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International Criminal Court
Office of the Prosecutor
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c/o Mr. Mark P. Dillon
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Dornbirn, 17 February 2021

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VIA E-MAIL: otp.informationdesk@icc-cpi.int

OTP-CR-449/20
Information after article 15 of the Statute upon Moria, Lesbos, Greece; Part III

Dear Mr. Dillon,

further to my two letters from September 16th and 20th, 2020, respectively, and referring to Your letter from November 2nd, 2020, I turn to You again as follows:

As annexed to this letter I submit herewith and under article 15 of the Statute a juridical survey, which shows, that the concept, act of aggression, in article 8 *bis* of the Statute indeed includes the threat of armed force. This results in the fact, that a threat of armed force, which is, in the sense of para. 2 of said article, *in any other manner inconsistent with the Charter of the United Nations* fulfils the crime of aggression, when it, *by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations*.

This is here the case, due to the grave situation incompatible with the human rights of those asylum seekers in Lesbos and (also) in Lipa/Bosnia Herzegovina.

Therefore, I kindly ask You and the Prosecutor of the ICC, respectively, to review Your assessment concerning those horrifying situations.

Sincerely,

Arthur Lambauer

On the concept of *aggression* after article 8bis of the Rome-Statute.

By Mag. Arthur H. Lambauer

This work shall be to set forth the meaning of the item act of aggression, in article 8bis of the Rome Statute¹, with a view to proving, under articles 31 and 32 of the Vienna Convention on the Law of Treaties², that, e. g., the threat of armed force is constituting such an act.

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I. The Charter of the United Nations

Article 5 paragraph 2 of the Statute³ reads as follows:

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

The Charter of the United Nations⁴ names the item *act of aggression* twice: in article 1 para. 1:

... 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 ...

respectively in article 39:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression ...

The two recent passages cited in bold print show that an act of aggression in any case shall be a breach to the peace, whilst not every threat to or breach of the peace

must be an act of aggression. This limits the latter item in so far as it, thus, can only exist in a more extremely kind of disturbing peace and security, namely in *using* armed force. But the meaning of such armed force already becomes visible by Article 53 para. 1 UN-Charter, which reads in part:

... But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

With this item, *aggressive policy*, obviously is meant (especially) the Nazi terror, i. e. the Holocaust, too. Yet the fact that millions of Jewish people were murdered just not by arms⁵ indicates that aggression, too, can be an act without directly and immediately using armament; if even not the threat of force by arms, i. e. of armed force, should be regarded as use of force, too.⁶

Consulting MURRAY⁷, regarding *aggression* we find the following:

An unprovoked attack; the first attack in a quarrel; an assault, an inroad.

The notion *attack*, at a first view, not necessarily implies physical force, for in several cases the overcoming of the resistance can also happen by strong words or other psychological strength.^{8, 9} But on the other hand, such

physical or moral violence. The term has the same meaning in the other languages of civilized peoples.

This Ministry feels that aggression so defined is in perfect accordance with the meaning which the United Nations Charter gives to that concept and that to seek new definitions may lead to confusion about the value of that term, since there would be, on the one hand, the plain and simple acceptance which derives from all modern languages and the new term devised specially for the use in international law, between which there would necessarily be differences of opinion concerning the meaning of each or the situations to which each applies.

Moreover, if the meaning of the word has to be restricted in order to provide this special acceptance of the term "aggression", this Ministry thinks that the result would be contrary to the desired intention because it would be tantamount to restricting the discretionary powers of judges with respect to it. [...]

To keep the concept of aggression within a closely defined and precise margin, as was advocated in one of the proposals, or to determine, by reference to cases in point, the situations in which it occurs, may lead to authorizing by implication countries prone to aggression to seek means of violating international peace and security by methods not covered by the limited definition or in the list of specific cases.

⁹ In so far completely false and suggesting that aggression only can be constituted in armed force, the statement of FRANCE in A/2162 (FN 8), p. 15:

The idea of aggression appears in two places in the Charter, in Chapter VII and in Article 51. Whereas Article 51 authorizes self-

¹ Rome Statute of the International Criminal Court. [2187 UNTS 38544](#). (The Statute).

² [1155 UNTS 18232](#).

³ Until it was repealed by paragraph 1 of the Annex to RC/Res.6; see [RC/11](#), p. 17.

⁴ <https://www.un.org/en/charter-united-nations/index.html>. (The UN-Charter).

⁵ If one does not want to speak of a weapon regarding the gas chambers.

⁶ See the statement of the UNITED KINGDOM in [A/2162/ADD.1](#), p. 5: *Briefly, it has all along been the view of the United Kingdom Government that a satisfactory definition of aggression, covering all those cases that are truly in the nature of aggression but without prejudicing the measures of defence which it may be necessary to take or to prepare in order to resist aggression, is extremely difficult to find, and that some which have been suggested are dangerous. The definition, if such it be, included in the present text of article 2 [of the ILC-draft Code of Offences against the Peace and Security of Mankind; [A/1858\(SUPP\)](#), para 59ff] has the further objection that it is incomplete and singles out for mention only some aspects of aggression.*

⁷ *A New English Dictionary on Historical Principles*, Oxford (1901), I, [182](#).

⁸ Cf. the statement of COSTA RICA in [A/2162](#), p. 9:

The concept of "aggression", which is defined in Spanish as the act of killing, maiming or inflicting some injury on persons, may be an act of

strength almost never will be successful, if it is not accompanied by the implicit threatening of a defeating force, because otherwise the victim will not give in.

This defeating force mostly must lie in physical strength, which is threatened for the case of insubordination.

Having a look at the dictionary¹⁰ under the item *force* in a more general meaning we find what follows:

As an attribute of physical action or movement: Strength, impetus, violence, or intensity of effect.

