

CONCEPTUALIZING AGGRESSION

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The special working group tasked by the International Criminal Court's Assembly of States Parties to define the supreme international crime, the crime of aggression, has produced a breakthrough draft definition. This paper analyzes the key concepts that make up the emerging definition of the crime of aggression by developing and applying a future-oriented methodology that brings together scenario planning and grounded theory. It proposes modifications and interpretations of the constituent concepts of the crime of aggression intended to make the definition sociologically relevant today and in the foreseeable future.

INTRODUCTION

The crime of aggression—individual responsibility for illegal war—is one of the core international crimes.¹ The Nuremberg Tribunal called aggression “the supreme international crime.”² The judges reasoned that it contained within it the accumulated evil of the entire war.³ Aggression has

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1. See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW 246-59 (2001) (including the crime of aggression as one of the major international crimes).

2. Judgment of the International Military Tribunal for the Trial of German Major War Criminals 421 (1946) [hereinafter Nuremberg Judgment].

3. *Id.* (“War is essentially an evil thing. . . . To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”). The IMT found twelve defendants guilty of the crime against peace. *Id.* at 485-528. The International Military Tribunal for the Far East in Tokyo convicted twenty-four defendants of aggression. Judgment of the International Military Tribunal for the Far East, reproduced in 103 THE TOKYO MAJOR WAR CRIMES TRIAL: THE JUDGMENT, SEPARATE OPINION, PROCEEDINGS IN CHAMBERS, APPEALS AND REVIEWS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 49,773-49, 851 (R. John Pritchard ed., 1998).

also been the most difficult international crime to define.⁴ It is included in the International Criminal Court Statute along with Genocide, Crimes Against Humanity, and War Crimes, but it is the only one without a definition. Without a definition, it cannot be prosecuted. This article examines the current definitional project from the perspective of a participant-observer. It wrestles with the imperatives of fidelity to the past and preparedness for the future, certainty and flexibility, and the possible versus the desirable, which pervade the activity of lawmaking generally.

The crime of aggression is exceptionally difficult to define because it is intertwined with a number of unresolved historical debates within the field of international law, such as the distinction between a just and an unjust war, the possibility of holding individuals responsible for collective acts of political violence,⁵ and the appropriate relationship of judicial to political institutions—such as the International Criminal Court (ICC) and the UN Security Council—in the international order.⁶ Furthermore, the definition has political and military repercussions for states and, as a result, their negotiation positions tend to reflect their strategic interests, which are regularly in competition. Finally, legal scholars and diplomats, wounded by repeated setbacks, question the wisdom of the overall project.⁷

Proponents of the definitional project anticipate that an implemented crime will discourage political and military leaders from using armed force as a strategy because it may jeopardize them personally.⁸ Legal scholar Mark Drumbl argues that a definition will carry with it an important expressive function.⁹ Former Nuremberg Prosecutor Benjamin Ferencz warns that not implementing the crime at this stage is regressive and that it

4. See Noah Weisbord, *Prosecuting Aggression*, 49 HARV. INT'L L.J. 161, 168 (2008) (engaging in a brief historical account of the development of the crime of aggression).

5. See generally HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (Penguin Books 1994) (1965).

6. See generally Carrie 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 CRIM. L. REV. 277 (2007) (discussing the relationship between the International Criminal Court and the UN Security Council).

7. See, e.g., Matthias Schuster, *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword*, 14 CRIM. L.F. 1 (2003) (discussing the difficulties of defining aggression and questioning the wisdom of attempting to do so).

8. See generally Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001) (discussing how criminal accusations jeopardize the political objectives of those who would use force to realize their ambitions).

9. Mark A. Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains?*, 41 CASE W. RES. J. INT'L L. 291, 291 (2009).

will send a dangerous message: that international aggression is not blameworthy.¹⁰

Some opponents, on the other hand, argue that national security is not an area where international law is useful or desirable.¹¹ The risk, they warn, is that criminal prosecution will increase political tensions, harden positions, and undermine alternative avenues to achieving peace and security, such as negotiated solutions.¹² Others, concerned for the integrity of the Westphalian system of sovereign states, reject the notion of individual responsibility in international law altogether.¹³

There is little relating to the transnational use of force that is uncontroversial. Almost any set of norms or concepts that we might apply to these questions could be debated or problematized by philosophic or theoretical argument. My purpose in this article is not to engage in that normative debate, which I may take up elsewhere, because I see it as a potential distraction from the concrete and immediate task of drafting this definition. Rather, I want to take as given certain goals and objectives that I think are shared by the majority of the participants in this debate and, from this basis, to translate these agreed premises into an operationalizable process that will generate a definition of aggression that best fits with those goals. The premise of the majority of the participants, stated broadly, is that an implemented definition will advance the goals of peace and justice set out in the preamble to the Rome Statute that established the ICC.

10. See Benjamin B. Ferencz, *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT'L L. 281, 290 (2009) (arguing that failing once again to define the crime of aggression will effectively provide aggressors a renewed mandate to initiate and wage illegal wars). See also LARRY MAY, *AGGRESSION AND CRIMES AGAINST PEACE* 319-41 (2008) (summarizing the broad arguments for and against criminal trials for aggression).

11. E.g., Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539 (2002) (concluding that Article 51 of the UN Charter, which limits the use of force in self-defense, has been so frequently violated by states that it cannot survive as a guide to United States policy-makers in the war on terrorism); Michael J. Glennon, *How War Left the Law Behind*, N.Y. TIMES, Nov. 21, 2002, at A37 (arguing that repeated transgressions of the prohibition on the use of force have destroyed that maxim of international law). See also Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005) (using the demise of the prohibition on the use of force to demonstrate his comprehensive theory of desuetude); Michael J. Glennon, *Terrorism and the Limits of Law*, WILSON Q., Spring 2002, at 12 (noting the pitfalls of strict adherence to abstract legal constructs and the need to balance law and legal theory with practical reality).

12. Andrew Natsios, "Waltz With Bashir: Why the Arrest Warrant Against Sudan's President Will Serve Neither Peace nor Justice," FOREIGN AFF., Mar. 23, 2009, <http://www.foreignaffairs.com/articles/64904/andrew-natsios/waltz-with-bashir?page=show> (last visited Oct. 29, 2009).

13. The United States has taken this position as one basis for its refusal to become a state party to the ICC. Stuart W. Risch, *Hostile Outsider of Influential Insider? The United States and the International Criminal Court*, ARMY LAW., May 2009, at 61, 76.

My project, therefore, considers the manner in which those involved in drafting the definition of the crime of aggression go about the task of conceptualizing the notion. Specifically, I am interested in suggesting techniques to aid these drafters in more clearly understanding, specifying, and operationalizing their underlying normative and conceptual commitments. In so doing, I aim to help the process of drafting the definition to converge upon and best fit with, in a clear and rigorous fashion, the sociological and geopolitical phenomena that the participants hope it will address.

This research explores the definition of the crime of aggression along three dimensions. The first is an exploration of the definition as times change and we move from past to future wars. The second dimension engages with the challenge of reaching an actual agreement in a context of frequently countervailing political and analytic (or academic) demands. Here, I am reminded of the joke about the economist who questions her colleague's proposal: "sure, it'll work in practice, but will it work in theory?" The third dimension, which relates closely to the second, is the challenge, when conceptualizing aggression, of moving seamlessly from the concrete to the abstract and vice versa. This is a perennial challenge in law with important implications for this project.

This article proceeds as follows. It introduces two methodologies that are intended to supplement the current negotiation process and thereby help correct some of the weaknesses that, I argue, have undermined the substantive definition (Part I). One of the methodologies, scenario planning, relies upon possible future contingencies to critique the current draft. These contingencies are presented in Part II. The article proceeds to unearth and explain the constituent concepts that make up the definition, as understood by the drafters, and tests them against the proposed methodologies (Parts III and IV). The proposed methodologies are not determinate (i.e., more than one outcome is possible), so the product of this analysis is a critique of the current draft, several suggested forward-looking modifications, and an approach to defining the crime of aggression that better accommodates conceptual evolution in a context of rapid social change. The article closes by evaluating the methodologies and proposing avenues for further research.

International lawmakers are closer to a negotiated definition today than at any time since the Nuremberg Charter was penned. The working group tasked by the ICC's Assembly of States Parties (ASP) to define the

crime of aggression has produced a breakthrough draft definition.¹⁴ The final draft article of the Special Working Group on the Crime of Aggression (SWGCA), as this group is called, is reproduced in the Appendix.

I. METHODOLOGIES

The Special Working Group on the Crime of Aggression built this definition from international legal precedent and customary international law, focusing on achieving consensus on the language of the draft. In a context where legitimacy is gauged by consensus and cooperation, basing an agreement on past agreements proved to be an effective negotiation approach, even as it resulted in certain substantive and analytic weaknesses in the definition. If adopted by the ASP at the ICC's first review conference in 2010, the definition will empower the Hague-based court to judge and punish political and military leaders for planning, preparing, initiating, and executing illegal wars. An adopted definition, moreover, will permeate national criminal law as ICC member states implement it, activating a worldwide network of courts legally bound to hold their own and foreign leaders to account. Completing the crime of aggression is the primary task of the 2010 review conference.

A more analytically coherent approach to drafting the crime might have been to begin from agreed-upon premises and reason through to their definitional implications. This is the primary way that legal scholars and philosophers have analyzed the crime of aggression to date. The philosopher Michael Walzer, author of the seminal 1970s text on just war theory, begins his analysis of the crime of aggression by asking, "what is the specific wrong that constitutes aggression?"¹⁵ The wrong, Walzer reasons, is

to force people to fight and die in defense of the state that protects their common life and the territory on which that common life is lived (it has to be lived somewhere). It is not just the crossing of the border that

14. The Special Working Group on the Crime of Aggression (SWGCA) is open to all states on equal footing, whether or not they have signed and ratified the Rome Statute of the International Criminal Court, and to a limited number of civil society representatives and legal experts. Mr. Christian Wenaweser (Liechtenstein) has chaired the group since 2002 but now that Mr. Wenaweser has been elected president of the Bureau of the Assembly of States Parties as a whole, Prince Ra'ad Zeid Al-Husseini of Jordan will lead the drafting project. The SWGCA completed its last formal meeting in New York City on February 13, 2009, but will meet informally in the run-up to the review conference to consider the elements of the crime and a number of remaining miscellaneous questions. This paper analyzes the final product of the working group, the basis for the definition of the crime.

15. Michael Walzer, *The Crime of Aggressive War*, 6 WASH. U. GLOBAL STUD. L. REV. 635, 635 (2007).

constitutes the wrong but the threat—to the community and its members—that the crossing signifies.¹⁶

The philosopher Larry May recently crafted an ambitious normative justification for the crime of aggression, perhaps the most coherent to date. May, like Walzer, thinks that the mere crossing of a border is not a sufficient normative grounding for the crime of aggression. He suggests instead, “crimes of aggression are deserving of international prosecution when one State undermines the ability of another State to protect human rights.”¹⁷ From this premise, May refutes the traditional understanding of aggression and, more coherently than any before him, justifies his alternative. Likewise, Drumbl bases his normative analysis of the crime of aggression on four interests that the international community hopes to protect by criminalizing aggression: stability, security, human rights, and sovereignty.¹⁸ Reasoning from these interests, he suggests “an expansion in the scope of the crime of aggression, both in terms of the impugned acts as well as in terms of who can be prosecuted.”¹⁹ Drumbl’s work, like Walzer’s and May’s, begins from the normative premises he has selected, but it is remarkable for its sensitivity to the realities of the drafters. Walzer’s, May’s, and Drumbl’s projects each offer important insights about the crime of aggression. Each also requires international lawmakers to agree upon shared premises in order to devise a coherent definition.

The diplomats participating in the drafting project have shied away from the prevailing academic approach, represented by these authors, presumably because they foresee that it will be more difficult to agree upon an explicit normative basis for the definition than upon the wording of the definition itself. Instead, they have opted for what the legal scholar Cass Sunstein calls an “[i]ncompletely [t]heorized [a]greement.”²⁰ According to Sunstein, “when closure cannot be based on relative abstractions, the legal system is often able to reach a degree of closure by focusing on relative particulars.”²¹ The particulars in the SWGCA discussions are the very words of the draft, which can be negotiated and traded by delegations committed to reaching an agreement. Confronted with disagreement on fundamental principle, Sunstein posits, participants in the law sometimes seek agreement on a result and a relatively low-level explanation for it:

16. *Id.*

17. MAY, *supra* note 10, at 3.

18. Drumbl, *supra* note 9, at 306.

19. *Id.* at 294.

20. Cass R. Sunstein, Commentary, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1733 (1995).

21. *Id.* at 1737.

“When they disagree on an abstraction, they move to a level of greater particularity.”²² However, even an incompletely theorized agreement has a normative basis, and the diplomats drafting the definition of the crime of aggression found theirs, at least explicitly, by looking back to legal precedent and customary international law. Implicitly, each delegation’s choice of precedents, and the way that delegation sought to incorporate them into the draft definition reflected, at least in part, its particular interests and ideals.

While the backward-looking method employed by the diplomats as they negotiated the definition of the crime succeeded in bringing the delegations to the brink of an agreement, it also carried with it a number of weaknesses, weaknesses that are not unique to these negotiations. These weaknesses map onto the three previously mentioned dimensions of this article. The first is that, as a direct consequence of the method chosen by the diplomats, the definition of the crime of aggression contains anachronistic concepts that undermine its relevance, and therefore its legitimacy, today. The broader question here is how law grounded in the past can best speak to the future. Second, by building the definition from a hodgepodge of past agreements, the diplomats made analytic and normative coherence a secondary concern. The method may have succeeded in practice in building agreement, but is this agreement defensible as a theory? Third, the method has obscured the political and strategic interests of states in the language of law, making these interests more difficult to discern and balance. Finally, the incompletely theorized draft definition was built from precedent and custom that sometimes risks, in its generality, violating the principle of legality.²³ The tension between the abstract and the concrete that pervades all lawmaking is particularly acute in the field of criminal law, where individual liberty is directly at stake. Meanwhile, as Sunstein demonstrates in *Incompletely Theorized Agreements*, the move from the abstract to the particular and vice versa can be a powerful technique to manage negotiation deadlock and converge upon an agreement.

My position, in its most general terms, is that the legitimacy of the definition of a crime can be built—and squandered—in various ways. This article argues that the definition of the crime of aggression should be

22. *Id.* at 1736.

23. The definition of a crime must be specific enough to forewarn potential perpetrators of the distinction between permissible and prohibited behavior. Article 22(2) of the Rome Statute states, in relevant part, that “[i]n case of ambiguity, the definition [of a crime] shall be interpreted in favour [*sic*] of the person being investigated, prosecuted or convicted.” Rome Statute of the International Criminal Court art. 22(2), July 17, 1998, 2187 U.N.T.S. 104.

forward- as well as backward-looking. A backward-looking definition that fails to regulate important forms of aggression as they emerge is fated to become irrelevant. A definition that does not fit the sociological phenomenon it seeks to regulate is, and will be perceived to be, unjust. These may not seem like controversial claims but, as this article demonstrates, they have transformative implications for the substantive definition of the crime of aggression. Traces of a sociologically sensitive and forward-looking approach are already present in the negotiations and this article seeks to build upon and systematize them. My solution does not resolve the tensions between past commitments and future contingencies, certainty and flexibility, and the possible and the desirable, but it represents, in my mind, a realistic improvement upon the current approach.

In order to imagine a forward-looking concept of aggression, this article brings insights from two social science methodologies into the predominantly doctrinal discussion. These methodological approaches are scenario planning²⁴ and the grounded theory methodology of Glaser and Strauss.²⁵ The substantive contribution of this article is to identify outdated concepts in the emerging definition and to consider incremental modifications and interpretations that are more sociologically relevant. The methodological contribution of this article is to begin to flesh out a nascent approach in international lawmaking that is both forward-looking and sociologically sensitive based on the amalgamation of these two methods.

A. Scenario Planning

Scenario planning is a set of methods for “improving the quality of educated guesses” about the future.²⁶ There are many examples of governments and businesses using scenario planning to help decision-makers imagine, anticipate, and prepare for a range of possible futures. Since 1950, the National Intelligence Council of the Central Intelligence Agency has produced intelligence estimates that set out alternative future scenarios and are relied upon by United States policy-makers as they plan

24. *See generally* PHILIP BOBBITT, *TERROR AND CONSENT: THE BATTLE FOR THE TWENTY-FIRST CENTURY* (2008) [hereinafter BOBBITT, *TERROR AND CONSENT*]; PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (2002) [hereinafter BOBBITT, *SHIELD OF ACHILLES*]; CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005); RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* (2004); ROYAL DUTCH SHELL GROUP, *THE SHELL GLOBAL SCENARIOS TO 2025: THE FUTURE BUSINESS ENVIRONMENT: TRENDS, TRADE-OFFS AND CHOICES* (2005) [hereinafter SHELL GLOBAL SCENARIOS].

25. BARNY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* (1967).

26. GILL RINGLAND, *SCENARIO PLANNING* 11 (1998).

for the future.²⁷ The Royal Dutch Shell Company used scenario planning as early as the 1970s to anticipate the rapid fluctuations in oil prices brought on by the formation and actions of OPEC and, in the 1980s, to envisage the collapse of the Soviet Union.²⁸ The Levi-Strauss clothing company uses a scenario planning methodology to consider what would happen, for instance, if cotton no longer existed or the cotton industry was deregulated.²⁹ The scenario planning methodology can also be a valuable analytic tool for the SWGCA as it drafts a definition meant to regulate future wars.

The range of practices that make up the scenario planning methodology are best described in contrast to a related future studies methodology: forecasting.³⁰ A scenario can be defined as “an internally consistent view of what the future might turn out to be”—not a forecast, but one possible future outcome.³¹ According to English future studies scholars George Wright and Paul Goodwin, “[t]he forecaster looks for a model of reality containing the necessary and sufficient conditions to pin down the future, the scenario thinker is satisfied to work with only necessary conditions, and is happy to explore the multiple possibilities these lead to.”³² Joseph Nye, former head of the United States National Intelligence Council, describes scenario planning as a tool in estimative intelligence “[t]o help policymakers interpret the available facts, to suggest alternative patterns that available facts might fit, [and] to provide informed assessments of the range and likelihood of possible outcomes.”³³

Scenario planners use an array of methods to imagine and refine possible futures. An example of an influential procedural tool used by scenario planners is the Delphi technique, developed by the RAND Corporation in the 1950s, a corporation originally established to research new weapons technology.³⁴ Researchers employing the Delphi technique

27. See Joseph S. Nye Jr., *Peering into the Future*, 73 FOREIGN AFF. 82, 83 (1994).

28. See RINGLAND, *supra* note 26, at 20-21; see also BOBBITT, SHIELD OF ACHILLES, *supra* note 24, at 718-19.

29. RINGLAND, *supra* note 26, at 30. For more in depth case studies of how scenario planning has been used and by whom, see *id.* at 259.

