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PROSECUTING THE CRIME OF AGGRESSION AND THE JURIDICTION OF THE INTERNATIONAL CRIMINAL COURT AND THE SECURITY COUNCIL.

By:

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DECLARATION

I, THOMAS KHAMALA BIFWOLI do hereby declare that this is my original Work and no portion of this work has been submitted or is being submitted for a similar or any other degree in this or any other University.

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LIST OF ABBREVIATIONS

GA	General Assembly
GC	1949 Geneva Conventions
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
IMT	International Military Tribunal for Nuremberg
IMTFE	International Military Tribunal for the Far East
ICTY	International Criminal Tribunal for former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
PCIJ	Permanent Court of International Justice
SC	Security Council
UN	United Nations

CHAPTER ONE

INTRODUCTION

1.1. Background to the Study

The crime of aggression has been included within the jurisdiction of the International Criminal Court but the court shall not exercise jurisdiction over this crime until an agreement is reached on its definition and the conditions for exercising jurisdiction.[1] Resolution F of the Rome Conference instructed the Preparatory Commission for the Court to prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and conditions under which the International Criminal Court shall exercise it's jurisdiction with regard to this crime.[2]

These proposals were to be submitted "to the Assembly of States Parties at a Review Conference[3], with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the Rome Statute." However, this Preparatory Commission did not succeed in submitting a completed proposal to be tabled before the Rome Diplomatic Conference that deliberated and adopted the Rome Statute. Instead, it's final work-product on aggression was a discussion paper proposed by the coordinator of the Preparatory Commission's working Group on Aggression, a kind of rolling text of what had been agreed (and not agreed) and a proposal for the creation of a working group of the Assembly, open to all states,[4] to carry the work forward.

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[1] **Rome Statute of the International Criminal Court**. Art. 5(2), *UN Doc. A/CONF.183/9* (1998)('Rome Statute'). Arts. 121 and 123 deal with amendments, the first of which may not be made until seven years after the entry into force of the statute. (Some essential machinery provisions of an 'institutional' nature may be changed earlier under Art. 122) Art. 121 contemplate amendments agreed upon at regular meetings of the Assembly of States Parties; Art 123 deals with Review Conferences to consider amendments. The first Review Conference must take place seven years after entry into force of the statute. Art 5(2) is hardly a shining example of the art of drafting. Like most commentators, I read the words "in accordance with articles 121 and 123" literally as not permitting the amendment to add aggression until seven years after the statute enters into force. But see O. Triffterer, Preliminary Remarks, in O. Triffterer (Ed.), Commentary on the Rome Statute of the International Criminal Court 17, at 40 (1999) who argues the phrase refers to procedure only and not to the time frame and, thus, that the necessary amendments can be made at any time

[2] Final Act of the United Nations Diplomatic Conference of plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/10 (1998), at 8-9

[3] Id. The Reference here to a Review Conference seems to support the minimum seven year time frame

[4] UN Doc. PCNICC/2002/WGCA/L.2/Rev. 1, Draft report of the working group-Draft resolution of the Assembly of States Parties on the continuity of work in respect of the crime of aggression, Prep COM Report. Somewhat unrealistically, the Final Act had instructed the Commission to submit proposals on aggression to the Assembly at a Review Conference. Since the first Review Conference is to take place seven years after entry into force of the statute (Art. 123) and the Prep COM expired with the conclusion of the first meeting of the Assembly of States Parties (Resolution F, para. 8), there was always an obvious gap of several years between the two events.

The Preparatory Commission concentrated most of its efforts until the last two of its ten sessions on the "definition" and "conditions".[5] The conditions refer to the vexed question of the relationship between what the ICC might do in the case of an individual and whatever antecedent action needs to be taken in a political or other organ of the United Nations, in particular the Security Council, or in it's absence the General Assembly or the International Court of Justice.[6] Indeed this was and still remains the biggest intellectual hurdle as a number of states, notably the permanent members of the Security Council, insist that there must be a predetermination of an act of aggression by a state made by the Security Council.[7] Others believe that this predetermination can be made by the General Assembly[8] or the International Court of

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[5] A particularly useful paper before the Prep COM was the Secretariats Historical review of the developments relating to aggression, UN Doc. PCNICC/2002/WGCA/L.1 and Add.1. The document analyzes the work of the Nuremberg Tribunal, that of the American and French tribunals established pursuant to Control Council Law No. 10 and the Tokyo Tribunal. It then turns to precedents concerning aggression and the use of force in general in the Security Council, General Assembly and the International Court of Justice. Another helpful document is UN Doc. PCNICC/1999/INF/2, Compilation of proposals on the crime of aggression submitted at the preparatory Committee on the establishment of an International Criminal Court (1996-1998), the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court (1998) and the Preparatory Commission for the International Criminal Court (1999). Many participants contributed to what is very much a collective effort. Germany worked very hard before and at Rome. Particularly influential since Rome were the contributions by the Arab States, by Bosnia and Herzegovina, New Zealand and Romania, by Greece and Portugal, and by Italy. Colombia, Guatemala and Thailand made important conceptual clarifications. Greece and Portugal have insisted that the Court itself must make the factual findings as to all relevant elements of the offence. In addition to formal papers, useful Non-Governmental Organization (NGO) material is contained in a paper by J. Bertram-Nothnagel, dated 14 April 2002, entitled Some Due Process Questions With Regard to the Crime of Aggression; and a Discussion Paper on the definition of an act of aggression, the Crime of Aggression and the exercise of Jurisdiction by the ICC, by N. Strapatsas.

[6] Most of the proposals before the PrepCom rolled up these two issues. Bosnia and Herzegovina, New Zealand and Romania made a valiant effort to distinguish the two (and to support a role for the International Court of Justice) by submitting separate papers on them. See UN Doc. PCNICC/2001/WGCA/DP.2/Add.1 (Conditions under which the Court shall exercise jurisdiction with respect to the Crime of Aggression) and PCNICC/2001/WGCA/DP.2 (Definition of Aggression).

[7] The argument that the Security Council does not have exclusive power in this area gains substantial support from the advisory opinion of the International Court of Justice, Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, 1962 ICJ Rep. 151. The Court stressed that the Security Council has primary responsibility which does not preclude other organ (or organs) from having secondary responsibility. This was , of course, the argument behind the adoption of the Uniting for Peace Resolution, General Assembly Res. 377A (V), 5 UN GAOR, Supp No. 20, at 10 UN Doc. A/1775(1950). See discussion of United States initiative leading to General Assembly Res. 377A, in (1950)UNYB 181-195. But see T. Meron, Defining Aggression for the International Criminal Court, 25 Suffolk Transnat'l L. Rev. 1, at 14 (2001) (arguing that while Security Council's responsibility to maintain peace and security under Art. 24 of the Charter is primary not exclusive, it's "prerogative to determine an act of aggression under Article 39, however, is exclusive"). E. Wilmshurst, The International Criminal Court: The Role of the Security Council, in M. Politi & Nesi (Eds). The Rome Statute of International Criminal Court: A Challenge to Impunity 39, at 41 (2001), emphasizes the last sentence of Art. 5(2) of the Rome Statute, that the provision for the crime of aggression must be "consistent with relevant provisions of the United Nations Charter." She says: " This is code for a requirement that the court will not be able to act in relation to the crime of aggression unless and until the Council has first determined that aggression has been committed by the state concerned (this was indeed the tenor of the statement made by the United kingdom and the United States on adoption of the statute at the Conference)". Others understood the code differently, see also S. Schwebel, Relations between the International Court of Justice and the United Nations in Le droit international au service de la paix, de la justice et du develoooement, Melanges Michel Virally 431, at 438-439 (1991). He says: "The essence of my conclusion was that, however plausible was the U.S argument that it was the intent of the drafters of the Charter and statute to vest exclusively in the Security Council and not concurrently in the court the determination of acts of aggression, the terms and travaux preparatoires of the Charter and Statute do not sufficiently demonstrate that that was their purpose nor do those terms accomplish that purpose.-Judge Schwebel, Dissenting Opinion, Military and Paramilitary Activities in and against Nicaragua. (Nicaragua v. United States of America). Judgement of 27 June 1986, 1986 ICJ Rep. 14 at 287-293.

[8] As the Secretariat's Historical review indicates, there is significant practice on the part of the General Assembly in making determainations that aggression has occurred. See UN. Doc. PCNICC/2002/WGCA//L.1, supra note 6, at 123 (China and North Korea in Korea);124-125 (South Africa in Namibia); 125 (South Africa in Angola, Botswana, Lesotho, Mozambique, Seychelles, Swaziland, Zambia and Zimbabwe); 126(Portugal in Guinea Bissau and Cape Verde); 127(Israel in Iraq, Lebanon, Palestine and Syria); 128(Yugoslavia and Croatia in Bosnia and Herzegovina). This practice might reasonably be regarded, in terms of the 1969 Vienna Convention on the Law of Treaties, Art. 31(3)(b), as "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding it's interpretation" and thus relevant to the interpretation of the charter.

Justice.[9] But other states strongly insist that all decisions must be made by the International Criminal Court itself. The political choice between these positions has still to be made.

1.2. Statement of the Problem.

International law confers on the Security Council the power to make a factual finding as to an act of aggression, yet at the same time it establishes an independent and impartial international criminal court to try and punish the crime of aggression. Certainly, the roles conferred on the Security Council and International Criminal Court as currently constituted under international law is contentious. Article 39 of the United Nations Charter empowers the Security Council to make a factual determination of an act of aggression. The implication of this provision is that the primary responsibility for determining an act of Aggression has been invested in the Security Council as a precondition to the initiation of criminal proceedings against individuals by the International Criminal Court. Consequently, the International Criminal Court (ICC) cannot exercise jurisdiction over the crime of Aggression until the Security Council has made a prior determination of existence of an act of Aggression by a state. This then means that, the Security Council, a political body, will be making a legal determination, a duty that should be left to the Court. Article 36(3) of the United Nations Charter calls upon the Security Council to encourage member states to refer their legal disputes to the International Court of Justice (ICJ). It is also against this provision that the Security Council itself is empowered to seek advisory opinion from the International Court of Justice. From the foregoing, it is quite evident that legal determination of disputes is not the business of the Security Council.

Again, a critical look at Article 16 of the Rome Statute reveals that it will never be possible to mount any meaningful criminal prosecutions against the permanent members of the Security Council and their friendly states because of their veto power. Besides exercising the veto power in their favour, it is quite likely that the Permanent

[9] The International Court of Justice has never made a finding that an act of aggression has occurred, but there is some discussion of the General Assembly's definition of Aggression in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States). The Court regarded at least some aspects of General Assembly Res. 3314 as reflective of customary law.

Security Council members may go further and exercise the veto in favour of other friendly states. Article 16 of the Rome Statute provides that no investigation or prosecution may be commenced or proceeded with under the Rome Statute for a period of Twelve (12) Months after the Security Council, in Resolution adopted under Chapter VII of the United Nations Charter has requested the Court (ICC) to that effect; that request may be renewed by the Security Council under the same conditions. This provision politicises the judicial role of the International Criminal Court in that it creates room for the Security Council, a political body, to interfere in the independent functioning of the International Criminal Court. This provision permits the Security Council to oust the Jurisdiction of the Court by placing a situation on the agenda of the Security Council where it may remain for consideration for as long as it is convenient to the Security Council. It should be noted that the Security Council has defined its powers under Chapter VII of the United Nations Charter in a very broad way. The net effect of this is that the Court (ICC) will be prejudiced by the political inertia of the Security Council, thus defeating the very objects and purposes for which the Court (ICC) was established. The International Criminal Court, being a judicial body should be invested with the competence to determine legal issues without interference from the Security Council, a political body.

1.3. Objectives of the Study

The roles of the Security Council and the International Criminal Court (ICC) pertaining the initiation of investigations and prosecution of the crime of aggression as currently constituted in international law are problematic. There would be serious problems, if the International Criminal Court is made to rely on the Security Council for determination of aggression before it can become seized of the crime of aggression. Thus, it is the objectives of this study to;

(i) To investigate and critically analyze the institutional Weaknesses of the International Criminal Court and establish effects of the same on the mandate of the Court.

(ii) To identify the legal and political challenges that the International Criminal Court is likely to face because of its close relationship with the Security Council.

(iii) To recommend legal solutions to the problems facing the International Criminal Court.

1.4. Research Questions.

Article 39 of the United Nations Charter confers on the Security Council the power to determine an act of aggression while article 24 of the United Nations Charter confers on the Security Council again the primary responsibility for maintenance of international peace and security. As such the United Nations Charter has conferred on the Security Council some powers to deal with a situation of aggression. On the other hand, the Rome Statute that establishes the International Criminal Court has set up an independent and impartial international criminal tribunal to punish core crimes *inter alia* the crime of aggression. Evidently, the roles of the Security Council and the International Criminal Court as currently constituted under the United Nations Charter and the Rome Statute in initiating and punishing the crime of aggression is problematic. In relation thereto, I shall investigate the following issues;

First, what is the nature of the crime of aggression?

Secondly, what is the juridical role of the Security Council and the International Criminal Court in the initiation and prosecution of the crime of aggression?

Thirdly, what are the legal and political challenges that the ICC is likely to face as a result of its relationship with the Security Council?

1.5. Justification for the Study

Although we now have an international criminal court, the same will not try and punish the crime of aggression until two critical issues have been sorted out. These two issues are first, the definition of the crime and secondly, who between the Security Council and the International Criminal Court should be invested with the jurisdiction to initiate the prosecution of the crime of aggression. For this reasons, the crime of aggression has been included *de iure* and not *de facto* in the Rome Statute. It is the intention of this study therefore to explore the roles of this two bodies i.e. the Security Council and the ICC and find out which of the two bodies is most suited to make a determination of aggression.

The law confers on the two bodies various roles which at times appear to contradict each other. This study will endeavour to investigate the respective roles of the Security Council and ICC and redefine them in order to diffuse tension between the two bodies and thus permit the competent body to determine aggression. There appears to be some confusion when some member states interpret primary responsibility of the Security Council in the maintenance of international peace and security to mean exclusive responsibility. The law equally confers secondary responsibility for determining an act of aggression on other bodies like the General Assembly who have also been making determinations of aggression. The study further examines whether the international community is willing to provide a definition, general enough to comprise the range of imaginable solutions, but precise enough to meet the requirement of the principle of legality.

