UNIVERSITY OF
LINCOLN

A CRITICAL EVALUATION OF THE INTERNATIONAL CRIMINAL COURT'S NEW JURISDICTION OVER THE CRIME OF AGGRESSION

- **A milestone for international criminal accountability or a 'renewed licence to wage illegal wars'?**[*]

Suzanne Jeanette Claxton

Doctor of Philosophy

School of Law

October 2021

[*] Benjamin B. Ferencz, 'Ending Impunity for the Crime of Aggression' (2009)

Declaration:

‘I confirm that this is my own work and the use of all materials from other sources has been properly and fully acknowledged.’

Suzanne Claxton

26th October 2021

Acknowledgements

I would like to thank my husband Christopher for his support and patience throughout this long passage. I would like to extend my deepest gratitude to my supervisor, Doctor Graham Melling. His insights throughout the entirety of my research have been thought-provoking and his support and guidance have been instrumental in my completion of this thesis. In addition, I would like to thank Professor Duncan French for his helpful comments in the final stages of my work.

Abstract

The 2010 Kampala definition of the Crime of Aggression represents an historic milestone in the attempt by the international community, beginning at Nuremberg, to define, enable prosecution of and eradicate the 'supreme international crime' of aggression.[*] The jurisdiction of the International Criminal Court was finally activated as of 17 July 2018, some 20 years after its inclusion as an undefined crime in the Rome Statute 1998.

This thesis critically evaluates the challenges the International Criminal Court faces in exercising its new jurisdiction over this 'supreme' crime, in light of the near debilitating limitations placed on that jurisdiction. These challenges arise, in the first instance, from the highly restrictive definition itself, raising problems of a very high gravity threshold, limitation of prosecution to political and military leaders only, restriction to state-on-state aggression and a finite list of state acts, which are potentially outdated. Modern types of warfare, including cyberwarfare and aggression committed by non-state actors are currently not included.

The second area of difficulty for the Court is posed by the extraordinarily restrictive jurisdictional conditions. Thus, the Court is subject to intense Security Council scrutiny, as well as a significantly reinforced requirement of consent by individual States to

[*] Robert H. Jackson, 'Opening Statement before the International Military Tribunal', 21 November 1945, *United States Representative to the International Conference on Military Trials,* HMSO, (London 1945), 305.

jurisdiction, even if they are signatories to the Rome Statute. The examination involves a critical assessment of these features and considers whether, in light of the restrictions placed on the Court's determination powers, effective prosecution and jurisdiction over the crime is possible. It will also suggest alternative approaches and potential solutions as to how the Court's reach over the crime of aggression could be widened. These range from judicial extension by close analogy and a re-write of the definition to a re-interpretation of States' right to consent as a duty, as well as the exercise of universal jurisdiction. It is contended that, without extension of jurisdiction through these means, the criminalisation and prosecution of aggression is in danger of irrelevance from the outset, allowing for elective impunity. Extending jurisdiction of the Court through the suggested means, on the other hand, would strengthen the prohibition of the use of force and contribute to the eradication of one of the most serious international crimes, furthering the aims of the Rome Statute and the UN Charter itself.

Table of Contents

INTRODUCTION

In June 2010, history was made in Kampala at the 1st Review Conference for the International Criminal Court.[1] After more than a decade of deliberations between negotiating states parties and observer states, consensus was finally achieved on a definition of the crime of aggression and its jurisdictional conditions.[2] The purpose of this definition was to identify individual criminal responsibility for the collective act of aggression.

Vast expectations had, for nearly a century, attached themselves to the birth of this crime, and the hope was expressed that it would capture all types of aggressors responsible for the illegal use of force, constituting a tool for wide jurisdiction of the Court. As the former prosecutor of the Nuremberg Tribunals,[3] Benjamin Ferencz, pleaded just prior to the Kampala Conference:

> Giving an international criminal tribunal effective jurisdiction over aggression, even if it seems remote today, would be an historical achievement of incalculable significance. Every legal step should be taken that might help deter nations from the incredible horrors of armed conflicts. Aggressors should not be granted a renewed licence to wage illegal wars with impunity… Nuremberg was triumph of

[1] The International Criminal Court ('the ICC' or 'the Court') was established by the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544.
[2] International Criminal Court, Assembly of States Parties (ASP), Review Conference, 'The Crime of Aggression', ICC Doc. RC/Res. 6 (11 June 2010), (Resolution 6, or the Kampala amendment).
[3] *Nuremberg Judgment, France and ors v Goering (Hermann) and ors, Judgment and Sentence*, The Trial of the Major War Crimes before the International Military Tribunals at Nuremberg [1946] 22 IMT 203, (the IMTs).

> Reason over Power. Allowing aggression to remain unpunishable would be triumph of Power over Reason.[4]

Following the acceptance of the Kampala amendments, the inception of the crime of aggression and jurisdiction by the first permanent International Criminal Court was celebrated as an unprecedented innovation and progression of international criminal law.[5] Claus Kress and Leonie von Holtzendorff, observing the events, described the Kampala consensus on aggression as 'a milestone in the development of international law', and expressed hope that 'world opinion will begin to slowly exert its soft power towards the expansion of the ICC's jurisdictional reach.'[6]

Reaching consensus on the aggression provisions was widely viewed as a major achievement, since the international community had, for decades, been attempting to define and outlaw the illegal use of force. A pre-existing notion of a largely unfettered right to go to war had, during the 20th century, become the subject of scrutiny, leading to condemnation and attempted prosecutions.[7] This change in attitude was the result of two unprecedented world wars and the lingering threat posed by a Cold War, with the potential of culminating in the deployment of nuclear weapons and large scale or even global destruction. However, despite the developing perception of aggression as one of the worst international crimes, an agreement on a definition and conditions for the exercise of