30. See MICHAEL GODET, CREATING FUTURES: SCENARIO PLANNING AS A STRATEGIC MANAGEMENT TOOL 2 (2d ed. 2006) (“Future studies, or foresight as *la prospective* is usually translated, involves anticipation (pre- or pro-activity) to clarify present actions in light of possible or desirable futures.”).

31. MICHAEL E. PORTER, COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE 446 (1985).

32. Kees van der Heijden, *Scenario Planning: Scaffolding Disorganized Ideas About the Future*, in FORECASTING WITH JUDGMENT 39, 50 (George Wright & Paul Goodwin eds., 1998).

33. Nye, *supra* note 27, at 83.

34. The key innovators were Olaf Helmer, Norman Dalkey, and Nicholas Rescher.

ask individual experts to answer successive questionnaires about the future and provide their reasoning. Between rounds of questionnaires, the researchers summarize the answers and reasons of the experts in a single document and give the summary back to the experts to consider. The experts are encouraged to revise their answers between rounds and the expectation is that they will eventually converge on the best estimates.³⁵ Shell and the Stanford Research Institute (SRI) rely heavily on methods from the Pierre Wack Intuitive Logics School, which emphasizes the creation of “a coherent and credible set of stories of the future as a ‘wind tunnel’ for testing business plans or projects.”³⁶ Scenario planning methods may be complex or simple.

In this paper, a simple scenario planning method will be used that draws on the forecasts of experts on war, leadership, and organizations as a wind tunnel to test the viability of the emerging SWGCA definition of aggression. War is changing and the SWGCA has not adequately accounted for this fact. Part II of this paper sets out key trajectories that are likely to continue into the foreseeable future. A basic grounded theory methodology, described in the next section, will be employed as a basis for modifying existing concepts or developing new ones that better fit the range of possible futures. Application of scenario planning to the field of law will also be used as a way to test the possibilities and limitations of the scenario planning method.

B. Grounded Theory

The grounded theory methodology of Barney Glaser and Anselm Strauss is a response to the logico-deductive method of theory generation in social research whereby concepts and their relation are devised from *a priori* assumptions via armchair speculation.³⁷ Glaser and Strauss felt that these “armchair” theories did not optimally fit the facts or work. By fit, they meant, “that the categories must be readily (not forcibly) applicable to and indicated by the data under study.”³⁸ By work, they meant that “[the categories] must be meaningfully relevant to and be able to explain the behavior under study.”³⁹ Glaser and Strauss charged many “great men” theories in social research—the theories of Weber, Durkheim, Simmel, and Marx, among others—with this defect, which they believed had

35. RINGLAND, *supra* note 26, at 19. See also Gene Rowe & George Wright, *The Delphi Technique as a Forecasting Tool: Issues and Analysis*, 15 INT’L J. FORECASTING 351 (1999).

36. RINGLAND, *supra* note 26, at 27.

37. GLASER & STRAUSS, *supra* note 25, at viii, 31.

38. *Id.* at 3.

39. *Id.*

undermined the field of sociology by turning it into a mere repository of great men theories with students relegated to technicians testing these theories in small ways rather than devising their own.⁴⁰ In order to put the field of sociology back on track, Glaser and Strauss proposed a method for generating “grounded theory,” whereby concepts are systematically generated, tested, and modified from and against new social science data.⁴¹ Their approach, created in the 1960s as they studied how nurses care for dying patients, became one of the most widely used qualitative methods in social research. The qualitative methods of Glaser and Strauss, in spite of their internalization in other areas of social research, have not yet penetrated the field of law.

Strauss and Corbin define theory as “a set of well-developed categories that are systematically interrelated through statements of relationship to form a theoretical framework that explains some social phenomenon.”⁴² Glaser and Strauss describe the elements of a theory as “first, conceptual categories and their conceptual properties; and second, hypotheses or generalized relations among the categories and their properties.”⁴³ “A category stands by itself as a conceptual element of a theory. A property, in turn, is a conceptual aspect or element of a category.”⁴⁴ The basis of Glaser and Strauss’s grounded theory methodology is that theory generation is a process and that a theory is “an ever-developing entity,” never a “perfected product” frozen in time.⁴⁵ In this way, grounded theory generation is similar to the common law: both systems continually test conceptual formulations against new contingencies and modify these formulations to fit the facts.

The process of grounded theory generation relies on an inductive-deductive loop which Glaser and Strauss call “the constant comparative method of qualitative analysis.”⁴⁶ Rather than devising categories, properties and their relations from *a priori* assumptions, grounded theory generation begins from the data related to a research situation—the treatment of dying patients, social stigma, or the use of military force, for example. Within the research situation,

40. *Id.* at 10.

41. Glaser and Strauss devised their method of theory generation from systematically obtained data in the 1960s while studying how nurses care for dying patients. See generally BARNEY G. GLASER AND ANSELM L. STRAUSS, AWARENESS OF DYING (1965).

42. ANSELM STRAUSS & JULIET CORBIN, BASICS OF QUALITATIVE RESEARCH: GROUNDED THEORY PROCEDURES AND TECHNIQUES 22 (2d ed. 1998).

43. GLASER & STRAUSS, *supra* note 25, at 35.

44. *Id.* at 36.

45. *Id.* at 32.

46. *Id.* at 101.

[t]he constant comparing of many groups draws the sociologist's attention to their many similarities and differences. Considering these leads him to generate abstract categories and their properties, which, since they emerge from the data, will clearly be important to a theory explaining the kind of behavior under observation.⁴⁷

These emergent categories are compared with new data and modified to best explain the behavior under observation. The newly refined categories serve to guide the theorist's data collection efforts by influencing his or her theoretical sampling.⁴⁸ According to Glaser and Strauss, "[l]ower level categories emerge rather quickly during the early phases of data collection," while "[h]igher level, overriding and integrating, conceptualizations—and the properties that elaborate them—tend to come later during the joint collection, coding and analysis of the data."⁴⁹ An important point about grounded theory for the current definitional project is that new data need not incessantly expand a nascent theory. Rather, new data refines or changes that theory so that it better fits and works.

The process of regulating human social interactions through law, lawmaking, is both similar and different from the process of social theory generation, theorizing. The principal difference between lawmaking and theorizing is that, while social theorists deal with what *is* (explanation, prediction, and control), those regulating social interaction through law have the added responsibility of incorporating an *ought*—or prescriptive—element into their constructs. However, the *ought* element of a law is only intelligible in relation to the social theory upon which it rests. This social theory as an element of a law is assembled from concepts and their relations, and is intended to reflect reality as authentically as possible—in the words of Glaser and Strauss, to fit and to work. In particular, a rule regulating human social interactions, like a social theory, must be assembled from concepts that fit the facts and relate in a true-to-life way. A rule that requires individuals or groups to behave in unrealistic ways is experienced as unjust. Therefore, a legal rule can be thought of as a social theory—conceptual categories, conceptual properties, and generalized relations among the categories and their properties—that includes a prescription. This understanding of the character of rules invites legal scholars to bring methodological insights from social theorists, such as Glaser and Strauss, into the field of law.

47. *Id.* at 36.

48. *Id.* at 45 (“Theoretical sampling is the process of data collection for generating theory whereby the analyst jointly collects, codes, and analyzes his data and decides what data to collect next and where to find them, in order to develop his theory as it emerges.”).

49. *Id.* at 36.

The following parts of this paper test this understanding of rules as social theories with an *ought* element by applying aspects of Glaser and Strauss's grounded theory methodology to the emerging definition of the crime of aggression. The focus is the social theory element. In particular, the grounded theory methodology will be the engine used to generate conceptual categories, properties, and their relations from new data on the character of armed conflict under possible futures. It is in this way that scenario planning and grounded theory methodologies will be applied in conjunction. Scenario planning will supply the data, and grounded theory will provide the analytic approach to organize this data. Within the lawmaking process, the contours of the rule will adhere to the agreement the negotiators are able to reach on its concepts, properties, and relations. Beyond generating forward-looking conceptual categories (and properties and relations) that can serve as constituent elements of the crime of aggression, this article will begin to evaluate the possibilities and limitations of the grounded theory approach in the field of law.

Part II identifies key political-military patterns in the armed conflicts that occurred between 1989 and the present and extrapolates to future scenarios. In subsequent parts of this article, these scenarios are used, in conjunction with grounded theory methodology, as a wind tunnel to test and refine the conceptual categories, properties, and relations of the SWGCA definition of aggression. This is not, as mentioned before, a determinate method that generates a fixed outcome. Rather, the following analysis demonstrates a process designed to bring better clarity than what currently exists about the kinds of phenomena that the drafters seek to include in the definition. As I hope to show, the results of this process are both interesting and novel.

II. FUTURE AGGRESSION SCENARIOS

War is changing. Independent groups other than the state are increasingly its perpetrators. These groups seem to be moving away from the bureaucratic organizational form and towards more strategic organizational arrangements. They are supplementing armed force with new unarmed methods that are ever more destructive to life and property. States drafting and voting on the definition of the crime of aggression should have the opportunity to consider whether to reflect these changes in the core concepts that make up the definition of the crime. In order to encourage this discussion, this part sets out and extrapolates from three emerging scenarios: first, war will become less state-centric and more decentralized; second, war-making organizations will restructure; and third, the methods of warfare will change so that they can no longer be justifiably

limited conceptually to the use of armed force. The following section constitutes the thick description upon which my suggested modifications to and interpretations of the draft definition of aggression will be based.⁵⁰

A. War is becoming less state-centric and more decentralized

In a seminal article in the *Marine Corps Gazette*, a team of American analysts led by William S. Lind set out a generational theory that describes warfare as heading towards an increasingly decentralized form and resulting in the nation state's loss of its monopoly on combat forces.⁵¹ Lind and his team, writing as the Soviet Union was collapsing, believed that they were entering a new generation of warfare, which they called the Fourth Generation. "A premise of 4GW," according to a 2007 posting on *In Defense and the National Interest*, "is that the world itself has changed, so that terrorism and guerilla warfare—and other elusive techniques that are still being invented—are now ready to move to center stage."⁵²

The heralds of Fourth Generation warfare are not alone in their forecasts. Military historian Martin van Creveld⁵³ and United States counterterrorism expert John Robb⁵⁴ describe the diminishing importance of conventional war and forecast the future irrelevance of state-on-state warfare. According to Robb, "Wars between states are now, for all intents and purposes, obsolete."⁵⁵ Robb predicts that "[t]he real threat, as seen in the rapid rise in global terrorism over the past five years, is that this threat isn't another state but rather the superempowered group . . . and as the leverage provided by technology increases, this threshold will finally reach its culmination—with the ability of one man to declare war on the world

50. If the suggested methodology were used in the context of a multilateral international negotiation, the participants would propose scenarios to be regulated and make these an integral part of their discussion. Scenarios generating widespread support would serve as the initial basis of the definition. This has already been done, if only occasionally, in the negotiations of the SWGCA.

51. William S. Lind, Colonel Keith Nightengale, Captain John F. Schmitt, Colonel Joseph W. Sutton, & Lieutenant Colonel Gary I. Wilson, *The Changing Face of War: Into the Fourth Generation*, *MARINE CORPS GAZETTE*, Oct. 1989, at 22. The first generation was characterized by tactics of line and column and culminated in the massed-manpower armies of the Napoleonic era. The second generation used the industrial society to mass-produce firepower and encourage tactics such as indirect fire covering movement. In the third generation, rather than closing with the enemy, successful commanders used mechanized forces to bypass and collapse the enemy's formations (i.e., blitzkrieg). See also THOMAS X. HAMMES, *THE SLING AND THE STONE: WAR IN THE 21ST CENTURY* 16-31 (2004).

52. Defense and the National Interest, *Is 4GW Simply Using Military Force in New Ways?* (Nov. 25, 2007), <http://www.d-n-i.net/dni/strategy-and-force-employment/fourth-generation-warfare-articles/>.

53. See MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR 10-18* (1991).

54. JOHN ROBB, *BRAVE NEW WAR: THE NEXT STATE OF TERRORISM AND THE END OF GLOBALIZATION* 7 (2007).

55. *Id.*

*and win.*⁵⁶ In 2007, T.X. Hammes, a retired colonel in the United States Marine Corps, corroborated Robb's findings: "there have been major changes in who fights wars. The trend has been and continues to be downward from nation-states using huge, uniformed armies to small groups of like-minded people with no formal organization who simply choose to fight."⁵⁷ That same year, a Marine Corps seminar produced a draft doctrinal manual, in which the authors warned that, "[o]ften, Fourth Generation opponents' strategic centers of gravity are intangible."⁵⁸ Unlike Robb, who argues that conventional war is obsolete, the authors of the draft manual add, "[l]ike always, the old generations of war continue to exist even as new ones evolve."⁵⁹

Philip Bobbitt's analysis agrees with Robb and the Marine Corps seminar that war is changing and that "asymmetric warfare will become the norm when great powers are confronted."⁶⁰ However, Bobbitt forecasts that the state will remain the center of gravity in geopolitics: "[t]he State has undergone many transformations in the constitutional order—the basis for the state's legitimacy—in the ensuing five centuries. Now it is about to undergo another."⁶¹ Bobbitt asks, "[c]ould al Qaeda be an example of this new form?"⁶² Bobbitt's dynamic conception of the state may offer diplomats drafting the definition of the crime and jurists interpreting it a way to include acts by al Qaeda-like groups within its ambit.

Despite their different perspectives on the future of the state, these forecasters point in a similar direction—most fundamentally, towards the decentralization of armed conflict—that few experts today dispute.⁶³ If accurate, the literature on the transformation of war has important repercussions on the way aggression should be conceptualized and regulated. Meanwhile, the current methods used by the diplomats as they negotiate the definition of aggression, which rely on international legal precedent and customary international law, are incapable of capturing these

56. *Id.* at 7-8.

57. T.X. Hammes, *Fourth Generation Warfare Evolves, Fifth Emerges*, MIL. REV., May-June 2007, at 14, 20.

58. Imperial and Royal (K.u. K.) Austro-Hungarian Marine Corps, *Fourth Generation War*, FMFM 1-A, Draft 4.2, (June 18, 2007) at 6, http://ics.leeds.ac.uk/papers/pmt/exhibits/3007/fmfm_1-a.pdf (last visited Sept. 23, 2009) [hereinafter Marine Seminar].

59. *Id.* at 20.

60. BOBBITT, TERROR AND CONSENT, *supra* note 24, at 146.

61. *Id.* at 126.

62. *Id.*

63. *But see* J. ECHEVARRIA II, STRAT. STUD. INST., *FOURTH GENERATION WAR AND OTHER MYTHS* (2005), available at <http://www.strategicstudiesinstitute.army.mil/Pubs/display.cfm?pubID=632> (providing a dissenting view).

changes. Part III of this paper will analyze the concept of the state/collective act of aggression emerging from the SWGCA and evaluate it in light of the literature on the transformation of war.

B. War-making organizations are restructuring

Bureaucracy is increasingly limited as an organizational model for strategic warfare. This shift away from bureaucracy is predominantly a reaction to three problems faced by this organizational form: wasted intelligence, failure to control the formal-informal split within the organization, and the inability to adapt efficiently when organizational change is required.⁶⁴ In the context of modern warfare, bureaucracies present two additional problems. First, they are an easy target. It is less complex to attack a government, which has permanent institutions and infrastructure, than the hundreds of mercurial cells that make up al Qaeda. Second, though bureaucracies are effective at coordinating massive uses of force, they are not particularly resilient as an organizational form. Specialization of function increases productive output, but it also makes the entire system vulnerable when a single part is disabled. In response to these weaknesses, war-making organizations are restructuring.

Rutgers management professor Charles Heckscher forecasts that organizations *in general* are undergoing a long-term shift that amounts to an evolutionary development beyond bureaucracy.⁶⁵ Heckscher and Donnellon *et al.* describe a pattern of empirical developments that characterize the “post-bureaucratic” organization,⁶⁶ including increased member participation in decision-making, cross-functional teams breaking the walls of functional organizations, parallel organizations operating on the basis of multi-level consensus, information technology facilitating dense networks of communication, organizational development practices building the decision-making capacity of peer groups, opening of previously closed inter-organizational boundaries, sharing of information

64. Charles Heckscher, *Defining the Post-Bureaucratic Type*, in THE POST-BUREAUCRATIC ORGANIZATION: NEW PERSPECTIVES ON ORGANIZATIONAL CHANGE 14, 20-24 (Charles Heckscher & Anne Donnellon eds., 1994).

65. *Id.* at 14.

66. “[A]n organic form of organization . . . [is] more team-based, more flexible, and less rule-bound than the traditional ‘mechanical’ hierarchy.” Charles Heckscher & Lynda M. Applegate, *Introduction*, in THE POST-BUREAUCRATIC ORGANIZATION: NEW PERSPECTIVES ON ORGANIZATIONAL CHANGE 2 (Charles Heckscher & Anne Donnellon eds. 1994). See also 12 Manage, *Adjusting Organization Forms to Appropriate Conditions: Explanation of Theory of Organic and Mechanistic Organizations of Burns and Stalker*, http://www.12manage.com/methods_burns_mechanistic_organic_systems.html (last visited Sept. 23, 2009) (comparing the post-bureaucratic and the organic organizational forms).

previously reserved for top officials, negotiated over top-down solutions, and new roles such as task force leader, change agent, coordinator, boundary-basher.⁶⁷ A key characteristic of this shift is that the “post-bureaucratic organization” relies on the use of influence rather than power.⁶⁸ “The influence hierarchy is not embedded in permanent offices,” observes Heckscher, “and is to a far greater degree than bureaucracy based on the consent of and the perceptions of other members of the organization.”⁶⁹ The central role of influence rather than formal authority in post-bureaucratic organizations has important implications for the definition of the crime of aggression that will be set out in Part IV of this paper.

These post-bureaucratic developments correspond to a change in the concept of leadership so that formal position and effective control over the action of subordinates, the key criteria in international criminal law, are no longer the most relevant properties of the category. What is becoming increasingly relevant to the concept of leadership is, rather, an individual’s centrality within a social network and his or her influence upon that network or group. According to Professors Daniel Brass and Marlene Burkhardt, specialists in organizational behavior, “a common finding in social network studies is that central positions are often associated with power and influence.”⁷⁰ Centrality is most often defined in terms of degree (“the number of direct ties one has with others”),⁷¹ betweenness (“falls on the shortest path between pairs of other points”),⁷² and closeness (“distances among points”)⁷³ within a social network. Influence, according to Professor Joseph Nye, rests on the combination of hard power (carrots and sticks) and soft power (attraction and cooption).⁷⁴ This article will

67. Charles Heckscher & Lynda M. Applegate, *Introduction*, in *THE POST-BUREAUCRATIC ORGANIZATION: NEW PERSPECTIVES ON ORGANIZATIONAL CHANGE 2-3* (Charles Heckscher & Anne Donnellon eds. 1994).