The Nuremberg and Tokyo Tribunals were criticised for being the victor's justice over the vanquished. They were established after the war and applied the law retrospectively. Because it was only the losers who were tried before this ad hoc tribunals, they could not be said to be truly international criminal tribunals and it is for this reason that that the ILC was afterwards mandated to develop an international criminal code of offences to be utilised by the future international criminal court. The ILC managed to come up with various Draft Codes of offences against the Peace and Security of Mankind but none could be adopted

because states could not agree on the definition of aggression. It was all along maintained that no international criminal code would be complete without the crime of aggression and therefore there would be no need of having an international criminal court without a complete code of offences. Although aggression is now listed as one of the core crimes under the Rome Statute, the ICC shall not exercise jurisdiction until issues of jurisdiction and definition have been resolved. This study will proposes how the issue of jurisdiction could be resolved to allow the ICC try and punish the crime of aggression. The Rome Statute would still remain incomplete until the ICC has jurisdiction over the supreme international Crime that contains within itself the accumulated evil of the whole.

1.6. Hypothesis

This thesis proceeds on the hypothesis that the Rome Statute that establishes the International Criminal Court does not give the Court (ICC) the necessary autonomy it requires to discharge its judicial role under the Statute.

1.7. Scope of the Study

The study shall focus on the development and challenges associated with the crime of aggression. It shall also interrogate the roles of the Security Council and the International Criminal Court in the initiation of prosecution of the crime of aggression. It shall endeavour to find out what are the pros and cons of investing the mechanism that will initiate prosecution of aggression with either the Security Council or the International Criminal Court. As the law confers on both the Security Council and the ICC mechanisms that may ultimately lead to the prosecution of aggression, this study will endeavour to redefine the roles of both the Security Council and the ICC and propose the way forward without compromising the independence and impartiality of the ICC. This study appreciates that both entities are intended to attain international peace and security though they employ different procedures and mechanisms.

1.8. Theoretical framework

This study shall be premised upon a positivist legal theory. This theory is informed by philosophers like Austin, Bentham, H.L.A. Hart and Kelsen among others. Positivists have generally tended to regard as law that which has been laid down by persons with law-making authority. As succinctly put by H.L.A Hart, a law will not cease to be law because it does not contain a certain minimum content of morality otherwise people will disobey laws on the ground that they are deficient of minimum content of morality.[10] Good laws arise from amending the existing laws or enacting new legislation. As such, it will be necessary to redefine the roles of the Security Council and the ICC and harmonise the ICC Statute with United Nations Charter in order to settle the contentious issues of jurisdiction over the crime of aggression.

1.9. Methodology

This study is meant to be descriptive, comparative and analytical. It explores the various problems that may arise as a result of the requirement that the International Criminal Court should not try the crime of aggression but instead wait until the Security Council has made a determination of aggression. The study shall focus on the reality of the law as it is in the legal framework establishing the ICC and Security Council.

As such, primary focus will be placed on analysis of the United Nations Charter and the Rome Statute that establishes the International Criminal Court. The study shall mainly rely on primary sources of information including, libraries, International law textbooks, case law and other instruments relating to the working of the Security Council and the ICC. From this information, the study shall analyse the contentious issue of jurisdiction over determination of aggression as between the two bodies i.e. the Security Council and the ICC.

[10] Hart, H.L.A (1958). "Positivism and the Separation of Laws and Morals," 71 Harvard Law Review 593.

Other sources shall be the internet and journal articles. This will be helpful especially in highlighting issues not yet captured in textbooks, as well as highlighting current affairs and emerging issues.

1.10. Literature Review

This study shall draw plenty from the various diverse approaches to the question of jurisdiction over the determination of aggression as a requirement for initiation of prosecution of the crime of aggression. Though a number of books and articles have been written on various issues of the ICC, none addresses in a comprehensive and precise manner, the issues raised in this thesis. Most books and articles have devoted their analysis on the historical evolution and development of the International Criminal Court.

Legislative History of the International Criminal Court, by Bassioni looks at the historical development of the ICC. It also interrogates the various works and drafts of the International Law Commission (ILC) that led to the Rome Statute.

An International Criminal Court: A Step Towards World Peace by Ferencz interrogates as well the historical development of the Court. It also analyses the efforts undertaken by the International community to set up a permanent international criminal tribunal culminating into the Rome Statute that established the International Criminal Court.

The Rome Statute of the International Criminal Court: A Commentary by Antonio Casese also looks at the historical development of the International Criminal Court. The book also analyses the events that that took place during the Rome Conference negotiations. The book also interrogates in depth the reactions of states to various provisions of the Rome Statute and their proposals.

Principles of Public International Law by I. Brownlie also analyses the historical development of international criminal law as well as international criminal tribunals.

The Making of the Rome Statute: Issues, Negotiations and Results by R.S. Lee looks at the historical development of the International Criminal Court, the crimes within jurisdiction of the court and the reactions of various states to the various provisions of the Rome Statute.

Introduction to the International Criminal Court by W.A. Schabas analyses the articles of the Rome Statute and how they should function.

1.11. CHAPTER BREAKDOWN

CHAPTER ONE

The essence of this Chapter is to introduce and explain to the reader what aggression is and in particular who should exercise jurisdiction over the crime of aggression between the Security Council and the International Criminal Court. This Chapter is intended to give the reader a general understanding of the research paper and the juridical roles of the Security Council and the ICC that shall be canvassed herein.

CHAPTER TWO

This Chapter concerns itself with the development of the crime of aggression and in particular since the First World War all the way to the discussions that took place during the negotiations of the Rome Statute. Legal and Political challenges associated with the crime of aggression and in particular, challenges of definition, individual criminal responsibility, criminal responsibility of the state and jurisdiction over the crime of aggression shall be discussed. This Chapter shall seek to give the reader an understanding of the nature of the crime of aggression and the roles of the Security Council and the ICC in the initiation of prosecutions over this crime.

CHAPTER THREE

This Chapter narrows down to the issue of jurisdiction but within the International Criminal Court framework. In particular, I shall debate who between the Security Council and the ICC is most competent to determine aggression for the International Criminal Court. I shall also look at the trigger mechanism and the role of the

prosecutor in initiating prosecution of the crime of aggression before the ICC. I shall also examine the issue of judicial control of the Security Council Resolutions more particularly by the International Court of Justice (ICJ). This Chapter shall give the reader an understanding of the working of the ICC and whether an individual will have the protection he/she enjoys before ICC when is aggrieved by the Resolutions of the Security Council.

CHAPTER FOUR

This Chapter draws conclusions from the fore-going, as well as suggest some recommendations from which all countries may draw lessons.

CHAPTER TWO

Development and Legal and Political Challenges Associated with Aggression

2.1. Introduction.

With entry into force of the Rome Statute[11], we finally have an International Criminal Court with jurisdiction *ratione materiae* over core international crimes. The crimes which the Rome Statute describes as the most serious crimes of concern to the international community as a whole[12] are Genocide, Crimes against Humanity, War Crimes and Aggression. However these crimes will not be automatically tried by the International Criminal Court (ICC) as ICC jurisdiction is complementary[13] to member States jurisdiction and only invoked in situations whereby a member state is either unwilling and/or unable to investigate and prosecute the aforesaid core crimes. Again, though the crime of aggression has found its place in the Rome Statute establishing the International Criminal Court since the Nuremberg and Tokyo trials, it is included in a rather extraordinary way i.e. *de iure* and not *de facto* as jurisdiction of the International Criminal Court over this crime of aggression is suspended until an agreement is reached on definition and conditions under which the ICC shall exercise jurisdiction[14] have been reached.

The crucial point of disagreement on the question of the Jurisdiction of the International Criminal Court over the crime of aggression is what role should the Security Council by virtue of chapter VII of the United Nations Charter play in the mechanism that may ultimately lead to the prosecution of the crime of aggression[15]. It is acknowledged that Section 24 of the United Nations Charter confers on the Security Council the primary responsibility for maintenance of international peace and security. But it is equally contended that this responsibility to maintain international peace and

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[11] Entry into force on 1 July 2002, in accordance with article 126. On 7 January 2003, there were 139 signatories and 87 parties. See http://www.un.org/law/icc/index.html for details.

[12] Art. 5 of the Rome Statute. Similarly art. 1 speaks of 'most serious crimes of international concern'.

[13] Art. 17 of The Rome Statute. Similarly art. 1 and paragraph 9 of the Preamble of the Rome Statute speak of the jurisdiction of the I[illegible]eing complementary to 'national criminal jurisdictions'.

[14] Art. 5(2) of The Rome Statute.

[15] M. Arsanjani, The Rome Statute of The International Criminal Court, 93 AJIL 29 (1999); A. Zimmerman, Commentary on art. 5, in O. Triffterer (Ed.) Commentary on the Rome Statute of the International Criminal Court 97, at paras, 22-24 (1999).

security is not exclusive to the United Nations Security Council[16]. During the Rome Conference of plenipotentiaries, some participants, notably the five permanent members of the Security Council argued that when a prosecutor intends to proceed with an investigation in respect of the crime of aggression, the court should first ascertain whether the Security has made a determination of an act of aggression by the state concerned and if no such determination exists, the court must give the Security Council an opportunity to make such a determination first and where the Security Council fails to make such a determination, that should be the end of the matter. However, other state parties disagreeing with the five permanent members of the security council over the exclusiveness of the Security Council in determining aggression, went ahead to make a wide range of proposals *inter alia* that the International Criminal court may go ahead and make the determination itself; it may ask the UN General Assembly to make a recommendation[17]; it may ask the General Assembly [18] or the Security Council [19] to request an advisory opinion from the International Court of Justice. Save for the five permanent members of the Security Council, no state is prepared to subject itself to a judicial body whose credibility and independence is doubtful given that the Security Council, a manifestly political body, will be in a position to influence the ultimate judgement on the criminal responsibility of its nationals and nationals of friendly states using the veto power[20]. Most states are unwilling to accept such hegemony where criminal and individual responsibility is concerned.

During the Rome negotiations, it was the view of most states that the International Criminal Court, being an international criminal tribunal, should approach any situation from a strictly legal point of view with its operations being based on the principles of independence and impartiality. Basic principles such as equality before the law and the presumption of innocence have to be respected and guaranteed by the

[16] The argument that the Security Council does not have exclusive power in this area gains substantial support from the Advisory Opinion of The International Court of Justice, Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, 1962 ICJ Rep. 151.

[17] As the Secretariat's Historical review indicates, there is significant practice on the part of the General Assembly in making determinations that aggression has occurred. See UN Doc. PCNICC/2002/WGC/L.1

[18] The General Assembly has power under Art. 96 of the UN Charter to ask for the Court's opinion on 'any legal question'.

[19] The reference to the Security Council's similar power in the Charter under article 96 is based on a proposal from the Netherlands, contained in UN Doc. PCNICC/2002/WGCA/DP.1 of 17 April 2002

[20] For the different views of the respective delegations, see the Report of the Preparatory Committee on the establishment of an International Criminal Court, Volume 1 (Proceedings of the Preparatory Committee during March-April and August 1996) UN G.A.O.R., 51st Sess., Supp. No. 22, A/51/22(1996).

ICC bearing in mind that the ICC is called upon to adjudicate upon heinous crimes of international concern where the national courts are unwilling or unable to deal with the same. Other core crimes in the Rome statute have been domesticated, prosecuted and punished by most states. It is only the crime of aggression that has never been prosecuted and punished by any national court. Again, very few states have criminalised this crime in their statutes. Unless the International Criminal Court is conferred with the competence to determine its own jurisdiction in trying the crime of aggression, it's most unlikely that perpetrators of this crime will ever face prosecution in the foreseeable future. States may be willing to cede their sovereignty to the International Criminal Court but never to the Security Council[21] and more so with regard to prosecuting the crime of aggression. It's therefore the aim of this paper to produce workable conditions under which the International Criminal Court shall exercise jurisdiction over the crime of aggression without its decision being influenced by the realpolitik, composition and voting procedure[22] of the Security Council.

2.2. **Development of the Crime of Aggression.**

2.2.1 Aggression after World War I.

Prior to the First World War, states had initiated measures to limit the means of conducting hostilities. The St. Petersburg declaration[23], Hague Conventions of 1899 and 1907[24] amongst others, had introduced revolutionary changes in the *ius in bello*, and consequently, states now had limited means of conducting hostilities. The purpose of war had undergone redefinition at this time with the aim of war being to disable the opponent and not to cause superfluous suffering and injuries to the soldiers. Certain weapons that were considered to cause unnecessary suffering instead of disabling the opponent were outlawed. However nothing much was done to address *ius ad bellum*.

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[21] Supra note 10.

[22] William A. schabas, An Introduction to the International Criminal Court, 2001, at 65.

[23] The Declaration Renounced the use in time of war, of explosive projectiles under 400grammes weight.

[24] The 1899 Conference succeeded in adopting the text of a convention with respect to the laws and customs of war on land with annexed regulations.

After the First World War, this concept of *ius ad bellum* underwent significant changes with states coming out for the first time to negotiate instruments whose effect was to outlaw war out rightly. The instigation of the First World War was the first casualty. The First World War was renounced by the Versailles Treaty "as supreme offence against international morality and the sanctity of treaties"[25]. To maintain international peace and security, a system of collective security in the form of The League of Nations was established. This was intended to protect the world from the suffering associated with another world war. Article 10 of The League of Nations Covenant called upon states to respect and preserve the territorial integrity and existing political independence of each member state against external aggression. Also, multilateral efforts were undertaken to contain the eagerness with which states went to war. With this in mind, the states moved to codify certain wars of aggression that were considered unlawful. To achieve this goal, two important multilateral Treaties were negotiated. These were the 1923 Draft Treaty on Mutual Assistance[26] and the 1924 Protocol for The Pacific Settlement of International Disputes[27]. However, most states saw these treaties as a limit to their sovereign authority to declare war and as such most states stayed away from this treaties refusing to ratify the same. Consequently, this two treaties never entered into force due lack of ratifications by the states. However, with effects of the First World War still fresh in mind, efforts to outlaw aggressive wars continued and in 1927, The Assembly of The League of Nations made a very important Resolution towards outlawing of aggressive war. In its Resolution the Assembly of The League of Nations stated that "a war of aggression can never serve as a means of settling international disputes, and is, in consequence, an international crime." This Resolution signalled that the International mood had now shifted in favour of prohibiting aggressive wars. And in 1928 The General Treaty for Renunciation of War, also known as The Kellogg-Briand Pact was negotiated. This treaty comprehensively prohibited aggressive war.[28] This treaty received a boost when Germany and Japan ratified it. Article 1 of the Kellogg-Briand Pact provided

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[25] Art. 227 Treaty of Versailles. The Treaty of Versailles and After-Annotations of the text of the treaty

[26] League of Nations O.J. Spec. Supp. 7, at 16 (1923), cited in Grant M. Dawson Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression? 2000 New York Law Journal of International and Comparative Law 413.