[4] Benjamin B. Ferencz, 'Ending Impunity for the Crime of Aggression' (2009) 41 Case W. Res. J. Int'l L. 281, 290.
[5] Claus Kress and Leonie von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 (5) JICJ, 1179. See also Jennifer Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference' (2011) 11 Int'l Crim L. Review 49, 50.
[6] Kress and von Holtzendorff, *ibid*, 1217.
[7] For a detailed account, see Chapter 1.

jurisdiction continued to remain out of reach. At the 1998 Rome Conference, aggression was included as a 'blank prose crime'[8] in Article 5 (1),[9] without a definition or jurisdictional conditions, which were left to be decided at a later date.[10] The central problem of establishing individual criminal responsibility for the collective state act of aggression had, despite the precedents of prosecutions at Nuremberg and Tokyo, as yet not been resolved.[11] As observed by Antonio Cassese, at the root of the disagreement was not only the political nature of the crime, but also a prevalent reticence of many States to relinquish, even partially, their sovereignty and grant jurisdiction over a new international crime to a new court.[12] As a result, and despite the substantial efforts of the negotiators, the deliberations nearly failed entirely until the last moments of the Kampala Conference, in which a compromise was agreed leading to the incorporation of Articles 8 *bis* and 15 *bis* and *ter.*

Jurisdiction over aggression has only recently been activated, and prosecuting the crime will be a new challenge for the first permanent international criminal court. For the first

[8] This iconic term was coined by Michael Glennon, 'The Blank Prose Crime of Aggression' (2010) 35 Yale J. Int'l L. 71.

[9] Article 5 (1) of the Rome Statute provides that '[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War Crimes;
(d) The crime of aggression.'

[10] Article 5 (2) of the Rome Statute provided that '[t]he 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.' Article 5 (2) was deleted by the Kampala amendment.

[11] The IMTs at Nuremberg, (n. 3), and *Tokyo War Crimes Trials*, The International Military Tribunal for the Far East (3 May 1946 to 12 November 1948), established by its Charter, 1946, 14 *DSB* (Article 5 a)) 361, 362 (1946), Judgment reprinted in reprinted in R. Pritchard (ed); *The Tokyo Major War Crimes Trial* (1998) 1190.

[12] See Antonio Cassese's concise assessment in *International Criminal Law* (3rd edn, OUP 2013) 138. See also Kress and von Holtzendorff (n. 5).

time in over seventy years, leaders have now been placed on notice that their extant and future acts of aggression may lead to criminal prosecutions. However, as the examination will reveal, the limitations placed on the jurisdiction of the Court are substantial.

1. Scope of inquiry

The main purpose of the inquiry is to assess the potential effectiveness of the Court's new jurisdiction over the crime of aggression, in light of the restrictions placed on it. These limitations, as a direct result of the Kampala compromise, are two-pronged. The first area of concern arises from the overly narrow definition itself,[13] which is based on the 1974 'Definition of Aggression' contained in General Assembly Resolution 3314.[14] Problems range from a high gravity threshold to a restriction to traditional types of warfare only, which may be irrelevant in a modern context. Additionally, participants other than the highest political and military officials have been excluded, and the definition of the crime is exceptionally state-centric, failing to capture the prevalent contemporary phenomenon of aggression committed by non-state groups.

The second area of concern is that the Court's jurisdiction has been severely handicapped through extraordinary jurisdictional conditions.[15] These significant and far-reaching

[13] The definition is contained in Article 8 *bis* of Resolution 6.
[14] United Nations General Assembly 'Definition of Aggression' (14 December 1974), XXIX, UN Doc A/RES 3314 (hereinafter Resolution 3314).
[15] Contained in Articles 15 *bis* and 15 *ter* of Resolution 6, providing for an exception to the regime established in Article 12, see Chapters 4 and 5.

limitations incorporate an amount of Security Council control not commonly present in international criminal prosecutions, as well as an exceptional level of insistence on state consent.[16] The restrictive effect of these specific provisions has been exacerbated by a recent controversial decision to apply the narrowest interpretation, resulting in a requirement for consent to be expressed in multiple ways, by both victim and aggressor state.[17] This exceptional consent requirement, in particular, is capable of undermining jurisdiction of the Court and potentially facilitating elective impunity. The problem of state consent to criminal prosecutions, therefore, poses the greatest problem for wider jurisdiction of the Court, and pervades the discussion throughout.[18]

These remarkable conditions differentiate the crime of aggression from the other crimes under the Rome Statute, and their examination begs the questions: Why was so much effort expended at limiting the ICC's independent jurisdiction? What are the reasons for historical and continuing scepticism of criminal jurisdiction over aggression, resulting in concerted attempts to actively restrain its exercise? Are the grounds for restriction of jurisdiction sufficiently justified? And were the level of Security Council involvement and greatly reinforced state consent requirement necessary? Do these severe restrictions render the newly obtained jurisdiction essentially unfit for purpose, in light of improbable or unsuccessful prosecutions, resulting in a lack of credibility of the Court and ineffective deterrence?

[16] See Chapters 4 and 5.
[17] Resolution ICC-ASP/16/Res.5, 16th Assembly of States Parties, 14th December 2017 (Resolution 5). See the discussion in Chapter 5.
[18] Despite the fact that, following a Security Council referral, jurisdiction of the ICC arises automatically irrespective of the consent of victim or aggressor, state consent is also relevant in such situations, because the permanent members of the Security Council (P5) effectively have to consent to the referral. See Chapter 4.

The contribution of this thesis to the debate not only entails an assessment of the likely practical effects of the restrictions on the Court's novel jurisdiction over aggression; it also attempts to suggest alternative approaches and potential solutions to overcome the limitations of the new crime. These range from the practical to the undeniably idealistic: from the proposal to re-amend the outdated definition and pragmatically promote wider voluntary subscription to the Court, to an entire re-think of the state consent requirement, particularly in the criminal branch of international law, and the necessity for reform of the voting structure within the Security Council.[19] They also consider the revival of the principle of universal jurisdiction over international atrocity crimes at customary law, harking back to Nuremberg and beyond. The more ambitious of these suggestions, in particular, deserve far more attention in a separate research project than I am able to afford them here, focusing mainly on the practical limitations placed on the ICC's new jurisdiction over the crime of aggression.[20] Before embarking on this examination, it may be prudent to set the scene for the arguments presented and set out the theoretical background.

