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

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Abstract
The International Criminal Court (ICC) recently celebrated the 10th year anniversary of the signing of its founding treaty, the Rome Statute. The Court is up and running, yet some aspects of substantive law, which could not be agreed upon in Rome or thereafter, continue to pre-occupy many minds. This article concerns the pre-conditions to the exercise of jurisdiction of the ICC with regard to the crime of aggression. As is well known, the ICC has jurisdiction over the crime of aggression, yet it cannot exercise said jurisdiction until the crime of aggression has been defined and the conditions for the Court to exercise jurisdiction with respect to said crime have been set. It is this latter part that will be discussed thoroughly in the present article. This aspect of the crime of aggression is highly contentious because it encompasses both aspects of power politics involving the use of force and the UN Security Council, and the rule of law embodied in the ICC. It is at the crossroads of jus ad bellum and international criminal law, touching on both and in need of fitting into both legal frameworks. The Security Council has the competence to determine the existence of an act of aggression, the ICC has the competence to determine the existence of a crime of aggression, and there is widespread consensus that a crime of aggression must include an act of aggression. This article was written in order to further stimulate informed discussion among a wide range of stakeholders involved in the negotiations on the crime of aggression. At the same time, it aims to provide a compromise solution and explains why it is essential to find a concrete agreement which would find overall support at the upcoming Review Conference of the ICC.

Keywords
Crime of Aggression; pre-conditions to the exercise of jurisdiction; Special Working Group on the Crime of Aggression; Review Conference; International Criminal Court; Security Council

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1. The ‘Exclusivity Thesis’ and its Merits

The main argument of Security Council involvement in the pre-conditions to the exercise of jurisdiction of the ICC over the crime of aggression stems from an interpretation of Article 39 of the UN Charter. It is mainly the permanent members of the Security Council (P5) that have advocated that Article 39 entails the exclusive competence for the Security Council to determine whether an act of aggression has been committed. Their argument is corroborated by the fact that the Charter mentions aggression solely within the ambit of Security Council powers.¹ Supporters of this approach also argue that such an interpretation is in conformity with Article 5 (2) of the Rome Statute, which explicitly requires conformity with the UN Charter with regard to the definition and the exercise of jurisdiction. Furthermore, a strong involvement of the Security Council would ensure that the assessment of this important aspect of *jus ad bellum* is not unnecessarily fragmented. It could be an appropriate affirmation of the Security Council’s primary role to determine whether an act of aggression has been committed. Reading Article 39 closely, it becomes clear that it does confer a power on the Security Council; however, exclusivity cannot necessarily be inferred from it without an interpretation of the Charter as a whole.² Article 24 speaks of the Security Council’s “*primary* responsibility for the maintenance of international peace and security”.³ ‘Primary’ insinuates that there is also a secondary responsibility, hence contravening the argument of exclusivity. Furthermore, even though this relates to the responsibility only, it indirectly also relates to the power to determine whether an act of aggression has been committed as this is one of the pre-conditions for exercising this responsibility by way of enforcement powers.⁴ Practice corroborates this interpretation of the Charter. While in some instances practice has even contradicted the text of the Charter thereby *de facto* amending it, with regard to the determination of an act of aggression, the practice does not support the Security Council’s exclusivity thesis. The Security Council but also the General Assembly and the International Court of Justice (ICJ) have made

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¹ This is the only exception being Art. 1 (1), which stipulates that the suppression of acts of aggression is one of the purposes of the United Nations. It could be inferred from this that being a purpose of the entire UN, determinations of aggression are not limited to the Security Council.
² For many excellent interpretation commentaries on this issue see Chapters 11-15 in M. Politi & G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (2004).
³ Emphasis added.
⁵ E.g. the accepted usage of Art. 27 (3) where the P5 do not have to vote in the affirmative but can also abstain, see Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16, at 22.