[27] Ibid., League of Nations O.J. Spec. Supp. 23, at 498

[28] Article 1 stated that "The High Contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another". Art. 2 called states to resolve disputes by pacific means of dispute settlement.

thus; "*The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.*" Article 2 encouraged states to settle their disputes by pacific means. It read as follows; "*The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means*".

However as opposed to the United Nations Charter, Article 39, where determination of an act of aggression is the jurisdiction of the Security Council, it was incumbent upon every state to determine unilaterally[29] whether it was being subjected to aggressive war[30] or not under the 'pact of Paris'. Also nothing in this pact outlawed the right to self defence and as such this right remained intact and in any event the realpolitik of the time would not have permitted any limitation to this right of self defence, considered to be the bedrock of a state's sovereignty.

Having outlawed war, the next problem presented itself in form of defining what constitutes aggression. In 1933, The Soviet Union came up with a proposal considered to be the first proposal ever in an attempt to define what constitutes aggression.[31] As a result of this proposal, a similar draft was placed before the League of Nation's Committee on Security Questions. However not much was achieved towards this end as there was no cooperation amongst states considering that Germany and Japan at this time had commenced their activities that led to the outbreak of the Second World War. Because of these disturbances, further deliberations into the proposed definition of aggression were halted at that time only to be halted further by the outbreak of the Second World War. Following the Second World War, nations came together and formed the United Nations Organization. With the new UN Charter in place, the Kellogg-Briand pact was rendered irrelevant as the major aspects of the Kellogg-Briand pact were captured in the UN Charter.

[29] Supra note 23.
[30] David J. Harris, Cases And Materials on International Law, 5th ed. 1998, at 861. The proscription does not encompass armed force not amounting to war.
[31] Supra note 13, cited in Bassiouni, Crimes, at 317.

Again the United Nations Charter declares the suppression of aggression or other breaches of the peace to be among the purposes of the UN.[32] Breaking away from the previous tradition, for the first time, authority to determine an act of aggression was invested in a different body[33] and not left to unilateral determination by the state concerned. Article 24(1) of the UN Charter confers on the Security Council the primary responsibility for maintenance of international peace and security. In order to fulfil obligations conferred upon it by the UN Charter under article 24(1), the UN member states conferred on it the power to make a factual finding to determine an act of aggression, threat or breach of peace etc. Article 2(4) of the UN Charter equally encouraged UN member states to resolve their disputes using peaceful means of settlement of disputes as outlined in Article 33(1)[34] of the UN Charter. In spite of these concerted efforts to outlaw war, the crime of aggression could not be defined in by the UN Charter. It was argued that it would be undesirable to define the crime of aggression as such definition would create loopholes that may be exploited through rapidly progressing and changing techniques of modern warfare. It was felt that leaving this determination to a political organ like the Security Council would provide the much needed flexibility in responding to changing means and methods of warfare.[35] However, critics of the Security Council have accused it for acting selectively in determining aggressive acts[36] and also for utilizing the veto power to protect their friends from being labelled aggressors.[37] Whether determination of aggression is a justiciable or a political issue remains a controversial issue. Between 1899 and 1998, forty nine multilateral treaties have been negotiated aiming to criminalize and prohibit war in efforts to maintain international peace and security. With time more is expected to follow. At the moment, both the *opinion iuris* and *state practice* is against unilateral resort to force[38] and more so without first having

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[32] Art. 1(1) of the UN Charter.

[33] Art. 39 of the UN Charter states that the Security Council shall determine existence of any threat to the peace, breach of the peace or act of aggression…

[34] Art. 33(1) of the UN Charter states that "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".

[35] UN Doc. A/RES/3314/XXIX (1974)

[36] Regarding condemnation of South African aggression against Angola; Resolution 387 (1976), 454(1979), 567,571,574,577(all1985), and 602 (1987) available at http://www.un.org/documents/scres.htm, visited on 20th September 2006

[37] Ibid at 56

[38] See art. 2(4) of the UN Charter and art. 1(1) of the UN Charter.

explored pacific means of dispute settlement.[39] However article 51 of the UN Charter continues to preserve the state's right to self defence[40] though in practice this right now is more impaired than it was in the early times and more so considering that the concept of state sovereignty itself has undergone tremendous metamorphosis.

2.2.2. Aggression after World War II

After the Second World War one of the United Nations stated objective was to "save succeeding generations from the scourge of war, which twice in our lifetime had brought untold sorrow to mankind"[41]. The question of aggression was considered seriously and as such considered as one of the main purposes and principles of the UN, Article 1(1) of the UN Charter.[42]

From the provisions of the UN Charter, aggression was appreciated as a threat to international peace and security and it is for this reason that it was one of the objectives of the UN to suppress acts of aggression or other breaches of the peace.[43]However, contrary to expectations of its founders, the UN did not achieve much with respect to ending wars. There have been countless incidences of unilateral resort to force by states which are contrary to the provisions of the UN Charter and a threat to international peace and security. But in spite of this glaring breach of the provisions of the UN Charter, there have been very little yet highly selective application of the remedial measures provided under chapter VII of the UN Charter. The only formal condemnations of aggression by the Security Council are those addressed to South Africa and Israel.[44] And even in this two cases it was not without controversy save for South Africa which was politically, economically and socially isolated at that time. But in the case of condemnation of aggression by Israel, the United States abstained from voting and vetoing as well.

Most instances of aggression that call for determination of the Security Council pursuant to Article 39 have escaped action of the Security Council due to its political

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[39] Supra note 31
[40] Art. 51 0f the UN Charter preserves the state's inherent right to self defence
[41] See par. 1 Preamble of The UN Charter.
[42] See Art. 1(1) of The UN Charter.
[43] Ibid.
[44] Supra note 33 and 34; Security Council Resolutions.

nature.[45] For instance, in 1950, when North Korea invaded South Korea, the Security Council opted not to term it an act of aggression but the breach of peace. This was due to the fact that the Soviet Union had threatened to exercise its veto in favour of North korea. The matter has been compounded further by the provisions of article 12 of the UN Charter that prohibits the UN General Assembly from passing a resolution on a matter before or still seized by the Security Council. It is for this reason that the General Assembly has never passed any resolution on both gulf wars as the Security Council has at all times insisted that it is still seized of the matter.[46]

Because of this political nature of the Security Council, the permanent members of the Security Council as well as their friendly states seem rather unlikely to become addressees of a determination of aggression pursuant to Article 39 of the UN Charter. The members have exploited their veto to stop being labelled aggressor and most other states, friendly to the Security Council permanent members may rely on one or more friendly members to exercise a favourable veto for them. It is precisely for this reason that most instances of aggression have been ignored in as much as they amount to aggression under customary law.[47]

After Nuremberg and Tokyo, there have been frequent and uncontroversial prosecutions of Genocide, War Crimes and Crimes against Humanity.[48] However, there have been no post-Nuremberg prosecutions for aggression even in the cases that involved formal condemnation by the Security Council as in the case of South Africa and Israel.[49] Although the offences of Genocide, War Crimes and Crimes against Humanity are related and at times are as a result of an aggressive war, there hasn't been much controversy in defining them, deciding the tribunals to try them and deciding the conditions under which jurisdiction is to be exercised. This is contrary to the position obtaining in respect of the crime of aggression. With respect to aggression, countries have not been able to agree to definition of the crime, jurisdiction and even conditions under which an international Tribunal would try the offence. The biggest obstacle to prosecuting the crime of aggression has been the fact

[45] Supra note 109.
[46] See Art.12 (1) of The UN Charter.
[47] Supra note 109
[48] Supra note 39, Antonopoulos, at 47
[49] Ibid, See Obvious cases such as Korean War, The Falkland War, The Iraq-Iran War e.t.c. The Security Council only determined the breach of peace.

that the perpetrators of this crime are political leaders of states. Criminalization of aggression is tantamount to criminalizing own powers and actions and as such in as much as perpetrators of aggression are easy to identify, they remain difficult to apprehend. The highly political nature of the crime has so far made it impossible to initiate proceedings against alleged perpetrators. Another obstacle is to obtain evidence of aggression. This evidence is not easy to come by as the leaders being investigated will do everything within their powers to suppress this evidence. The matter is even made worse by the fact that this evidence constitutes highly classified and confidential information of a state as it touches on matters of state security.

But the position of most states towards criminalization of the crime of aggression has shifted tremendously. Most states are now willing to criminalize this crime of aggression and it is due to this willingness that for the first time during negotiation of the Rome Statute creating the International Criminal Court (ICC), most states were unwilling to ratify the Rome Statute if aggression was not included as a crime. Finally we have the crime of aggression included in the Rome Statute but the court will not have jurisdiction to try it till controversies regarding definition and jurisdiction have been resolved.[50] But the Rome Statute has been viewed as a major milestone because the proposal to include aggression in the statute was supported by a majority of states and further that the Rome Statute was being enacted in peacetime.

2.3. Legal and Political Challenges associated with Aggression.

Among the legal and political challenges associated with the crime of aggression are as follows;

2.3.1 Definition of the Crime of Aggression.

2.3.2 Individual criminal responsibility for the Crime of Aggression.

2.3.3 Criminal Responsibility of States in respect of Aggression.

[50] Art. 5 of The Rome Statute.

2.3.1. Definition of the Crime of Aggression.

2.3.1.1. ILC and Definition of Aggression.

After the Second World War, and considering the difficulties encountered by the ad hoc Tribunals of Nuremberg and Tokyo it became very necessary to properly and firmly establish the crime of aggression in international law so as to avoid future legal technicalities in terms of *nulla poena, nullum crimen sine lege.* To achieve this objective the International Law Commission was mandated to come up with an extensive but acceptable definition of this crime. In its work the ILC commenced with elaboration of the Nuremberg Principles which principles were affirmed by the UN General Assembly in 1946.[51] Principle VI (a) defined the crime of aggression[52] and this definition was lifted verbatim from the Nuremberg Charter. After this the ILC commenced its work to develop a criminal code of offences to be utilised by a future International Criminal Court. This was to be a code of offences against the Peace and Security of Mankind. With the Nuremberg principles as the basis of its Draft Code of Offences, the ILC developed and presented its first Draft in 1954[53] which was a clear departure from the Nuremberg definition in that it detailed a list of acts constituting aggression and other crimes which would constitute 'Crimes against Peace' or fall there under.

The above definition is a clear departure from the Nuremberg charter definition in that the 1954 Draft defines in an extensive and comprehensive way acts constituting aggression as well as other acts which are not labelled aggression but which also come within the scope of a wide definition of the crime of aggression. Although a vague definition was favoured in the Nuremberg Charter and same appeared to have worked perfectly in the proceedings that followed, the 1954 ILC draft favoured a precise but nonetheless extensive and comprehensive definition, a position

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[51] U.N.G.A.O.R., 5th Sess. Supp. No. 12, UN Doc. A/1316, 11-14(1950); Principles of International Law Recognised in The Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal.
[52] Principle vi(a) defined the Crimes against peace as "Planning, Preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances.
[53] 1954 YILC, Vol. II(Part Two), at 151; hereinafter 1954 Draft.

championed by the United States then.[54] With this definition, both the war of aggression together with other acts of aggression short of war gave rise to criminal responsibility. Both threat of aggression as well as preparation of the employment of armed force would suffice. Again, a wide range of acts of indirect aggression are included as for instance support and backing of terrorism, breach of treaties intended to ensure international peace and security and participation in civil strife. Intervention of any state using coercive measures of economic and political nature would constitute an international crime under this definition.

This definition as comprehensive as it was if accepted would have marked a turning point in international law. It would have marked the end of impunity of Heads of State and other persons in positions of authority as this definition left very little loopholes and provided an effective deterrent in maintaining peace. Criminalizing the breach of disarmament treaties would certainly be a valuable contribution to international law by at last attaching a real consequence to such conduct. As widely expected, this ambitious 1954 Draft did not see light of the day as it was never adopted and political reality at the outset of the cold war did not permit even the modest of efforts at finding a code for an International Criminal Code.

Although article 39 of the UN Charter confers on the Security Council jurisdiction to make a factual finding as to acts of aggression,[55] there was no legal framework in place to guide the Security Council in the discharge of this noble function. As such, the Security Council, a political body of the United Nations enjoyed tremendous discretion in making determinations of aggression which decisions more often than not were influenced by the political reality of the day. The abuse of this wide discretion by the Security Council prompted the UN General Assembly to adopt Resolution 3314.[56] The purpose of this Resolution was to formulate basic principles that would guide the Security Council in achieving the determination of aggression under article 39 of the UN Charter.[57] This Resolution was hoped to defer future perpetrators of aggression by authoritatively pointing out what would constitute a crime under international law.

[54] Supra note 79, B. Ferencz, Defining the Crime of Aggression.
[55] Supra note 30. See art 39 UN Charter.
[56] General Assembly Resolution 3314 (XXIX), 14 December 1974, UN G.A.O.R. 29th Sess., Supp. No. 31 at 142.
[57] Ibid, See The Preamble to Resolution 3314 par. 9.

There have been mixed reactions to the above detailed and comprehensive definition with some scholars praising it and others fiercely criticising the same.[58] Its critics like J. Stone, in his article Hopes and Loopholes in the 1974 Definition of Aggression argue that Resolution 3314 is responsible for igniting controversy regarding prohibition of the use of force on the one hand and permissible exceptions on the other hand.[59] They further contend that this Resolution has achieved nothing more than mere consensus of the differences in state practice concerning the use of force. Resolution 3314 may indeed have turned out to be an "agreement on phrases with no agreement as to their meaning"[60]. It must be noted that more attention was paid to state interests instead of developing a workable legal definition.[61] As such, the outcome of the process that started when a special committee was appointed by the General Assembly in 1952 did not achieve much[62]. However it is important to note that it was the open nature of the definition that permitted the adoption of Resolution 3314. Nonetheless this Resolution 3314 is a remarkable contribution to development of international law with respect to the crime of aggression. Criminalization of Aggression the 'Supreme International Crime that contains within itself the accumulated evil of the whole' is not an easy task and more so considering that such criminalization takes away with it some portion of state sovereignty. Historically, states have always been extremely reluctant to let any bit of their sovereignty go away and it's precisely for this reason that the criminalization of aggression as opposed to other international crimes has been and continues to be high politics.