2. The role of States at international law

States are the main actors on the international stage. Acting on behalf of their citizens, they negotiate and enter into international agreements, engage in diplomatic relations with

[19] See the discussion in Chapter 6.
[20] See the suggestions for reform in Chapter 6 and for further research in the Conclusion.

other States, and pursue the defence of their territory. At times, States also commit acts of aggression through the participation of individuals. As a result, state centricity is a cardinal feature of aggression,[21] which has also been transposed into the Kampala definition of the crime,[22] despite the fact that the latter is concerned with individual criminal liability. Furthermore, the crime of aggression is subject to the most stringent, triply buttressed state consent requirement within the jurisdictional conditions.[23] It is this reinforced insistence on state consent to criminal jurisdiction over aggression, which constitutes the greatest obstacle to widespread jurisdiction of the Court.[24] Andrew Guzman sums up the problem of state consent in international law generally as follows:

> [M]odern international law is built on a foundation of state consent. In an era of pressing global challenges, however, this commitment to consent represents a double-edged sword. On the one hand, consent protects the interests of states and supports notions of sovereign equality. On the other hand, it functions as a barrier to effective cooperation in a world of vastly divergent priorities and concerns. A requirement of consent creates a powerful *status quo* bias that frustrates many attempts to solve global problems.[25]

[21] See for instance the definition of the state act in Resolution 3314 (n. 14). For detail, see Chapters 2 and 3.
[22] Article 8 *bis.*
[23] Articles 15 *bis* and *ter*.
[24] Discussed in Chapter 5.
[25] Andrew Guzman, 'The Consent Problem in International Law' (2011), UC Berkeley: Berkeley Program in Law and Economics, available at https://escholarship.org/uc/item/04x8x174, 5, accessed 6 November 2020. See also Stephen Krasner's assessment that the insistence on state sovereignty at international law gravely affects the ability of States to resolve the biggest international problems. Stephen Krasner, 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2004) 25 Mich. J. of Int'l L. 1075, 1077-78.

Notwithstanding the problems the state consent requirement causes in tackling difficult international or global issues, it has long been accepted as the source of international law.[26] The Permanent Court of International Justice stated in the 1927 *Lotus* case:

> International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.[27]

This interpretation thus insists on voluntarism, with state consent as the source of the binding force and legitimacy of international law.[28] States bind themselves legally by granting their consent,[29] and – if interpreted strictly – without such consent there is no legal enforceability.[30] The consent requirement therefore allows States to 'control both the content and meaning of international law.'[31] The 1969 Vienna Convention on the Law

[26] Anthony Aust, *Handbook of International Law* (CUP 2005), 4. See also James Leslie Brierly, *The Law of Nations: An Introduction to the Modern Law of Peace* (Clarendon 1963) 51-54, and Ian Brownlie, *Principles of Public International Law* (6th edn, OUP 2003), 4.
[27] *S.S. 'Lotus' (France v Turkey),* [1927] PCIJ Rep Series A No. 10, 43-44.
[28] See Jan Klabbers, 'Law-Making and Constitutionalism', in Anne Peters, Jan Klabbers, and Geir Ulfstein (eds), *The Constitutionalization of International Law* (OUP 2009), 81, at 100, 114. See also Jean d'Aspremont and Joerg Kammerhofer, 'Introduction: The Future of International Legal Positivism', in Joerg Kammerhofer and Jean d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014), 4.
[29] Anthony Arend, *Legal Rules and International Society* (OUP 1999), 87. Consent itself has been defined as '[t]he role of the procedures of consent to be bound is to constitute a mechanism by virtue of which a treaty becomes binding on states, or, as it was described, acquires characteristics of a "juridical act"'. (M. Fitzmaurice, 'Consent to be Bound – Anything New Under the Sun' (2005) 74 Nord. J. Int'l L. 484.
[30] James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2012), 20. See also Louis Henkin, *International Law: Politics and Values* (Nijhoff 1995), 28.
[31] Guzman (2011) (n. 25) 5.

of Treaties confirms the significance of state consent as binding on treaty parties.[32] The VCLT also asserts that third parties cannot be bound by a treaty without their consent.[33] Consent to a treaty can be expressed in a number of ways with the effect of binding States.[34] The most obvious manifestation of state consent is evidenced by membership of treaties, but the conduct of States may also point to such consent and forms an alternative, although more difficult to determine, source of international law consisting of customary norms. To that effect, Article 38 (1) of the 1946 Statute of the International Court of Justice[35] recognises conventions (or treaties), as well as customary international law, evidenced by state practice, *opinio juris*, and 'the general principles of law recognized by civilised nations'.[36]

The most common form of customary international law is constituted of state practice and *opinio juris*,[37] and it is non-consensual in the sense that it is possible for States to be legally bound by customary rules even if they have not individually consented to them.[38] The 'general principles' constitute an additional customary source of law,[39] and are also recognised in Article 53 of the VCLT:

---

[32] United Nations, Vienna Convention on the Law of Treaties (23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
[33] Article 34 of VCLT.
[34] Articles 11 –15 of VCLT.
[35] United Nations, Statute of the International Court of Justice (18 April 1946) 33 UNTS 993 (ICJ Statute).
[36] *Ibid*, Article 38 (1).
[37] Customary international law has been widely recognised in the jurisprudence of the ICJ, for instance in the *North Sea Continental Shelf cases (Germany v Denmark)* [1969] ICJ Rep. 3, and *The Asylum Case* [1950] ICJ Rep. 266. The customary prohibition of aggression, specifically, was acknowledged in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits), [1986] ICJ Rep. 14, para 103 (hereinafter *Nicaragua* case). This was confirmed in *Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda)*, [2005] ICJ Rep. 168, para 223 (hereinafter *Armed Activities* case). National jurisdictions also recognise customary international law. The UK case of *R v Jones* [2006] UKHL 16, for instance, acknowledged the existence of a customary crime of aggression several years before the Kampala Definition (para 19).
[38] Michael Akehurst, 'Custom as a Source of International Law' (1975) 47 BYIL, 1, 23.
[39] M. Cherif Bassiouni, 'A Functional Approach to 'General Principles of International Law' (1990) 11 Mich. J. Int'l. L. 768, 768-9. See also Hersch Lauterpacht, 'International Law – the General Part' (unpublished) in Elihu Lauterpacht (ed), *International Law: Collected Papers of Hersch Lauterpacht,* (CUP 2009) 1, 74. Whilst there is no definitive list of these norms, it is widely accepted that they include

> [A] peremptory norm is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[40]

These customary norms are potentially capable of superseding state consent on account of their compelling and authoritative nature.[41] They are recognised in domestic legal systems as generally applicable on the basis of widespread acknowledgement by other 'civilized nations', but are not necessarily based on the consent of *all* of those States.[42] As Dworkin states: 'If enough states to constitute "the international community of States" have recognized fundamental rules as peremptory and non-negotiable, then these rules are peremptory and non-negotiable for the whole international community.'[43] The 'general principles' are thus not created directly and intentionally through the will of States; rather their pre-existence is merely confirmed by a number of States *ex post facto.* Recently a number of draft conclusions on peremptory norms have been adopted by the International Law Commission, confirming their status.[44]

---

prescriptions relating to piracy and slavery, as well as aggression, the protection of prisoners of war, genocide, torture, war crimes and crimes against humanity (see Bassiouni, *ibid.*) See also International Law Commission, *Report of the International Law Commission on Peremptory Norms of general international law (jus cogens)*, Chapter V, (16th May 2019) UN Doc A/74/10.

[40] Article 53 VCLT (n. 32).

[41] Peremptory rules have been described as having a 'higher normativity', independent of legal opinion and state practice. See Oscar Schachter, 'Entangled Treaty and Custom', in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity, Essays in Honour of Shabtai Rosenne* (Nijhoff 1989) 717, 734. Note here the differing view of Rosalyn Higgins, reasserting the importance of *opinio juris* and state practice. Rosalyn Higgins, *Problems and Process, International Law and How We Use It,* (2010 reprint OUP), 21.

[42] Bassiouni, *supra*, (n. 39).

[43] Ronald Dworkin, 'A New Philosophy for International Law', (2013) Wiley, Phil. & Pub. Aff., 6.

[44] See the 2019 *ILC Report* (n. 39).

Notwithstanding the fact that in a given situation the individual consent of a State may not be required for a customary international law rule to apply to that State, these norms do not substantially undermine the common insistence on state consent as the general basis of international law.[45] All of these sources of legally binding norms, whether treaty based or customary in nature, are thus founded on at least some level of state consent, although not necessarily on the consent of every single State.[46] Consent is, therefore, widely perceived to be central to international law as a source of legitimacy,[47] allowing sovereign nations to enter into binding agreements whilst protecting their interests and sovereignty, and consequently it is jealously guarded by States.[48]

3. Positivist underpinnings of state consent

The theoretical underpinnings of the emphasis on state consent, as the basis of international law, stem from the strand of epistemology associated with legal positivism.[49] According to this traditional view, States are the creators as well as the primary subjects of international law, and their consent is required as of necessity.[50]

[45] Andrew Guzman, 'Saving Customary International Law', (2005) 27 Mich. J. Int'l L., 115, 141-5.
[46] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008), 112. See also Guzman, (2011), (n. 25) 32.
[47] See Franck's argument that consent amounts to a validation of authority and evidence that this authority is being exercised 'in accordance with right process', Thomas Franck, *Fairness in International Law and Institutions* (OUP 1995), 25-46. For a different view that consent is not necessarily required for legitimacy of a legal rule, citing domestic law and delegation of States' authority to the European Union as support, see Guzman, (2011), (n. 25), at 10-13.
[48] Guzman, *ibid.*
[49] See Hans Kelsen, *General Theory of Law and State* (HUP 1945) xiv. Herbert L. A. Hart has since developed international legal positivism to entail greater nuances (see H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 (4) Harv. L. Rev. 593-629. See also H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983), and H.L.A. Hart, *The Concept of Law* (2nd edn. OUP 1994). See also the discussion below.
[50] See for example Henkin, (1995) (n. 30) 29. See also Arend (1999), (n. 29) 76, and Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP 2010) 28-30.

International legal positivism does not concern itself with a norm's intrinsic morality or political contribution, validity is simply derived from state consent.[51] This lack of extrinsic considerations attempts to render legal scholarship a true science or 'pure theory' of law, [52] devoid of moral considerations and value judgments. Hans Kelsen states:

> When this doctrine is called the 'pure theory of law', it is meant that it is being kept free from all the elements foreign to the specific method of a science whose only purpose is the cognition of law, not its formation. A science has to describe its object as it actually is, not to prescribe how it should be or should not be from the point of view of some specific value judgments.[53]

This view of international law as established simply by state consent, free of any considerations of morality, political value, or social utility, has persisted as the mainstream approach to international law in the 20th century and beyond.[54] As Paulus and Simma assert, '[l]aw is regarded as a unified system of rules that … emanate from state will. This system of rules is an "objective" reality and needs to be distinguished from law 'as it should be.'[55] These two simple sentences sum up the basic tenets of the prevailing positivist interpretation of international law, the first stipulating that state consent is its

[51] Richard Collins, 'Classical Legal Positivism in International Law revisited', in Kammerhofer and d'Aspremont, (2014), (n. 28) 38.
[52] This term was coined by Kelsen and is derived from the German word 'Rechtswissenschaft', which is based on 'Grundnormen', or basic norms. See Kelsen, (n. 49) at xiv.
[53] See Kelsen (n. 49) at xiv.
[54] For support see for instance Kelsen (n. 49), Henkin (n. 30), Arend (1999) (n. 29), von Bernstorff (2010) (n. 50), and Crawford (2012) (n. 30).
[55] Bruno Simma and Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 AJIL, 302, 304-5.

unquestionable source,[56] and the second denying the relevance of any moral considerations. Despite representing the mainstream view with apparent certainty,[57] neither statement is completely unassailable.