Referring to the use of force by threatening it, this means that every conduct of official executive behaviour (by a state's officer) must, if it is not legitimate,¹¹ be regarded as aggression, because the power of the government, incorporated in such officer, always, and in the last consequence, implies force for the case of disobedience.

Thus, under the UN-Charter (article 2 para. 4), the meaning of *using force*, as a variant of aggression, implies its threatening, too.¹² This is true in a most special way regarding **armed** force, because showing one's arms alone leads, against an inferior adversary, to its obedience.

However, the foregoing let us know that the provision concerning the crime of aggression having been to be adopted by the Assembly of Parties (to the Statute) needed to be consistent with the (meaning of the) relevant provisions of the UN-Charter and, therefore, as far as it were themselves conform with them, with the secondary legal literature of the UN, too, i. e. the relevant resolutions of the General Assembly (UNGA) defining *aggression*, and their *travaux préparatoire*. Because, in those papers the organs of the UN, if true, realized the specifics of the meaning of such provisions of the UN-Charter. In any rate, those papers can be useful to determine the UN-Members' intention to construe those provisions.

Hence, it must be clear that the organs of the United Nations in defining aggression were not allowed to deviate from the meaning of this notion which had been given to it at the UN Conference of San Francisco. This means that those organs were bound to the inherent meaning of the item as it could be concluded by applying the international rules on interpretation of Treaties.

defence only if an armed attack occurs against a Member of the United Nations, the Security Council may take action in situations (threats to the peace, breaches of the peace) other than cases of aggression.

¹⁰ MURRAY, *aaO*, IV, 419.

¹¹ Cf. the statement by EGYPT in A/2162 (FN 8), p. 13:

A definition of aggression expressed in general terms as suggested would then comprise the three constituent elements of aggression, namely:

(1) The legal element, which is the incompatibility of the act of aggression with the rules of the positive and customary international law in force.

(2) The material element, which would deal with questions of attempted and indirect aggression.

(3) The moral element, which is represented by the existence of a premeditated intention to commit aggression and the absence of legal justification.

¹² Cf. the ILC in its report A/1858(SUPP) (FN 6), para 59:

While every act of aggression constitutes a crime under paragraph (1), no attempt is made to enumerate such acts exhaustively. It is expressly provided that the employment of armed force in the

This must be true independently from some justification which would have been given to post war deterrence policies under articles 106 and 107 of the UN-Charter: Because such justification only could be lawful for a temporary section after world war II, until disarmament after article 26 of the Charter and supreme power of UNSC after article 43 of the Charter would have been implemented; whereby the fact, that neither the one nor the other actually is implemented until today, only could deliver an abusive excuse for such deterrence policies.

The notion of *aggression*, therefore, has to be regarded under the aspects of utility and the needs of the Charter with a view to guaranteeing that the purpose of this notion, namely, to secure the international peace against its disturbances, was not frustrated. Under this point of view there can be no doubt, that a definition of aggression which would exclude the threat of armed force, never could be sufficient to fulfil such purpose.

II. The UN intern definition of aggression

The path the organs of the United Nations, in search of a definition of aggression, went along was very lengthy.

At first the UNGA in 1950 adopted its resolution 378(V) B¹³; thereby it was initiated by a proposal¹⁴ submitted, in its 385th meeting¹⁵, to the First Committee by the USSR. Said resolution, referring to the proposal mentioned before, reads as follows:

The General Assembly,

Considering that the question raised by the proposal of the Union of Soviet Socialist Republics can better be examined in conjunction with matters under consideration by the International Law Commission, a subsidiary organ of the United Nations,

Decides to refer the proposal of the Union of Soviet Socialist Republics and all the records of the First Committee dealing with this question to the International Law Commission, so that the latter may take them into consideration and formulate its conclusions as soon as possible.

It deems rather strange that the UNGA explains here that the ILC is a subsidiary body of the UN, as if Member States would not be aware of that! It seems as if the draft of this resolution would have been to be submitted to somebody alien to the UN for previous consent,¹⁶ or, at least, to be

circumstances specified in the paragraph is an act of aggression. It is, however, possible that aggression can be committed also by other acts, including some of those referred to in other paragraphs of article 2.

So, para. (2) of article 2 of the ILC-draft reads:

(2) Any threat by the authorities of a State to resort to an act of aggression against another State.

Although the ILC refers here to para. (2) of article 2 of the ILC-draft which defines only another case of *offences against the peace and security of mankind*, in doing so, it stresses that threatening armed force is aggression, too. — Cf. also article 10 of the League of Nations Covenant!

¹³ [A/RES/378\(V\)](#), *Duties of States in the event of the outbreak of hostilities.*

¹⁴ [A/C.1/608](#).

¹⁵ [A/C.1/SR.385](#).

¹⁶ See the statement of INDIA in [A/C.6/SR.295](#), p. 257:

India said his delegation considered the question of defining aggression, although within the field of international law, a political question, and in view of the existing political situation

worded like this, it is to say without any referral to the item *aggression*, for avoiding any external opposition to it. The reasons for this become evident, when you have a look onto the sequential resolutions.

In its resolution 599(VI)¹⁷ the UNGA was

Considering that, although the existence of the crime of aggression may be inferred from the circumstances peculiar to each particular case, it is nevertheless possible and desirable, with a view to ensuring international peace and security and to developing international criminal law, to define aggression by reference to the elements which constitute it, ...

This bold printed passage indicates the UNGA's opinion, that aggression can be committed in many forms; nevertheless, it found that a definition should be possible and desirable.