Although Resolution 3314 has made tremendous contribution to international law, it nonetheless contributed very little to "Individual Criminal responsibility". Article 5(2) in no uncertain terms states; "a war of aggression is a crime against international peace. Aggression gives rise to international responsibility". This leaves international scholars in a sorry state of affairs. It's not clear where the dividing line lies between the two notions and what their respective consequences should be. There is neither

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[58] Supra note 15, See Rifaat, at 279.
[59] Supra note 45, See Antonopoulos at 39.
[60] J. Stone, Hopes and Loopholes in the 1974 Definition of Aggression, 71 AJIL 225, at 245 (1975); J. Garvey, The U.N. Definition of Aggression; Law and Illusion in the Context of Collective Security, 17 VJIL 192 (1977).
[61] T.W. Bennett, A Linguistic Perspective of the Definition of Aggression: German Yearbook of International Law, Vol. 31 (1988) at 49.
[62] Ibid, 55.

guidance nor clarification as to whether this is a crime committed by the state alone or the individual or both. It is equally not clear whether international responsibility in this case refers to state responsibility or individual responsibility or both. There is varied and divided opinion on this issue. Some scholars have argued forcefully that Resolution 3314 provide for Individual Criminal Responsibility[63] while others have argued that this Resolution 3314 provides for 'Individual Criminal Responsibility only in connection with a war of Aggression, and mere State Responsibility for acts of Aggression.[64] However, a closer scrutiny of the language of Resolution 3314 rules out any possibility of Individual Criminal Responsibility. This is because if the Resolution intended to establish Individual Criminal Responsibility, it would have at least included elements of *mens rea* with respect to the potential perpetrator of aggression[65]. Although it has been rightfully observed that the Nuremberg Charter provided for individual criminal responsibility without any provisions as to *mens rea,* this position can no longer be tenable in a modern international code of offences.[66] This does not however imply that this crime of aggression does not give rise to individual criminal responsibility. To the contrary, the position obtaining in international law subsequent to Nuremberg and adoption of Resolution 3314 regarding individual criminal responsibility was more or less settled and leaving little doubt if at all for holding individuals responsible for committing a crime of aggression.[67]

In spite of its shortcomings, Resolution 3314 continues to be an important and authoritative reference point in criminalization of the crime of Aggression. It's important to note that the ILC in its 1991 Draft Code of Offences against the Peace and security of Mankind, incorporated, almost verbatim the definition of Resolution 3314 in article 15 of the Draft Code[68]. More importantly is that this 1991 Draft Code attempted to address deficiencies in Resolution 3314 regarding aforementioned

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[63] Benjamin B. Ferencz, The United Nations Consensus Definition of Aggression: Sieve or Substance 10 Journal of International Law and Economics 701.

[64] Irina Muller-Schieke, Defining the Crime of Aggression, 14 leiden Journal of International Law 409 (2001) at 417.

[65] Justin-Hogan Doran/ Bibi T. van Ginkel, Aggression as a Crime under International Law and the Prosecution of Individuals by the Proposed International Criminal Court, 43 Netherlands International Law review 321 (1926), at 335.

[66] Benjamin Ferencz, Can Aggression be Deterred by Law? Pace International Law Review, Fall 1999, text available at http://www.benferencz.org/pacearti.htm visited on 18 December 2005.

[67] See Nuremberg Judgement, Supra note 60.

[68] 1991 YILC, Vol. II (Part Two), at 94-97 (hereinafter the 1991 Draft)

omission of clauses addressing aspects of individual criminal responsibility. In the 1991 Draft Code, article 15(1) establishes individual criminal responsibility which had been omitted in Resolution 3314. The list of acts constituting aggression in the 1991 Draft Code commences in paragraph 4 which also prescribes that regard be paid to the priority principle of paragraph 3 and to the general definition of paragraph 2. The 1991 Draft Code however omits the explanatory note to article 1 of resolution 3314, and addresses the non-exhaustiveness of the enumeration in paragraph 4(h) through different wording. The omission of article 5 of Resolution 3314 was necessary as the provisions of article 5(2) and (3) cannot be part of a criminal code and the non-admissibility of justification for aggression can only be addressed together with other pertinent defences. Besides Resolution 3314, the 1991 Draft Code is more refined than its predecessor, the 1954 Draft code. Though the 1954 draft talks about threats, the 1991 draft is the first Draft Code to define 'threats of aggression'.[69]

Despite the handicaps faced since Nuremberg to define and punish this crime of aggression, it's quite evident that there have always been consistent and concerted efforts by the international community to conclusively define and punish this crime of aggression. With passing time, we are having more and more refined Drafts coming out all in the effort to have this offence punished. However as the ILC realised with time, it became increasingly difficult to have an extensive and comprehensive definition of aggression accepted as opposed to a vague definition similar to that of Nuremberg. This realization prompted the ILC in its 1996 Draft Code of Offences against Peace and Security of Mankind to revert back to a general and vague definition of aggression which was believed would be more acceptable to states.[70] Contrary to long enumerative definitions in the 1954 Draft code, Resolution 3314 and the 1991 Draft Code, article 16 of the 1996 Draft Code simply defined aggression as follows;

"An individual who as a leader or organizer, actively participates in orders the planning, preparation, initiation or waging of aggression committed by a state shall be responsible for a crime of aggression."

[69] See article 16 (1) of the 1991 Draft Code.
[70] UN G.A.O.R., Supp. No. 10, A/51/10(1996) (hereinafter 1996 draft)

This definition takes into account the strict interpretations applied by the Nuremberg Tribunal as well as post Nuremberg developments[71], expressly limiting the scope of the crime to leaders and organizers and to aggression committed by states. At this time, the ILC must have realised that the stage was not ripe still for international politics to yield ground to an objective and comprehensive definition.

2.3.2. Individual Criminal Responsibility

The notion of individual criminal responsibility in international criminal law is not so strange or unknown as such.[72] Individuals have previously been held individually liable for international criminal acts. For instance following the French Revolution of 1879, Napoleon Bonaparte was personally held responsible for violations of international peace and was expelled to St. Helena and Elbe. Thereafter when Germany lost the First World War, its leader Kaiser Wilhelm II was indicted for instigation of war pursuant to article 227 of The Treaty of Versailles.[73] Unfortunately, he never stood trial as he ran to the Netherlands that readily granted him refuge and refused to extradite him. Netherlands in refusing extradition argued that Kaiser Wilhelm II as the then Head of the Germany Republic enjoyed immunity in respect of acts committed in his official capacity as the Head of State.

Besides international politics, there were other controversial legal issues that were to be contended with. The Versailles Treaty, pursuant to which Kaiser Wilhelm II was to be indicted and tried, was enacted after the First World War. As such, it was thought that such a trial would have violated the celebrated criminal principles of *nulla poena and nullum crimen sine lege*. This would have meant that Kaiser Wilhelm II would have been prosecuted pursuant to retrospective laws that were not in existence at the time of World War II and further subjected to punishment that was not known in international law as at the time the First World War took place. In criminal law, the suspect should only be tried for breach of conduct defined in advance to constitute criminal conduct. It is undesirable to criminalise previous actions after they have occurred when at their time of commission they were not criminal. This is premised

[71] See Nuremberg charter, supra note 58.
[72] Supra note 45.
[73] Art. 227 Treaty of Versailles. The Treaty of Versailles .

on the notion that what is not expressly prohibited by the law is therefore not unlawful until such a time that it is declared to be criminal conduct. Therefore, imposition of *ex post facto* laws as the Versailles Treaty did is not permissible and quite controversial. The only effective contribution to the crime of aggression at the time was only limited to the calls to introduce penal sanctions that would criminalise and address in future grave outrages against elementary principles of international law. In as much as much effort was invested in criminalizing aggressive war after the First World War, little was done to develop the notion of individual criminal responsibility.

After the Second World War, there was great need to have the German war criminals indicted and punished for waging aggressive war. But there was one dilemma. It was uncertain whether the proposed indictments should include individual criminal responsibility for the crime of aggression. Although at this time the illegality of an aggressive war was not so much in issue as there were numerous international instruments outlawing the said crime of aggression;[74] however none of those instruments addressed the subject of individual criminal responsibility. There was great concern as to whether aggression was an act punishable under international law prior to the outbreak of the Second World War. There being little evidence that crimes against peace had existed prior to the Second World War, the principles of *nulla poena and nullum crimen sine lege* became the central issue in litigation.[75] The disagreement over the issue of individual criminal responsibility was so intense that various countries took different positions. The renowned Kellogg-Briand Pact that outlawed war was equally silent on the issue of individual criminal responsibility. It only rendered aggression to be an illegal act for states and did not render it an illegal act for which individuals could be tried and punished. Though morally it seemed unacceptable and unbearable to let those who brought the greatest man-made calamity on earth walk away with impunity, yet legally speaking there was no authoritative text that provided a mechanism for punishing these war criminals that had brought a lot of suffering on mankind. Fearing that war criminals may walk a way with impunity due to legal technicalities arising from the principles of nulla poena, nullum crimen sine lege, the United Kingdom shifted their position and even favoured summary

[74] See Versailles Treaty, Kellogg-Briand Pact, UN Charter.,

[75] Benjamin Ferencz, The Crime of Aggression, in Gabrielle Kirk McDonald/ Olivia Swaak-Goldman, Substantive and Procedural Aspects of International Criminal Law, Vol. 1; The Experience of International and National Courts, at 39.

execution of the German war criminals without any formal trial at all.[76] The Soviet Union on the other hand, more concerned with the impunity of its own leaders conceded to establishment of the ad hoc Tribunals of Nuremberg and Tokyo after receiving assurance that jurisdiction of the said ad hoc tribunals would be limited to crimes committed by the European Axis Leaders. Similar to the scenario obtaining after the First World War, there were those countries that strongly felt that the best way of dealing with the issue was formal condemnation in the peace-treaties and introduce penal sanctions to criminalize future conduct so as the principles of *nulla poena, nullum crimen sine lege* are not violated.[77] This left the Allies entirely divided.

The drafting of the statute of the Tribunal was not easy either as it was to contend also with the issue of *ex post facto* laws as well as a suitable definition for the crimes against peace. Here again different views were vindicated by different countries with the United States leading those countries that favoured precise definition of the crimes against peace to avoid possible defences found on the ground that crimes against peace lacked precise elements and thus were not enforceable. France and the Soviet Union strongly opposed such inclusion of a definition. There argument was premised on the fact that there was no established norm of international law that prescribed individual criminal responsibility for aggressive war. Eventually, a statute was agreed upon and consequently annexed to the London Agreement[78] Article 6(a) of the statute defined the crime against peace.[79]

However it is the ad hoc Tribunals of Nuremberg and Tokyo that played an important role in shaping and developing the concept of individual criminal responsibility. In their proceedings, the Nuremberg Tribunal described the war of aggression as "the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".[80]

The debate on possible implications of the principle of *nulla poena, nullum crimen sine lege* did not end with negotiation of the statute of the Tribunals and adoption of

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[76] Supra note 55, Ferencz B. The Crime of Aggression, at 42.
[77] Ibid, at 42.
[78] Charter of the International Military Tribunal and Protocol of 6th October 1945, August 8, 1945
[79] Art., 6(a) define[redacted]me of aggression as, "planning, preparation, initiation or waging of a war of aggression, or a war in violation of International Treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
[80] Trial of the Major War Criminals, Judicial Decisions, International Military Tribunal (Nuremberg) Judgement and sentences (1947) 41 American Journal of International Law 172, at 186.

the London agreement.[81] Serious objections were raised in the proceedings before the ad hoc Tribunals and the tribunals could not proceed with cases until a finding was made as to whether German war criminals could be held liable and punished for individual criminal responsibility or not. Resolving this issue went down to the very jurisdiction of the ad hoc Tribunals themselves and would have easily undermined their very inception and existence. As such the issue was dealt with very carefully with the Nuremberg Tribunal which stated thus;

"Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"[82].

With this ruling of the Nuremberg Tribunal, questionable as it might have been at the time, the principle of individual criminal responsibility for aggression under international law was finally established. The Tribunal backed its objection of the nulla poena sine lege objection with an argument relating to the more firmly established concept of individual responsibility of those guilty of committing war crimes: The Fourth Hague Convention of 1907 does not have any express provision for individual criminal responsibility for violations of its provisions. However since there have been no objections to individual responsibility for war crimes arising there from, the same must hold true in relation to the Kellogg-Briand Pact.[83] In comparison with the position obtaining after the First world War, where individuals pleaded immunity for wrongs committed by them in official capacity, the Nuremberg judgement brought to an end a long era of leaders acting with impunity as it watered down the possible defences of state action by individuals and elevated the concept of individual criminal responsibility affirming that a state acted through individuals who should be punished for wrongful acts.

Although ad[84] hoc Tribunals of Nuremberg have been criticised for being victor's justice over the vanquished, they have gone in history as having laid down important principles in international criminal law. From this time onwards, the traditional concept of state sovereignty according to which states had no superior was rendered obsolete. As opposed to the position obtaining previously, states could now accept

[81] Supra note 58.
[82] Ibid, at 221.
[83] Ibid, at 218-219.
[84] Ibid, at 221.

foreign judgements. But a bigger blow was dealt on the frequently invoked defence of 'acts of state'. In regard to this, the ad hoc Tribunal of Nuremberg held that "the principle of international law which under certain circumstances protects the representatives of a state could not be applied to acts which are condemned as criminal under international law.[85] As such it was asserted that authors of such atrocities could not be permitted to hide themselves behind their official position in order to be freed from punishment..." Regarding the role of international law and its effects on individuals, the judgement found that 'individuals have international duties which transcend the national obligations of obedience imposed by individual states.'[86] International law is thus not, as had long been the prevalent view, concerned only with actions of sovereign states. Rather, it creates duties for individuals and under certain circumstances provides for their punishment. Although it may seem that heads of state should be allowed to escape responsibility because they act not out of their own selfish interest, but rather for the sake of other people, it would be wrong to assume that political functions do not have any responsibilities attached to them.[87]

Following controversy on definition of the crime of aggression, with United States of America favouring a precise definition and the Soviet Union and France pushing for a vague definition, it was expected that the issue of definition would generate controversy before the Nuremberg Tribunal. However the vague definition that was opted for worked so well. Vagueness of the definition of aggression contained in article 6(a) of the Nuremberg Charter posed surprisingly little difficulty during the actual trial. Apparently, the French and the Soviets had been right to assume that a vague definition would assist the Tribunal better than a comprehensive one. This may well be attributed to the fact that the acts of Nazi Germany qualified as aggression no matter what the general definition of initiating and/or waging aggressive war. As such so much attention was focussed on the crimes that little attention was focussed on definition of the crime.[88]

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[85] Ibid, at 221.
[86] Ibid
[87] Supra note 42, Michael Waltzer at 290.
[88] Grant M. Dawson. Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court; What is the Crime of Aggression? 2000 New York Law Journal of International and Comparative Law at 431.

