

***DEFINING THE CRIME OF AGGRESSION***  
**BY OSCAR SOLERA<sup>†</sup>**  
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If one examines the Statute of the International Criminal Court (ICC), Article 5 includes the crime of aggression, however, the court cannot exercise jurisdiction with respect to the crime of aggression as an acceptable definition of aggression continues to be elusive. Oscar Solera, of Switzerland's Centre for Applied Studies in International Negotiations, believes that a "rule on aggression applicable to state responsibility issues may or may not fully coincide with a rule on aggression for individual criminal purposes."<sup>1</sup> So there are two concurrent definitional processes. In Solera's view, it is what states or international actors have to say. He does examine the views on the subject of eminent scholars, and provides an understanding of their writings and analytical approaches.

Solera's approach is to look at the contours of a definition which encompass all of the elements that will make a rule on aggression legally sound. To be successful in this quest, there must be a "social understanding" of aggression by the international community. To achieve his objective, the core of the analysis focuses on scrutiny of the "documentary evidence of States' positions in the [UN] General Assembly specialized organs, the ILC's discussions on aggression, and the proposals and debates that have taken place in the context of the Preparatory Commission for the [ICC]."<sup>2</sup>

The book is organized into two parts. In Part I, the evolution of the notion of aggression is analyzed starting with its context in the League of Nations and culminating in the adoption of the UN General Assembly Resolution 3314 (XXIX) of 1974, which could be said to constitute a landmark in the process of finding a legal definition of aggression. It was an extremely troublesome and complex process. The author is painstakingly thorough in providing the reader with the entire picture and

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<sup>1</sup> OSCAR SOLERA, *DEFINING THE CRIME OF AGGRESSION* 11 (2007).

<sup>2</sup> *Id.* at 12.

before ending this part, he asks and responds to the question, “Was the Effort Worth It?”

Part II of the book deals with trying to define the crime of aggression for criminal purposes. Here, the author commences with a review of all the issues surrounding what the prosecution encountered in its cases at Nuremberg, based on the centerpiece of crimes against peace and the development of the notion of personal criminal responsibility for acts committed on behalf of or as an agent of the state. The diverse views of the Allied Powers and political interests, as a backdrop, resulted in the London Charter’s provision on crimes against peace being crafted in ambiguous terms. When the Nuremberg Tribunal dealt with aggression it relied on moral arguments against making war instead of dwelling on the legal issues underlying the crime. All of the efforts of the International Law Commission (ILC) are next examined in detail, and why it failed with respect to “aggression.”

With regard to the work in the ICC context, Solera presents what took place from the perspective of the input in three cycles, namely in the preparatory process of the Rome Conference, at the Conference itself, and in the final phase by the Preparatory Committee on the Establishment of the ICC. All of the political skirmishes, the different proposals, options and survey of delegations’ positions are set out; variations and explanations offered to support a particular approach are evaluated.

The author dissects the definition of aggression into its constitutive elements and delimits them so that the definition would cover all acts that states consider as aggressive. This analysis entails: the object of aggression, the objective conduct, and the subjective mindset that needs to be considered. Weaknesses or limitations that are intrinsic to the international legal system are suggested, and how legal defenses would be offered in answer to the notion of aggression. The right to individual and collective self-defense is set out. In trying to answer the question of where do we go from here, Solera underscores the ambiguity of Articles 121 and 123 of the ICC Statute. Various alternatives presented by the special working groups on this crime are reviewed.

Before offering his conclusions that are at a stalemate at this juncture, the author thinks that the three-element definition alluded to, needs to be looked at as it would apply in practice. To this end, he examines three examples in which armed force was used, to test the proposed definition on those cases. These are NATO’s “humanitarian intervention” military campaign against the former Yugoslavia, the American led invasion in Afghanistan as a war on terror, and the use of force in Iraq in 2003. In these situations, he concentrates particularly on the question of the

subjective element. He is testing primarily whether the mental element could lead to the conclusion that aggression may have been committed. His analysis of the evidence in these cases is not exhaustive, but adequate to show that an international criminal judge can determine whether the *mens rea* was aggressive or defensive.

One of the greater merits of this study is the author's account of all of the acceptable definitions. There is an excellent 22-page bibliography of all primary documents and secondary source references. The author's organization of the materials and writing style make a complex subject easy to follow. Finally, the publisher should have invested in an index to assist Dr. Solera.