4. Can the state consent requirement be circumnavigated?

Rules of recognition and potential customary international law exceptions to state consent

Unlike orthodox legal positivism, its post-modern strand recognises that legitimacy at international law is not necessarily solely derived from state consent.[58] Post-modern legal positivism adopts and develops HLA Hart's theory of law, which identifies the existence of a number of rules.[59] The first category, primary rules of obligation, are rules which impose duties or obligations, however, secondary rules are necessary to provide an authoritative determination and statement of the primary rules. To achieve that purpose, the second category includes rules of recognition, rules of change and rules of adjudication. Following Hart's positivist theory, state consent is thus recognised as *one*

[56] This perspective also forms the basis for the unwavering emphasis on state consent to the ICC's jurisdiction over the crime of aggression, the greatest obstacle encountered in this discussion. See particularly Chapter 5.
[57] See the discussion above at pp. 6-9.
[58] Benedict Kingsbury, 'The Concept of 'Law' in Global Administrative Law', (2009) 20 (1) EJIL, 23, 27. See also Jean d'Aspremont, 'Herbert Hart in today's international legal scholarship, in Kammerhofer and d'Aspremont (2014), (n. 28) 146, stating: 'International legal positivism does not mean that law exclusively emanates from the state… For instance, in the pluralised contemporary international legal system, it would be entirely conceivable for law to emanate from non-state entities.'
[59] See HLA Hart's theory of 'rules of recognition' in for instance, Hart (1994) and (1983) (n. 49).

of the sources of international law, but not the only one. Despite Hart's wider recognition of a number of potential sources as giving rise to legal norms, including the capability of taking into account a number of social facts, his rejection of moral considerations, [60] found prevalent in natural law theories,[61] follows the classical positivist approach.[62]

Consequently, Hart's positivism has been described as offering 'a more sophisticated and nuanced account of legal validity that can incorporate non-consensual and even constitutional norms. They [i.e. post-modern positivists] partially reject the substantive institutional core – rooted in consent – that lies at the heart of the classical variant on the grounds that it is too blunt and empirically insensitive.'[63] A similar critique of orthodox legal positivism has been presented by Jean d'Aspremont, who points out that the traditional insistence on state consent and voluntarism not only has the effect of perpetuating state sovereignty as well as prioritising it over international cooperation and agreements, but also 'fails to offer a satisfying theory to explain the binding character of

[60] Hart, *ibid*, (1994), 79, and (1983), 89. Hart's positivist theory dismisses morality as a source of legitimacy of law. Morality and law are separate concepts (the 'separation thesis'). (See Hart's stance in the Hart-Fuller debate in Hart (1958) (n. 49), and LL. Fuller, 'Positivism and fidelity to law: A reply to Professor Hart' (1958) 71 (4) Harv. L. Rev., 630).

[61] For natural law claims of 'primal' adherence to universal human values, see, for instance, Mark Murphy, *Natural Law in Jurisprudence and Politics* (CUP 2006), 1. For a more nuanced view of law as 'conventional' principles which are 'rooted in shared beliefs', and the necessity for at least some moral considerations in order to establish a hierarchy of rules, see Patrick Capps, 'International Legal Positivism and Modern Natural Law', in Kammerhofer and d'Aspremont (2014) (n. 28) 229 and 237.

[62] See Kelsen (n. 49).

[63] Capps (n. 61) 217. A similar argument can be derived from a different school of legal theory. To that effect, the New Haven School also devalues the role of States, suggesting that the traditional insistence on state consent as the ultimate source of legitimacy of an international legal norm is too static. Instead, law consists of a social process resulting in policy decisions based on values. See Mc Dougal and Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order' in Myres S. McDougal and W. Michael Reisman, *International Law Essays* (Minneola 1981). These values include, for example, security, wealth, economic growth and trade, respect, articulation and implementation of human rights, amongst others (*ibid* 35-8). The result of this process of law-making is the establishment of 'authoritative' and 'controlling' rules *(id.* 22). For more on this approach and the concept of a 'minimum public world order', see the discussion below.

international law.'[64] D'Aspremont's argument thus revisits the fact that customary international law,[65] consisting of state practice and *opinio juris*, the 'general principles recognised by civilized nations', and peremptory rules, or *jus cogens,* [66] are all rules capable of binding States even if they have not individually consented to the acceptance of the legal norm. As long as *some* States have consented to these rules,[67] a State can be bound without having granted their consent. Consequently, this phenomenon may be interpreted as contradicting the strict application of the consent requirement.[68] Traditional, source-based positivism provides no explanation for this contradiction. It fails to provide an answer to fundamental questions, for instance: How many 'civilised nations' must recognise a rule before it becomes binding on all States? What makes States sufficiently civilised? And which norms are peremptory?[69] In an attempt to make sense of the problem, which absolute insistence on state consent in international law entails, Dworkin submits:

> These latter difficulties stem from the scheme's perfectly understandable ambition to extend the ambit of international law beyond those communities that have explicitly consented to its principles to include those that have not. International