Moreover, the UNGA in this resolution was

Considering further that it would be of definite advantage if directives were formulated for the future guidance of such international bodies as may be called upon to determine the aggressor, ...

A bone of contention doubtlessly was the UNGA's intention to seek a practicable definition, as an act of aggression, of the agitations of so many illegitimate governments who maltreat nations.

But this was not enough! Rather, in its resolution 688(VII)¹⁸ the UNGA was

Considering that the discussion of the question of defining aggression at the sixth and seventh sessions of the General Assembly and in the International Law Commission has revealed the complexity of this question and the need for a detailed study of

- (a) The various forms of aggression,*
- (b) The connexion between a definition of aggression and the maintenance of international peace and security,*
- (c) The problems raised by the inclusion of a definition of aggression in the Code of Offences against the Peace and Security of Mankind and by its application within the framework of international criminal jurisdiction,*
- (d) The effect of a definition of aggression on the exercise of the jurisdiction of the various organs of the United Nations,*
- (e) Any other problem which might be raised by a definition of aggression, ...*

That the notion of aggression had *various forms*, could be seen as a strong initiative by the UNGA against the widespread crime of aggression, because it makes clear that many governmental behaviours, having become usual through the recent century, may constitute the crime of aggression. Therefore, in the further paragraphs of this quotation it is expressed some political difficulty to be expected for defining aggression. For obviously it

in the world the time was scarcely propitious for elaborating such a definition.

¹⁷ [A/RES/599\(VI\)](#), Question of defining aggression.

¹⁸ [A/RES/688\(VII\)](#), Question of defining aggression.

¹⁹ [A/2638\(SUPP\)](#).

²⁰ They were comprised by the following states: Bolivia, Brazil, China, Dominican Republic, France, Iran, Mexico, Netherlands, Norway,

appears that the term *form* used by the UNGA does not refer to the various ways in which force by arms can be inflicted; but it aims at the variation of type of means which can be used to commit aggression.

By the same resolution, the UNGA established a Special Committee of 15 member states (mentioned therein) and requested

... the said Special Committee:

(a) To submit to the General Assembly at its ninth session draft definitions of aggression or draft statements of the notion of aggression;

(b) To study all the problems referred to above on the assumption of a definition being adopted by a resolution of the General Assembly; ...

This 1953 Committee delivered a report¹⁹ to the UNGA which confirms our reflections on the notions of aggression and force undertaken above; therein the Committee sets forth:

The majority of the Committee agreed that it was the duty of the Committee to define aggression in the sense of the Charter. However, the relevant Articles of the Charter were interpreted differently by them. Some members were of the opinion that the notion of aggression in the sense of the Charter could be limited solely to armed aggression, whereas the representatives of BOLIVIA, CHINA, IRAN, MEXICO, POLAND, SYRIA and the UNION OF SOVIET SOCIALIST REPUBLICS maintained that, in the sense of the Charter, the notion of aggression could include other forms of aggression not necessarily consisting in the actual use of armed force.

The seven states mentioned in this quotation represent almost the majority, but in any case, an important part of the Committee Members²⁰; and they represent a geographically widespread range of peoples and nations.

This is why the UNGA in its resolution 895(IX)²¹ explains what follows:

Considering that the discussions to which the question of defining aggression gave rise at the ninth session of the General Assembly have revealed the need to co-ordinate the views expressed by the States Members,

1. Decides to establish a Special Committee comprising one representative of each of the following States Members: China, Czechoslovakia, Dominican Republic, France, Iraq, Israel, Mexico, Netherlands, Norway, Panama, Paraguay, Peru, Philippines, Poland, Syria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia, which will meet at United Nations Headquarters in 1956; ...

Its remarkably interesting that the UNGA did not dissolve the Committee established by its resolution 688(VII). Five of the seven swinging out Member States mentioned in the report²² cited above were members of the new built 1956 Committee, too.

Pakistan, Poland, Syria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America.

²¹ [A/RES/895\(IX\)](#), Question of defining aggression.

²² Which report is not mentioned in this resolution 895(IX)!

The 1956 Committee submitted a report²³ to the UNGA, which, on its page 33, lists a range of grounds on which aggression might not be justified; it reads:

In particular, aggression may not be justified on any of the following grounds:

I. The internal situation of a State, as for example:

- (a) The political, economic or cultural backwardness of a people;*
- (b) Administrative shortcomings;*
- (c) Dangers which may threaten the life or property of aliens;*
- (d) **Revolutionary movements, civil war, disorders or strikes;***
- (e) The establishment or maintenance of any political, economic or social system in a State.*

II. Any act, legislation or regulations of a State, as for example:

- (a) **Violation of rights or interests acquired by another State or its nationals with regard to trade, concessions or any other kind of economic activity;***
- (b) Breaking-off of diplomatic or economic relations;*
- (c) **Measures constituting an economic or financial boycott;***
- (d) Repudiation of debts;*
- (e) **Prohibition or restriction of immigration or modification of the status of aliens;***
- (f) Violation of privileges accorded to the official representatives of another State;*
- (g) **Refusal to allow the passage of armed forces proceeding to the territory of a third State;***
- (h) Measures of a religious nature;*
- (i) **Frontier incidents.***

Having a look at the points enumerated above in bold print, it becomes clear that some of those grounds themselves inhere a momentum of at least the threat of armed force. Thus, and under the consideration that aggression (after MURRAY) is defined as an unprovoked first attack, it becomes clear that this enumeration of grounds in the report cited above was an attempt of restricting the meaning of aggression by *de facto* excluding those opposed grounds from its definition.

The reaction of the UNGA did not let wait too long: In its resolution 1181(XII)²⁴ the UNGA

Considering that, in spite of the progress made in the study of the question, the discussion at the present session shows the need for the elucidation of other aspects of a definition of aggression, ...