Nuremberg Tribunal further distinguished between "aggressive war and aggressive acts" and held that it was only aggressive war that constituted a crime under the Nuremberg Charter.[89] However a closer interrogation of the two reveals that the difference between the two is blurred and at times confusing. On one hand, individuals responsible for the use of force against Belgium, Greece, Netherlands, Denmark etc were held guilty of waging aggressive war because in this cases these countries involved resisted demands of the Nazi Germany. But the annexation of Austria and imposition of German administration on parts of Czechoslovakia were considered to be aggressive actions or steps in furthering the plan to wage aggressive wars against other countries because these countries were said to have submitted to Germany's demands.[90] Individuals responsible in the second case were held liable for crimes against peace. The confusion notwithstanding, the Tribunal left in abeyance the question of whether conflict with Britain and France constituted aggressive war. Really, this is one clear case where having a vague definition may lead to confusing and at times absurd or convenient judgements. Resistance to German armed forces should not be the basis for classifying one conflict as aggressive war and the other as aggressive acts. In any event the intention and objectives of Germany in both cases was the same i.e. to wage war of aggression for whatever reason.

The Nuremberg Charter provided wider latitude in prosecutions in that it allowed far-reaching prosecutions including ordinary combatants as well as citizens. Its wording permitted a wider circle of persons who could be held liable for initiating or waging wars of aggression. However, Nuremberg Judges restricted this scope to individuals in authority and at a policy-making level.[91] In settling this issue, the Nuremberg Tribunal stated that Hitler could not make aggressive war by himself. He had to have the cooperation of statesmen, military leaders, diplomats and businessmen.[92]The court therefore found that the people liable to prosecution should be drawn from those around the president and considered the role each had played in waging the war of aggression. Further narrowing the scope of the responsible persons, the Tribunal did not prosecute leaders who had been absent from decisive conferences in which Hitler

[89] Nuremberg Judgement, supra note 60 at 186.
[90] Ibid., at 192-196.
[91] In Re Hirota and Others (International Military Tribunal for The Far East, Tokyo Trial, 1948), 15 Annual Digest and Reports of Public International Law Cases 356, at 373 (hereinafter : Tokyo Trial).
[92] Nuremberg Judgement, supra note 60, at 223.

presented his ideas concerning annexation of new territories. Such leaders were considered by the Tribunal, not to be in a position to influence and/or shape the policy of aggressive war. As a result the conviction of Ernst von Weizsaecker's was set aside following review of his case.[93] Ernst von Weizsaecker was the Secretary of State, Germany Foreign Ministry and second only to von Ribbentrop.

The Tribunal found that though Ernst von Weizsaecker was diplomatically active in aiding and abetting German war plans, he took no part in actual policy planning and opposed Nazi aggression from within the Foreign Ministry. He was equally said to have been involved in underground resistance against the government. In reviewing Weizsaecker's case, the tribunal rejected the prosecution's contention that his resistance ought to have been open and active and that he ought to have revealed the plans of aggression to the victim Nations. Similar position was upheld in the High Command Case, in which case the Tribunal held that a person could be held responsible if he had actual power and influence to shape the policy of their Nation.[94] This position was defined to be a position which entails responsibility for the formulation and execution of policies.[95]

The ad hoc Tribunals of Nuremberg and Tokyo have gone down in history as the first Tribunals to try and punish the crime of aggression and above all expound the principle of individual criminal responsibility. Out of the twenty four persons indicted before the Tribunal, eight were convicted for the crime of aggression[96] while others were convicted for other related charges like war crimes, crimes against humanity or acquitted altogether.

Just like the Nuremberg Charter, the Tokyo Charter also did not provide a comprehensive definition of crimes against peace.[97] However the definition in the Tokyo Charter was somewhat modified from what appeared in the Nuremberg

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[93] In Re Von Weizsaecker and Others, U.S. Military Tribunal at Nuremberg, 14 April 1949 (1955), 16 Annual Digest and Reports of Public International Law Cases 344(hereinafter; Ministries case).
[94] U.S.A. v. Von Leeb and Others; 15 Annual Digest and Reports of Public International Law Cases 380 (1948).
[95] U.S.A .v. Krauch and Others, 15 Annual Digest and Reports of Public International Law cases 669 (1948).
[96] Supra note 55., B. Ferencz; The Crime of Aggression; at 45.
[97] Art. 5(a), Charter of The International Military Tribunal for The Far East as Reprinted in 15 Annual Digest and Reports of Public Internaional Law Cases, 356 and 357.

Charter. This was intended to block any arguments that might be advanced to the effect that Japan technically had not been at war.

Besides Nuremberg and Tokyo tribunals, several cases of aggression have been tried and punished before the special courts of the U.S.A and French military Tribunals. Further, the offence has been criminalised in statutes of various countries[98] though there has been little effort or at all to punish this offence at the municipal level. Control Council law No. 10 was the legal basis for prosecution of the crimes against peace and other Nuremberg crimes by each occupying authority in Germany.[99] Utilising it, we now have the crime of aggression as a core crime in law and again we now have the issue of individual criminal responsibility settled in international law.

2.3.3. State Responsibility

The ICJ has held in the Corfu Channel case that a state is responsible for internationally wrongful acts.[100] In cases where a state has acted in contravention of international law, that particular state will be held responsible and called upon to make reparations for wrongs committed. However, a more controversial notion of state responsibility has now arisen i.e. criminal responsibility of a state. This has been argued to entail subjecting the state concerned to penalties in the form of indemnities and various measures of security such as military occupation, demilitarization, and destruction of existing war potential, and international control of certain aspects of governmental activity.[101] Besides the recognised delictual responsibility of states, the notion of state criminal responsibility has courted a lot of controversy and debate. Article 19 of the ILC Draft Articles on State Responsibility provides that states can indeed incur criminal responsibility.[102]

The ILC Draft articles went ahead to recommend legal consequences for such delinquent behaviour of states[103] and recommended measures that call for collective punishment of the delinquent state. The measures recommended by Article 51 slightly

[98] Supra note 45; See Antonopolous, at 33.
[99] B. Ferencz; Defining International Aggression; The Search for World Peace 522(1975).
[100] The Corfu Channel Case, Merits, ICJ Rep. (1948) at 18.
[101] Ian Brownlie, International Law and the Use of Force by States, 1963 at 150.
[102] ILC's 1996 Report, art. 19. available at http://www.un.org visited on 12th September 2006.
[103] Supra note 41. See art. 51.

fell short of permitting the use of force or sanctioning military action against delinquent state. As anticipated, this ILC Draft Articles were subjected to scathing criticisms both by governments and some scholars to the extend that the ILC opted not to include similar provisions in its 2001 Draft Articles[104] on Responsibility of States for internationally wrongful acts. Criminal Responsibility of States in respect of the crime of aggression remains big debate to date besides jurisdictional issues engulfing this crime of aggression in the Rome Statute.[105]

[104] U.N.G.A.O.R., 56th Sess., Supp. No. 10 (A/56/10).
[105] Supra note 2

CHAPTER THREE

Jurisdiction over Aggression in International Criminal Court (ICC).

In the interpretation of the Statute, the relationship between the United Nations, in particular the Security Council and the ICC probably constitutes the main area of contestation. Whereas for some, the Security Council is the guardian of legality in the international system, in its relationship with the court, the Council rather symbolizes political intervention in an independent international judiciary. With the showdown in the Security Council over the submission of UN operations under the jurisdiction of the Court, the intricacies of this relationship have already tarnished the entry into force of the Statute.

Article 16 was already controversial at the Preparatory Committee and at the Rome Conference.[106] Lionel Yee is correct in stating that because of precedence of the Charter over other international agreements, the UN members are under an obligation to follow the Council rather than the Court.[107] This does not answer the question, however, of what happens in the event that the Security Council acts *ultra vires* the Charter.[108] In their detailed and succinct commentary to Article 16 in the Triffterer Commentary, Morten Bergsmo and Jelena Pejic sum up the mélange between legal and political considerations as follows: "First political considerations were given as much, if not more, weight than legal arguments in the determination of the appropriate role for the Security Council in ICC proceedings. Secondly, the Security Council's deferral power confirms its decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict. Thirdly, article 16 provides an unprecedented opportunity for the Council to influence the work of a judicial body."[109]

[106] See Yee, "The International Court and the Security Council: at 44. See also Kirsch and Robinson. "Reaching Agreement at the Rome Conference". In A. Casese, P. Gaeta, J. Jones (ed.) The Rome Statute of the International Criminal Court: A Commentary (2002) at 82.
[107] See Yee, "The International Court and the Security Council: Articles 13(b) and 16" in Lee, ICC, at 152.
[108] See Frowein and Krisch, in B. Simma (ed.) *Charter of the United Nations.A Commentary (2nd ed., 2002)* Introduction to Chapter VII, MN 25 (determinations are only binding if supported by the member states in general)
[109] Bergsma and Pejic, in Triffterer Commentary, Article 16 MN 7

The adoption of Security Council Resolution 1422, which exempted UN Personnel of non-member states from ICC jurisdiction for one year, confirms the primacy of the political over the legal, a primacy which was intended both by the Charter (Article 103 and 25) and the ICC Statute (Article 61).[110] Nevertheless the primacy should not be unlimited, but exists only within the legal bounds. Contrary to the ILC proposal, which contained an automatic bar for prosecutions relating to situations under Council review, Article 16 of the Statute only grants a temporary stay of the proceedings. Accordingly, in the Triffterer Commentary, Bergsmo and Pejic insist that Article 16 applies only after charges have been brought. Hence the Security Council cannot block the collection of information or a preliminary explanation before the Pre-Trial Chambers authorization of an investigation. Even after the Security Council has invoked article 16, they maintain that the Prosecutor may preserve evidence.[111] In addition, to invoke article 16, the Security Council must act under chapter VII of the Charter. However both authors fail to answer the question as to who is to assess whether the Security Council has acted within the legal limits established by Article 39 of the UN Charter and article 16 of the Rome Statute. One may also ask whether the Security Council may take advantage of its primacy under the UN Charter to circumvent the Statute.

It has been argued that the Security Council cannot in any way affect the Statute, not by invoking Chapter VII powers, nor by referring situations to the Court under article 13(b) which are otherwise not under its jurisdiction.[112] However, this position is far from being self-evident or required by legal logic. The author's invocation of the principle of speciality amounts to little more than a *petitio principii*, because it disregards the primacy of the UN Charter over the Rome Statute. Even if the Court was not by any means intended to serve as a subsidiary organ of the Security Council, it should be available to the Security Council as alternative to ad hoc tribunals.[113] Condorelli and Villalpando are correct to stress the latitude of the political discretion

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[110] *Ibid., at MN 14-15.*

[111] *Ibid., at MN 20.*

[112] Condorelli and Villalpando, 'Can the Security Council extend the ICC's Jurisdiction', Casese/Gaeta/Jones Commentary, 571 at 575.

[113] See ibid., at 581, arguing that certain obligations of member states regarding enforcement may be altered or strengthened by the Council. Concerning a referral, they also argue that the Security Council powers derive from Chapter VII of the UN charter.

of the Council in referring situations to the Court,[114] an argument which can be extended to the deferral power under Article 16. Of course deferral would have to respect not only the preconditions of Chapter VII and therefore be limited to specific instances of a threat to international peace and security and aggression- but also the basic principles of the jurisdiction of the court, including its limitation to the most serious crimes affecting the international community as a whole. The aforesaid scholars argue that by assessing whether the Security Council acted *ultra vires* in deferring a case, the court will have some measure of control over the Council. While this approach upholds international legality, it does not solve the difficult question of what states will do in light of the primacy of the Security Council pursuant to articles 25 and 103 of the UN Charter. Although it has been thought that the intervention of the International Court of Justice (ICJ) might be helpful, it is hoped that the Relationship Agreement may resolve some of the issues involved.

The complicated interrelationship between the International Criminal Court (ICC) and the Security Council should have led to a reciprocal reluctance to test the limits of the tension between law and politics. Regrettably, one Council member seems to have chosen the opposite path, not even shying away from blackmailing the rest of the international community into adopting resolutions of dubious legality. The United States has already commenced negotiations with State Parties to enter into immunity agreements that will shield its nationals from jurisdiction of the Court. The fear that the Security Council deferral would become a threat to the judicial independence of the ICC has thus been realized even before the International Criminal Court (ICC) has tried its first case.

The role of the Security Council constitutes a further limit to the founding vision of the International Criminal Court, namely the idea that a criminal court which would remove certain options from the political equation by criminalizing them. This particular kind of legalization of international relations, however, would require a degree of centralization and deference to legality which seems not to be present in the international realm; the reluctance of states to use a permanent clause of consent to

[114] Ibid., at 630-633. However, this argument seems to be at odds with their view that the conditions for admissibility in Articles 17 and 18 are at least in principle, applicable to SC referrals. Condorelli and Villalpandao, at 637-640.

the International Court of Justice (ICJ) jurisdiction has long demonstrated this point. For the founders however, political obstacles are there to be overcome. Legality primes reality even when legality risks its prospects of implementation into reality.

3.1. Legal and Political Challenges associated with Jurisdiction over Aggression in ICC

There are various challenges associated with jurisdiction over aggression. Amongst these are the following;

3.1.1. Determining Aggression: Security Council versus the ICC

3.1.2. The Trigger Mechanisms and the Role of the Prosecutor.

3.1.3. Judicial control of Security Council Resolutions by the ICJ

3.1.1. Determining Aggression: The Security Council versus the ICC

Apart from the contentious issue of defining the crime of aggression, in today's system of collective security established under the UN, it is necessary to ask which international body should be entrusted with the determination of a case of aggression. This question would be superfluous if it were possible to prosecute an individual for his role in the unlawful resort to force by a state without prior determination of a commission of aggression by the state. It is essential to rule on the unlawful legality of the use of force by the individual's State.[115]

The act committed by the State is a precondition for the criminal responsibility of individuals.[116] Since it is the Security Council which under the UN Charter is primarily designed to maintain international peace and security and situations wherein the crime of aggression arises are intertwined with the maintenance of international peace and security, it seems logical to entrust the Security Council with the determination of whether aggression by a state has occurred. Also, the dedication of the definition in Resolution 3314 to the Security Council implies this assumption. However, with a permanent international criminal court in place, it may no longer be necessary for the Security Council to exercise this function as a prerequisite to establish jurisdiction.