[64] See Jean d'Aspremont, in Kammerhofer and d'Aspremont (2014) (n. 28) 145. See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989 CUP, reissue 2005).
[65] See Article 38 (1) of the ICJ Statute (n. 35). For case law recognising the existence of customary international law, see (n. 37).
[66] See the discussion above in section 2.
[67] Thus potentially becoming 'rules of recognition', following Hart's interpretation (n. 59).
[68] See Dworkin, (2013) (n. 43) 6. See also Dworkin's critique of legal positivism in 'Natural Law Revisited' (1982), 34 (2) U. Fl. L. Rev., 165-188, *A Matter of Principle* (HUP 1985), and *Law's Empire,* (HUP 1986), amongst others. Dworkin's hybrid theory acknowledges both the rules of source-based positivism and moral principles derived from naturalism, whilst rejecting the separation thesis of Hart's positivism (see n. 60). Dworkin's morality is, however, of a political rather than religious nature, as defended in orthodox naturalist theories. (See for example *Basic Writings of St. Thomas Aquinas,* Vol. 2, A. C. Pegis (ed), (Hackett Publishing Co. 1997), and John Finnis, *Natural law and natural rights* (2nd edn, OUP 2011).
[69] All of these questions are considered problematic by Dworkin (2013), *ibid*, 6-7.

> law could not serve the purposes it must serve in the contemporary world – disciplining the threat some states offer to others, for example – unless it escaped the straitjacket of state-by-state consent. But yielding to that ambition seems to undermine the axiomatic place of consent in the scheme, and thus its assumed jurisprudential foundation.[70]

Non-consensual compliance based on the perception of a 'sovereign duty' or the necessity to achieve a 'minimum world public order'

If one accepts that state consent does not, or at least not in all situations, provide a satisfactory explanation for States' abidance by legal rules, the question arises on what other grounds do States comply? It seems logical to assume that non-voluntarist compliance with international law has to be due to the exertion of some sort of pressure, which may be economic, diplomatic, or perhaps even moral in nature.[71] A State may wish to be seen to be 'doing the right thing', thus improving their international reputation and leading to an advancement of their standing in international relations with other States. This may lead to powerful alliances and advantageous trade deals. A State's motivation may therefore be based on political utility or an adapted political morality with additional benefits.[72]

[70] *Ibid*, 7.
[71] Dworkin refers to this as 'coercive dominion'. *Ibid,* 10.
[72] *Ibid.*

The question remains, however, how individual States decide that an international rule is 'law', and therefore ought to be legally binding on that State. If the State looks to other States' decisions to determine 'law' for themselves, what considerations have these decisions by other States been based on? And how can the taking into account of any such extrinsic factors not violate the very sovereignty so fiercely defended in the legal positivist interpretation? How can the current government of a State bind future administrations, which are liable to change, without compromising the sovereignty of that future government?[73] All of these questions and problems highlight the difficulty which arises from a strict insistence on state consent and sovereignty in international law.

It may be possible to reduce the dilemma by reinterpreting the sovereign rights of a State as a sovereign duty, exercisable for the benefit of its citizens.[74] Following this view, as expressed by Ronald Dworkin, a State gains legitimacy by improving the conditions in which its citizens live, and this includes advancing the stability of international relations, peace and security.[75] Thus, States may be deemed to have a duty to protect their own citizens, and promote a peaceful, stable and effective international order. States may also be subject to an onus to intervene, in order to prevent human rights abuses and war crimes, genocide etc. in other countries, and to cooperate internationally 'to prevent economic, commercial, medical or environmental disaster.'[76] A similar, if slightly less defined approach had also been taken by early liberal internationalists, who viewed international

[73] Many of these points are made by Dworkin, *ibid*, at 8-10, who derives at the conclusion that States enter into political obligations and engage in international law as a result of 'political morality' (*id.* 11-12), rather than because the 'self-limiting consent' of States is the basis of international law (*id.* 10).
[74] See also Dworkin, *ibid*, 16-18. Admittedly, this interpretation may be more acceptable in democracies than totalitarian regimes or absolute monarchies, based on the notion that a State's government in a democratic system is elected by and on behalf of its citizens.
[75] Dworkin, *ibid.*
[76] *Ibid*, 18.

law as a product of a re-evaluation of society as 'directed by a kind of cosmopolitan purpose'.[77] Citing the Swiss jurist Johann Bluntschli, Collins describes the approach as follows:

> [I]nternational law concerned the relations between states, but states embodied a collective will of their people, which in turn pointed with 'inner necessity to the higher unity of mankind of which the nations were only members'.[78]

According to this view, international law may manifest itself through States' observation of customs and conclusion of treaties, however it is the result of a 'common juridical conscience'.[79] In other words, it is this underlying communal conscience, which affords the State legitimacy as a participant and source of international law in the first place, rather than mere consent of state officials.

Admittedly, the references to a 'higher unity of mankind' and a 'common conscience' do contain moral undertones and therefore are highly likely to be subject to critique, particularly by classical positivists who deny the relevance of any moral considerations in law.[80] The argument presented here is, nevertheless, that international law, which attempts to regulate behaviour between States and problems affecting the global community at large, is subject to an outward-looking political morality or duty, rather

[77] Collins (2014) (n. 51), 31.
[78] *Ibid*, citing Johann C. Bluntschli, *The Theory of the State*, English translation from the 6th German edn (Clarendon 1885), 25.
[79] Collins, *ibid*, 31. The term 'common juridical conscience' is a direct translation of 'la conscience juridique commune', a term coined by Alphonse Rivier, *Principes du Droit des Gens,* Tome I (Arthur Rousseau 1896), cited by Collins, 27.
[80] See Kelsen and Hart (both n. 49).

than the inward-looking, subjective morality commonly rejected in traditional positivism. Following this view, as expressed by John Tasioulas, the legitimacy of states, as well as international law itself, is regarded as:

> [D]ependant on its furtherance of certain values, e.g. human rights, peaceful co-existence, environmental protection, etc. as tempered by the requirements of the rule of law (predictability, liberty, etc.) and the values of political participation (including the political self-determination of states).[81]