Resolves:

...

*3. To ask the Secretary-General to refer the replies of Member States to a committee composed of the Member States whose representatives have served on the General Committee at the most recent regular session of the General Assembly, **which committee***

shall study the replies for the purpose of determining when it shall be appropriate for the General Assembly to consider again the question of defining aggression, [sic!] and shall report to the Secretary-General when it has determined that the time is appropriate, setting forth the considerations which led to its decision; ...

This was the third time that the UNGA established a different Committee to study the question! But the above underlined passage seems really to be the limit of outrage – outrage over alien influence on the members of the committee obviously taking place in the background!

Then, only by its resolution 2330(XXII)²⁵ the UNGA was engaged with the question again. By this resolution, the UNGA established a fourth Committee and requested it to consider all debates in the Sixth Committee and the UNGA²⁶ and submit a report on the definition of aggression; doing that the UNGA beforehand was

Considering that in conformity with the Charter of the United Nations all Members of the United Nations must 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,

Considering that one of the main purposes of the United Nations is to 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,

Convinced that a primary problem confronting the United Nations in the maintenance of international peace remains the strengthening of the will of States to respect all obligations under the Charter,

Considering that there is a widespread conviction that a definition of aggression would have considerable importance for the maintenance of international peace and for the adoption of effective measures under the Charter for preventing acts of aggression,

Noting that there is still no generally recognized definition of aggression, ...

The fault which has been made, regarding the definition of aggression, by many commentators of the UN-Charter simply is, that they overlooked the phrase *or in any other manner inconsistent with the purposes of the United Nations*, whereby this phrase teleologically replaces the preceding passage *against the territorial integrity or political independence of any State*; what results in a prohibition of the threat or use of force for example against a group of foreign citizens, when this, in the said meaning, is inconsistent with the Charter. The question now is whether such threat or use of force other than *against the territorial integrity or political independence of any State* is to be subsumed under the conception of aggression or that of *other breaches of the peace*. The answer to this question does not seem to be that difficult:

The main connotation of the notion of aggression seems to lay in a breach of the will of the victim: such victim may,

²³ [A/3574\(SUPP\)](#).

²⁴ [A/RES/1181\(XII\)](#), *Question of defining aggression*.

²⁵ [A/RES/2330\(XXII\)](#), *Need to expedite the drafting of a definition of aggression in the light of the present international situation*.

²⁶ But not the reports of the previous Committees!

as seen before, be both another state and (a group of) citizens. Now, where should be the difference which could legitimize a lack of jurisdiction by the ICC concerning such acts against citizens? The argument of the supporters of such a lack of jurisdiction regarding the crime of aggression, in the case of (only) threatening of armed force²⁷ often is that the Court only shall be engaged with crimes of special atrocity. But, for example, is it not atrocious, when armed governmental executive agents, it is to say the police, threaten a group of ten thousand people seeking for asylum, not to flee of a camp in which they suffer inhuman conditions of living? Must those people at first resort to rebellion, and must then the policemen indeed make use of their arms and injure or shoot many of them, so that the Court is willing to see that this is a form of aggression, too, when such force is only threatened; because the threat leads to same result, in which the people suffer from diseases and hunger and are, illegitimately, imprisoned in such camp?

We will see that this is not the case, after the provisions of the definition of aggression.

By this resolution 2330(XXII)²⁸ the UNGA established a further Committee and instructed the same

... Special Committee, having regard to the present resolution and the international legal instruments relating to the matter and the relevant precedents, methods, practices and criteria and the debates in the Sixth Committee and in plenary meetings of the Assembly, to consider all aspects of the question so that an adequate definition of aggression may be prepared and to submit to the General Assembly at its twenty-third session a report which will reflect all the views expressed and the proposals made; ...

By this instruction, the UNGA stressed the importance of considering all aspects of the question and expressed thereby the need to include all forms of aggression.

In its next resolution 2420(XXIII)²⁹, seized of this matter, the UNGA again was

Considering that in its resolution 2330 (XXII) of 18 December 1967 the General Assembly recognized the widespread conviction of the need to expedite the definition of aggression, ...

This consideration obviously refers to the then world political situation, in which the number of acts of aggression was escalating more and more. And it reflects, too, the rightful fear that, if a definition of aggression would not be found soon, the danger would not be averted, that the results of such escalating aggression could render the common sense unable to express a truthful definition; whereby such danger was the greater even the more such aggression would be of the sort which is the central object of this work.

Afterwards, the adoption by the UNGA of similar resolutions took place, namely of resolutions 2549(XXIV)³⁰, 2644(XXV)³¹, 2781(XXVI)³², 2967(XXVII)³³, and 3105(XXVIII)³⁴.

Eventually, in its report³⁵ to the twenty-ninth session of the UNGA, the Committee delivered a draft *definition of aggression*, which directly was adopted, as its annex, in resolution 3314(XXIX)³⁶.

The first three preambular paragraphs of the *Definition of Aggression* (annexed to resolution 3314) read:

The General Assembly,

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and 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,

Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

Recalling also the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice, ...

Hereby the UNGA refers to the provisions of article 1 and 39 of the UN-Charter. As mentioned above, every act of aggression is, at the same time, a breach of the peace. But KELSEN³⁷ did wrong, when he claimed, that

[t]he reaction against a breach of the peace is formulated in Article paragraph 1 as 'suppression of acts of aggression or other breaches of the peace.' The express mentioning of 'acts of aggression' is superfluous since these acts are included in the concept, 'breaches of the peace.'