68. *Id.*

69. *Id.*

70. Daniel J. Brass & Marlene E. Burkhardt, *Centrality and Power in Organizations*, in *NETWORKS AND ORGANIZATIONS* 191, 191 (Nitin Nohria & Robert G. Eccles eds., 1992).

71. Michael D. Irwing & Holly L. Hughes, *Centrality and the Structure of the Urban Interaction: Measures, Concepts, and Applications*, 71 *SOC. FORCES* 17, 19 (1992).

72. Linton C. Freeman, *A Set of Measures of Centrality Based on Betweenness*, 40 *SOCIOMETRY* 35, 35 (1977) (citing Alex Bavelas, *A Mathematical Model for Group Structure*, 7 *APPLIED ANTHROPOLOGY* 16, 16 (1948)).

73. *Id.*

74. JOSEPH S. NYE JR., *THE POWERS TO LEAD* 31 (2008) (“Soft power is not merely the same as influence, though it is one source of influence. After all, influence can also rest on the hard power of threats or payments. Nor is soft power just persuasion or the ability to move people by argument,

consider whether the SWGCA definition of aggression can reach beyond formal authority to capture both aspects of influence, which have been operationalized in numerous studies and would not be difficult to employ for the purpose of criminal law by the ASP or the Court.⁷⁵

C. The methods of warfare are changing

The use of armed force may still be the primary method of warfare, but this is changing. Invasion, bombardment, blockade, and the sending or directing of proxy forces into an enemy state are the methods of warfare that form the basis of the SWGCA concept of aggression. These traditional methods are increasingly being supplemented by a cluster of destructive methods, called “systems disruption,” that do not rely on arms.⁷⁶

John Robb, the former United States counterterrorism operation planner and commander who coined the term, describes systems disruption as the sabotage of critical systems such as electricity, telecommunications, gas, water, or transport, to inflict economic costs on a target state.⁷⁷ Though sabotage is an ancient form of warfare, Robb predicts that it will soon take center stage because of our increased reliance on interdependent networks.⁷⁸ By targeting a vulnerable point in a network and disrupting it by whatever means, armed or unarmed, an aggressor can collapse a system, “amplif[y] the damage of the attack and providing rates of return up to a million times the initial investment (the cost of the attack)”.⁷⁹

In the summer of 2004, Iraq’s global guerillas attacked a southern section of the Iraqi oil pipeline infrastructure (Iraq has over 4300 miles of pipelines). This attack cost the attackers an estimated \$2000 to produce. None of the attackers was caught. The effects of this attack were over \$500 million in lost oil exports.⁸⁰

Systems disruption makes warfare affordable to small groups and even individuals intelligent enough to find a system’s unique vulnerabilities and create a cascade of failure.⁸¹ Robb gives numerous examples of massively damaging systems disruption attacks of which the 2006 attacks on two

though that is an important part of it. It is also the ability to entice and attract. Attraction often leads to acquiescence.”)

75. Linton C. Freeman, *Centrality in Social Networks: Conceptual Clarification*, 1 SOC. NETWORKS 215 (1979).

76. ROBB, *supra* note 54, at 95.

77. *Id.* at 95.

78. *Id.*

79. *Id.* at 98.

80. *Id.* at 99.

81. *Id.* at 100.

Russian Gazprom pipelines carrying natural gas to Georgia is one.⁸² In the midst of harshly cold weather, Gazprom's primary and backup pipelines were destroyed at the same time as a power transmission pylon carrying electricity from Russia to Georgia. The attacks reduced Georgia to a "preindustrial level" for a week.⁸³ Two features of systems disruption attacks are particularly important for drafters and interpreters of the crime of aggression to take into account: first, the low cost and high return of these attacks allows individuals and small groups other than the state to wage war; second, these attacks need not be carried out with armaments.

Cyberwarfare, a method still in its infancy, seems poised to become an important method for aggressive states, small groups, and individuals to disrupt an enemy's essential infrastructure (or services) and cause massive damage. Essential infrastructure and services such as air traffic control, medical files, and defense systems increasingly rely on networks to operate and are vulnerable to attack from inside or out. To date, documented cyberattacks have amounted to a growing nuisance rather than causing significant damage to infrastructure,⁸⁴ but recent attacks hint at vastly destructive future scenarios. Volunteer groups tracking malicious activity on the internet documented attacks against Georgia as early as July 20, 2008, weeks before the Georgian assault on Tskhinvali or the Russian invasion.⁸⁵ Government, media, communications and transportations companies were attacked. The website of Georgian president Mikheil Saakashvili was overwhelmed by a "denial of service attack" whereby a barrage of millions of bogus requests overloaded and shut it down.⁸⁶ The web sites of the Georgian parliament and the National Bank of Georgia were defaced by images of twentieth century dictators interspersed with images of President Saakashvili. The attacks in Georgia targeted websites, but, in 2007, cyberattacks in Estonia briefly interrupted communication with Emergency services.⁸⁷ Hackers who disrupt government web sites today may disrupt or mimic government and military electronic communications tomorrow, turning institutions and infrastructure against an enemy at low cost and with minimal risk to their own safety. If cyberwarfare is wedded to advanced notions of systems disruption, the next

82. *Id.* at 94-95.

83. *Id.*

84. Ethan Zuckerman, *Misunderstanding Cyberwar in Georgia*, REUTERS, Aug. 16, 2008, <http://www.reuters.com/article/reutersEdge/idUSGOR66065320080816>.

85. John Markoff, *Before the Gunfire, Cyberattacks*, N.Y. TIMES, Aug. 13, 2008, at A1, available at <http://www.nytimes.com/2008/08/13/technology/13cyber.html>.

86. *Id.*

87. *Marching off to Cyberwar*, ECONOMIST TECHNOLOGY QUARTERLY, Dec. 6, 2008, at 13, available at http://www.economist.com/sciencetechnology/tq/displayStory.cfm?story_id=12673385.

oil pipeline, electricity grid, or nuclear reactor to be sabotaged may be struck by a hacker, not a bomb.

A key aspect of cyberwar for the concept of aggression is the disaggregated quality of the attacks. In April 2001, a United States Navy spy plane collided with a Chinese jet fighter over the South China Sea, killed the fighter's pilot, and was forced to land on China's Hainan Island. After a diplomatic row, the plane and crew were returned safely to the United States. Following the incident, un-attributable web sites sprang up offering instructions to hackers on how to disable United States government computers.⁸⁸ According to United States officials, the attacks nearly shut down California's electrical grid.⁸⁹ To this day, nobody knows whether the attacks were state-sponsored or grass-roots activism.⁹⁰ As private companies such as the Russian Business Network⁹¹ disseminate more malicious software capable of turning private computers from Azerbaijan to Zimbabwe into unknowing bases from which cyberattacks can be waged, the source of the ensuing attacks will become still more murky and responsibility maddeningly difficult to attribute to a state. In this context, bureaucracy, the paradigmatic organizational model imagined by the drafters of the crime of aggression as they designed the legal mechanism whereby responsibility will be attributed to an individual, is less relevant.

The following parts of this article will test the constituent concepts of the SWGCA definition of the crime of aggression against these scenarios—war is becoming less state-centric, war-making organizations are reorganizing, the methods of warfare are changing—and suggest forward-looking modifications and interpretations. My intention is to shift the discussion to future contingencies. The constituent parts of the definition of the crime of aggression, as understood by the drafters, structure the analysis. They are the state/collective act of aggression and the conceptual link through which an individual is held accountable for that state/collective act.⁹²

88. Michael Reilly, *How Long Before All-out Cyberwar?*, NEW SCIENTIST, Feb. 23, 2008, at 24.

89. *Id.*

90. *Id.*

91. Markoff, *supra* note 85.

92. The jurisdictional trigger that allows the ICC or a member state to initiate an aggression case is part of the SWGCA negotiations. *E.g.*, ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 6th Sess., New York, June 6, 2008, *Report of the Special Working Group on the Crime of Aggression*, Annex II, 6-8, ICC-ASP/6/20/Add.1, available at http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-6-20-Add1-AnnexII-ENG.pdf; Preparatory Commission for the International Criminal Court, New York, July 25, 2002, *Report of the Preparatory Commission for the International Criminal Court: Addendum Part II: Proposals for a Provision on the Crime of*

III. CONCEPTUALIZING THE STATE/COLLECTIVE ACT OF AGGRESSION

The SWGCA has proposed a historic solution to the ancient problem of how to distinguish just from unjust wars.⁹³ The solution was negotiated in the context of a Cold War era General Assembly Resolution (3314) called “Definition of Aggression,” a resolution that delegates have chosen, because of its precedential value, to use as the basis for the state/collective component of the definition of the crime.⁹⁴ The SWGCA selected articles from the 1974 Definition, which pertains to states, and incorporated them into the definition of the crime of aggression, which pertains to individuals. The incorporated articles from the 1974 Definition are now part of the draft definition of the crime of aggression, known in the SWGCA as the State Act of Aggression or simply the State Act.

As a result of the SWGCA’s drafting method, fundamental sub-issues within the ancient debate over just and unjust wars such as the subject of the prohibition, the distinction between aggression and self-defense, and the acts that qualify as aggression are all subsumed in the formal legal debate over the correct way to incorporate this 1974 resolution into the larger crime. In order to understand the concept of aggression that materializes when parts of that definition are incorporated into the draft definition of the crime of aggression and others are left out, it is therefore necessary to understand the provisions of the 1974 Definition and their relationship to each other. Part III undertakes this analysis and tests the resulting concept of aggression that the SWGCA has employed in the

Aggression, 3-4, PCNICC/2002/2/ADD.2, available at http://www.iccnw.org/documents/pcnicc2002_2e.pdf. The jurisdictional trigger is not, however, considered a part of the definition of the crime of aggression.

93. For examples of this literature, see MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (1977); JAMES TURNER JOHNSON, *JUST WAR TRADITION AND THE RESTRAINT OF WAR: A MORAL AND HISTORICAL INQUIRY* (1981); JAMES TURNER JOHNSON, *THE HOLY WAR IDEA IN WESTERN AND ISLAMIC TRADITIONS* (1997); JAMES TURNER JOHNSON, *MORALITY & CONTEMPORARY WARFARE* (1999); TERRY NARDIN ET AL., *TRADITIONS OF INTERNATIONAL ETHICS* (Terry Nardin & David R. Mapel eds., 1992); James F. Childress, *Just-War Theories: The Bases, Interrelations, Priorities, and Functions of Their Criteria*, 39 *THEOLOGICAL STUDIES* 427 (1978); James F. Childress, *Moral Discourses About War in the Early Church*, in *PEACE, POLITICS AND THE PEOPLE OF GOD* 117-34 (Paul Peachy ed., 1986); Sohail H. Hashmi, *Interpreting the Islamic Ethic of War and Peace*, in *THE ETHICS OF WAR AND PEACE: RELIGIOUS AND SECULAR PERSPECTIVES* 146-68 (Terry Nardin ed., 1996); MOHAMMAD TAGHI KAROUBI, *JUST OR UNJUST WAR? INTERNATIONAL LAW AND UNILATERAL USE OF ARMED FORCE BY STATES AT THE TURN OF THE 20TH CENTURY* (2004).

94. G.A. Res. 3314 (XXIX), at 142, U.N. Doc. A/RES/3314 (Dec. 14, 1974) [hereinafter 1974 Resolution]. The term state/collective is used throughout this article to indicate that the collective responsible for an act of aggression need not be a state.

definition of the crime against the future aggression scenarios set out in Part II.

It turns out that the 1974 Definition, as it has been incorporated into the draft definition of the crime, is riddled with anachronistic concepts that undermine its normative relevance today. This is not surprising. The 1974 Definition is a product of Cold War ideas and politics. The armed conflicts at the time of the negotiations—between 1950 and 1974—shaped the discussions of the delegates and the concept of aggression that emerged. The delegates attempted to regulate the dominant forms of armed conflict occurring around them, as well as to ensure that the definition advanced their key political-strategic interests. Interestingly, the scenario planning method was more apparent in these Cold War-era negotiations than it is in the current drafting project. During the Cold War, the competing blocs quite explicitly sought to forecast how each proposal might, under possible futures, impact their political and strategic interests.

Three characteristics of the armed conflicts of the day shaped the 1974 Definition: the political-strategic competition between the Soviet Union and the West for global supremacy; the forms of armed conflict that the delegates sought to regulate, specifically, nuclear war, conventional war for territory, and state-sponsored insurgency; and struggles of peoples for independence from colonial regimes. The negotiations became a Cold War battlefield with words as weapons, arguments as tactics, and the definition of aggression a strategic asset that states vied to control with the aim of one day mobilizing it against their geopolitical rivals. The dominant forms of armed conflict today and in the foreseeable future, however, are different now than they were in 1974, as are the strategic interests shaping the definition of the crime of aggression.

Furthermore, the negotiating positions of delegates and the positions of legal scholars commenting on the definition, such as Benjamin Ferencz and Julius Stone, were conditioned by their understanding of the possibilities and limitations of law, and international law in particular. Specifically, the negotiations over the Definition of Aggression were taking place as the field of international law was undergoing an historic transformation.⁹⁵ According to Harvard Law Professor David Kennedy, “[a]ll of pre-war international law was in disrepute after 1945. The positivists in the United States had been largely isolationist, and the naturalist enthusiasts for the League seemed to have been altogether out of

95. David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT’L L. & POL. 335, 380 (2000).

touch”⁹⁶ The new disciplinary consensus, which was to last until the end of the Cold War, “rejected both naturalism and positivism in favor of a general sensibility influenced by pragmatism, functionalism, American legal realism, and the American legal process school.”⁹⁷ Just as the post-World War II political landscape shaped the 1974 Definition of Aggression, the post-World War II intellectual sensibility left its mark.

This conceptual analysis of the state/collective act of aggression as a component of the crime of aggression will focus on four key properties (also the sub-Parts of Part III): A) the unit to be regulated; B) the primary feature distinguishing aggression and self-defense; C) the acts that qualify as aggression; and D) the Escheresque property of the 1974 Definition, lost in the definition of the crime of aggression. It is this final characteristic of the 1974 Definition, its Escheresque property, that makes any modification of it for the purpose of incorporating it into the definition of the crime of aggression so delicate.

In particular, as the 1974 Definition was being negotiated, discrepancies between American and Soviet concepts of aggression were managed using a drafting technique that can be characterized as Escheresque because of its analogy to the *trompe-l’oeil* sketches of the Dutch artist M.C. Escher. Just as removing one element from an Escher sketch can fundamentally change its character, removing articles from the 1974 Definition fundamentally alter the concept of aggression. This is why each sub-Part of the following analysis begins by tracing how the SWGCA incorporation of the 1974 Definition into the definition of the crime of aggression has changed its underlying properties and their relations. The sub-Parts then evaluate the conceptual product against the scenarios set out in Part II and suggest incremental modifications and/or interpretations that make the SWGCA’s state/collective act of aggression, as a component of the draft crime of aggression, more closely tailored to foreseeable acts of aggression poised to emerge.

A. The Unit to Be Regulated

1. Summary of the Argument

The SWGCA has designed a crime that analogizes the state to a weapon wielded by a statesman against another state. The definition of the crime of aggression is more state-centric, in fact, than its parent 1974 Definition, as this sub-part will explain. Today and in the foreseeable

96. *Id.* at 379.

97. *Id.* at 380.

future, however, as Part II forecasts, there are and will be weapons other than the state (as currently conceived) and aggressors besides the statesman that the definition of the crime of aggression fails to capture. This sub-Part argues that the definition of the crime of aggression should be modified and/or interpreted to include them, or risk irrelevance.

2. The 1974 Definition Prior to its Incorporation into the Crime of Aggression

The unit to be regulated in the draft definition of the crime of aggression is fashioned from the 1974 Definition, though it is, in fact, quite different conceptually. The preamble of the 1974 Resolution recalls “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,” and reaffirms “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.” Article 1, which begins like the preamble and many of the articles that follow (i.e., Arts. 3, 6, 7, 8), identifies the fundamental geopolitical unit as the state rather than some alternative such as an individual statesman, the leader of a group, or a people. Thomas and Thomas, legal scholars commenting on the negotiations in the run-up to the 1974 Definition, explain that, “[s]ince the state has been the prime recipient of rights and duties at international law, it is the sovereign state which is usually regarded as the aggressor or the one against whom aggression is committed.”⁹⁸ The explanatory note to Article 1 does not rule out the application of the definition to a group of states such as, presumably, a coalition, a treaty organization, or a union. The concept that comes into view throughout the definition is of states penetrating the territory of other states and undermining their political independence.

This is not the whole story. The Escheresque quality of the 1974 Definition is revealed when considering whether the state is the only political unit subject to the definition. According to Ferencz, the debate as to whether the only entities regulated should be states continued until at least 1971.⁹⁹ Cassin, Debevoise, Kailes, and Thompson, writing at the time, identify the indeterminacy created by the explanatory note attached to Article 1: if the word State is used “without prejudice to questions of recognition,” there is no indication whether the *de facto* or the *de jure*

98. ANN V.W. THOMAS & A.J. THOMAS, JR., THE CONCEPT OF AGGRESSION IN INTERNATIONAL LAW 47 (1972).

99. Benjamin B. Ferencz, *Defining Aggression: Where It Stands and Where It's Going*, 66 AM. J. INT'L L. 491, 498 (1972) [hereinafter Ferencz, 1972].

government is regulated by the definition.¹⁰⁰ The upshot is that a violent insurgent group operating from the bush and claiming to be the legitimate government of a state can argue that it is acting in self-defense to expel a foreign occupier from the capital. Meanwhile, the group in power in the capital can claim it is defending against an (externally supported) insurgency. Article 1 does not resolve the question of which use of force is legitimate and which is not.

Furthermore, two other political units besides the state are contemplated in the 1974 Definition: “armed bands, groups, irregulars or mercenaries,” that, at the behest of a state, “carry out acts of armed force against another state,”¹⁰¹ and peoples under alien domination forcibly deprived of their right to self-determination.¹⁰² Under Article 3(g), armed bands are analogized to a weapon penetrating an enemy state, devoid of volition or responsibility under international law, whose actions are attributable to the state that sent them. Article 7, which reads like an aside—“Nothing in this Definition . . . could in any way prejudice the right to self-determination”—seems, at first glance, to have the objective of guaranteeing a preexisting right of peoples to struggle against colonial or racist regimes to establish their own state.