Consequently, if States derive their legitimacy and legal capacity from the collective will and benefit of the people, state consent can be a source of international law only if granting it in a particular treaty or situation represents the collective will.[82] Thus, states can grant valid consent and bind themselves legitimately at international law only if this reflects the people's benefit.[83]

These arguments echo Dworkin's reinterpretation of States' sovereignty as a sovereign duty, exercisable for the benefit of the people with the aim of improving international stability, peace and security.[84] Developing this point for the purpose of the discussion in this thesis, it is also tenable that States actually have a duty to eradicate the most heinous

[81] See John Tasioulas, 'Customary International Law and the Quest for Global Justice', in Amanda Perreau-Saussine, James B. Murphy (eds), *The Nature of Customary Law* (CUP 2007) 307, 329.
[82] For support, see Dworkin (2013) (n. 43) 18.
[83] The point of legitimacy of internal state decision-making as a test of valid state consent at international level has been made, for instance, by Capps (n. 61) 218.
[84] See Dworkin (2013) (n. 43).

international crimes known to mankind,[85] including the crime of aggression. Consequently, a State's failure to grant consent to the jurisdiction of the International Criminal Court over the crime of aggression may even be seen as a failure to exercise that sovereign duty.[86]

The specific provisions prohibiting and criminalising aggression can also be viewed as 'necessary rules of coexistence' and 'principles of minimum world public order'.[87] This terminology was applied in a number of publications by Myres McDougal and Florentino Feliciano in the late 1950's and early 1960's against the background of the development of nuclear and biological weapons and serious polarisation of the post WWII world into power blocs. Accordingly, McDougal and Feliciano state that '[t]he common interest which sustains the law of war is the interest of all participants in economy in the use of force – in the minimization of the unnecessary destruction of values.[88]

The 'economy in the use of force', including the prescription of aggression, is thus viewed as a generally applicable rule of coexistence, which is in the interest of the international community at large, and consequently transferred into a duty of States. McDougal and Feliciano view the law of war including the prescription against aggression as essential

[85] The Rome Statute refers to the 'most serious crimes of concern to the international community as a whole', and 'unimaginable atrocities that deeply shock the conscience of humanity'. (See Preamble, Rome Statute (n. 1).

[86] Admittedly, this discussion raises the problem of who is to be the judge of a State's decisions. Defining the benefit to the people may not be as straightforward as it appears. As Guzman states: 'We live in a world of many States with wildly divergent priorities and concerns.' (2011) (n. 25) 6. For the purpose of this discussion, however, it is contended that the eradication of the worst international crimes is beneficial to the people. See also Dworkin's discussion of states' duty and assessment of benefit by the international community (below at n. 97 and related text).

[87] Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, (YUP 1961).

[88] Myres S. McDougal and Florentino P. Feliciano, 'International Coercion and World Public Order: The General Principles of the Law of War' (1958), 812, https://digitalcommons.law.yale.edu/fss_papers/2451/, accessed 25 November 2020.

to ensuring 'the preferred goals of maximum human dignity and minimum destruction of human values.'[89] The *status quo* of decentralisation of effective power, and unilateral state supremacy in each State's attempt to retain the maximum power and protection for itself, presents a problem.[90] Thus, States view themselves as competent to take any measures subjectively deemed appropriate in their defence or that of allies, and this problem has to be surmounted in order to guarantee a public world order devoid of aggression. Instead of allowing nations to resort to such unilateral exercise of power, McDougal and Feliciano propose inter-state co-operation and specialised central international institutions to develop and administer rules on 'unlawful coercion', for the benefit of the community as a whole.[91] In order to achieve such a public world order of freedom, an equilibrium of power, and complementary humanitarian policies, international authority has to be organised and centralised, although States are still deemed to be the principal actors at international law.[92] One may ask how such a centralisation of international authority can be compatible with the autonomy of States, however Dworkin's reinterpretation of sovereignty as a duty of cooperation may provide a solution.[93]

This discussion attempts to make a case for the sovereign duty of States not to deny participation in the international legal process by failing to grant consent, the problem at the heart of the jurisdictional limitations placed on the crime of aggression. Nevertheless, it cannot be denied that it provides an imperfect solution only, leaving the debate still largely unresolved. The concept of an international legal system is very young compared

[89] *Ibid*, 816.
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid*, 812.
[93] See Dworkin (2013) (n. 43).

with the traditional notion of sovereignty as a right of States.[94] Moreover, compliance with and enforcement of international legal obligations remains a problem in a system originally developed on a voluntarist basis.[95] Notwithstanding these difficulties, the reinterpretation of the sovereign right to grant consent as a duty to cooperate internationally, where it benefits the citizens of the State in question, may require at least an exceptionally good justification of why consent is being withheld. Thus, political pressure could be used to support and at least partially enforce an international system, requiring less than cooperative States to provide justification for their actions.[96] The benchmark would be the benefit to the people. Admittedly, this raises the problem as to who should be the arbiter of any existing benefit to the people. Dworkin appears to suggest that the matter should be decided by the international community at large:

> If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a prima facie duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole. If some humane set of principles limiting the justified occasions of war and means of waging war gains wide acceptance, for instance, then the officials of other pertinent nations have a duty to embrace and follow that set of principles.[97]

[94] This is explored in detail in Chapter 1.
[95] 'If no state can be forced to cooperate, they will all have a reason not to participate.' (Dworkin (2013) (n. 43) 18. For a view that even voluntary consent does not ensure compliance of States, see Guzman (2011) (n. 25) 10.
[96] See Guzman, *ibid*, 8-10.
[97] See Dworkin (2013) (n. 43) 19.

This view develops an ideal image of a widespread political morality based on utility for citizens and improvement of values which are deemed to be globally prominent.[98] These values include peace, security, and economic stability amongst others.[99] As attractive as this vision may be, it does gloss over the fact that state interests, in practice, do not always (some might say very rarely) converge, particularly when it comes to resources or territorial claims.[100] The benefit to a State's nationals may be quite different to a benefit to the global community, and States would be likely to claim that their sovereign duty exists primarily towards their own citizens.[101] Additionally, the judges of benefits to the people appear to be the community of States rather than the citizens themselves, whether national or international.