In doing so, KELSEN referred to UNCIO³⁸, Doc. 723, I/1/A/19, p.8:

'A suggestion was made to consider "other breaches of the peace" coming after "aggression" as superfluous. But the subcommittee held that there may be breaches of the peace other than those qualified by present connotation as aggression and the subcommittee decided to keep "other breaches of the peace" as an all-inclusive term which implies the use of any means of coercion or undue external influence, which, through exertion or threat to security of a state, amounts to a breach of the peace.' The terms 'act of aggression' and 'breach of the peace' appear also in Article 39: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression. If 'breach of the peace' is the

²⁷ As a form of using armed force quasi abstractly.

²⁸ See FN 25!

²⁹ [A/RES/2420\(XXIII\)](#), Report of the Special Committee on the Question of Defining Aggression.

³⁰ [A/RES/2549\(XXIV\)](#), Report of the Special Committee on the Question of Defining Aggression.

³¹ [A/RES/2644\(XXV\)](#), Report of the Special Committee on the Question of Defining Aggression.

³² [A/RES/2781\(XXVI\)](#), Report of the Special Committee on the Question of Defining Aggression.

³³ [A/RES/2967\(XXVII\)](#), Report of the Special Committee on the Question of Defining Aggression.

³⁴ [A/RES/3105\(XXVIII\)](#), Report of the Special Committee on the Question of Defining Aggression.

³⁵ [A/9619\(SUPP\)](#) and [Corr.1](#).

³⁶ [A/RES/3314\(XXIX\)](#), Definition of Aggression.

³⁷ *The Law of the United Nations*, 14.

³⁸ *United Nations Conference on International Organization*, San Francisco (1945).

wider concept including that of 'act of aggression,' then the wording of Article 39 is obviously incorrect. –

But this is not true! The differentiated expression of both, the breach of the peace and the act of aggression, in article 39 aims at the different forms of reaction by the UNSC after articles 41 and 42 of the Charter, so that the mention of acts of aggression in article 39 was needed to take up those different reactions, whereby the sanctions after article 42 fit much more to aggression than to other breaches of the peace.

Having in mind this reason for the differentiation in article 39, it becomes clear, that the threat of armed force (in the sense of using arms, respectively, their visual force) must count to the notion of *act of aggression* rather than to *other breaches of the peace*; because in any case where there are arms in use – whether directly or indirectly – the only means to overcome any resistance against UNSC-recommendations has to be armed force by the UNSC!

This, resulting directly from the Charter, is a strong argument why the threat of armed force is to be regarded *aggression*.

The further preambular paragraphs of resolution 3314 read, one by one:

Bearing in mind *that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations,*

This is based on the reflection that especially the UNSC, by this Definition of aggression, shall not be restricted in determining any act of aggression after article 39, not included in the definition.

Considering also *that, since aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences, aggression should be defined at the present stage,*

When the UNGA, in the year of 1970, refers in such a direct way to weapons of mass destruction, which at this time were being used in Hiroshima the last time, then this can only mean that it wanted to refer to the threat of force by nuclear deterring policy, which, if not consequently

³⁹ Cf. in this context [S/RES/984\(1995\)](#), last preambular paragraph, which reads:

Considering further *that, in accordance with the relevant provisions of the Charter of the United Nations, any aggression with the use of nuclear weapons would endanger international peace and security, ...*

Were here meant the direct and immediate use of nuclear weapons, then, there were not mention only of endangering the peace, but of breaching it! And operating para. 2 of the same resolution does not change anything of that:

2. Recognizes *the legitimate interest of non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to receive assurances that the Security Council, and above all its nuclear-weapon State permanent members, will act immediately in accordance with the relevant provisions of the Charter of the United Nations, in the event that such States are the victim of an act of, or object of a threat of, aggression in which nuclear weapons are used; ...*

The bold printed text is just belonging to the (underlined) *legitimate interest*, and therefore not able to constitute a decisive opinion of the UNSC. Moreover, thereby it is differentiated between victim (of an act of aggression) and object (of a threat thereof), what indicates that under the former must be understood both the direct and immediate

suppressed, would change the collective view upon such aggression, what would lead to a world more and more aggressive and arm's force based.³⁹

Reaffirming *the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity,*

Regarding the rights, here enumerated, it becomes truly clear that they can be violated by the threat of armed force, too.

Reaffirming also *that the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter, and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof,*

Military occupation can be undertaken without a single bullet shot! Moreover, the UNGA stresses here the variant of the **threat of occupation** (or other measures of force) which even more does not need any direct use of armed force, but only indirect.

Reaffirming also *the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,*

Convinced *that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim,*

It is one of the most often conclusions to be drawn by criminal science, e. g. criminal psychology, that aggressors are able to find still new forms of aggression to slip through the net of criminal law. Therefore, a definition of aggression can only be a simplification of the concept of aggression, undertaken by elements of crime, but never could be allowed to exclude any specific form of it.

Believing *that, although the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, it is nevertheless desirable to*

use of nuclear weapons and the expressive threat thereof; whilst the latter obviously means the situation under the nuclear deterrence policy, by which there is no concrete and expressive, but a permanent threat of such aggression.

This result is underlined by the third operative paragraph of that resolution which only speaks of *victim*:

3. Recognizes further *that, in case of aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, any State may bring the matter immediately to the attention of the Security Council to enable the Council to take urgent action to provide assistance, in accordance with the Charter, to the State victim of an act of, or object of a threat of, such aggression; and recognizes also that the nuclear-weapon State permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council action to provide, in accordance with the Charter, the necessary assistance to the State victim; ...*

This clearly constitutes a recognition that the sole possession of nuclear arms yet is a threat of an act of aggression with the latter comprising of the threat of the direct and immediate use of such arms, too.

formulate basic principles as guidance for such determination,

Dito.