Read together, however, Articles 3(g) and 7 create the *trompe-l’oeil* necessary to achieve consensus between American and Soviet blocs on the 1974 Definition as a whole.¹⁰³ According to Cassin, Debevoise, Kailes, and Thompson, “opinions on self-determination aided by external force divide along political and ideological lines. China, the Soviet Union, and some Third World nations vigorously support the use of force to achieve self-determination. The United States, Japan, and the European Community abhor the prospect.”¹⁰⁴ Julius Stone wrote disapprovingly of the Soviet Union and China, who, he felt, “tried to secure the best of both worlds”: while the Soviet Union tried to stress that only struggles against “colonial” or “racist” oppressors were covered by Article 7, China sought to limit

100. Vernon Cassin, Whitney Debevoise, Howard Kailes & Terence W. Thompson, *The Definition of Aggression*, 16 HARV. INT’L L. J. 589, 595 (1975).

101. 1974 Resolution, *supra* note 94, art. 3(g).

102. *Id.* art. 7.

103. See generally Benjamin B. Ferencz, *The United Nations Consensus Definition of Aggression: Sieve or Substance*, 10 J. INT’L L. & ECON. 701, 709-17 (1975) (describing and analyzing the compromise nature of the definition of aggression) [hereinafter Ferencz, 1975]; Benjamin B. Ferencz, *A Proposed Definition of Aggression: By Compromise and Consensus*, 22 INT’L & COMP. L.Q. 407 (1973) (analyzing the compromise definition that emerged from the negotiations between the competing blocs); Ferencz, 1972, *supra* note 99, at 496-501 (providing an extensive discussion of the points of contention between the competing blocs).

104. Cassin et al., *supra* note 101, at 599-600.

Article 7 to “imperialist” oppression, which Beijing associated with both the United States and the Soviet Union.¹⁰⁵ The negotiated outcome is not radical indeterminacy, but rather, as the next paragraph explains, a legal *trompe-l’oeil* that covers the range of armed conflicts of the day and fluctuates, depending upon how the articles are read, between permitting and prohibiting the use of force by armed groups. Here is how the *trompe-l’oeil* works.

Article 3(g), read on its own, prohibits the sending of armed groups to carry out attacks against a State that amount to aggression. Article 7 safeguards the right of “peoples” to “struggle” for self-determination and to “seek and receive support.” Read together, the two provisions meld the stigmatization of the use of armed force by non-state groups and the principle of self-determination of peoples without appearing to directly contradict each other. The essential element that allows the *trompe-l’oeil* to succeed is the innocuous-seeming qualifier that permits “struggles” for self-determination “in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration [the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States].” The Six Powers, led by the United States, could interpret the Charter and the Declaration, and therefore the qualifier, as prohibiting the use of force by struggling armed groups, while the thirteen (non-aligned) Powers could interpret it as authorizing armed struggle for self-determination. Stone notes, “[t]he final result was to preserve the above preconsensual conflicts as a question of interpretation whether the right of peoples to ‘struggle’ includes the right to use armed force against the parent state and the corresponding question as to the right of third states to support such struggles by force.”¹⁰⁶ Ultimately, the unresolved question of whether the State is the only subject of the definition or whether “peoples” are also contemplated and captured by the Resolution was built into its provisions. This intricate Cold War-era concept of aggression was completely altered by the SWGCA when it incorporated it into the definition of the crime of aggression. The way the 1974 Definition was incorporated changed the relations between its properties. Rather than making the concept of aggression more relevant, the SWGCA made it less.

105. Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT’L L. 224, 234 (1977) [hereinafter Stone, 1977].

106. *Id.* at 233.

3. The 2009 SWGCA Concept of the State/Collective Act of Aggression

The SWGCA, in its final report, has included Articles 1 and 3 of the 1974 Definition into the crime of aggression as the State act. Read alone, Articles 1 and 3 eradicate the Escher effect and the Cold War duality that characterizes the original text. As a result of the way the 1974 definition is incorporated into the draft crime of aggression, the draft crime fails to capture independent non-state groups without a state sponsor. Independent non-state groups are those that scenario forecasters have identified as the most important emerging threat to global security. The following explains how incorporating Articles 1 and 3 of the 1974 Definition without the rest has changed the concept of aggression.

The idea of states launching armed attacks against states which, in the integrated 1974 Definition, is transformed by Article 7, and which refocuses the definition on “peoples” and their right to “struggle” for self-determination, becomes even more state-centric when Article 7 is removed. Though the existence of armed non-state groups is acknowledged in Article 3(g), non-state groups are represented exclusively as a weapon used by one state against another. While the 1974 Definition was capable of two interpretations in this regard, the definition of the crime of aggression is not. The state is a weapon in the hand of a statesman.

This fixation on the state is particularly troubling in light of the literature on the transformation of war, which forecasts increasing decentralization, the state’s continued loss of its monopoly on combat forces, the diminishing importance of conventional war, the rise of superempowered groups and individuals, and intangible strategic centers of gravity. The reality is that states now face a common threat from independently acting transnational guerillas that, we are seeing, are able to convince populations of the legitimacy of their violence. Governments wishing to consolidate power in this context have an impetus to band together and prevent the erosion of their monopoly on the use of legitimate violence by reinforcing the existing war convention and criminalizing aggression by non-state groups and, eventually, superempowered individuals. International criminal law, which penetrates the state, is a sensible place to intervene. This would also ensure the relevance of the definition of the crime of aggression as times change.

4. Suggested Modifications and/or Interpretations

These sociological changes in the character of modern war should be used as a basis to modify or interpret the concept of the state/collective act. This can be done in one of three ways: by incrementally modifying the

draft definition of the crime of aggression; by interpreting it in light of the 1974 Definition as a whole; or by interpreting the concept of the state dynamically, as Philip Bobbitt has done in his socio-legal scholarship.¹⁰⁷

In order to include non-state groups within the definition of the crime of aggression, the word “State” should be accompanied by “or Group,” or “/Group,” each time it is used to refer to the aggressor. For instance, Article 8 *bis*, paragraph 1 of the definition, “For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State” should instead read, “For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation, or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State or Group” or, “For the purpose of this Statute, ‘crime of aggression’ means the planning, preparation, initiation, or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State/Group.”¹⁰⁸ If the States Parties voting on the provision at the 2010 review conference or at a subsequent opportunity prefer to qualify the word “Group” for the sake of specificity, they can do so by adding the words “Political” or “Military” before it. Both words are consistent with the quality of aggression that scenario planners expect to emerge. Furthermore, the Rome Statute already explicitly contemplates organizations and groups in the provisions on crimes against humanity¹⁰⁹

107. See generally BOBBITT, SHIELD OF ACHILLES, *supra* note 24, at 6 (“[T]here is no state without strategy, law, and history The precise nature of this composition defines a particular state [E]very state is some combination of these elements and can be contrasted with every other state . . . in these ways.”); BOBBITT, TERROR AND CONSENT, *supra* note 24, at 4 (noting that there is a “change in the constitutional order—from nation state to market state,” and defining the market state as “[t]he emerging constitutional order that promises to maximize the opportunity of its people It is contrasted with the current nation state, the dominant constitutional order of the twentieth century that based its legitimacy on a promise to improve the material welfare of its people”). Mark Drumbl arrives at a similar conclusion as I do from his initial normative premises: “If we are agreed as to the interests at play, then the question follows whether criminalizing *only* interstate armed attacks that flagrantly violate the *jus ad bellum* captures the key stability, security, human rights, and sovereignty challenges that the international community currently faces. I think that the answer to this question is ‘no.’” Drumbl, *supra* note 9, at 306.

108. Report of the Special Working Group on the Crime of Aggression, 7th Sess. (second resumption), N.Y., Feb. 9-13, 2009, ICC-ASP/7/SWGCA/CRP.2, Annex I, Proposals for a provision on aggression elaborated by the Special Working Group on the Crime of Aggression, at 11 (on file with the author).

109. “‘Attack directed against any civilian population’ means a course of conduct . . . pursuant to or in furtherance of a State or organizational policy to commit such attack.” Rome Statute of the International Criminal Court art. 7(2)(a), July 17, 1998, 2187 U.N.T.S. 104.

and war crimes.¹¹⁰ Modifying the draft definition has the advantage of certainty over interpreting it in one of the two ways described next. Delegates, however, are understandably reticent to reopen the definition to debate lest it undermine the agreements that have already been reached after years of negotiations.

The first interpretation that would include armed groups acting independently of the state requires the definition of the crime of aggression to be read in light of the 1974 Definition as a whole. This interpretation is natural in light of the language of Paragraph 2 of the draft definition of the crime of aggression, which reads, in relevant part:

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

[the list of acts from Article 3 of the 1974 Definition follows]

The reason this reading fits naturally is that the SWGCA discussion about whether to include the definition in whole or in part was never completely resolved. While Silvia Fernandez de Gurmendi's 2002 Discussion Paper refers to GA Resolution 3314 in its entirety—Article 2: “act of aggression” means an act referred to in United Nations General Assembly Resolution 3314¹¹¹—Christian Wenaweser's 2007 drafts add two “disaggregated” models to the discussion, both of which include only Articles 1 and 3 of the 1974 Definition. The final report of the SWGCA, in spite of residual resistance from a number of states, settles on the disaggregated model that incorporates Articles 1 and 3 of the 1974 Definition directly into the definition of the crime of aggression. The more sophisticated among the resisting states agreed to the direct incorporation of Articles 1 and 3 because of the phrase, “in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.” This phrase is the channel through which aspects of the General Assembly's Cold War-era concept of aggression can be read into the definition of the crime of aggression, for instance, the inclusion of non-state groups. The weaknesses of this approach as a technique for including non-state groups within the ambit of the definition of the crime is that, as this sub-Part explains above, Articles 3(g) and 7 of the 1974 Definition, read together and in the context of the other provisions, are far from

110. “[A]rmed conflicts not of an international character . . . applies to . . . armed conflict between governmental authorities and organized armed groups or between such groups.” *Id.* art. 8(2)(f).

111. Preparatory Commission for the Int'l Criminal Court, Working Group on the Crime of Aggression, *Discussion paper proposed by the Coordinator*, U.N. Doc. PCNICC/2002/WGCA/RT.1/Rev.2 (July 11, 2002), <http://untreaty.un.org/cod/icc/documents/aggression/aggressiondocs.htm> (follow link to English pdf document of PCNICC/2002/WGCA/RT.1/Rev.2 [hereinafter 2002 Discussion Paper]).

determinate. This is in large part due to the Escher effect built into the 1974 Definition. Furthermore, limiting the definition to States and peoples struggling for self-determination is still anachronistic in light of the variety of aggressive groups scenario forecasters have imagined. The strength of this approach, meanwhile, is that it does not require the review conference to reopen the draft definition to scrutiny, potentially rekindling old controversies and stalling the amendment process at the eleventh hour.

The final, and I think the best, approach, despite the fact that it may at first seem counterintuitive to some jurists, is to read the word “State” dynamically and incrementally to include state-like entities. This common law approach to the challenge of social change preserves the conceptual character of the original norm while allowing it to adapt. In fact, the properties of the state have never been stagnant. Philip Bobbitt, in *The Shield of Achilles* and *Terror and Consent*, explains how the modern state has transformed over time, describes its various forms, and forecasts how it will continue to evolve. The definition of the crime of aggression should be adaptable enough to capture conceptual evolution lest it become irrelevant.¹¹² Eventually, new political-military organizations that do not control territory but that attack states should be included within the ambit of the definition. Whether the definition will one day include acts of aggression *against* these organizations is an open question that national and international judges hearing aggression cases should resolve on a case-by-case basis. The strength of this approach is that it does not reopen the draft definition to scrutiny at the review conference. The weakness is that judges interpreting the definition may be accused of judicial activism and the authority of their decisions challenged.

The main policy argument for modifying or interpreting the definition in this way is that it broadens the definition beyond recognition. There are legitimate concerns that an overly broad definition may dilute its pull to compliance or invite the ICC and national prosecutors to exercise too much discretion in his or her enforcement of the law. In fact, when the other aspects of the definition are taken into account, such as the *de minimis* clause specifying that the attack must amount to a manifest violation of the UN Charter and that it must be perpetrated by the political or military leaders of a group, the nature of that aggressive group becomes less relevant. Had the definition been law at the time of the 9/11 attacks, the suggested modification would have included Osama bin Laden within their

112. The 1933 Montevideo Convention on the Rights and Duties of States, that sets out the qualifications for statehood and which are taken by some jurists to preclude a dynamic and incremental interpretation of statehood, was not drafted for the purpose of international criminal law, and should serve as a guide for judicial interpretation, not binding authority.

ambit, while the current draft would not because al Qaeda is not a state. This is an important scenario and the diplomats should be encouraged in their negotiations to consider whether and how it might shape the core concepts, properties, and relations of their definition. The current drafting methods, however, do not invite discussions of this type.

B. Distinguishing Aggression and Self-Defense

1. Summary of the Argument

The SWGCA has devised a procedural solution to the intractable problem of distinguishing aggression and self-defense. They have delegated responsibility for the determination to judges applying the provisions of the Rome Statute and the rules of customary international law. This is an historic advance because it marks a shift from politics to law in the use of force regime. In their interpretations, tribunals should be guided by three considerations: a just interpretation should admit no double standard; any rule should include widely accepted institutional checks and balances; and, the rule should not be a suicide pact.

2. The 1974 Definition Prior to its Incorporation into the Crime of Aggression

Article 2 makes first strike *prima facie* evidence of aggression. However, the simple determinacy of Article 2 is another *trompe-l'oeil*. In fact, Article 2 is one of the more stark examples of the Escher effect deliberately built into the 1974 definition of aggression in order to overcome the negotiation deadlock caused by Cold War polarities. The seemingly paradoxical nature of the provision is the result of an all-inclusive compromise reached between Soviet and Western blocks on the relevance of first strike versus intention (also referred to as “purpose” in the negotiations) as properties of the concept of aggression.

At the League of Nations Conference for the Reduction and Limitation of Armaments in 1933, the Foreign Commissar of the Soviet Union, Maxim Maximovitch Litvinov, argued that prohibiting first strike would be the most effective deterrent to potential aggressors and submitted a draft definition based on this idea.¹¹³ The prohibition on first strike, also known as the “principle of priority,”¹¹⁴ was criticized by the United States and its allies who argued that 1) it is difficult to determine who had struck first; 2) historically, the first use of armed force was often provoked as a

113. Minutes of the Gen. Commiss'n, Records of the Conference for the Reduction and Limitation of Armaments, Vol.II, 237-38 (September, 1933), available at http://www.letton.ch/lvx_33sbn.htm.

114. Cassin et al., *supra* note 100, at 596.

pretext for a massive retaliation; and 3) in the context of weapons of mass destruction, it would be too late to defend once the first strike had occurred.¹¹⁵ Between 1933 and 1974, the United States and its allies repeatedly put forth and stuck to their counterproposal that the intent or purpose of the belligerents was the decisive factor. The Soviets and the Arab states, which, in light of Israel's preemption in the 1967 War, had come out in support of the principle of priority, argued that intent or purpose were more difficult to ascertain than first strike.¹¹⁶ Stone, capturing the essence of the debate, asked rhetorically, "[i]s the critical date of the Middle East Crisis 1973 or 1967, or the first attack by Arab states on Israel in 1948, or is it the Balfour Declaration in 1917, or the Arab invasions and conquest of the seventh century, or even perhaps the initial Israelite conquest of the thirteenth century B.C.?"¹¹⁷ Neither the principle of priority nor the principle of intent offered a clear solution.

The technique for arriving at a compromise on the priority versus intent controversy in 1974, according to Ferencz, was "to employ language that enabled the parties on both sides to interpret the Article to suit their own prior conception"—the Escher effect writ large.¹¹⁸ In particular, *first strike* is decisive (satisfying the Soviet Union and the Arab states), so long as the strike is 1) in contravention of the UN Charter (no further guidance is given as to which interventions amount to a Charter contravention); 2) the Security Council has not determined that the "act of aggression is justified" (i.e., a justifiable response to provocation, protection against economic aggression, or preemptive self-defense); or 3) the acts concerned or their consequences are of sufficient gravity (no guidance is given as to which acts or consequences meet the *de minimis* threshold). Rather than resolving the debate over how to distinguish aggression and self-defense, the 1974 Definition built the two dominant positions into its articles.

3. The 2009 SWGCA Distinction Between Aggression and Self-Defense

The SWGCA solution to the problem of distinguishing aggression and self-defense, as introduced earlier, is procedural, not substantive. Article 2 of the 1974 Definition contains the paradoxical principles of priority and intent. When Article 2 is removed from the 1974 Definition, as the SWGCA has done in its definition of the crime of aggression, both

115. Benjamin B. Ferencz, *Defining Aggression—the Last Mile*, 12 COLUM. J. TRANSNAT'L L. 430, 443 (1973) [hereinafter Ferencz, 1973].

116. Stone, 1977, *supra* note 105, at 229.

117. *Id.* at 236.

118. Ferencz, 1975, *supra* note 103, at 711.

principles evaporate from the resulting concept of aggression, and aggression becomes, “the use of armed force against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations” (Art. 2). The SWGCA formulation, which contains neither the principle of priority nor the principle of intent, blurs the distinction between aggression and self-defense. Whether the SWGCA product is blurrier than the 1974 Definition, which contains both principles and offers no guidance as to how to balance them, is difficult to ascertain. What is clear is that today, unlike in 1974, there is a network of judicial bodies including the ICC and the criminal tribunals of member states, which have incorporated the provisions of the Rome Statute into their national laws, that can draw upon customary international law on the use of force and predetermined rules of evidence and procedure to judge whether a particular claim to self-defense is justified or pretextual. The removal of the principles of priority and intent from the definition of the state/collective act, by blurring the line between aggression and self-defense, is both realistic and risky.

Four dominant schools of thought have emerged in the contemporary reappraisal of the international law of self-defense, a reappraisal that has attracted a vast literature since the release of the National Security Strategy of the United States in 2002.¹¹⁹ The *traditionalists* argue that the principle of priority is still the most reasonable rule since relaxing the prohibition on first-strikes creates a Zeno’s paradox where states are pressured to preempt each other’s preemptions.¹²⁰ Opponents of the traditional view invoke the collapse of the League of Nations, and warn that the international legal system will not survive if divorced from strategic realities and the practice of the great powers. The *skeptics*, on the other hand, believe that the survival of states is not a matter of law. Michael Glennon, a professor at the Fletcher School of Law and Diplomacy, has proclaimed the death of the Charter prohibitions on the use of force.¹²¹ According to Glennon, coherent international law concerning intervention by states no longer exists. The received rules neither describe accurately what nations do, nor predict reliably what they will do, nor describe intelligently what they should do.

119. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/>; for a range of views, see Lori F. Damrosch & Bernard H. Oxman, *Agora: Future Implications of the Iraq Conflict*, 97 AM. J. INT’L L. 553 (2003).