[115] Antonopoulos, supra note 39, at 50.

[116] See supra section 'Individual criminal responsibility'.

This section contemplates the role of two international bodies in the determination of aggression, taking into consideration possible consequences thereof and concluding with a workable compromise derived from these findings.[117]

The 1994 Draft Statute[118] granted the Security Council comprehensive powers by providing in Article 23 92) that '(a) complaint of or directly related to an act of aggression may not be brought under the Statute unless the Security Council has first determined that the State has committed the act of aggression which is the subject of the complainant. Under Article 23 (3), 'no prosecution may be commenced under this statute arising from a situation being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the chapter, unless the Security Council otherwise decides.' Under these provisions, a single state that is a member to the Security Council could prevent the ICC from entertaining a matter by merely placing an item on its agenda.[119]

At the Rome Conference views were divided between states. The permanent members of the Security Council espoused the view that a determination by the Security Council that aggression has occurred be a precondition to the exercise of jurisdiction by the ICC.[120] Most other states were opposed to the potential politicization of the ICC.[121] Roughly aligned with the position of the permanent member states of the Security Council, the 1998 Draft Statute provides in article 10 (4) that the Security Council must act prior to the prosecution of any alleged crime of aggression:[122]

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[117] A noteworthy proposal in favour of a judicial determination to a third body is to delegate the determination of aggression to the ICJ. In the absence of Security Council action, the General Assembly could ask the ICJ for an advisory opinion on whether aggression has occurred. See Marjorie Cohn, The Crime of Aggression: what is it and why Doesn't the U.S Want the International Criminal Court to Punish it? Available at http://www.jurist.law.pitt.edu/forum/forumnew18.htm, visited on 6th May 2005

[118] Report of the International Law Commission on the work of its Forty-Sixth Session, Draft Statute for an International Criminal Court, 49 UN G.A.O.R., 49th Sess., Supp. No. 10, UN Doc. A/49/355 (1994)

[119] William A. Schabas,*An Introduction to the International Criminal Court,* 2001, at 65.

[120] See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1 (Proceedings of the Preparatory Committee during March –April and August 1996) UN. G.A.O.R., 51st Sess., Supp. No. 22, A/51/22 (1996).

[121] See the Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1 (Proceedings of the Preparatory Committee during March –April and August 1996) UN. G.A.O.R., 51st Sess., Supp. No. 22, A/51/22 (1996).

[122] Report of the Preparatory Committee on the Establishment of the International Criminal Court, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/2/Add.1(1998)

Option 1

A complaint of or directly related to (an act) (a crime) of aggression (referred to in article 5) may (not) be brought (under this statute) unless the Security Council has (first) (determined) (formally decided) that the act of a state is the subject of the complaint, (is) (is not) an act of aggression (in accordance with chapter VII of the Charter of the United Nations.

Option 2

(The determination (under Article 39 of the Charter of the United Nations) of the Security Council that a state has committed an act of aggression shall be binding on the deliberation of the Court in respect of a complaint, the subject matter of which is the act of aggression.)

Optional article 10 (7) provides that no prosecution is to be commenced where the Security Council is exercising its Chapter seven Authority, unless the as Security Council waives its consents.

But there are substantive objections to leaving the determination to the Security Council. In the aftermath of the World War II, the five big (and victorious) nations[123] were granted permanent membership to the Security Council along with a veto right.[124] At the time, this was arguably in the best interests of international peace and security. Almost sixty years later, it can be legitimately asked if this rationale is still valid. If the Security Council is solely entrusted with the determination of aggression as a prerequisite to the exercise of jurisdiction by the ICC, those states privileged with a veto right are bound to abuse this political tool to the detriment of the impartiality and independence of the ICC. No citizen of one of the permanent member states to the Security Council will conceivably be indicted with the crime of aggression committed in connection with the use of force by that state as long as that state has the power to prevent this by way of veto.

[123] U.S.A, France, United Kingdom, Soviet Union

[124] Under article 27(3) of the UN Charter, decisions by the Security Council on non-procedural matters 'shall be made by an affirmative vote of nine members including the oncurring votes of the permanent members'.

It is thus the political nature of the Security Council that leads to concerns that the determination of aggression for the purpose of prosecuting individuals be better left to another body. Whereas during the Cold War the Security Council was more or less permanently paralyzed in deadlock, using its chapter VII powers on merely three occasions,[125] there has been remarkably frequent application of the procedure after 1990;

A change in attitude amongst the Security Council's inherent purpose brought about through liberation from Cold-War restraints. The Security Council can therefore no longer be considered ineffective solely because of deadlock. But the prospect of a deadlock situation remains, and in international politics it is highly uncertain when the next conflict will surface. Furthermore, the fact that the Security Council has so far made a determination only in certain cases on a highly selective basis[126] would render unlikely comprehensive prosecution for the crime of aggression. And a determination of a threat to or a breach of peace would not be suitable to advance criminal proceedings. Moreover, despite an apparent increase in efficiency, the Security Council remains subject to political interests of States. National concern continues to be the primary motivation in the casting of votes in the Security Council.

But it may be strength rather than weakness of the Security Council, which comes from this apparent dilemma. In the interest of world peace and security it may be desirable to let decisions based on political pragmatism prevail over those prescribed by a strictly legal interpretation of the law. A politically motivated decision not to prosecute a case of aggression leaves the door open to a 'reversal of aggression'. In this, the crime of aggression differs from war crimes' under international law; the crime of aggression can be reversed.[127] If reparation is awarded to the victim state, either by the aggressor state itself or by the Security Council and international peace and security is thus maintained or restored, the Security Council has accomplished its role. The argument is that every case of aggression is consequently labelled as such and the blame for a use of force allotted to a specific state, politically undesirable consequences may ensue, with a potential to further destabilize the situation to the

[125] Authorisation of military action in North Korea became possible through the Soviet Union's temporary abstention from the Security Council; the two other cases involve the imposition of non-military sanctions on South Rhodesia and South Africa. See Antonopoulos at 49.
[126] Supra note 33 and 34; Security Council Resolutions.
[127] Antonopoulos, supra note 39, at 50.

detriment of peace and security. Consequently, it should be up to the Security Council to decide whether it is wise to prosecute a specific incident of aggression. In this, the Security Council may exercise wide discretion and is not bound by any legal instrument, including Resolution 3314. It is restricted only by the obligation to respect the principles of the UN and international law.[128]

Furthermore, certain provisions in the UN charter and the statute of the ICC have been interpreted as an indication that the Security Council should legitimately have a say in the matter. From the wording of the charter, the determination of aggression has been delegated to the Security Council under article 39. Moreover, article 5 (2) of the Rome statute requires a future definition of aggression to be consistent with the relevant provisions of the UN charter. This formulation can be interpreted as directly referring to article 39 of the UN charter, thus prescribing a Security Council determination prior to the exercise of jurisdiction.[129] However, article 5 (2) of the Rome Statute has also been interpreted as merely requiring that the ICC make no finding which contradicts a determination, if any, made by the Security Council.[130] Yet, an even wider interpretation seems permissible. It is not clear from article 5 (2) of the Rome Statute whether it makes reference to procedural law of the UN Charter at all. The formulation 'the relevant provisions' of the Charter arguably constitutes a mere reference to substantive forms governing the legal use of force. It cannot conceivably be argued that this provision refers to the Charter's procedure employed in connection with the determination of aggression. There have been incidents amounting to aggression under substantive UN law, which were never labelled as such by the Security Council.[131]

Another norm addressing the relationship between the Charter and other instruments is article 103 of the UN Charter, which provides that 'in the event of a conflict between the obligations of the members of the United nations under the present Charter and their obligations under any international agreement, their obligations under the present Charter shall prevail.' This provision has also been interpreted as

[128] Ibid., at 49.
[129] Lionel Yee in Roy S. Lee (ed.). The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results, [illegible] at 145.
[130] Ibid.,
[131] See Israel aggression against Tunisia; Resolution 573 (1985)and 611 (1988) Text available at http://www.un.org/documents/scres.htm, visited on 10th October 2006.

requiring prior Security Council determination.[132] However, no such incompatible obligations arise with respect to States which are members of the UN and at the same time, parties to the Rome Statute. States do not undermine the authority of the UN Charter by endorsing an ICC definition of aggression that excludes mandatory consultation with the Security Council. The fact that the Charter exclusively empowers the Security Council with the determination of aggression as a prerequisite to chapter VII measures do not imply that no other authority may determine aggression for other purposes other than those envisaged by chapter VII. In other words, no conflicting obligations in the sense of article 103 of the UN Charter will follow from the events before the ICC. As a result, the provisions of the UN Charter and the Rome Statute do not undermine an equal and autonomous role for the ICC.

As a compromise it was submitted that an 'accused' member State should abstain from consideration or voting on the matter (as is customary).[133] By nonetheless vetoing the Security Council determination the state would put itself in violation of article 1 of the UN Charter, which sets forth the goal of suppressing acts of aggression ' in conformity with the principles of Justice and international Law.' The Veto should be interpreted as incompatible with the principles of Justice, giving the ICC judges the right to disregard such improper Council resolutions. Highly theoretical and legally dubious as it may be, this solution would still not eliminate cases where a state makes a courtesy veto in favour of a friendly State.

Remarkably, the different versions within option 1 of draft article 10 (4) of the 1998 Draft Statute permit both a positive and negative determination by the Security Council.[134] The consequences resulting from this minute distinction are immense with respect to the probability of the ICC exercising jurisdiction over the crime of aggression in a specific case. Under the positive option, and it is this option that has been the subject of the controversy surrounding the issue, the Security Council would have to determine that aggression has occurred as a prerequisite to ICC jurisdiction. Consequently, any Security Council Member State could singly thwart jurisdiction by

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[132] Antonopoulos, supra note 39 at 51.
[133] Ferencz, Can Aggression be Deterred by Law? Pace International Law Review, Fall 1999, text available at http://www.benferencz.org/pacearti.htm visited on 11th April 2005.
[134] Supra note 150.

casting a veto.[135] It is obvious that the positive option gives a single member state immense powers to interfere with the ICC's jurisdiction and to abuse this power in the interests of politics. On the other hand, under the negative option, the Security Council would have to determine that aggression has not occurred in order to block jurisdiction of the ICC. Thus, a Security Council member State could use the veto power only to permit jurisdiction contrary to the votes of the other Security Council members, but not to obstruct it. Arguably, this solution more appropriately reflects the structure of the Security Council in requiring a positive resolution.

Under chapter VII of the UN Charter, it is the role of the Security Council to determine situations detrimental to international peace and security. Only if the Security Council finds such to be the case and if it deems the pursuance of justice to be of secondary importance to a political solution to the situation, should it have the power to stall the work of the ICC. Otherwise, the 'principle of Justice' can hardly be upheld. To grant the right to veto with respect to the prosecution of the crime of aggression to each State represented in the Security Council not only means arbitrarily awarding these states power over the ICC, but also undermines the structure and purpose of the Security Council and more immanently, the purpose of the veto right.

But even the requirement of a negative determination by the Security Council is necessary in order to ensure that the international order under the UN remains Unimpeded. For the relationship between the ICC and the Security Council in determining Aggression is not as starkly exclusive as it may seem, and a consolidation of both sides is possible. Indeed, both bodies can fulfil their purposes and remain legally unimpeded by each other at the same time.

A determination by the ICC of a case of Aggression need not prejudice the work of the Security Council. The ICC is a court outside the system of the UN and its Statute is not an integral part of the UN.[136] The ICJ in the *Nicaragua Case* has proved that a court can determine that Aggression has occurred without prior determination of the Security Council.[137] Admittedly, reaching contrary conclusions regarding one and the

[135] Art 27 UN charter.
[136] Supra note 39, Antonopoulos at 51.
[137] See Nicaragua Case (Preliminary Objections), ICJ Rep. 1984, 393, at 434-436.

same instance would put one or both bodies in a dubious light. But it may just be worth taking that risk in the hope of prosecuting the crime of aggression when judicial examination deems necessary, while at the same time leaving the necessary discretion to the Security Council in determining acts of state in the light of political reality. This would allow the Security Council to find the best solutions in the interests of peace and Security. At the same time, this proposal will ensure that the interests of Justice are served without interfering with politically necessary measures. Therefore, no Security Council determination, be it positive or negative, that aggression has occurred is needed as a prerequisite to the exercise of jurisdiction by the ICC.

In any event, where the Security Council is of the opinion that a certain act of force should not be tried before the ICC, it has the power to defer prosecution. Under article 16 of the Rome Statute 'no investigation or prosecution may be commenced or proceeded with ... For a period of 12 months after the Security Council in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect, that request may be renewed by the Council under the same conditions. Even though in practice this provision would make it very difficult for the Security Council to block prosecution, the Security Council in principle retains the possibility to let political decisions prevent prosecution. This provision largely resembles the negative determination option in the 1998 Draft Statute[138], with two modifications. It applies not only to the determination of aggression, but also to jurisdiction in general. Furthermore, it is subject to yearly renewal.