The most important provision of the Definition of aggression in resolution 3314, is to be found in its article 4, which reads:

*The acts enumerated **above** are **not exhaustive** and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.*

The item *above* refers to article 3, where numerous specific forms of aggression are enumerated.

Some forms of aggression enumerated in article 4, in praxis, do not necessarily require the imminent use of force, but only the threat thereof: Thus, e. g. an invasion (art. 3, sec. a) can be imagined without any shot, too. And the same is true, as shown above, respecting military occupation (ibd.)

The conclusion has to be, that, after the provisions of the UN-Charter, aggression is to be defined as including the threat of armed force!

III. The work of the Preparatory Commission for the International Criminal Court

In its resolution F, para. 7,⁴⁰ the *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*⁴¹, whilst establishing the Commission, adopted the following provisions:

...

3. The Commission⁴² shall elect its Chairman and other officers...

*7. The Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in **this Statute**.*

That the provision which was to be adopted should be included in *this Statute* indicates that the later deletion of article 5 para. 2 of the Statute could not mean the deletion of the requirement that the provision conforms to the UN-Charter.

During its first session the PCNICC named its *Coordinator for the definition of the crime of aggression*.⁴³

In Annex IV of the before cited PCNICC paper (FN 43 above)⁴⁴ there is to be found a discussion paper

submitted by the said Coordinator, with several options on the definition of the crime of aggression comprising therein. The first option reads partly:

*For the purposes of the present Statute, [and subject to a determination by the Security Council regarding the act of a State,] the crime of aggression means [the use of the armed force, **including the initiation thereof**, ...*

Whatever this passage, printed in bold, should have a meaning, it may include the threat of armed force, too. It surely is no coincidence, that this option seems to base on a proposal made by several states of the Near East⁴⁵, which reads:

*For the purposes of this Statute, the crime of aggression is committed by a person who is in a position of exercising control or capable of directing political/military actions in his State, against another State, or depriving other peoples of their rights to self-determination, freedom and independence, in contravention of the Charter of the United Nations, by **resorting to armed force to threaten** or to violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those people.*

The term, **resorting to armed force to threaten**, may include the threatening of armed force.

After the establishment by the PCNICC of a *Working Group on the crime of aggression*,⁴⁶ the Coordinator submitted to this body a discussion paper⁴⁷, wherein the option text cited before in so far was upheld as an option 1. This conformed with a proposal⁴⁸ by GREECE and PORTUGAL submitted to the Working Group.

Also, in its fourth⁴⁹, fifth⁵⁰, sixth⁵¹, seventh⁵², eighth⁵³ and ninth⁵⁴ sessions the PCNICC upheld that concept cited above as option 1, whilst in all those options, in all those sessions, there has been submitted a variant to those options, reading as follows:

... the crime of aggression means ... any of the following acts committed by [an individual] ...:

(a) initiating, or

(b) carrying out.

Variation 1

[an armed attack] [the use of armed force] [a war of aggression] [a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing] against another State [against another State, or depriving other peoples of their rights to self-determination], in [manifest] contravention of the Charter of the United Nations, ...

⁴⁰ See the *Final Act* of that Conference; [A/CONF.183/10](#), p. 72.

⁴¹ Convened in Rome 1998.

⁴² Meant is the *Preparatory Commission for the ICC*; (the PCNICC).

⁴³ See [PCNICC/1999/L.5/REV.1](#), para. 12.

⁴⁴ *Ibid.*, p. 26.

⁴⁵ BAHRAIN, IRAQ, LEBANON, THE LIBYAN ARAB JAMAHIRIYA, OMAN, the SUDAN, the SYRIAN ARAB REPUBLIC and YEMEN; [PCNICC/1999/DP.11](#).

⁴⁶ See PCNICC/1999/L.5/REV.1 (FN 43), para. 16(a).

⁴⁷ [PCNICC/1999/WGCA/RT.1](#).

⁴⁸ [PCNICC/1999/WGCA/DP.1](#).

⁴⁹ [PCNICC/2000/L.1/Rev.1](#), Annex IV, p. 37.

⁵⁰ [PCNICC/2000/L.3/Rev.1](#), Annex II, p. 8.

⁵¹ [PCNICC/2000/L.4/Rev.1](#), Annex V, p. 13.

⁵² [PCNICC/2001/L.1/Rev.1](#), Annex V, p. 17.

⁵³ [PCNICC/2001/L.3/Rev.1](#), Annex III, p. 13.

⁵⁴ [PCNICC/2002/L.1/Rev.1](#), Annex IV B, p.19.

In distinguishing between *an armed attack* and *the use of armed force*, the latter notion clearly includes the threat of armed force⁵⁵, too.

At its tenth and last session, the PCNICC was engaged with a completely new concept of the draft definition of aggression⁵⁶, which was referring to resolution 3314(XXIX) of the UNGA. Actually, the novelty of this concept was characterized by a summary, by referring to the said resolution, of all the options and variants set out in the foregoing discussion papers.

See the further on this, at once below.

IV. The work of the Assembly of States Parties to the Rome Statute of the International Criminal Court.

At its first session⁵⁷, the *Assembly of States Parties to the Rome Statute of the International Criminal Court* (the Assembly) adopted a resolution⁵⁸ in which it decided to

establish a special working group on the crime of aggression, open on an equal footing to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, for the purpose of elaborating proposals for a provision on aggression in accordance with paragraph 2 of article 5 of the Statute and paragraph 7 of resolution F adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 ...

On the recommendation of the Chairman of this special working group on the crime of aggression (SWGCA), the Assembly decided⁵⁹

to annex the discussion paper on the definition and elements of the crime of aggression prepared by the Coordinator of the Working Group on the Crime of Aggression during the Preparatory Commission of the International Criminal Court as contained in document PCNICC/2002/2/Add.2 to the report of the Assembly⁶⁰.