120. See THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 207-29 (1980) (describing the notion of reciprocal fear of surprise attack).

121. Glennon, *How International Rules Die*, supra note 11; Glennon, *The Fog of Law*, supra note 11; Glennon, *Terrorism and the Limits of Law*, supra note 11; Glennon, *How War Left the Law Behind*, supra note 11, at A37.

The implication is that preemption should be the prerogative of each state. The weakness of the skeptics' approach is that it justifies the law of the jungle.

Between the traditionalists and the skeptics lie two reformist schools, the *extenders* and the *exceptionists*. The extenders would widen the imminence standard contained in the *Caroline* correspondence, an exchange of letters in the early 1840s between the United States and Britain, which has become a classic, though contested, statement of the law of self-defense in international law.¹²² According to this standard, "the use of defensive force is permitted when the "[n]ecessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."¹²³ The English legal scholar Christopher Greenwood, for example, argues that received international law does not require States to wait until it is too late, but it does not give a broad general license for preemptive military action either.¹²⁴ When determining whether an attack is imminent, the gravity of the threat and the way it would materialize are both relevant. Greenwood's proposal would accommodate the use of force against a non-state group in possession of weapons of mass destruction, even if the moment of the attack remains uncertain. However, Greenwood's reliance on a subjective threshold, rather than an objectively verifiable armed attack, invites abuse.

The *exceptionists* would preserve the received framework, but incorporate different types of exceptions. An increasing number of international lawyers have suggested carving out nuclear proliferation as a special category triggering a right of preemptive self-defense. They advocate lowering the imminence bar because the nuclear threat is so catastrophic. Michael Reisman proposes another type of exception.¹²⁵ Reisman, like the traditionalists, warns that legalizing unilateral preemptive self-defense might increase the expectation of, and resort to, violence and undermine world order. He would curtail self-defense in international law, but make an exception for the United States, which, he argues, now has a

122. David A. Sadoff, *A Question of Determinacy: The Legal Status of Anticipatory Self-Defense*, 40 GEO. J. INT'L L. 523, 535-36 (2009).

123. MARY ELLEN O'CONNELL, AM. SOC'Y INT'L L., THE MYTH OF PREEMPTIVE SELF-DEFENSE 9 (2002) (quoting JOHN B. MOORE, 2 A DIGEST OF INTERNATIONAL LAW 412 (1906)), <http://www.asil.org/taskforce/oconnell.pdf>; HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT, 91-96 (1992); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 150-52 (1991).

124. Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L L.J. 7, 15-16 (2003).

125. Michael Reisman, Editorial Comment, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT'L L. 82, 90 (2003).

unique role as guarantor of world order. According to Reisman, the Bush doctrine contained in NSS 2002 stabilizes expectations without undermining the international system.¹²⁶ However, Reisman's suggestion requires states to accept American hegemony and trust American commitments to use its military might for the collective good.

Alternatively, Tom Franck proposes mitigation as a legal safety valve that preserves the rule of law but prevents it from rendering unreasonable results in exceptional cases.¹²⁷ When strict adherence to the law would lead to catastrophic results, Franck argues that states withhold judgment—just as domestic courts have withheld judgment when small groups stranded on a lifeboat eat the cabin boy so the rest of the castaways can survive. He argues that the majority of states withheld judgment after Israel's 1967 War with its Arab neighbors and after the NATO bombing of Kosovo. The problem with Franck's proposal is that it does not guide state behavior—the exception only applies after the military intervention occurs.

4. Suggested Interpretations

Removing Article 2 of the 1974 Definition does not resolve the debate over the scope of self-defense. Rather, it pushes its resolution to the ICC judges who are required to make interpretations in concrete cases. Removing Article 2 would represent a conscious choice on the part of the SWGCA to recast the question of self-defense as a legal rather than a political issue, at least in the domain of international criminal law. This is a positive development. Judges considering concrete cases, unlike working groups negotiating general principles, have the capacity to devise nuanced case-by-case solutions that, over time, and in the aggregate—like the common law—may reveal guiding principles. Furthermore, the considerations guiding the judicial decisions of ICC judges are less politicized than the positions of SWGCA delegations representing the interests of their nations and therefore have the potential to constitute an impartial, and ideally, a generalizable, approach for fairly adjudicating cases. Critics of judge-made law in the domain of high politics resist what they consider to be the judicialization of politics and point out the lack of democratic accountability of ICC judges. They argue that peace is better promoted through flexibility and political negotiation rather than through law. Ferencz and others retort that the current framework of high politics has failed to curb war and that the time for a legal approach is upon us.

126. *See id.* at 87, 90.

127. THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 174 (2002).

In their decisions, judges adjudicating aggression cases should be guided by three considerations. First, a just interpretation should admit no double standard. Exceptionally, if certain states are granted special powers, they should also have special responsibilities to use them for the aggregate good of the community. The non-proliferation treaty was designed this way. Non-nuclear powers were not supposed to acquire nuclear weapons and, in exchange, nuclear powers were meant to disarm. The nuclear powers did not fulfill their side of the bargain and the double standard has undermined the treaty's pull to compliance. Today, survey Iranians on whether the NPT is a just regime and the vast majority will answer "no." The double standard criteria would eliminate Reisman's proposed exception to the current use of force regime for the United States.

Second, any rule should include widely accepted institutional checks and balances. It is a basic principle of fairness recognized all over the world that a party to a dispute should not also be the judge because people and groups tend to favor their own cause. In spite of its failings, the most legitimate institutional body to authorize the use of force is still the Security Council. But the reality is that the Council is a political body often deadlocked on points of self-interest, and it cannot always be relied upon to decide fairly. In cases of Security Council deadlock, ICC judges should also take account of the authorization of established regional bodies, like the African Union or the Organization of American States—i.e., the next most legitimate institutional body to authorize force after the SC—since they have an interest in maintaining a stable neighborhood. Finally, judges should consider whether the case for self-defense was made publicly, giving as much information as could safely be divulged at one of these bodies before acting. If the attack is imminent, and time does not permit deliberation, the self-defense justification should be formally evaluated by the ICC judges after the fact. The 2002 and 2006 U.S. National Security Strategies go too far in their unilateralism.

Third, the rule applied by the ICC judges should not be a suicide pact. The imminence standard should be relaxed somewhat when the threat is catastrophic. However, it would be dangerous to relax the standard absent an increased commitment by states to justify their armed interventions before the most legitimate international forum available, starting with the Security Council. If the Security Council, the local regional organization, and maybe the General Assembly, as a last resort, deny the legitimacy of the military intervention, this is strong evidence for the ICC judges that the use of force was illegal and unjustified. For their part, these institutions must be prepared to convene and decide rapidly. Ultimately, a just interpretation of the law of self-defense will wisely counterbalance the

risks of weapons of mass destruction in the hands of extremists and the risks of creating an environment where no checks and balances exist to restrain the arbitrary use of military power.

C. The Acts that Qualify as Aggression

1. The 1974 Definition Prior to Its Incorporation into the Crime of Aggression

At first glance, the 1974 Definition seems to prohibit only the use of “armed force,” not other uses of force. According to Article 1, “Aggression is the use of armed force by a State against another state.” Article 2 prohibits the first use of “armed force.” All of the acts of aggression listed in Article 3—invasion, bombing, blockade, etc.—include the use of armed force.

The use of armed force was not, however, the only use of force that the General Assembly committees considered including. A protracted debate over the inclusion or exclusion of so-called economic aggression risked paralyzing the working group. The 1967 and 1973 Oil Embargoes, whereby the oil-producing Arab states sought to deter Israel’s allies from supporting it militarily by denying them oil, were fresh in the minds of many delegates. According to Julius Stone, “[a] substantial body of states continued to press in the Special Committee for inclusion of economic aggression in the definition.”¹²⁸ In the midst of paralyzing controversy, the Special Committee once again accommodated competing positions by using the drafting technique that gives the 1974 Definition its Escheresque quality.

In particular, the concept of aggression, which appears incontrovertible from the perspective of Articles 1, 2, and 3, becomes bifurcated when considered in light of the definition as a whole. Article 4 qualifies the list of uses of armed force amounting to aggression: “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 SWGCA, however, after years of debates, chose not to include Article 4 of the 1974 Definition in its definition of the crime of aggression lest it violate the principle of legality by failing to forewarn potential perpetrators of the acts that are prohibited.

In addition, as Stone points out, “the fact that an alleged aggressor’s use of armed force had been in response to extreme economic coercion might be held by the Security Council [or, in the future, the ICC] to be

128. Stone, 1977, *supra* note 105, at 230.

among the ‘other relevant circumstances’ which, under Article 2 of the Consolidated Text [the first use of force is a *prima facie* act of aggression], might lead to the conclusion that a finding of aggression was not justified.”¹²⁹ The 1974 Definition was drafted so that no concept, including economic aggression, could be used as a sword by one superpower without also being used as a shield by the other—so long as their international lawyers grasped its Escheresque quality.

Article 5(1) qualifies Articles 1, 2, 3, and 4 still further. According to Article 5(1), “No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.” This seems to cut Stone’s argument down—read literally, the use of armed force cannot be justified as self-defense in response to economic aggression. However, read literally, Article 5(1) also removes the use of armed force as a justified response to an armed attack—no military consideration can serve as a justification for aggression.

This cannot be correct: the inherent right to self-defense is enshrined in Article 51 of the UN Charter and general international law. The way to reconcile Article 51 with the articles preceding it is to notice that no consideration, whether political, economic, military or otherwise, may serve as a justification for *aggression*, rather than the use of armed force. In other words, the use of armed force short of aggression may be justified in response to political, economic, or military offensives. Whether the use of economic, diplomatic, or today, cyber force, can trigger the right to use armed force in self-defense depends upon the interpretation of the 1974 Resolution as a whole.

2. The 2009 SWGCA Concept of the State/Collective Act of Aggression

The delicate structure of the 1974 Definition, which simultaneously includes and excludes the use of force not qualifying as armed force within its provisions, depending upon how the Definition is read, is disturbed when Articles 2, 4, and 5 are removed, as the SWGCA has done. Articles 1 and 3 of the 1974 Definition, the only articles to be included in the definition of the crime of aggression, are incontrovertible—only the use of armed force is prohibited. The removal of the other articles limits the SWGCA definition of aggression at a time when military planners foresee an imminent increase in unarmed attacks, including sabotage and cyberattacks, that disrupt networked systems and cause massive damage.

129. *Id.*

The SWGCA did, however, deliberately build in what some participants considered “constructive ambiguity” as a diplomatic solution to the debate over whether the list of prohibited acts should be open or closed.¹³⁰ Article 8 *bis*, paragraph 2, which reads, “[a]ny of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression,” may be interpreted as either closing or opening the list that follows. This is because the ambiguous phrase “any of the following acts” gives little indication as to whether these are the only acts that qualify as acts of aggression or whether they are meant as examples. Though this “constructive ambiguity” may leave a tribunal interpreting the crime some leeway to add new acts, it does not resolve the question of whether armed attacks are the only acts prohibited by the definition.

3. Suggested Modifications and Interpretations

Systems disruption, including cyberattacks causing damage akin to an armed attack, should be included as acts of aggression. This can be done in one of four ways: the word “armed” can be replaced by another word such as “destructive”; the crime of aggression can be interpreted in light of the original 1974 Definition; the listed acts can be incrementally expanded by analogy; or the word “armed” can be interpreted broadly to include any tool capable of disrupting a system and causing massive damage.

Replacing the word “armed” in “armed attack” with “destructive” shifts the focus of the act of aggression from means to effects. Rather than the attack being “armed,” it must be “destructive” to violate the provision. In the context of criminal law, this means intentionally destructive. This modification has the advantage of including future acts that are difficult to foresee within the ambit of the crime. It accords, moreover, with the moral sentiment that intentionally destructive behavior is blameworthy by whatever means it is committed. The weakness of the approach is that it may overreach, including normal competitive behavior among states. Another disadvantage is that proposing a controversial drafting modification of this sort at the review conference, one not firmly based upon existing international law, may stall the negotiations at the eleventh hour.

130. International Criminal Court [ICC], Assembly of States Parties, 6th Sess., Special Working Group on the Crime of Aggression, Informal Inter-Sessional Meeting of the Special Working Group on the Crime of Aggression, held at Lichtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, June 11-14, 2007, ¶ 47, ICC-ASP/6/SWGCA/INF.1.

Another way unarmed systems disruptions can be included within the ambit of the crime is for jurists to interpret the definition of the crime of aggression in light of the 1974 Definition. As discussed earlier, this interpretation is natural in light of the language of Paragraph 2 of the draft definition of the crime of aggression which reads, in relevant part, “Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression.” This could allow for the inclusion of new means of violence into the list of prohibited acts through Article 4 of the 1974 Definition, 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.” Two problems arise, however, and both were raised in the SWGCA debates. First, an open list may violate the principle of legality in criminal law whereby an accused must be forewarned of the prohibited behavior in order to be punished for it.¹³¹ Second, and related, the Security Council should be kept separate from the court during the trial or the court’s independence will be challenged and its legitimacy may be undermined.

An alternative is to analogize from the listed acts to include new acts of aggression. For example, a denial of service cyberattack, whereby hackers overwhelm government, military, or other essential systems and prevent communication with the outside world, may be analogized to a blockade. There are three main problems with this approach. The first is that the first sentence of Article 22(2) of the Rome Statute explicitly prohibits this sort of judicial interpretation: “The definition of a crime shall be strictly construed and shall not be extended by analogy.” The second problem is that not every systems disruption will have an analogy in the list of prohibited acts. The third problem is that analogizing from the list of prohibited acts does not get around the explicit identification of “armed attack” as a requirement for an act to qualify as aggression.

The fourth, and I think the best, solution is for jurists to read the word “armed” in “armed attack” broadly. Whatever tool is used to attack an enemy, whether it is a wrench disabling an oil pipeline, a bucket of water poured on a sensitive electronic device, or a personal computer planting a virus into a government network, should be considered an armament if the intention is aggressive and the damage surpasses the *de minimis* threshold, amounting to a violation of the UN Charter. This interpretation does not violate article 22(2) of the Rome Statute because no analogy is necessary,

131. *Id.* ¶ 50.

only a broad reading of the word “armed.” Furthermore, the SWGCA does not need to negotiate any changes to the existing language of the provision.

The larger point, however, is that at a time when warfare is changing and new methods of committing aggression are becoming increasingly dangerous, inexpensive, and prevalent, the drafters of the crime of aggression should employ a method that is forward- as well as backward-looking. Rather than just negotiating the appropriate precedents and the way that they are to be incorporated, the drafters and interpreters of the definition should also consider how new contingencies should impact its core concepts, properties, and relations.

D. The 1974 Concept of Aggression is Escheresque

The way we evaluate the Escheresque property of the 1974 Resolution depends upon our understanding of the purpose and function of international law. The international legal scholars of the day wrestled with the problem, and their theoretical orientations are evident from their expectations of what the definition would achieve. Stone’s disappointment with the text permeates his analysis:

It is indeed dramatic to the point of high tragedy—or is it low comedy?—that so many of the issues on which the Consensus Definition of 1974 is silent, or builds into itself the head-on conflicts in the standpoints of states, are rather central and critical for contemporary international crises and tensions.¹³²

In this passage, Stone reveals his expectation that legal texts are meant to be determinate, systematic, and authoritative, and in this regard, his analysis can be characterized as formalistic. His disappointment stems from the fact that the 1974 Definition does not accord with the formalist ideal.

Looking back at the 1974 Definition in 2007, Ferencz draws a different conclusion, a conclusion more in line with the functionalist sensibility of the international legal establishment of the post World War II era: “[t]he wording left no doubt that the 1974 consensus definition of aggression bound no one. It reflected the fears, doubts, and hesitations of its time. However, it was also a cautious step toward a more rational world order.”¹³³ Ferencz’s optimism, in spite of the observation, which he shares with Stone, that the 1974 Definition binds no one, stems from his faith in the legal process, born at Nuremberg, and his forecast that international law is headed in the direction of a liberal order.¹³⁴ On the legal process, Ferencz

132. Stone, 1977, *supra* note 105, at 225.

133. Benjamin B. Ferencz, *Enabling the International Criminal Court to Punish Aggression*, 6 WASH. U. GLOBAL STUD. L. REV. 551, 556 (2007) [hereinafter Ferencz, 2007].

134. Ferencz states:

wrote, “[t]he voluntary surrender of a bit of sovereignty in favor of a reasonable process for the adjudication of such differences as are bound to arise, and a system of enforceable sanctions, are further requirements if reason is to replace barbarism.”¹³⁵ The creation of the ICC in 1998 fuelled Ferencz’s optimism that the 1974 Definition would advance his lifelong project to replace war with law.¹³⁶ It remains to be seen whether the ICC will ever have an opportunity to interpret the definition to resolve cases and, if so, whether it is capable of advancing Ferencz’s lifelong dream of subverting the law of force with the rule of law.¹³⁷

Though the state act of the SWGCA definition of aggression is ultimately more determinate than the 1974 Definition, it is also less flexible. This is regrettable when there is finally an institutional arrangement, the Rome System’s network of courts (including the ICC), to interpret the law and apply it in concrete cases. It is true that determinacy has its advantages in the judicial realm: a criminal provision that is stark is less likely to violate the principle of legality and, at the hands of an able defense team, result in technical acquittals of otherwise blameworthy

The consensus definition of aggression is only a tiny fragment in a much broader mosaic. It is a tool which may be used to help build a more peaceful society of States. States that recognize that they are interdependent and not independent, that cherish and nurture their cultural and religious heritages without seeking to impose them on anyone else, that have the right to organize their own political and economic systems in whatever manner seems to them to best serve the happiness of their peoples, must also recognize that, in their own self-interest, they may have to surrender some portion of their sovereignty, their wealth and their power in order that the hopes and aspirations of all mankind may be fulfilled.

Ferencz, 1975, *supra* note 103, at 717.

135. Ferencz, 1973, *supra* note 115, at 462.

136. Benjamin B. Ferencz, *Reconciling Legitimate Concerns and Removing the Lock from the Courthouse Door*, May 2008, <http://www.benferencz.org/> (follow “Articles and Lectures” hyperlink; then follow “Speaking Frankly About Aggression” hyperlink).

