues persists’. Once more and for a last time, I respectfully beg to differ.

To the extent that there is disagreement within the international community about the *jus contra bellum*, it is not likely to go away for many years to come. Waiting for the emergence of a more or less complete consensus about the international regulation of the use of force before allowing the ICC to exercise its jurisdiction over the crime of aggression would thus, in fact, amount to a postponement of the project *ad calendas graecas*. The consequence would be the lasting impunity also in those instances of the use of force where the legitimacy and the need to use the international criminal law instrument cannot be seriously doubted.

Also, I do not think that after a century of political and scholarly debate about criminalizing aggression ‘much more research is needed’ to make a decision which is informed both in law and policy. It is not overly realistic to expect that a magic formula of a specific collective intent requirement would shortly emerge which would command universal support. I think it is fair to inform states’ leaders about

⁵⁷ Meron, *supra* note 7, at 13.

⁵⁸ To overstretch the ‘specificity’ of the crime of aggression runs like a red thread through those contributions which are fundamentally critical of allowing the ICC to exercise its jurisdiction over this crime; for a most thoughtful, careful, and balanced legal and philosophical argument against this tendency see May, *supra* note 7.

the following background to the proposal submitted by the Special Working Group: a majority of states do not wish to narrow the definition of the state component of the crime through a specific collective intent requirement of any kind. At the same time, a significant number of states will not accept an unqualified reference to Articles 1 and 3 of the annex to GA Resolution 3314. In that situation, the additional requirement, that the state's act of aggression must constitute a manifest violation of the Charter of the United Nations, is both a reasonable and a workable compromise. It may not meet 'the highest standards of codification'⁵⁹ because it is possible to conceive of a more specific definition. Yet, as I have tried to demonstrate in this comment, the suggested solution, on a somewhat closer inspection, proves to be much more determinate than it may seem at first glance. I would argue that it will be easier to apply the qualifier contained in draft Article 8*bis* of the ICC Statute than to pinpoint the minimum requirements of a 'widespread or systematic attack directed against any civilian population' within the meaning of Article 7(1) of the ICC Statute or to specify the meaning of 'incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' within the meaning of Article 8(2)(b) (iv) of the ICC Statute. There can be no doubt about the importance of the principle of legal certainty in international criminal law, but it would be unwise to overstretch this principle as the relevant international human rights case law and the (constitutional) jurisprudence all over the world reveal on closer inspection. I am in no doubt that draft Article 8*bis* of the ICC Statute satisfies the principle of legal certainty and, importantly, it advances legal certainty beyond the current state of customary international law. I am equally confident that draft Article 8*bis* of the ICC Statute could and would be reasonably applied by international prosecutors and international judges in the future. In addition, there is an avenue to be offered to those who do not share my trust and feel that they need a 'wait and see period'. If the entry into force of the proposed amendment follows the logic of Article 121(5) of the ICC Statute (the application of which should, for reasons of fairness and legitimacy, be extended to non-state parties),⁶⁰ those states which are particularly concerned that the Court might unduly downplay the significance of the 'qualifier' could withhold their acceptance, and thereby completely shield their nationals from the risk of prosecution first to see the case law unfold. This is another reason why there is no compelling need for a requirement that the Security Council consent to the exercise of the Court's jurisdiction over the crime of aggression in each and every case.

It would be a little naïve to say that Kampala will confront states with the alternative 'now or never' with respect to the crime of aggression. It is much less naïve, however, to recognize that Kampala will open a 'window of opportunity' to respond to a century-old challenge of the international legal order which, if not used, may

⁵⁹ This seems to be the benchmark set by Meron, *supra* note 7, at 3.

⁶⁰ On those issues see Clark, 'Ambiguities in Articles 5 (2), 121 and 123 of the Rome Statute', 41 *Case Western Reserve J Int'l L* (2009) 413.

remain closed for a very long time. I believe that the response proposed by the Special Working Group, though not free from shortcomings, is solid enough not to let this very significant opportunity pass. Therefore it is my view that, provided that the final compromise regarding the procedural role of the Security Council⁶¹ will not sacrifice the legitimacy of the international criminal justice system on the altar of *realpolitik*, the 2010 Review Conference in Kampala should mark the historic occasion where states' leaders eventually form the collective will to allow for the prosecution of the most serious violations of *jus contra bellum* and thereby to complete the new system of permanent international criminal justice.

⁶¹ For two more recent thoughtful studies on the subject see Schaeffer, *supra* note 7, at 419 ff; Blokker, *supra* note 7, at 887 ff.