This discussion paper comprises, more or less, the final outcome which contains the definition of aggression in article 8*bis* of the Statute; and it is based, concerning the notion, *act of aggression*, on resolution 3314(XXIX) of the UNGA. This basis ultimately has been resulting of a reference document⁶¹ prepared by the Secretariat, by which it had introduced this resolution.

The said discussion paper⁶² provides, concerning the procedure at the Court, that without the concurrence of the respective organ of the UN (UNSC, UNGA, ICJ, respectively) the Court be not allowed to proceed. The reason, why this concept is consequently rejected in the final version of article 15*bis* obviously lies in the fact, that the mainly responsible for acts of aggression are the five permanent members of the UNSC. But this rejection also results in, or at least supports, article 4 of the annex of the resolution 3314(XXIX) being construed in a manner, so that it shall be the Court itself who is entitled to determine

other forms of aggression not contained in article 3 of that resolution.

In its first (written) report⁶³ to the Assembly, the SWGCA considered, that

[a]s a result of its exchange of views the Special Working Group agreed that more time should be allocated to the Working Group, and decided to adopt the report of the intersessional meeting contained in document ICC-ASP/4/SWGCA/Inf.1⁶⁴ and to recommend to the Assembly of States Parties that it be annexed to the Proceedings of the fourth session of the Assembly.

In this report⁶⁵ referred to therein, concerning a definition of aggression, about the intersessional meeting there is exhaustively stated:

There was extensive discussion of whether the definition of the crime of aggression should be generic or specific (i.e. accompanied by a list such as that contained in United Nations General Assembly resolution 3314 (XXIX)). There was a considerable preference for a generic approach.

This, too, lays heavy weight onto article 1 of the definition of aggression in resolution 3314(XXIX), the generic part of the definition.

This attitude held by the meeting in 2005 did not change in 2006 meeting, whereto the records⁶⁶ of this intersessional meeting set forth, what follows:

7. There was extensive discussion of whether the definition of the act of aggression at the State level as referred to in section I, paragraph 2 of the 2002 Coordinator's paper should be generic or specific. It was recalled that a generic definition was one which does not include a list of acts of aggression, while a specific definition was accompanied by such a list, for example the one contained in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.

8. Several participants favoured a generic definition. It was argued that a generic definition was the most pragmatic approach as it would be impossible to capture all instances in which the crime of aggression would be applicable. The point was made that the option of an illustrative list, such as that contained in General Assembly resolution 3314 (XXIX), was difficult to reconcile with the need to respect the principle of legality. Some delegations pointed out that a specific list might create conflicts of jurisdiction between the Security Council and the Court, while others argued that such risks were alleviated by the fact that it was for the Court to determine which cases fell under the definition of aggression.

9. Those participants who favoured a specific approach felt that a detailed list of acts was more likely to ensure legal clarity and consistency with the definitions of other crimes in articles 6 to 8 of the Rome Statute. It was stressed that a specific definition was essential in light

⁵⁵ As herein understood.

⁵⁶ See the discussion paper of the Coordinator, [PCNICC/2002/WGCA/RT.1](#).

⁵⁷ See the *Official Records* of that session; [ICC-ASP/1/3](#).

⁵⁸ ICC-ASP/1/Res.1, *Continuity of work in respect of the crime of aggression*. See this resolution in the *Official Records* (FN 57), p. 328.

⁵⁹ See the *Official Records* of this second Session, [ICC-ASP/2/10](#), p. 10.

⁶⁰ See Annex II in the *Official Records* (FN 59), p. 234.

⁶¹ Submitted as early as in the year of 2000 in [PCNICC/2000/WGCA/INF/1](#).

⁶² FN 60.

⁶³ [ICC-ASP/4/SWGCA/1](#), para. 5.

⁶⁴ [ICC-ASP/4/32](#), Annex II.

⁶⁵ FN 64, para. 75.

⁶⁶ [ICC-ASP/5/SWGCA/INF.1](#), para. 7 ff.

of the importance of the crime and the requirements set forth under article 22 of the Statute. The point was made that some specific acts listed in General Assembly resolution 3314 (XXIX), such as the “blockade of the ports or coasts of a State” (article 3(c) of the resolution) might not be captured by a generic definition.

10. However, it was also emphasized that the generic and specific approaches could easily be combined by including a general chapeau and a non-exhaustive list of specific acts.

Article 22 of the Statute contains the principle of *nullum crimen sine lege*. In the worldwide legislative praxis, national and international, there are many examples of crime definitions that, regarding their most important elements, are content with a generic definition. So, e.g. the definition of the crime of enslavement under the Geneva Anti-Slavery Convention of 1926 (as amended 1953)⁶⁷ in its article 1 gets by on a completely generic definition of slavery by setting forth:

Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

Also, the crime of fraud normally is not defined specifically by all the possible manners by which the victim may be deceived or harmed.

In the case of the crime of aggression an additional momentum exists in the fact, that the specific circle of persons who are eligible for commitment of this crime, after the political constitutions of their countries (and after international law) have to be personalities who, representing their entire people, are well educated, and knowing the laws, especially those that determine their duties as such persons. The more this is true, the less they are infringed in their rights by an only generic definition of the crime. This correlation, that a crime’s definition can be the less precisely, the more the possible perpetrators are, or after the laws have to be, specialists themselves, is a basic element of the principle aforementioned, and moreover logically self-understanding.