There have been some concerns that criminal cases could encompass complex, politically laden factual inquiries ill-suited for courts, however it is still the courts which have proven to be the most effective forum in dealing with justifiable matters. And the determination of aggression is such a justifiable matter, according to the rulings of the Nuremberg Tribunal and the ICJ in the Nicaragua Case.[139] Therefore, the determination of aggression should be left to the ICC, with the limitation under article 16 of the Rome Statute that the Security Council may defer proceedings by positive resolution. Such a solution should ensure that the prosecution of cases of unlawful resort to force will become the rule and not the exception. Hard as it may be

[138] Supra, see note 149.
[139] Supra note 166.

for states to give up privileges they have attained and subsequently grown accustomed to, it is up to the permanent members to the Security Council to budge from their position and waive their supremacy. It will take hard work and persuasion on the part of the other states to reach a solution that ensures independence and impartiality of the ICC. But if jurisdiction over aggression is to be dependent on the concert of the members of the Security Council, it might well be better to exclude it from the ICC's jurisdiction altogether. Arguably, a complete lack of jurisdiction will lead to less injustice than the recognition of inhibited and arbitrary jurisdiction.[140]

The need to empower the International Criminal Court (ICC) to determine aggression is a necessary component of any judicial tribunal and is necessary in the exercise of judicial function. This power constitutes the inherent jurisdiction of any tribunal and does not even require to be provided for in the constitutive instrument of the tribunal although this is often done.[141] In international law, there is no integrated judicial system and as such every judicial organ needs a specific constitutive instrument. As such, the first obligation of any tribunal as of any other judicial body is to ascertain its own jurisdiction. Whether or not the power of any tribunal to examine its jurisdiction can be limited by an express provision in the constitutive instrument remains a controversial issue and judicial opinion over the same remains unsettled. [142] Nonetheless, it is absolutely clear that such a limitation to the extend to which it is admissible, cannot be acceptable where the limitation risks undermining the judicial character or the independence of the tribunal. This is precisely the position obtaining in this case. Investing the Security Council, a political body with the jurisdiction to determine aggression is to limit the inherent jurisdiction of the International Criminal Court. Such limitation would undermine the judicial character and independence of the ICC. The ICC would simply be reduced into subordinate organ of the Security Council, with no powers to act in cases of aggression unless and until the Security Council has made a determination of aggression.

[140] Article 5(2) of The Rome Statute
[141] Prosecutor –v- Dusko Tadic a/k/a Dule at par 19 available at http://www.icty.org.html
[142] Ibid at par 23.

3.1.2. The Trigger Mechanisms and the Role of the Prosecutor

It is well known that two tendencies clashed at the Rome Conference; some States including the United States and China insisted on granting the power to set investigations and prosecutions in motion to states and the Security Council only. Other countries were bent on advocating the institution of an independent Prosecutor capable of initiating *proprio motu* investigations and prosecutions. The clash was between sovereignty-oriented countries and states eager to implement the rule of law in the world community.

The final result was a compromise. First of all the right to carry out investigations and prosecute was not to authorities of individual states or entrusted to a commission of inquiry or similar bodies; this option, which was undoubtedly open to the Rome Conference, was discarded. Instead, a prosecutor was envisaged[143]. Once they decided to set up a prosecutor, states had two options; the first was the Nuremberg model, whereby the prosecutor is an official of the state that has initiated the investigation and prosecution, and is therefore designated by that state and remains throughout under its control, while the second option was modelled alongside the International Criminal Tribunal for former Yugoslavia and Rwanda ICTY and ICTR models, whereby the prosecutor is a totally independent body. Fortunately, the latter option was chosen. As an independent and impartial body, the prosecutor was granted the power to investigate and prosecute *ex officio*, although subject to significant restrictions.

Secondly, the power to initiate investigations was conferred both on the prosecutor (subject to judicial scrutiny) and on states, as well as the Security Council. In short, a three pronged system was envisaged:

(a) Investigations may be initiated at the request of a state, but then the prosecutor must immediately notify all other states, so as to enable those which intend to exercise their jurisdiction to rely upon the principle of complemetarity.

[143] Article 15 of The Rome Statute.

(b) Investigations may be initiated by the prosecutor, but only subject to two conditions. First a pre-trial chamber must authorize them and secondly, they must be notified to all states.

(c) Investigations may be initiated at the request of the Security Council, and in this case the intervention of the pre-trial chamber is not required, nor is notification to all states.

Clearly, this is a balanced system which takes into account both the interests of states and the demands of international justice. In addition as has been rightly pointed out, the prosecutor acts both as administrator of justice (in that he acts in the interest of international justice by pursuing the goal of identifying, investigating and prosecuting the most serious international crimes)[144] and, as in common law legal orders, as a party in an adversarial system.

The best safeguard for the proper administration of international justice can be seen in a key provision of the Statute, Article 53(2). On the strength of this provision, the prosecutor enjoys broad powers in sifting through cases initiated either by entities that may be politically motivated (states) or by a political organ (the Security Council). By virtue of article 53(2) the prosecutor may decide that there is not a sufficient basis for a prosecution even when the case has been initiated by a state or by the Security Council. It should be noted that under this provision the prosecutor may conclude that a prosecution is not warranted not only because first, there is no legal and factual basis for a warrant of arrest or a summons to issue or, secondly, the case is inadmissible under article 17, as a state which has jurisdiction over the crimes is investigating or prosecuting it, and what is even more important, that a prosecution is not in the interest of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.

This rule is of crucial importance, for it assigns to the prosecutor the role of an independent and impartial organ responsible for seeing to it that the interests of

[144] Article 5 of The Rome Statute.

justice and the rule of law prevail. The prosecutor may thus bar any initiative of states or even deferral by the Security Council which may prove politically motivated and contrary to the interests of justice. In short, prosecutorial discretion has been enshrined in the statute (subject to review by the state making a referral and by the pre-trial chamber), an important principle, since not every crime which technically falls within the ICC's jurisdiction should be prosecuted before the court.

One might object that this balanced and well justified relation between political entities (states and the Security Council) and an administrator of justice such as the prosecutor may be thwarted whenever the Security Council decides, under Article 16 of the Rome Statute, to request the Prosecutor to defer any investigation or prosecution for a period of 12 months (or a shorter period). At first sight this provision seems to allow a political body to interfere grossly with a judicial body. However, a sound interpretation of this provision leads to the conclusion that the powers of the Security Council are not unfettered. The request may only be made by a Resolution adopted under Chapter VII of the United Nations Charter. Hence, the Security Council may request the Prosecutor to defer his activity only if it explicitly decides that continuation of his investigation or prosecution may amount to a threat to the peace. The Prosecutor is undoubtedly bound by that request, but the whole context of the Statute and the reference in Article 16 to Chapter VII of the United Nations Charter seem to rule out the possibility that the request be arbitrary. Moreover, the Security Council must show its hand if it wishes to stay an ICC proceeding, and continue to show its hand every 12 months, and this visibility creates accountability.

3.1.3. Judicial Control of Security Council Resolutions by the ICJ

The UN Charter does not contain any provisions aimed at dealing with the judicial control of the Security Council acts. The question therefore arises as to the meaning to be given to the silence of the UN Charter. Does it mean simply that the question is left unresolved, and must therefore be dealt with under customary international law? Conversely, does the silence exclude any form of judicial

review, meaning that the legality of the Security Council Resolutions can be checked only through the political process?

Both conclusions are logically sustainable. The latter puts much emphasis on the absence of clear determination purporting to submit the acts of the Security Council to judicial review and sees this silence as evidence that the framers of the UN Charter chose to provide a broad discretion to the organ entrusted with the most politically sensitive function; that of maintaining international peace and security.[145] Those who sustain such a perspective recall that a proposal to include a proposition in the UN Charter calling for judicial review was rejected at the San Francisco Conference, evincing the will to keep the Security Council action beyond the reach of judicial control.[146]

A systematic argument which further supports this first conclusion is that a lack of judicial control is not logically inconsistent with the very idea of the UN Charter as a legal order. The idea of judicial control over the legality of legislation is intimately connected to the solution of state constitutionalism, and is based on the widespread acceptance that certain functions must be, for the sake of common good, subjected to neutral, non-majoritarian assessment. This precise form of legitimacy can hardly be reproduced within the international legal order, in which the judicial function is still reliant on the previous consent of the addressees of the judicial decision to be legally bound by it. Thus, the idiosyncratic features of the international system make it very difficult for a court of justice to gain the legitimacy necessary to overrule determinations of the highest institution of the international community[147].

An alternative view is taken by those who advocate a strict separation between the function discharged by the ICJ and the function entrusted on the Security Council. Whereas the latter maintains peace in the legal frameworks set up by the UN Charter, the former settles disputes between states. Though the UN Charter mentions the ICJ as the principal judicial of the UN[148], the exercise of the

[145] Prof .J.H.H Weiller, Global Law Working Paper-Machiavelli, the UN Security Council and the Rule of Law. NYU School of Law- New York, NY 10012 available at http:// www.nyu.law.edu.
[146] See, Enzo Cannizaro, supra note 174 at 10.
[147] Ibid., at 11.
[148] Article 92 of the UN Charter.

contentious function by the ICJ has developed in a legal framework quite unrelated to the UN legal order. Thus, review of legality of Security Council Resolutions by the ICJ is not part of a constitutional design drawn out of the UN Charter, but rather is based on the consent of the parties to a dispute, which bestow on it the competence to determine the law applicable in their mutual relations. In other words it is true that the ICJ, like other international tribunals, is not designed to review the legality of Security Council (SC) Resolutions. However, such a review can be done incidentally, at the request of the parties to a dispute,[149] in respect to whom alone the decision has binding effect.

In a more systematic perspective, the solution which admits the competence of the ICJ to review Security Council Resolutions might seem appealing as it accords with an intuitive sense of justice, which is fed, in the present era, by judicial, non-political control over the legality of acts. Particularly, in light of the activism sometimes exhibited by the Security Council, which in recent decades tends to operate very close to the limits of its competence, the existence of some form of judicial review would appease disquieting concerns about the risk of political choices resulting in arbitrary outcomes. Whereas it is plainly acceptable that explicit or, more frequently, implicit rules of the system recognize a certain discretionary space reserved for political organs, it is not acceptable to exclude judicial review for an entire area of legal activities. Applied to the question of justiciability of UN Resolutions, this construction suggests an interpretation of the UN Charter consistent with its aspiration, which emerges from many of its provisions, to be constitutive instrument of a new constitutional international legal order. Because the UN Charter does not set up any centralized judicial body, as is well known, the competence to review the legality of the acts of the UN organs should be seen as incidentally included in the competence to determine the law necessary to settle a legal dispute arising between parties or, as far as the ICJ is concerned, in order to answer questions submitted to it under Article 96 of the UN Charter.[150]

[149] Article 36 of The ICJ statute.
[150] Ibid.

Some authors seem to favour an evolution within the UN legal system, akin to that which took place in some domestic systems, notably in the U.S, in which the absence of specific indication in the constitution was not seen as an obstacle to the development of forms of judicial review of legislation. Whilst judicial review is not necessarily required in the concept of a legal system, the idea that the powers of the UN organs are not subject to non-political, independent control seems at odds with the construction of the UN as a community of law, a construction implicitly stemming from the UN Charter.[151]

Although many reasons support the conclusion that the ICJ can incidentally assess the legality of Security Council Resolutions as part of its competence to settle disputes among states, this does not amount to a form of judicial review within the UN legal system.[152] Because of both the paucity of the disputes referred to the ICJ and to the laxity of the standards of control, an efficient judicial control of Security Council Resolutions by the ICJ is unlikely to occur. The infrequency of this form of control militates against it constituting an acceptable instrument for discharging an important function of the system, namely the judicial function, and for securing in a great majority of cases, if not all, the review of the legality of acts of the UN organs. Moreover, the structural limits of the dispute settling mechanism of the ICJ, and in particular, the fact that it is not open to individual claims,[153] makes the court ultimately unfit to protect individual rights affected by Security Council Resolutions and therefore unsuitable to cope with the possible evolution of the Security Council from an organ operating basically in an inter-state legal environment to one entitled to pierce the veil of state intermediation and to directly address individuals[154]. Coupled with the deference owed to determinations made by political organs on questions of policy, these assumptions can explain why the idea of incidental judicial review by the ICJ has not attracted wide support amongst international scholars.

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[151] Supra note 174.

[152] W.M. Reisman; *The Constitutional Crisis in the United Nations*, 87 AJIL (1993) at 83.

[153] Article 93 UN Charter.

[154] See B. Simma; From Bilateralism to Community interest in International Law, in 250 RCADI (1994), 217; P.M. Dupuy, The Constitutional Dimension of the Charter of the UN Revisited, in 1 Max Planck Yearbook of UN law (1997),1; B. Fassbender, The United Nations Charter as the Constitution of International Community, in 36 CJTL (1998), 531.

Examples of Security Council Resolutions potentially impinging on rights individually possessed by natural or legal persons, though not lacking, have been an infrequent occurrence in the past. However, the most recent practice of the Security Council has established a true international system of administering sanctions against individuals. This makes the conflict between the Security Council action and individual rights more likely to occur and emphasizes the need to open to individuals the means to protect their fundamental rights from intrusions coming from determinations adopted at the international level[155].

The first Resolutions of this new pattern were adopted by the Security Council towards the end of the 1990s.[156] They outline sanctions against individuals deemed to be involved in terrorist activities. The measures have generally consisted of the freezing of assets and the restriction of cross-border travel. Occasionally, they have also extended to more radical measures such as confiscation of assets.[157] Even outside the particular context of terrorism, the Security Council has adopted measures aimed at directly sanctioning individuals[158]as part of its action for maintaining or restoring international peace and security.

The adoption at the international level, of a decision-making procedure likely to affect the legal position of individuals, without a corresponding incorporation of safeguards and guarantees equivalent to those which have been developed at the state level, creates a clear asymmetry. Being taken by international bodies, these decisions are removed from their usual national context, with the consequent waning of fundamental guarantees, which surround, in most states of the world, the processes of making and implementing internal decisions affecting individuals. Indeed, there are no forms of redress against actions taken at the international level which intrude directly upon the legal positions of individuals. Remedies established by international human rights treaties are barred by the provisions of

[155] E. McWhinney, The International Court as Emerging Constitutional Court and the Coordinate UN Institutions (Especially the Security Council): Implications of the Aerial Incident at Lockerbie, in 30 CYIL (1992), 261.
[156] A non-exhaustive list includes Res. 1267 (1999); Res. 1333 (2000); Res. 1373 (2001); Res. 1390 (2002); Res. 1455(2003); Res.1526(2004); Res. 1617 (2005).
[157] See for example Resolution 1483 of 2003.
[158] See Res. 1572 (2004), Concerning the situation in Cote d'Ivoire; Res. 1533 (2004) and 1596 (2005) concerning the situation in Congo; Res. 1636 (2005), concerning the situation in Lebanon.

Article 103 of the UN charter, which provides that obligations deriving from the UN Charter take priority over any other international obligation, including obligations to respect human rights.