137. What holds true for Stone and Ferencz can be generalized to other theorists of international law. The way that they evaluate the 1974 Definition, whether they actually undertook that exercise or not, depends upon their expectations about the purpose and function of international law. Myres McDougal and Harold Lasswell’s policy-oriented school of jurisprudence, developed at the time the 1974 Definition was being negotiated, eschewed positivist approaches and held that the overriding goal of international law was to arrive at solutions that reflect the global common interest in approximating a world public order of human dignity. Myres S. McDougal & Florentino P. Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective*, 68 *YALE L.J.* 1057 (1959); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* (New Haven Press 1994) (1961 *originally published as* *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION*). Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld’s international legal process school, developed at Harvard Law School in the 1960s, with its confidence in institutional settlement, concentrates not so much on the exposition of rules and their content as on how international law rules are actually deployed by the makers of foreign policy. ABRAM CHAYES, THOMAS EHRLICH & ANDREAS LOWENFELD, *1 INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE* (1968).

defendants. The risk, however, is that an inflexible crime will undermine the legitimacy of the court and the law in other ways, in particular by becoming irrelevant as times change. The challenge, faced by the drafters of the crime of aggression but not unique to them, is how to best balance the demands of certainty and flexibility in their definition. The grounded theory method offers them specific insights about how to go about doing this. Once the definition is implemented, the judges take over and are faced with the same challenge as they interpret the law.

IV. CONCEPTUALIZING THE INDIVIDUAL'S PARTICIPATION IN COLLECTIVE ACT OF AGGRESSION

In his essay, *Beyond Nuremberg: Individual Responsibility for War Crimes*, David Cohen poses the key question for this part of the paper. Unlike ordinary domestic crimes, mass atrocities are,

the product of collective, systematic, bureaucratic activity, made possible only by the collaboration of massive and complex organizations in the execution of criminal policies initiated at the highest levels of government. How, then, is individual responsibility to be located, limited, and defined within the vast bureaucratic apparatuses that make possible the pulling of a trigger or the dropping of a gas canister in some far-flung place?¹³⁸

The SWGCA has negotiated an answer to Cohen's question in the form of three interrelated legal mechanisms that serve as a conceptual link between the individual and the state/collective act: 1) a leadership clause; 2) a set of conduct verbs describing the culpable conduct; and 3) a liability doctrine setting out the nature of the defendant's relationship to the aggressive group. The following sub-Parts consider these components in turn, test them against the future aggression scenarios set out in Part II, and, following the grounded theory approach through, suggest incremental modifications and interpretations that bring the definition of the crime of aggression up to date.

A. The Leadership Clause

The leadership clause is a phrase within the definition of the crime of aggression that limits the reach of the crime to leaders and excludes followers. Since Silvia Fernandez de Gurmendi, Coordinator of the PrepCom working group, released her 2002 Discussion Paper, there has been near consensus among delegates that the crime of aggression should

138. David Cohen, *Beyond Nuremberg: Individual Responsibility for War Crimes*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA, 53, 53 (Carla Hesse & Robert Post eds., 1999).

apply only to leaders and that a leader is a person “in a position effectively to exercise control over or to direct the political or military action of a State.”¹³⁹ The components of the leadership clause are, 1) the *position* of the person in the organization, 2) his or her capacity to exercise *effective control* or to *direct*, 3) *political or military action*, and 4) the nature of the aggressive collective as a *state*. This sub-Part, as the previous sub-Parts of Part III have done, will situate the draft leadership clause historically, decipher its components, test these components against the future scenarios set out in Part II, and suggest incremental modifications and interpretations that will tailor this clause to the future aggression scenarios set out in Part II.

1. Conceptual Roots of the Leadership Clause

The SWGCA leadership clause is descended from an influential pre-World War II concept of leadership set out by the German sociologist Max Weber that is still relevant today, but not nearly as much as it was when Weber devised it and when the Nuremberg tribunals delivered their verdicts. In *Politics as a Vocation*, Weber sets out his evolutionary taxonomy of political leadership with three methods to “legitimate any rule,” from least to most advanced.¹⁴⁰ Traditional leadership, “exercised by the patriarchs and patrimonial rulers of the old style,” is “sanctified by a validity that extends back into the mists of time and is perpetuated by habit.”¹⁴¹ Charismatic leadership, “practiced by prophets or—in the political sphere—the elected warlord or the ruler chosen by popular vote, the great demagogue, and the leaders of political parties,” finds its authority in the “extraordinary, personal *gift of grace* or charisma, that is, the wholly personal devotion to, and a personal trust in, the revelations, heroism, or other leadership qualities of an individual.”¹⁴² Weber’s highest form of leadership, “rule by virtue of ‘legality,’” “found in the modern ‘servant of the state,’” is authoritative by virtue of “the belief in the validity of legal

139. 2002 Discussion Paper, *supra* note 111, art. 1; ICC, Assembly of States Parties, Resumed 5th Sess., New York, Jan. 29-Feb. 1, 2007, *Discussion Paper Proposed by the Chairman*, at I(1)(a)-(b), ICC-ASP/5/SWGCA/2, Annex, http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-5-SWGCA-2_English.pdf [hereinafter *Chairman’s 2007 Discussion Paper*]; *Non-Paper by the Chairman on Defining the Individual’s Conduct*, in ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 6th Sess., New York, Nov. 30-Dec. 14, 2007, *Report of the Special Working Group on the Crime of Aggression*, Annex, ICC-ASP/6/SWGCA/1, http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-6-SWGCA-1_English.pdf [hereinafter *Chairman’s 2007 Non-Paper on Defining the Individual’s Conduct*].

140. MAX WEBER, *POLITICS AS A VOCATION* (1919), *reprinted in* THE VOCATION LECTURES 32, 34 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004) (emphasis omitted).

141. *Id.*

142. *Id.*

statutes and practical ‘competence’ based on rationally created rules.”¹⁴³ Weber’s highest form of leadership corresponds to his concept of bureaucracy, a rational-legal structure of authority, which he described and popularized in *Economy and Society* in 1914.¹⁴⁴ When Weber wrote *Economy and Society*, bureaucracy was becoming the most effective means of coordinating large organizations, including governments and militaries.

The International Military Tribunal at Nuremberg (IMT) based its reasoning upon an organizational model that coincides closely with Weber’s when judging the Nazis after World War II. Subsequently, the Nuremberg precedent became the inspiration for the Rome Statute and the emerging definition of the Crime of Aggression, born of the London Charter’s Article 6(1), “Crimes Against Peace.” The IMT, after a brief introduction and description of the provisions of the London Charter, presented a detailed history of the evolution of the bureaucratic structure of the Nazi organization and its consolidation of power.¹⁴⁵ This is an account of the charismatic leader, Hitler, and his willing accomplices, the defendants, as they transformed a “small political party called the German Labor Party”¹⁴⁶ into an all-pervasive and rationally organized government bureaucracy legitimized by law, where the defendants held top offices and used the organization to engineer massive crimes.

Even though the IMT judgment reflected a Weberian concept of leadership, there were glimmers of recognition by the tribunal that the bureaucratic model did not capture the whole story of the Nazis’ rise to and exercise of power. For example, the IMT and its successor tribunals wrestled with the status of business leaders, non-state actors who did not hold formal positions or exercise effective control in the Nazis’ bureaucratic apparatus, but whom the Allied populations felt should be held criminally responsible nonetheless. “Hitler could not make aggressive war by himself,” the IMT held: “[h]e had to have the cooperation of statesmen, military leaders, diplomats and business men.”¹⁴⁷ The successor tribunals followed the lead of the IMT and prosecuted business leaders for waging aggressive war. The *I.G. Farben Judgment* affirmed that business leaders are included, as a matter of law, in the provision on crimes against peace,¹⁴⁸

143. *Id.* (emphasis omitted).

144. 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 956 (Guenther Roth & Claus Wittich eds., 1978).

145. *Nuremberg Judgment*, *supra* note 2, at 413-21.

146. *Id.* at 413.

147. *Id.* at 448.

148. However, the defendants were acquitted because the tribunal found that “[t]he evidence falls far short of establishing beyond a reasonable doubt that their endeavours and activities [the rearmament

but the disproportionate number of acquittals of business leaders in relation to political and military leaders in this case and others indicates uneasiness on the part of the judges with the prospect of including them within the ambit of the crime.¹⁴⁹

Ultimately, in spite of the Nuremberg Tribunal's reflections on business leaders, its core concept of leadership envisaged an individual holding high office or a high top position within a complex bureaucracy, exercising formal and effective control over the political or military action of a state. This was a sociologically accurate description of leadership within the Nazi organization. The Nuremberg concept of leadership, which serves as the basis of the leadership clause of the definition of the crime of aggression, is not a sociologically accurate description of leadership within Al Qaeda and the vast number of aggressive organizations emerging today. It does not require a major redrafting or a radical interpretation, however, to bring the clause up to date.

2. The Leadership Clause in the Draft Definition of the Crime of Aggression

The SWGCA, in order to remain true to precedent and garner the greatest possible support at the 2010 review conference, closely modeled the leadership clause of the crime of aggression upon the Nuremberg Tribunal's concept. The SWGCA, however, made two slight modifications that broaden the modern concept somewhat. These modifications acknowledge the changing character of leadership, but are still not adequate to capture new forms of leadership that scenario forecasters such as Heckscher and Donnellon¹⁵⁰ anticipate. The first modification is a shift in focus from formal position to include effective control as a marker of leadership: "crime of aggression" means the planning, preparation, initiation or execution, by a person *in a position effectively to exercise control*." The second is the insertion of the word "direct" as an alternative way that an individual may be identified as a leader.

By including "effective control" as a core property of leadership rather than only formal "position," the SWGCA has created a definition that

of Germany] were undertaken and carried out with the knowledge that they were thereby preparing Germany for participation in an aggressive war." *I.G. Farben*, International Military Tribunal, Judgment, July 30, 1948, at 1123, *reprinted in* VIII TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS (1952).

149. In *I.G. Farben*, 24 defendants were acquitted because the tribunal found that "[t]he evidence falls far short of establishing beyond a reasonable doubt that their endeavours and activities [the rearmament of Germany] were undertaken and carried out with the knowledge that they were thereby preparing Germany for participation in an aggressive war." *I.G. Farben*, *supra* note 148, at 1123.

150. *See supra* note 64 and accompanying text.

includes informal leaders—individuals who hold no formal position but who effectively control the political or military action of a state. This inclusion would, for instance, capture business and religious leaders while formal control would not. Though effective control is a sociologically appropriate evolution from formal position because it captures important contemporary aspects of leadership, it suffers from two problems as a property of the leadership qualifier of the crime of aggression. The first is its conceptual origin as a transplant from an unrelated legal context. The second is that “effective control” does not go far enough to capture the leaders of post-bureaucratic organizations.

“Effective control” is the standard the International Court of Justice used in 1986 to assess whether the United States should be held accountable for acts carried out by Contra guerillas in Nicaragua.¹⁵¹ It was not originally meant as a way to attribute state action to an individual leader. The “effective control” standard gives the impression of being legitimate precedent for the SWGCA without actually being on point. Strictly speaking, it should not lend legitimacy to the definition of the crime of aggression by virtue of its precedential value. Overlooking, for the moment, the question of its conceptual origins, the “effective control” standard was later countenanced by the International Criminal Tribunal for the former Yugoslavia in the *Tadić Case* by a more permissive “overall control” test¹⁵² that would have done a better job at capturing the individuals most responsible in post-bureaucratic organizations. “Effective control” would likely not have captured Osama Bin Laden’s involvement in the 9/11 attacks, while “overall control” would have had a better chance.

The main problem with the “effective control” standard, whatever its origins may be, is that, as the grounded theorists would say, it does not fit well with the changing structure of aggressive organizations (see Part II). Rather than formal or effective control, centrality within a social network and the influence of an individual within that network are rapidly emerging as important properties of leadership.¹⁵³ Centrality and influence within the disaggregated network of networks that is al Qaeda would encapsulate Bin Laden and link him to the 9/11 attacks, while effective control would not.

3. Suggested Modifications and/or Interpretations

Three avenues exist for incorporating contemporary social scientific insights into the leadership clause of the crime of aggression: the SWGCA

151. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 65 (June 27).

152. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 146 (July 15, 1999).

153. *See supra* notes 64-69 and accompanying text.

can modify the clause and present it to states to vote on at the 2010 review conference; the SWGCA can build the changes into the elements of the crime of aggression; or, the judges can read the changes into the existing clause through the word “direct.”

If the SWGCA chooses to modify the leadership clause, one possible formulation is:

A leader is a [central/focal] person in a position effectively to exercise control over[, determinatively influence,] or to direct the political or military action of a State [/Group].

This formulation is closely based upon the original SWGCA leadership clause, but it includes modifications derived from forecasts on leadership that can be incorporated independently of one another or in conjunction.

First, these drafting changes capture leaders within the bureaucratic model who are “in a position” to exercise control over subordinates. The Weberian property of formal position, an element of his pure-type rational-legal authority, was the original inspiration for this component of the leadership clause. The SWGCA leadership clause might be modified to include individuals in post-bureaucratic organizations who exercise power by virtue of their central or focal position in the organization by adding one of these terms into the definition (the first set of square brackets above). However, because of the ambiguity of the word “position”—it might as easily refer to formal position as position within a social network—an explicit modification of the existing leadership clause is not strictly necessary. If the SWGCA wishes to make the double meaning of the term “position” explicit in order to put the expansion of the concept of leadership to a vote by States, it can do so in the elements of the crime. Alternatively, the ASP can choose to leave it to the judges to decide on the meaning of “position.” In this case, the bench must be aware of the possible double meaning. This can be done by clearly describing the double meaning of “position” in an official report of the SWGCA or at the review conference.

Effective control is the second Weberian concept that should be expanded to capture aggressive leaders within post-bureaucratic organizations. In the discussion above, “influence” was identified as an alternative component of responsibility that has supplemented, and frequently replaced, the concept of effective control in aggressive organizations. The terms “determinatively influence” could be added to the existing leadership clause to bring it up to date. The nature of this influence can be narrow or broad and preceded by a qualifier akin to “determinatively,” or not. The key modification is that the term “influence”

captures charismatic (or transformational) leaders,¹⁵⁴ brokers between organizations,¹⁵⁵ and catalysts,¹⁵⁶ whereas the Nuremberg-era concept does not. Instead of explicitly altering the existing leadership clause, the term “or to direct” may be read to include “determinatively influence.” States preferring to supplement “effective control” with “influence” (with or without a qualifier akin to “determinatively”) might, as with the first proposed modification described above, build “influence” into the elements or leave it to the judges to interpret the term “direct” to include it.

4. The Conduct Verbs

The conduct verbs are meant to link the individual leader to the collective act of aggression by describing what the leader actually *does*—the culpable conduct. The conduct verbs in the emerging crime of aggression were extracted directly from Article 6(a) of the London Charter of the International Military Tribunal at Nuremberg, except the last one, which is a modern variation on the Nuremberg-era verb.¹⁵⁷ There is a near consensus among SWGCA delegates that “planning, preparation, initiation and execution” of an act of aggression/armed attack is the culpable conduct.¹⁵⁸ These conduct verbs are based on a Nuremberg-era concept of leadership, a concept that, in this section, will be tested against an important contemporary critique.

5. Conceptual Roots of the Conduct Verbs

The Nuremberg-era conduct verbs correspond closely with the behavioral concept of leadership devised by the French Scholar Henri Fayol, the father of modern operational management theory. In his seminal

154. See JAMES MACGREGOR BURNS, *LEADERSHIP* 244 (1978); see also Boas Shamir, Robert J. House & Michael B. Arthur, *The Motivational Effects of Charismatic Leadership: A Self-Concept Based Theory*, 4 *ORG. SCI.* 577, 577 (1993).

155. See, e.g., CHRISTOPHER S. STEWART, *HUNTING THE TIGER: THE FAST LIFE AND VIOLENT DEATH OF THE BALKANS' MOST DANGEROUS MAN* (2007) (discussing Željko Ražnatović, leader of the transnational Serb paramilitary group Arkan's Tigers).

156. ORI BRAFMAN & ROD A. BECKSTROM, *THE STARFISH AND THE SPIDER: THE UNSTOPPABLE POWER OF LEADERLESS ORGANIZATIONS* 92 (2006) (“In open organizations, a catalyst is the person who initiates a circle and then fades away into the background.”).

157. As an advisor to the SWGCA, the author observed that the SWGCA replaced the final conduct verb of Article 6(a) of the London Charter, “waging” (“waging of a war of aggression”) with “execution.” It was decided that waging did not fit as well as “execution” with “act of aggression” or “armed attack,” and that the terms captured similar conduct.

158. See *Chairman's 2007 Discussion Paper*, *supra* note 139, at ¶ 1; *Chairman's 2007 Non-Paper on Defining the Individual's Conduct*, *supra* note 139, at ¶ 13 (“Without disregarding the different preferences of individual States, it is probably fair to say that no one present at Princeton 2007 would stay in the way of consensus about the conduct clause were the Review Conference tomorrow.”); *2002 Discussion Paper*, *supra* note 111, at ¶ 4.

1917 text, “Administration industrielle et générale,”¹⁵⁹ Fayol proposed five “primary functions of management”: planning, organizing, commanding, coordinating, and controlling.¹⁶⁰ Fayol’s primary functions of management and the behavioral approach he devised match so closely with the conduct verbs and concept of leadership of the London Charter—planning, preparation, initiation, and waging—that there is a strong case to be made that the drafters of the London Charter were influenced by the Frenchman’s work.¹⁶¹ Furthermore, Fayol’s principles of management—specialization of labor, authority, discipline, unity of command, unity of direction (top-down), subordination of individual interests, fair remuneration, centralization, formal chain of command, order, equity of treatment, limited turnover of personnel, initiative, and cohesion among personnel—coincide closely with the description of the Nazi organization as a bureaucracy that the IMT sets out in its judgment.¹⁶²

Whether Fayol’s “primary functions of management” directly or indirectly inspired the conduct verbs in the London Charter and, subsequently, the SWGCA link between the individual and the state/collective act, is an interesting historical question. However, it is not Fayol’s theory that is most significant for this analysis, but the scholarship of his primary critic, the Canadian management scholar, Henry Mintzberg.¹⁶³ Mintzberg offers an appraisal of Fayol’s work that sheds light on the concept of individual culpability used by the Nuremberg tribunal. In Mintzberg’s empirical studies of managerial work, spanning the 1970s and 1980s, he studies managers of all sorts¹⁶⁴ and analyzes whether his subjects spend their time planning, organizing, influencing, leading, and controlling. “A synthesis of these findings,” concludes Mintzberg, “paints an interesting picture. One as different from Fayol’s classic view¹⁶⁵ as a cubist abstract is from a renaissance painting.” Mintzberg finds that managerial behaviors are far more fragmented—giving out a gold watch,

159. HENRI FAYOL, ADMINISTRATION INDUSTRIELLE ET GÉNÉRALE (Paris, 1917) (also available as HENRI FAYOL, INDUSTRIAL MANAGEMENT AND ADMINISTRATION (J.A. Coubrough trans., 1930)).

160. *Id.*

161. Fayol’s treatise and the English translation were published soon before the London Charter was negotiated. By the time of the negotiations, his work was widely known.