Although, in para. 47 until 49 of said 2006 inter-sessional meeting’s record⁶⁸, regarding the concept of the “*threat of aggression*” (which is not the same as the *threat of armed force* as a variant of the *use of armed force*), there was maintained, what follows:

47. *The question of whether or not the definition should also cover the “threat” of aggression was also discussed. Participants agreed that the notion of “attempt” had to be differentiated from the notion of “threat” which, albeit similar to attempt, nonetheless constituted a different concept which was not reflected in the 2002 Coordinator’s paper. A threat was mainly a verbal expression, but it could include other, more substantial activities, and it would be broader than an attempted act of aggression. The question of retaining an appropriate threshold was therefore particularly important.*

48. *It was noted that the threat of aggression had been included in the early versions of the draft code of crimes prepared by the International Law Commission, but that*

such a notion had disappeared in the Commission’s draft of the 1990s.

49. *It was stated that including the concept of threat would create complications because the word threat was contextual, not necessarily having the same meaning in one situation as in another. Nonetheless, a view was also expressed that the concept of threat—particularly if backed up by substantial or credible activities—should be considered more closely.*

In doing so, the meeting did not discuss the question of the threat of use of armed force being included in the meaning of act of aggression. Thus, if article 1 of said resolution 3314(XXIX) speaks of “*the use of armed force ... inconsistent with the Charter*”, the central question is, whether this kind of use includes the abstract variant of itself, too, namely the threat of the employment of armed force. Given the common meaning of use, this question clearly is to be answered in the affirmative, because one can use something also abstractly, instead of practically or immediately.

This view is confirmed by a statement in para. 30 of the 2007 inter-sessional meeting’s record⁶⁹, which, referring to para. 3 of a proposed draft article 15bis⁷⁰, reads as follows:

30. *In the context of paragraphs 3 (a) and (b), participants discussed alternative language originally suggested as part of a proposal presented at the Turin Conference on International Criminal Justice.8 The Chair thus invited comments on a possible addition to paragraph 3 (a) or alternatively a possible new paragraph 3 (a) bis: “if the Security Council has determined the existence of a threat to or breach of the peace as a result of the threat or use of armed force by one State against another State.” This alternative language found very limited support. It was argued that under such an approach a Council decision might be interpreted as de facto determination of an act of aggression, irrespective of the Council’s intention. It might therefore have a negative impact on the decision-making within the Council, which might adjust the way it used certain terms. It was argued that this option would also create a subordinate relationship between the Court and the Council.*

Here, the concept of, *threat of armed force*, is, as the most normal thing on earth, set equal to the use of armed force, as both realizing the notion threat or breach of the peace, which an act of aggression always is. And the reasons why this concept was supported very limitedly were of a kind which had nothing to do with the said equating but were of procedural character, so that they do not express anything in the negative upon the question here of interest.

The papers concerning the seventh and eighth sessions of the Assembly do, as far as can be overseen, contribute nothing new to this question, although they contain the final version of the draft article 8bis of the Statute: There is, especially, the discussion paper by the Chairman⁷¹, the resolution 6⁷², and the 2009 inter-sessional meeting’s report⁷³.

⁶⁷ 212 UNTS 2861.

⁶⁸ FN 66.

⁶⁹ ICC-ASP/6/SWGCA/INF.1.

⁷⁰ Contained in Annex III, (FN 69) p. 20.

⁷¹ ICC-ASP/7/SWGCA/INF.1.

⁷² ICC-ASP/8/Res.6.

⁷³ ICC-ASP/8/INF.2; not containing any further discussion of the concept “threat”.

As this documentation shows, the central question of whether the *threat of armed force* is included in the notion of *aggression*, although several times marginally mentioned, has not been discussed adequately to its important meaning.

The reasons therefore clearly lie in the political impossibility to openly have such a discussion with foresight of bringing this issue into being in an official definition of aggression.

This does not mean, that it would not have been brought into being such a definition, including such issue, tacitly. In any rate, the guideline given through the relevant contents of the UN-Charter as discussed above under Section I of this work, did not at all allow the Assembly to deviate from it, even more as such a deviation would, for being functional, have needed an expressive determination of itself, which, as shown, has not happened.

Quod erat demonstrandum.

V. The relevant impact of the concept of the crime of aggression after article 8bis of the Statute

As shown above, the notion act of aggression in article 8bis para. 2 of the Statute connotationally includes, by requiring the use of armed force, the threat of such armed force.

In doing so, article 8bis para. 1 of the Statute sets forth that not every threat of armed force fulfils the crime of aggression; but, only such a threat, which *by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.*

When, e. g., a policeman of a member state of the Statute (on demand of its interior minister) threatens an individual of armed force, if the latter would not commit a bank robbery and let the haul to him, no one would see that crime fulfilled, because such a policeman's conduct would be individually initiated, and the international community here can rely on the member's authorities that they will punish and disable such policeman and minister. Here, neither the required *gravity* nor such *scale*, of the threatened armed force, is existent.

Completely different from that case would it be, e. g., if the threatening of armed force (in case of, lawfully not at all punishable because incompatible with Human Rights, disobedience) stems directly from the government of that member state and aims at a group of individuals, foreigners or citizens, which is in special, human rights relevant, need of help by that government; when the group is of a number that lets be afraid of their harmful treatment would impact on international security, because the human rights against which such threatening happens, are of graver importance.

Because in such a threat of armed force by a government and incompatible with graver human rights, can be seen an act (of aggression) which is *in another manner inconsistent with the Charter of the United Nations* (article 8bis para. 2 of the Statute) due to its systematic violation of human rights. And, moreover, in such a case the *character* of the threat, aiming at an especially vulnerable group, as well as its *gravity*, due to the involvement of human rights, and its *scale*, because of the great number of concerned people, are eligible for fulfilling the crime.

Arthur H. Lambauer