CHAPTER FOUR

4.1. CONCLUSIONS AND RECOMMENDATIONS

This thesis interrogates the jurisdiction of the International Criminal Court (ICC) and the United Nations Security Council (UNSC) with respect to the initiation of prosecution for the crime of aggression. It looks at the United Nations Charter and the Rome Statute that establishes the International Criminal Court with a view of identifying and analyzing their juridical roles in the prosecution of the crime of aggression. The thesis seeks to establish whether the provisions of the Rome statute give the ICC the necessary independence and autonomy it requires to discharge its mandate of trying and punishing serious crimes. From the preceding chapters of this thesis, there is no doubt that there is a close working relationship between the International Criminal Court and the Security Council. This relationship is premised on Article 39 of the United Nations Charter that in a nutshell empowers the Security Council to make determination of an act of aggression. It was upon this background that the International Law Commission (ILC) in article 23 of its draft preceding establishment of the International Criminal Court proposed that;

(i) The ICC would not directly deal with cases of aggression without prior determination of an act of aggression by the Security Council.

(ii) Pursuant to its powers under chapter VII of the UN Charter the Security Council was empowered to refer Matters to the court.

(iii) The court could not commence a prosecution without prior approval of the Security Council in cases involving situations being dealt by the Security Council under chapter VII of the UN Charter.

The abovementioned ILC proposals formed the basis of negotiations for the Preparatory Committee on the crime of aggression as well as at the conference. After heated arguments both within the preparatory committee and at the Rome Conference, a compromise was reached which is embodied in articles 5, 13(b) and 16 of the Rome Statute.

Although a compromise was reached under article 5 of the Rome Statute, the question of how the court would exercise its jurisdiction in respect of the crime of aggression was suspended to a future date under article 5(2) of the Rome Statute. Consequently, the Preparatory Committee was mandated to come up with a definition of the crime of aggression as well as conditions under which the Court shall exercise its jurisdiction.

The most controversial provisions which the Preparatory Committee must consider in depth in dealing with the task placed on it are articles 39 and 103 of the United Nations Charter as well as article 5 of the Rome Statute. Article 5(2) of the Rome Statute states thus; *"the court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the charter of the United nations."*

On the other hand, article 25 of the United Nations Charter invests the Security Council with primary responsibility for maintenance of international peace and security. As a measure for maintaining international peace and security, the United Nations Charter article 39 invests the Security Council with the power to determine existence of any threat to peace, breach of peace or an act of aggression. The Security Council is further empowered to make recommendations or decide what measures shall be taken in accordance with articles 41 and 42 to maintain or restore international peace and security.

The problem posed by the foregoing provisions is that if the preparatory committee is to come up with a definition of the crime of aggression that is in accordance with the provisions of the United Nations Charter, then the Security Council as opposed to the International Criminal Court will determine who is to go before court. As such, the Security Council which is a political body and whose primary concern is maintenance of international peace and security and not justice, will usurp the judicial function of the court of determining an act of aggression. It is also quite likely that the permanent Security Council members are likely to utilise their veto powers selectively to shield themselves or their friendly nations from the jurisdiction of the court.

The other issue that arises is the initiation of investigations and prosecution for the crime of aggression. The trigger mechanism under the Rome Statute has been spelt out under article 13. Article 13(b) empowers the Security Council acting under chapter VII of the United Nations Charter to refer a situation to the prosecutor. This read together with article 39 of the UN Charter means that the International Criminal Court cannot exercise its jurisdiction over a case of aggression until the Security Council has triggered its mechanism under article 13(b) of the Rome Statute. Before the Security Council refers a situation of aggression to the prosecutor pursuant to article 13(b) of the Rome Statute, it (Security Council) must make a determination of an act of aggression under article 39 of the UN Charter first. As such, article 13(b) subjects the court to the control of the Security Council, a political body.

Article 16 of the Rome Statute provides that *"no investigation or prosecution may be commenced or proceeded with under this statute for a period of 12 months after the Security Council, in a resolution adopted under chapter VII of the charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions"*. This research has shown that historically the Security Council has acted selectively in making determinations for an act of aggression depending on who are the parties involved. Glaring cases of aggression like the Iraqi invasion of Kuwait, have been ignored altogether or labelled something else like the breach of peace. The Security Council has interpreted its chapter VII powers in a very broad manner such that it becomes difficult for one to tell whether it is acting within or without the provisions of Chapter VII. In some cases, permanent members of the Security Council have utilised their veto powers in their own favour or in favour of a friendly state to stop the Security Council labelling it the aggressor. It is likely that the Security Council and more so the permanent members, are likely to carry on with this tactics to oust the jurisdiction of the court in cases of aggression.

The United Nations Charter encourages member states to settle their disputes amicably with article 36(3) of the UN Charter calling upon the United Nations Security Council to encourage states to refer legal disputes to the court. This study shows that articles 5, 13 and 16 of the Rome Statute places upon the Security Council determination of legal issues as opposed to political issues which the Security Council is not well equipped to deal with. In any event, the safeguards provided for in the

Rome Statute are of no consequence to the Security Council as the Security Council being a creation of the UN Charter cannot be bound by provisions of the Rome Statute. The only limitations of the Security Council are the purposes and principles of the United Nations.

It is therefore the overall conclusion of this thesis that the hypothesis of this thesis that the Rome Statute as the constitutive instrument of the International Criminal Court does not give the court sufficient autonomy it requires to discharge its mandate effectively has been proved.

For the International Criminal Court to function independently and impartially, it is important that the relationship between the Security Council and the International Criminal Court is harmonised. This harmonization is critical to enable the court discharge its mandate effectively. Consequently, I recommend as here below.

RECOMMENDATIONS

1. Amendment of articles 5, 13(b) and 16 of the Rome Statute

Articles 5, 13(b) and 16 of the Rome Statute do not address the conflict between the Security Council and the court over determination of aggression. Article 103 of the UN Charter provides that in case of a conflict, provisions of the UN Charter override those of the Rome Statute. As such, the court cannot question any action of the Security Council pursuant to any provision of its Statute. On the other hand, the Security Council is a powerful body with the only limitations to its powers being the principles and purposes of the United Nations as set out in the UN Charter. Among the proposals made in Rome to address this conflict were as follows;

1) The court to stay its proceedings upon a request of the Security Council acting under chapter VII of the UN Charter. However, such a stay is to be lifted and proceedings to proceed when;
    (a) The security Council notifies the Court that the stay is no longer necessary, or
    (b) All sanctions, including military and economic have been suspended or terminated, or
    (c) There being no activity from the Security Council, the Court decides that the stay is no longer necessary having considered the actions and views of the Security Council.

This proposal will address the issue of deferral and referral under article 16 of the Rome Statute. This is a practical and workable proposal in that it is easier to get consensus to amend the Rome statute than amend the United Nations Charter. Secondly, it will address the fear of most states that the Security Council members, especially the permanent members, acting under chapter VII of the UN Charter may defer certain issues indefinitely to protect a Security Council member or any other friendly state.

2. **Judicial Review of Security Council Resolutions**

The Security Council enjoys immense powers under the United Nations Charter. The Security Council is not subject to the control of any other body and the only limitations to its powers are the principles and purposes of the United Nations under the United Nations Charter. These being the case, it is important that some remedy is provided in cases where the Security Council acts *ultra vires* the UN charter. Historically, in cases of aggression, the Security Council has been accused of acting selectively. On the 25 June 1950 when the North Korean armed forces invaded South Korean territory without prior warning, the Security Council condemned the action as a breach of the peace and not an act of aggression. Again in August 1990 when Iraq invaded Kuwait accusing it of driving down the oil prices by exceeding OPEC production quotas and stealing oil from the Rumalia oil field at the Iraqi-Kuwaiti frontier, the Security Council determined that the invasion was a breach of international peace and security and not an act of aggression. There is need to judicially review those Security Council Resolutions that are *ultra vires* the United Nations Charter. It has been argued that under article 25 of the UN charter, member states have agreed to respect only those decisions that are in conformity with the UN Charter and not otherwise. It is well within the right of member states to reject Security Council decisions that are not in conformity with the UN Charter and insist that the Security Council lives by example by acting within the provisions of the UN Charter. This position has been upheld by the International Court of Justice (ICJ) in its advisory opinion in *Conditions of Admission to the United Nations* where it said;

"The political character of an organ cannot release it from the observance of treaty provisions established by the Charter when they constitute limitations on its power or criteria of judgement".

This position has further been reinforced by the United Nations International Criminal tribunal for former Yugoslavia (ICTY) in the case Prosecutor .vs. Tadic in which case the court held;

"The Security Council is an organ of an international organization established by a treaty which serves as a constitutional framework for that organization. The Council is thus subject to certain constitutional limitations on its powers and criteria of judgement".

In view of the foregoing, Security Council Resolutions that are *ultra vires* the United Nations Charter should be subjected to judicial review. The system of the United Nations is not actually built on the concept of an *etat de droit* and no concept of strict separation of powers as it prevails under national democratic systems. There is no institutional hierarchy between the Security Council and the International Court of Justice (ICJ), as these two bodies serve distinct functions. The former employs political considerations and the latter acts according to strict legal rules. Nevertheless, they are functionally parallel in the sense that they pursue the same objective, namely compliance with the principles and purposes of the United Nations. As such the ICJ could be called upon to determine whether or not the Security Council in its Resolution has acted *ultra vires* the principles and purposes of the United Nations.

It is true that the ICJ, like other international tribunals is not designed to review the legality of Security Council Resolutions. However, such a review can be done incidentally, at the request of the parties to a dispute in respect to whom alone the decision has a binding effect.

Bibliography

A. Books

1. Brownlie, Ian, *International Law and the Use of Force by States*, Clarendon Press, Oxford 1963.

2.Bernhard, Rudolf (ed.) *Encyclopaedia of Public International Law,* Vol. 1, New Holland, Amsterdam, London, New York, Tokyo, 1992.

3. Dinstein, Yoram, *War, Aggression and Self Defence,* 3rd (ed.)., Cambridge University Press, Cambridge 2001.

4. Ferencz, Benjamin B., *Defining International Aggression*-The Search for World Peace., Oceana Publications, Dobbs Ferry, 1975.

5. Ferencz, Benjamin B., *New Legal Foundations for Global Survival; Security through the Security Council*, Oceana Publications, Dobbs Ferry, New York, 1994.

6. Jorgensen, Nina H.B., *The Responsibility of States for International Crimes*, Oxford University Press, New York, 2000.

7. Kittichaisaree, Kriangsak, *International Criminal Law*, Oxford University Press, Oxford, New york, 2001.

8. Mcdonald, Gabrielle Kirk/ Swaak-Goldman, Olivia, *Substantive and Procedural Aspects of International Criminal Law,* Vol. 1: *The Experience of International and National Courts*, Kluwer Law International, The Hague, 2000.

9. Rifaat, Ahmed M., *International Aggression; A Study of the Legal Concept: Its Development and Definition in International Law*. Almqvist & Wiksell international, 1979.

10. Triffterer, Otto (ed)., *Commentary on the Rome Statute of the International Criminal Court*: observers Notes, Article by Article, Nomos Verlagsgesellschaft, Baden-Baden, 1999.

11. Walzer, Michael. *Just and Unjust Wars. A moral Argument with Historical Illustrations*, 2nd (ed)., Basic Books, New York, 1992.

B. JOURNALS

1. **Bantz, Vincent P.,***The International Legal status of Condominia (1998) Florida Journal of International Law*, Vol. 12 at 77

2. **Casese Antonio.,** *The Statute of the International Criminal Court: Some Preliminary Reflections.* 1999 EJIL 145.Available at http://www.nyu.edu

3. **Clark, S. Rodger.**, *Rethinking Aggression as a Crime and Formulating its Elements: The Final Work-Product of the Preparatory Commission for the Interntional Criminal Court*, 15 Leiden Journal of International Law 859-890 (2002).

4. **Dawson, Grant M.**, *Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression*? 2000 New York Law Journal of International & Comparative Law 413.

5. **Ferencz, Benjamin B.**, *The United Nations Consensus Definition of Aggression: Sieve or Substance,* 10 Journal of International Law and Economics 701.

6. **Ferencz, Benjamin B.**, *Can Aggression be Deterred by Law?* Pace International Law Review, Fall 1999, text available at http://www.benferencz.org/pacearti.htm

7.**Hall, Christopher K.,** *The third and the fourth Sessions of the United Nations Preparatory Committee on the Establishment of an International Criminal Court* (1997)91 American Journal of International Law 124.

8. **Hogan-Doran, Justin/Van Ginkel, Bibi T.**, *Aggression as a Crime under International Law and The Prosecution of Individuals by The Proposed International Criminal Court*, 43 Netherlands International Law Review 321 (1996).

9. **Muller-Schieke, Irina Kaye.,***Defining the Crime of Aggression,* 14 Leiden Journal of International Law 409 (2001).

10. **Peirce, Rachel**, *Which of the Preparatory Commission's Latest Proposals for the Definition of the Crime of Aggression and the exercise of Jurisdiction should be adopted into the Rome Statute of the International Criminal Court*? 15 Brigham Young University Journal of Public Law 281, (2001).

11. **Stone, Julius**, *Hopes and Loopholes in the 1974 Definition of Aggression,* 71 American Journal of International Law 225, (1977).

12. **Tsen-Ta, Jack Lee.,** Separability, Competence-Competence and the Arbitrators Jurisdiction in Singapore. (1995) Singapore Academy of Law Journal 421.

CASES

1. *Case Concerning Military and Paramilitary in and Against Nicaragua* (Merits), 1986, I.C.J. Rep. 14.

2. *ICJ Corfu Channel Case,* Merits, ICJ Rep. (1948)

3. *In Re Von Weizsaecker and Others,* United states Tribunal at Nuremberg, 14 April 1949 (1955) 16 Annual Digest and Reports of Public International Law Cases 344.

4. *Nicaragua Case* (Preliminary Objections), ICJ Rep. 1984, 393

5. *Prosecutor .v. Dusko Tadic a/k/a "Dule"* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) available at http://www.ictr.org

6. *Re Hirota and Others* (International Military Tribunal for the Far East, Tokyo Trial, 1948), 15 Annual Digest and Reports of Public International law Cases 356.

7. *Trial of the Major War Criminals, Judicial Decisions, International Military Tribunal (Nuremberg), Judgement and Sentences* (1947) 41 American Journal of International Law 172.

8. *United States of America .v. Von Loeb and Others*, 15 Annual Digest and Reports of Public International Law Cases 380 (1948).

9. *United States of America .v. Krauch and Others,* 15 Annual Digest and Reports of Public International Law Cases 669 (1948).