162. See Nuremberg Judgment, *supra* note 2, at 175-83.

163. See HENRY MINTZBERG, THE NATURE OF MANAGERIAL WORK (Prentice-Hall 1980) (1973); See also Henry Mintzberg, *The Manager’s Job: Folklore and Fact*, 53 HARV. BUS. REV. 49 (1975), (reprinted Mar.-Apr. 1990) [hereinafter Mintzberg 1975].

164. See Mintzberg 1975, *supra* note 163, at 164 (“Foremen, factory supervisors, staff managers, field sales managers, hospital administrators presidents of companies and nations, and even street gang leaders.”).

165. According to Mintzberg, the French industrialist Henri Fayol introduced the words planning, organizing, influencing, leading and controlling in 1916 to describe what managers do. *Id.* at 163.

attending a conference, making calls after a factory burns down—and, on the basis of these findings, he issues a warning, “don’t be surprised if you can’t relate what you see to these words.”¹⁶⁶

In accordance with Mintzberg’s critique, the Nuremberg Tribunal fails to consistently operationalize and/or apply the conduct verbs from Article 6(a) of the London Charter to the behavior of individual defendants. One possible explanation, derived from Mintzberg’s work, is that while the conduct verbs describe what leaders do, they are too abstract to guide the judge’s interpretations and produce consistent results throughout the judgment, especially given the diverse activities in which leaders engage.¹⁶⁷ “Planning,” the conduct verb that received the most attention in the IMT judgment, serves a dual function as both a conduct verb and as an element of the separate crime of conspiracy, but was defined predominantly along the shallow lines of attendance at Hitler’s key meetings in order for the tribunal to establish the minimum *mens rea* of knowledge of Hitler’s aggressive plans.¹⁶⁸ Betraying the tribunal’s difficulty in precisely delineating the bounds of planning, the justices noted in the final judgment that

[p]lanning and preparation are essential to the making of war. . . . [A]ggressive war is a crime under International Law. The Charter defines this offence [*sic*] as planning, preparation, initiation or waging of a war of aggression “or participation in a common plan or conspiracy for the accomplishment . . . of the forgoing.” The Indictment follows this distinction. Count One charges the Common Plan or Conspiracy. Count Two charges the planning and waging of war. The same evidence[, attendance at Hitler’s key meetings] has been introduced to support both counts. We shall therefore discuss both counts together, as they are in substance the same.¹⁶⁹

Absent defined bounds, “preparation” is likewise difficult to employ consistently given the myriad of activities that can be considered to fall under the term. The tribunal evinced this difficulty throughout its judgment, as it repeatedly confused its conception of the term. At one

166. *Id.*

167. Roger Clark, in his analysis of the conduct verbs in the London Charter’s crime against peace and their application by the International Military Tribunal at Nuremberg concludes, “It is all very rough and ready, both in the general explanations and in applying the Charter to the individuals. The ultimate challenge that Nuremberg leaves us with in respect of the crime against peace is whether twenty-first century drafters can do better than those in London sixty-one years ago. It is still a daunting task.” Roger Clark, *Nuremberg and the Crime Against Peace*, 6 WASH. U. GLOBAL STUD. L. REV. 527, 550 (2007).

168. *E.g.*, Nuremberg Judgment, *supra* note 2, at 423-25, 447-49; 1 Nuremberg Trial Proceedings 2-11 (1945).

169. Nuremberg Judgment, *supra* note 2, at 447.

extreme, the IMT determined early in its judgment that *Mein Kampf*, the book written by Hitler in prison, constituted preparation. “*Mein Kampf*, the justices concluded,

was no mere private diary The general contents are well known. Over and over again Hitler asserted *his belief* in the necessity of force as the means of solving international problems *Mein Kampf* is not to be regarded as a mere literary exercise Its importance lies in the unmistakable attitude of aggression revealed throughout its pages.¹⁷⁰

At the other end of the spectrum, Hitler’s meetings with his highest-ranking military commanders was also considered preparation.¹⁷¹ Adding to its confusion, the tribunal also arbitrarily placed “preparation” both before and after Hitler’s plans to invade surrounding countries.¹⁷² Discussing the conquest of Austria, the IMT noted that “[t]he invasion of Austria was a premeditated aggressive step in furthering the plan to wage aggressive wars against other countries.”¹⁷³ It is unclear from this declaration when preparation ended, and when execution of the Second World War began. Clearly, the invasion of Austria was a necessary and preliminary step in Hitler’s grand plan to conquer Europe, but it was also an act of aggression itself. Can the same action be simultaneously an aggressive war and a preparatory step? At what point did Hitler’s preparation end and his war on Europe begin, and on which side of the dividing line should the annexation of the Sudetenland, Austria, and Czechoslovakia fall? The tribunal’s blurred hints provide no answer.¹⁷⁴ These conduct verbs, applied today, risk violating the principle of legality contained in Article 22, paragraph 2 of the Rome Statute which forewarns, in the second sentence, “[i]n case of ambiguity, the definition shall be interpreted in favour [*sic*] of the person being investigated, prosecuted or convicted.”¹⁷⁵

6. Suggested Modifications and/or Interpretations

The solution, based on Mintzberg’s critique of Fayol, is to further flesh out the properties of the conduct verbs, which, as they stand, are abstract enough to capture both classic and contemporary concepts of

170. *Id.* at 422-23.

171. *Id.* at 423-25.

172. *E.g., id.* at 425-42.

173. *Id.* at 425.

174. Roger Clark has an alternative explanation: “My take on Sudetenland etc is not that the Tribunal had trouble with the verbs, but that it got hung up on the ‘war’ requirement.” E-mail from Roger Clark, Professor of Law, Rutgers School of Law – Camden, to Noah Weisbord, Visiting Assistant Professor, Duke University School of Law (Nov. 2, 2009 15:43:08 EST) (on file with author); See Roger Clark, *Nuremberg and the Crime Against Peace*, 6 WASH. UNIV. GLOBAL STUD. L. REV. 527, 535 (2007).

175. Rome Statute of the International Criminal Court art. 22, July 17, 1998, 2187 U.N.T.S. 104.

leadership. Properties can be drawn from the jurisprudence of the nations participating in the negotiations. Legal scholars can assist the SWGCA by setting out, analyzing, and commenting upon the content of the conduct verbs in their jurisdictions. The properties of these Nuremberg-era conduct verbs, at least, should be forward-looking in order to capture new contingencies.

There are two different ways that new properties can be incorporated into the definition of aggression. The drafters might include a list of culpable behaviors for each conduct verb in the official document describing the elements of the crime of aggression. The elements offer guidance to the bench that is more specific than the provision itself, in particular, pertaining to the conduct, consequences, and circumstances associated with each crime.¹⁷⁶ The elements, however, are only meant to clarify what was agreed upon in the definition. The risk of re-opening the discussion, once again, is deadlock at the review conference

Alternatively, the ASP might leave it to the judges to interpret the terms. While deferring the question to the judges would help the delegates at the 2010 review conference to avoid another last minute controversy, this approach risks results similar to the Nuremberg judgment unless the ICC judges are aware of the problem identified by Mintzberg and prepared to flesh out the properties of the conduct verbs in their judgments. Even then, the defendant at the first aggression case, who will be on trial before the judges flesh out the properties of the conduct verbs, will be justified in raising Article 22, paragraph 2, the principle of legality, in his or her defense. This is a perennial point of contention of relying on judges to develop criminal law jurisprudence in the common law style in a mixed system (common and civil) of international criminal law.

When contemplating properties of the conduct verbs, the ASP or the bench should not only look to definitions of individual conduct from past judicial decisions, but also account for future contingencies. Face-to-face meetings convened by a leader and his ministers accompanied by redacted minutes are one way among many that planning takes place today. Alternatively, people who have never met who are advancing divergent agendas, such as local religious leaders and transnational criminal gangsters, may be involved in the same aggressive plan for different reasons and communicate through signals on a publicly accessible web site. Different contributions to the planning of swarming attacks should also be

176. See International Criminal Court, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000), available at <http://www1.umn.edu/humanrts/instate/iccelementsofcrimes.html> (discussing elements of crimes under the Rome Statute of the International Criminal Court).

contemplated, as swarming is an increasingly prevalent method of contemporary warfare and is, according to some forecasts, likely to become still more important in the foreseeable future.¹⁷⁷ The swarming phenomenon may offer insights about the core properties of the concept of planning that should be considered. Ideally, the definition of planning will be cast specifically enough to forewarn potential perpetrators that their involvement may be criminal, yet broadly enough to allow for different ways that the meeting of minds can take place. Examples of key properties of the concept of planning drawn from national jurisprudence are the existence of a proposal, the level of detail of the proposal, the level of involvement of an individual in the proposal, the intent that the illegal result should come about, and a meeting of minds (not necessarily in person) where two or more people are involved. Whenever possible, empirically verifiable indicators of the prohibited conduct should be included as properties of the conduct verb. The challenge for drafters and interpreters of the conduct verbs, like the drafters and interpreters of any criminal prohibition, is to satisfy the demands of legality, a backward-looking concept, while accommodating future contingencies. While the judges have a variety of interpretive tools at their disposal to delineate the contours of the concept, the diplomats negotiating the definition must base its contours on the agreement they are able to achieve.

C. Liability Doctrine: Conspiracy, Command Responsibility, Joint Criminal Enterprise, and Future Aggression Scenarios

When it comes to crimes committed by “the action of a multitude of persons,”¹⁷⁸—the crime of aggression is the paradigmatic example¹⁷⁹—individuals usually commit parts of the whole. Any successful concept of liability for the crime of aggression must convincingly place the individual contribution in the context of the collective act so that the individual punishment fits each individual’s contribution to the collective crime. Towards this end, the legal systems of the world have generated a number of concepts meant to apportion individual blame for collective acts. Conspiracy, organizational guilt, superior (or command) responsibility, and

177. See JOHN ARQUILLA & DAVID RONFELDT, *SWARMING & THE FUTURE OF CONFLICT* vii (2000) (“Swarming is seemingly amorphous, but it is a deliberately structured, coordinated, strategic way to strike from all directions, by means of a sustainable pulsing of force and/or fire, close-in as well as from stand-off positions. It will work best—perhaps it will only work—if it is designed mainly around the deployment of myriad, small, dispersed, networked maneuver units (what we call “pods” organized in “clusters”).”).

178. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 181 (2003).

179. *But see* ROBB, *supra* note 54, at 8-9 (describing the superempowered individual).

joint criminal enterprise (or enterprise participation) are four examples. Joint criminal enterprise, specially tailored, is the most promising conceptual link for the crime of aggression. Joint criminal enterprise finds its roots in the older doctrine of conspiracy.

1. Conceptual Roots and Properties of the Liability Doctrines

Conspiracy, an inchoate crime arising out of the common law tradition,¹⁸⁰ is an agreement by individuals to commit an unlawful act, with the intent of each individual to achieve the collective purpose, and minimal conduct that furthers the agreement.¹⁸¹ The concept of conspiracy has not been accepted by most civil law jurisdictions, which, instead, prohibit “criminal association,” a much narrower offense.¹⁸² In contemporary international criminal law, which melds civil and common law traditions, conspiracy applies only to the crime of genocide,¹⁸³ on the theory that genocide is the most heinous crime, and a permissive doctrine is justified in order to ensure that perpetrators are punished.¹⁸⁴ To accord with civilian sensibilities—over half the world’s nations are civil law jurisdictions—the concept that connects the individual to the collective act of aggression should be narrower than conspiracy.

In the wake of World War II, the Allied Powers, facing the prospect of trying thousands of defendants, incorporated a novel concept of organizational guilt into the London Charter that was inspired by the common law concept of conspiracy.¹⁸⁵ In accordance with this concept, whose creation is attributed to United States War Department lawyer Murray Bernays, the Nazi *organizations* would be indicted and tribunals would penalize individual membership itself, thereby shifting the burden onto the defendant to prove that they were coerced into joining in order to

180. Inchoate Crimes are “acts that: (i) are *preparatory* to prohibited offenses, (ii) have not been completed, therefore *have not yet caused any harm*, and (iii) are *punished on their own*, that is, in spite of the fact that they have not led to a complete offense.” CASSESE, *supra* note 178, at 190.

181. BLACK’S LAW DICTIONARY 329 (8th ed. 2004). Conspiracy arose from the common law and does not exist in many civil law jurisdictions. Rachael Lorna Johnstone, *State Responsibility: A Concerto for Court, Council and Committee*, 37 DENV. J. INT’L L. & POL’Y 63, 71 (2008).

182. See Alexander D. Tripp, Comment, *Margins of the Mob: A Comparison of Reves v. Ernst & Young with Criminal Association Laws in Italy and France*, 20 FORDHAM INT’L L.J. 263 (1996).

183. Statute of the International Criminal Tribunal for Rwanda art. 2(3)(b), Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute].

184. CASSESE, *supra* note 178, at 191.

185. Agreement for the Prosecution and Punishment of the major War Criminals of the European Axis, London Charter of the International Military Tribunal at Nuremberg, arts. 9-10, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter].

escape punishment.¹⁸⁶ The IMT was troubled by Barnays' concept and modified it in its judgment, ruling that the prosecution must prove, amongst other requirements, that individual members were aware of the collective purpose of the organization in order to justify punishment.¹⁸⁷ Meanwhile, the Nuremberg provision on crimes against peace, Article 6(a) of the London Charter, included its own notion of individual responsibility for collective action whereby conspiracy to commit crimes against peace was an independent inchoate crime. The tribunal left the concept in Article 6(a) intact and found eight of the twenty-two defendants guilty under the provision.¹⁸⁸

The Nuremberg concept of organizational guilt does not gracefully accommodate post-bureaucratic organizations with no formal membership requirement and weak links between members who participate in criminal acts for diverse reasons. Furthermore, the Nuremberg-era crime of conspiracy is a separate offense, not a link between a state/group act of aggression and an individual. In short, the Nuremberg-era link is not an ideal component for the SWGCA's draft definition of aggression.

The modern concept of superior (or command) responsibility is another legal solution to the problem of attributing individual responsibility for collective action. The concept is often traced to the Lieber Code,¹⁸⁹ the Hague Conventions of 1907,¹⁹⁰ and the trial of Emil Muller in Leipzig after World War I.¹⁹¹ According to Professor Mark Osiel, "[s]uperior

186. See Stanislaw Pomorski, *Conspiracy and Criminal Organizations*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 213, 215-16 (George Ginsburgs & V.N. Kudriavtsev eds., 1990); see also TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 75 (1992).

187. See Nuremberg Judgment, *supra* note 2, at 469 ("A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations.")

188. Pomorski, *supra* note 186, at 235.

189. Francis Lieber, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, BY ORDER OF THE SECRETARY OF WAR, APRIL 24, (1863)*, reprinted in RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 45, 45-71 (1983).

190. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 (1907); Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2351, T.S. 543.

191. See *German War Trials: Judgment in the Case of Emil Muller* (May 30, 1921), reprinted in 16 AM. J. INT'L L. 684 (1922); see also Stuart E. Hendin, *Command Responsibility and Superior Orders in the Twentieth Century-A Century of Evolution*, 10 MURDOCH U. ELECTRONIC J.L. 1 (2003), available at http://www.murdoch.edu.au/elaw/issues/v10n1/hendin101nf.html#Up%20to%201900_T; Edoardo

responsibility places a decided emphasis—both rhetorical and substantive—on the chain of command and how power passes through it, from top to bottom. It stresses the formal, hierarchical structure of military organizations.”¹⁹² Allison Danner and Jenny Martinez describe two forms of command responsibility: active and passive.¹⁹³ In active command responsibility, the leader takes active steps to bring about a crime, while in passive command responsibility, the leader “knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”¹⁹⁴ To prove either form of superior responsibility, the prosecutor must show the required *mens rea* (the superior “knew or had reason to know”), a superior-subordinate relationship, and the superior’s failure to prevent or punish the subordinates’ wrongs.¹⁹⁵ Osiel observes that superior responsibility comports with the sociological features of mass atrocity “where criminal policymaking and control over events concentrate at the top of a bureaucratic hierarchy.”¹⁹⁶

The concept of superior responsibility becomes nonsensical when applied to the crime of aggression. Because the crime of aggression is, by definition, a crime committed by superiors, superiors cannot be held responsible for crimes of aggression committed by their subordinates. The leadership qualifier in the emerging SWGCA definition, which limits the concept to “a person in a position effectively to exercise control over or to direct the political or military action of a State,” makes the emerging crime incompatible with the existing doctrine of superior responsibility as contained in Article 28 of the Rome Statute. This leaves the drafters of the crime of aggression two options: they can add a clause to the crime explicitly excluding Article 28, or they can leave it to the judges to recognize the clumsy conceptual fit and avoid the doctrine of superior

Greppi, *The Evolution of Individual Criminal Responsibility Under International Law*, 835 INT’L R. OF THE RED CROSS 531 (Oct. 30, 1999). These materials provide short histories of the concept of superior responsibility.

192. Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1770 (2005).

193. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 120 (2005).

194. Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(3), May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 6(3), Nov. 8, 1994, 33 I.L.M. 1602; *see also* Rome Statute of the International Criminal Court art. 28, July 17, 1998, 37 I.L.M. 999.

195. ICTY Statute, *supra* note 194, art. 7(3).

196. Osiel, *supra* note 192, at 1770.

responsibility altogether when judging individuals for the crime of aggression.

The doctrine of joint criminal enterprise (JCE), rather than superior responsibility or conspiracy, in light of the scenarios set out in Part II and the conceptual considerations just described, is the most appropriate liability doctrine for the definition for the crime of aggression.

2. Proposed Liability Doctrine for the Crime of Aggression

JCE is rapidly becoming the most important concept in international criminal law to apportion individual blame for collective acts and can serve as a widely accepted liability doctrine for the crime of aggression. In its first decision, *Tadic*, the ICTY read the doctrine of JCE into its statute.¹⁹⁷ The core of the concept of enterprise participation is “a common plan, design or purpose which amounts to . . . the commission of a crime.”¹⁹⁸ The ICTY has categorized three forms of enterprise participation: shared intent to bring about a certain offense,¹⁹⁹ organized systems of repression and ill-treatment,²⁰⁰ and criminal acts beyond the common design, but “a natural and foreseeable consequence of effecting” it.²⁰¹ The first indictment relying “explicitly on JCE was confirmed on June 25, 2001.”²⁰² According to Danner and Martinez,

Of the forty-two indictments filed between that date and January 1, 2004, twenty-seven (64%) rely explicitly on JCE. . . .

. . . If all indictments that include charges that the defendant acted ‘in concert’ with others are viewed as implicitly employing a JCE theory, then thirty-four of the forty-three indictments confirmed between June 25, 2001 and January 1, 2004 (81% of the total) incorporate JCE.²⁰³

Five years after the concept of JCE was read into the ICTY Statute, it was explicitly incorporated into the Rome Statute of the ICC in Article 25(3)(d). The ICC can, and likely will, choose to build on the ICTY jurisprudence when interpreting the statutory provision on JCE.

The strength of the concept of JCE, in light of the changing nature of organizations, is its capacity to locate individual responsibility within a wide range of organizational models. The emphasis of superior responsibility, as Osiel points out, is on the chain of command, while

197. Danner & Martinez, *supra* note 193, at 104 (describing how the International Criminal Tribunal of Yugoslavia read the JCE into Art. 7(1) of the ICTY Statute).

198. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 772 (Jan. 14, 2000).

199. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 195 (July 15, 1999).

200. *Id.* ¶ 202.

201. *Id.* ¶ 204.

202. Danner & Martinez, *supra* note 193, at 107.

203. *Id.* at 108 (footnotes omitted).

enterprise participation “is more consonant with differing dimensions of mass atrocity, where malevolent influence travels through informal and widely dispersed networks.”²⁰⁴ The weakness of the JCE concept is its breadth. Unlike the concept of conspiracy, which relies on an actual agreement among individuals, JCE is based on a legal fiction—that the individual participants are united by a common purpose, a common purpose imagined by the bench.²⁰⁵ Because the concept is based on a legal fiction, it suffers from a serious weakness from the perspective of legality. The defendant cannot know how expansively the tribunal will imagine the common purpose to be prior to its determination, and therefore, whether he or she will be included within the ambit of the crime. For this reason, critics of the concept of JCE, such as Osiel, consider it to be “dangerously illiberal.”²⁰⁶

However, the JCE doctrine, when applied to the definition of the crime of aggression, becomes bounded by the crime’s leadership qualifier. Only leaders of the common plan to commit aggression, individuals “in a position effectively to exercise control over or to direct” the common plan (or, under one formulation proposed above, “a [central/focal] person in a position effectively to exercise control over, [determinatively influence,] or to direct the political or military action of a State [/Group]”) are included within the ambit of the concept. This answers critics, such as Osiel, and makes the concept of JCE viable from the perspective of liberal legalism. If tribunals continue to create additional categories of JCE, some specifically tailored to the crime of aggression, the concept, “consonant with the differing dimensions of mass atrocity,”²⁰⁷ will become still more predictable and comport increasingly closely with the concept of legality. The future of individual accountability for the collective crime of aggression lies in progressively refining the properties of the doctrine of JCE.

3. Recap and Postscript to Part IV

The conceptual link between the individual and the collective act of aggression is, as Part IV demonstrates, made up of three properties: a leadership clause, four conduct verbs, and one or more liability doctrines. Part IV argues that, in addition to formal or effective control, centrality within a social network and the influence of an individual within that network should be included as properties of the leadership clause. In

204. Osiel, *supra* note 192, at 177.

205. *Id.* at 1771 n.92.

206. *Id.* at 1772.

207. *Id.* at 1770.

addition, the solution to the problem with the conduct verbs, based on Mintzberg's critique of Fayol, is to further flesh out the properties of those verbs, which are abstract enough to capture both classic and contemporary concepts of leadership. Finally, the liability doctrine of JCE, tempered by the leadership clause of the crime of aggression, rather than the doctrines of superior responsibility or conspiracy, is the most appropriate option for the definition for the crime of aggression.

There is, in fact, a fourth conceptual link that this article does not address in detail because I consider it in an earlier study—the modes of participation in the crime of aggression contained in Article 25(3) of the Rome Statute.²⁰⁸ An important conceptual consideration related to the modes of participation that I do not address in detail in that earlier study is the uneasy relationship between the conduct verbs (planning, preparation, initiation, and execution).²⁰⁹ and the modes of participation set out in Article 25(3)(a)-(d) of the Rome Statute. The following chart eschews structural theories of perpetration,²¹⁰ which have only confounded the SWGCA debate, and instead presents each mode of perpetration and participation in relation to each conduct verb contained in the SWGCA definition (plus the leadership qualifier), with the aim of evaluating the resulting concepts of perpetration/participation that emerge. Problematic concepts are shaded in gray and the reason they are problematic is described below the chart.

208. Weisbord, *supra* note 4, at 190.

209. *See supra* Part IV.B.

210. *See generally* Albin Eser, *Individual Criminal Responsibility*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 767, 781 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) (describing how true “actors” and mere “accomplices” are both perpetrators and indistinguishable under the unitary perpetrator concept, whereas perpetrators and mere participants are distinguishable under the differential participation concept since perpetrators have a more direct role to play in the commission of the crime than participants in terms of causation and are therefore more blameworthy).

| | | <i>Conduct Verbs in the SWCCA Definition</i> | | | |
|---------------------------------------|---|--|---|---|---|
| | | PLAN | PREPARE | INITIATE | EXECUTE |
| <i>Perpetration in Article 25(3)</i> | <i>Commits Individually</i> | A leader individually plans the commission of aggression/armed attack. | A leader individually prepares for the commission of an act of aggression/armed attack [1]. | A leader individually initiates the commission of an act of aggression/armed attack. | A leader individually executes the commission of an act of aggression/armed attack [2]. |
| | <i>Commits Jointly</i> | A leader jointly plans the commission of an act of aggression/armed attack. | A leader jointly prepares the commission of an act of aggression/armed attack. | A leader jointly initiates the commission of an act of aggression/armed attack. | A leader jointly executes the commission of an act of aggression/armed attack. |
| | <i>Commits Through Another</i> | Through another, a leader plans the commission of an act of aggression/armed attack. | Through another, a leader prepares the commission of an act of aggression/armed attack. | Through another, a leader initiates the commission of an act of aggression/armed attack [3]. | Through another, a leader executes the commission of an act of aggression/armed attack. |
| <i>Participation in Article 25(3)</i> | <i>Orders</i> | A leader orders the planning of an act of aggression/armed attack. | A leader orders the preparation of an act of aggression/armed attack. | A leader orders the initiating of an act of aggression/armed attack. | A leader orders the execution of an act of aggression/armed attack. |
| | <i>Solicits</i> | A leader solicits the planning of an act of aggression/armed attack. | A leader solicits the preparation of an act of aggression/armed attack. | A leader solicits the initiation of an act of aggression/armed attack. | A leader solicits the execution of an act of aggression/armed attack. |
| | <i>Induces</i> | A leader induces the planning of an act of aggression/armed attack. | A leader induces the preparation of an act of aggression/armed attack. | A leader induces the initiation of an act of aggression/armed attack [4]. | A leader induces the execution of an act of aggression/armed attack. |
| | <i>Assists</i> | A leader assists the planning of an act of aggression/armed attack [5]. | A leader assists the preparation of an act of aggression/armed attack [6]. | A leader orders the initiation of an act of aggression/armed attack [7]. | A leader assists the execution of an act of aggression/armed attack [8]. |
| | <i>Provides Means for the Commission</i> | A leader provides the means for the commission of the planning of an act of aggression/armed attack [9]. | A leader provides the means for the commission of the preparation of an act of aggression/armed attack. | A leader provides the means for the commission of the initiation of an act of aggression/armed attack [10]. | A leader provides the means for the commission of the execution of an act of aggression/armed attack. |
| | <i>Attempts</i> | A leader attempts the planning of an act of aggression/armed attack [11]. | A leader attempts the preparation of an act of aggression/armed attack. | A leader attempts the initiation of an act of aggression/armed attack. | A leader attempts the execution of an act of aggression/armed attack. |

[1] If a leader prepares individually, there is no one being led.

[2] A collective act cannot be executed individually by a leader.

[3] If a leader initiates “through another,” how is this different from just initiating by him or herself?

[4] If a leader induces the initiation, how is this different from just initiating by him or herself?

[5,6,7,8] Can a leader be an assistant? The word “assists” pertains to the planning, preparation, initiation, or execution of an act of aggression/armed attack.

[9] What “means for the commission” of planning does the working group have in mind? Computers, maps, expert military planners?

[10] What means for the commission of initiation are necessary? Communication devices?

[11] Under 25(3)(f) of the Rome Statute, an attempt is an action that constitutes a “substantial step” toward the execution of a crime. Does an incomplete plan constitute a substantial enough step to justify criminal responsibility and punishment?

There are two possible avenues the ASP can take in response to these observations. The ASP can replace the existing conduct verbs with verbs that are more compatible with Article 25(3). The advantage of his approach is that, with careful attention to compatibility, the resulting crime would be more conceptually elegant than the existing concept. Alternatively, the ASP can accept that some of the modes of perpetration and participation resulting from the interaction of the leadership clause in the definition, the conduct verbs in the definition, and the terms in Article 25(3) of the Rome Statute, are conceptually problematic and leave it to the judges to avoid them (i.e., the shaded boxes). One advantage of this approach, which comes at the expense of conceptual elegance, is that it avoids another protracted debate in the run-up to the review conference by proceeding on the basis of conduct verbs that states have already agreed to. Another advantage is that these conduct verbs, borrowed from the London Charter, have historical resonance. The risk of using the existing model is that an aggressive prosecutor or an activist bench will one day exploit the conceptual confusion as an avenue to interpret the provision to capture a wider range of perpetrators and participants than the signatories to the statute intended. The above chart offers clearer guidance than structural theories of perpetration and participation as the ASP defines the crime, judges interpret it, and legal scholars evaluate their judgments.

CONCLUSIONS

A. Evaluating the Methodology

The combined scenario planning and grounded theory methodology that this article begins to develop has strengths and weaknesses as an approach to drafting the definition of the crime of aggression. The most important strength is that the methodology shifts the gaze of the drafters from events that have already occurred and agreements already reached to the sociological phenomenon that the Assembly intends to regulate and back again. In this way, it strikes a balance between fidelity to the past and preparedness for the future. The grounded theory approach, unlike *a priori* methodologies, focuses the attention of the drafters on the conceptual fit of the definition and the sociological phenomenon they intend to regulate. It offers an incremental way for lawmakers to shape a definition that does not rely on an initial agreement on *a priori* assumptions. Taken together, scenario planning and grounded theory methodologies are more likely than methodologies focused predominantly on precedent and tradition or efforts based upon an initial normative agreement to guide the drafters to a well-tailored and relevant definition.

What the proposed methodology cannot do is remove politics from the negotiations. Just as SWGCA delegations chose their preferred precedents with their nations' interests in mind, they are likely to choose their favorite scenarios to advance their political and military interests as well. Ultimately, the proposed method can only produce an analytically ideal definition to the limits of what is politically possible. My hope is that through an open discussion of scenarios and constituent concepts, the proposed methodology will help clarify the normative commitments of the drafters so that these commitments can be better accounted for in the negotiations. If politics is to be tethered to process, as the diplomats drafting the crime of aggression seem to prefer, the process would do well to accurately reflect their interests so that these interests are properly taken into account in the final product.

In addition to balancing fidelity to the past and preparedness for the future, the proposed method offers a systematic way to move from the concrete to the abstract and vice versa. This is the primary contribution of grounded theory. The existing definition contains concrete aspects, such as the list of acts of aggression in Paragraph 2 (invasion, bombardment, blockade, etc.), and abstract parts, such as Paragraph 1 (characterizing an act of aggression as a manifest violation of the Charter of the United Nations), but these are more often than not inherited from the hodgepodge of precedents that are the building blocks of the definition. The proposed

method seeks to more deliberately build concreteness and specificity into the definition so that the final definition best fits the phenomena it is meant to regulate. Once again, however, the imperative of designing a definition that best fits the target phenomena and the realities of politics are regularly at odds. “Constructive ambiguity”²¹¹ and a focus on “relative particulars”²¹² are not only tools to tailor the definition to a social phenomena, they are also tools the diplomats use to reach an agreement. The proposed method, ultimately, is incapable of fully disentangling the two uses.

B. Directions for Future Research

Future research might usefully address the above critiques by suggesting specific qualitative and quantitative methodological procedures that would strengthen the overall method. There are no doubt methods of lawmaking employed in other contexts, both domestic and international, which address the challenges of drafting a definition that is certain enough to guide behavior yet flexible enough to capture new contingencies and where consensus is difficult to reach because of disagreement about first principles. A useful follow-up study would compare a number of these methods, draw general lessons about their applicability in a range of contexts, and also about the challenge of lawmaking in the midst of rapid social change. Another direction for future research is to apply the scenario planning and grounded theory approach in a more fine-grained way to particular components of the definition of the crime of aggression, such as the concept of armed attack or the leadership clause. Alternatively, the methodology might be tested in a new drafting scenario, such as the drafting of a municipal regulation. In short, the methodology that this paper introduces is preliminary and requires more study.

In relation to the crime of aggression, new research is needed on the jurisdictional conditions and, in particular, possible solutions to the controversy in the working group over the appropriate role for the Security Council in the ICC’s legal process.²¹³ The question of whether the Security Council should have primary or exclusive authority to authorize an

211. ICC, Assembly of States Parties, 6th Sess., Special Working Group on the Crime of Aggression, *supra* note 131.

212. Sunstein, *supra* note 20, at 1737.

213. See Draft Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, in ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 7th Sess., 2d Resumption, New York, Feb. 9-13, 2009, *Report of the Special Working Group on the Crime of Aggression*, Annex I, ICC-ASP/7/SWGCA/2, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP7R2/ICC-ASP-7-SWGCA-2-ENG.pdf (proposing a draft amendment to the Rome Statute of the International Criminal Court on the Crime of Aggression that would provide for the exercise of jurisdiction over the crime of aggression); see also Weisbord, *supra* note 4, at 196-97.

aggression case has not yet been resolved and it is sure to pose a challenge at the 2010 review conference.²¹⁴ Here, Sunstein's scholarship on incompletely theorized agreements, mentioned in the introduction, offers a promising place to start.

Another important question that legal academics might help resolve is the mechanism for the entry into force of the definition and the jurisdictional conditions of the crime. The ASP will need to decide whether Article 121(4) of the Rome Statute, 121(5), or some combination of the two controls the entry into force of the aggression provisions.²¹⁵ Article 121(4) requires seven-eighths of the ICC's States Parties to deposit their ratifications or acceptance of the amendment with the UN Secretary General before the amendment comes into force. Once this threshold is reached, the amendment binds all States Parties. Article 121(5), by contrast, only requires acceptance by two-thirds of States parties to come into force. However, it only binds States Parties that have deposited instruments of ratification or acceptance. One important and unresolved controversy is which article—or combination of articles—should be employed. Another key question requiring further research is how the definition of aggression would apply to States Parties that have not accepted the amendment under either 121(5) and to non-states parties attacked or attacking a State Party.²¹⁶

C. The Future of the Crime of Aggression

The criminal prohibition of international aggression has been an aspiration among legal scholars and statesmen for approximately a century—at least since the Allied victors of World War I tried unsuccessfully to try Kaiser Wilhelm II and hold him responsible for the war.²¹⁷ The idea is both sticky and resilient. The repeated attempts to define and enforce the crime of aggression since the Nuremberg Trials indicate that the idea has captured the legal imagination and that it will continue to

214. See ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 5th Sess., *Report of the Special Working Group on the Crime of Aggression*, ¶ 8, ICC-ASP/5/SWGCA/1 (Nov. 29, 2006).

215. See generally Roger S. Clark, *Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute*, 41 CASE W. RES. J. INT'L L. 413 (2009).

216. See ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 7th Sess., *Report of the Special Working Group on the Crime of Aggression*, Annex II, ICC-ASP/7/SWGCA/2, (discussing issues related to article 121, paragraph 5).

217. Treaty of Peace between the Allied and Associate Powers and Germany art. 227, June 28, 1919, 225 Consol. T.S. 188; see also Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference* (1919), reprinted in 14 AM. J. INT'L L. 95, 116-17 (1920).

attract new supporters, even after repeated failures to implement it. The adoption of the Rome Treaty in 1998, a major advance in the rapidly evolving post Cold-War international criminal justice system, has created a context in which the crime may finally be defined and enforced. Four possible scenarios present themselves.

The first scenario is that the Review Conference agrees upon a definition and jurisdictional conditions in 2010. Judging from the SWGCA negotiations, if states agree upon a definition, it will be a narrow one. The risk is that the ICC will only apply the definition to isolated leaders in weak states. The hope is that states will incorporate the definition into their national criminal codes, as many have begun to do even pending an amendment to the Rome Statute, and that the definition will help discourage political and military leaders from attacking their neighbors.²¹⁸

Another possible scenario is that states will agree upon a definition in 2010, but not the jurisdictional conditions. In this case, the ICC will not be able to prosecute aggression cases until States Parties at a subsequent review conference amend the Rome Statute to add a jurisdictional trigger. In this scenario, States Parties incorporating the definition into their national criminal laws will still be able to prosecute aggression cases, even if the ICC is not. The day may come when the definition is widely accepted in national jurisdictions and this generates enough momentum among States Parties to insert jurisdictional conditions into the Rome Statute, allowing the ICC to proceed.

A third scenario is that the Review Conference fails to agree upon both the definition and the jurisdictional conditions in 2010. Though this may result in a period where States are less motivated to define the crime, if the history of the twentieth century is any indication, the idea will resurface again at the end of a destructive armed conflict that detrimentally affects enough powerful states. With regular ICC review conferences on the horizon, there will be ample opportunity to define the crime and implement it when the conditions are ripe.

Under the final scenario, the delegations fail to define the crime, the jurisdictional trigger, or the method of implementation at the review conference and the idea finally withers. Though the death of what some consider an ill-conceived idea may appeal to even thoughtful commentators within the international legal establishment,²¹⁹ this scenario is unlikely. The

218. See generally *Evaluating Domestic Legislation on the Customary Crime of Aggression under the Rome Statute's Complementarity Regime*, in *THE ICC'S EMERGING PRACTICE: THE COURT AT FIVE YEARS 725-54* (Göran Sluiter & Carsten Stahn eds., 2009).

219. See generally Mattias Shuster, *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword*, 14 *CRIM. L.F.* 1 (2003).

sociological changes that are allowing small groups and even individuals to wage war against states call for an individualistic basis of regulation. Though other crimes, such as terrorism, might cover similar ground, the crime of aggression has proven to be a legal idea too compelling to ignore and prone to resurface, despite definitional setbacks.

The fate of this charismatic legal idea, it is fair to conclude, is not yet sealed. Studying it is valuable, whatever the outcome of the drafting process, because of what it reveals about the possibilities and limitations of international law and what the crime of aggression, one of the century's most fascinating legal puzzles, inspires in terms of method.

APPENDIX²²⁰

Article 8 *bis* Crime of Aggression

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

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

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

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

220. Draft Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, in International Criminal Court [ICC], Assembly of States Parties, Special Working Group on the Crime of Aggression, 7th Sess., 2d Resumption, New York, Feb. 9-13, 2009, *Report of the Special Working Group on the Crime of Aggression*, Annex I, 11-12, ICC-ASP/7/SWGCA/2, available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP7R2/ICC-ASP-7-SWGCA-2-ENG.pdf.

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

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

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

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

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