Consequently, agreement on what constitutes 'benefit' may be problematic, whoever determines its existence. The attempt to dismantle state sovereignty is therefore inexorably imperfect. Admittedly, it is easier to criticise state centrism in international law than to suggest a perfect, unassailable alternative, but that does not mean that the *status quo* should not be questioned.[102] If one accepts that international law *is* politics,[103] law, just like politics, has to be capable of moving with the times and develop in response to contemporary challenges, rather than simply insist on the fixture of consent of the executive of States as a sole source of legitimacy of legal rules.

[98] *Ibid,* 19. This is what Dworkin calls the 'principle of salience'.
[99] See McDougal and Lasswell (n. 63) and McDougal and Feliciano (1958) (n. 88).
[100] See for instance Guzman's observations, (2011) (n. 25) 6, and comments in (n. 86).
[101] *Ibid.*
[102] See Kammerhofer's and d'Aspremont's encouragement of this debate (2014) (n. 28).
[103] Koskenniemi (1989) (n. 64), see also Martti Koskenniemi, *The Politics of International Law* (Hart 2011), Preface I, p. V.

This discussion raises the important question whether international law's obsession with state consent derived from classic positivism is still viable, particularly when prescribing and attempting to eradicate the worst international crimes. International criminal law is concerned with a limited list of international crimes of such gravity that they pose a threat to 'world public order'. In order to create deterrence, these crimes require regulation, enforcement and prosecution, as part of a new and developing cooperative process on a wide international level, rather than the prevailing insistence on state sovereignty as an absolute right, and the requirement of individual state consent.[104] In a plea to overcome such a static approach in favour of new processes, policies and the interpretation and application of global values, McDougal and Feliciano sum up:

> It is by the consistent maintenance of these emphases, in the employment of all his special intellectual skills for inquiry into the basic specific problems of international coercion, that the lawyer who values human dignity may make his richest contribution to moving the general community of mankind from its present incomplete and disorganized structures and processes of authority, harassed by contending exclusive orders, toward a more inclusive world public order in which the values of a safe, free and abundant society are honoured not merely in theory but in practice.[105]

[104] Derived from classical legal positivism, which is described by McDougal and Feliciano (1958) as 'the repetitive reiteration of overoptimistic faith in inherited ambiguous technicalities' (n. 88) 844.
[105] *Ibid*, 845.

To that end, the desideratum of a sovereign duty incorporating a certain political morality, and requiring justification of any decisions which affect the international community detrimentally (including the denial of consent to jurisdiction of the ICC generally, and over the crime of aggression specifically), may eventually come to replace a jealously guarded consent system. In the face of increasingly common global crises and shared problems,[106] States may yet submit either voluntarily or out of necessity to greater cooperation even if the advantage gained is international rather than domestic. In the meantime, even the mere contemplation of States' political duty to cooperate towards the achievement of improvements, and the need for justifications if they refuse, may be able to assert some influence on state behaviour, or at least confirm the existence of a rule. This inadvertent effect was considered by the ICJ in the *Nicaragua* case:

> If a state acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state's conduct is in fact justifiable on that basis, the significance of that attribute is to confirm rather than to weaken the rule.[107]

Thus, the perception of a duty and a justification requirement may act as a persuasive tool, even if there is no absolute compliance pull. In addition to these contemplations,

[106] The United Nations Foundation has identified a number of global issues of concern in 2021, including, amongst others, extreme poverty, food and water insecurity, growing violence and a lack of access to healthcare leading to a prediction of 2021 being 'the worst humanitarian crisis year since the beginning of the United Nations'. All of these problems require substantial global cooperation. See the United Nations Foundation, 'Five Global Issues to Watch in 2021', available at http://www.unfoundation.org/blog/post/five-global-issues-to-watch-in-2021/, accessed 5th February 2021.
[107] See *Nicaragua* (1986) (n. 37) para 186.

there may be one other concept, also based on customary international law, which could be capable of circumnavigating the problem of the state consent requirement.

A different approach to circumventing the consent problem? - The concept of universal jurisdiction

The discussion, so far, has considered the waiving of a state consent entitlement based on a reinterpretation of States' sovereign rights as a sovereign duty, the joint responsibility to create an international system which maintains a 'minimum world public order', and the more pragmatic suggestion to exert diplomatic and political pressure and influence on States to consent to jurisdiction of the Court. There remains one other concept which, at least theoretically, may provide a solution to the problem of state consent to criminal jurisdiction in the international arena. To that end, it may be possible to invoke the customary law concept of universal jurisdiction.

The term 'universal jurisdiction' refers to jurisdiction exercised by States over crimes of universal interest, offending universal public policy and attracting universal condemnation. Universal jurisdiction entitles any State to legitimately prosecute a crime in domestic courts in the interest of all States. The first assumption of this concept is that the prosecution of universally deplored crimes is of interest to every single State, as offending all notions of a common perception of humanity.[108] The second element of domestically exercised universal jurisdiction is the exceptional possibility to disregard

[108] The perpetrators are deemed to be enemies of all humankind, or '*hostis humanis generis*'. See Sharon Williams, 'The Rome Statute on the International Criminal Court – Universal Jurisdiction or State Consent – To Make or Break the Package Deal' (2000) in Michael N. Schmitt (ed), 'International Law across the Spectrum of Conflict', 75 International Law Studies, US Naval War College, 539, 544.

the territory on which the crime occurred, irrespective of where it was committed or the nationality of the perpetrator or the victim.[109] Thus, under universal jurisdiction, States are perceived to have 'the legal competence and jurisdictional competence to define and punish particular offences, regardless of whether that State had any direct connection with the specific offences at issue.'[110] The consent to jurisdiction by the State, of which the victim or perpetrator are citizens, is immaterial.[111] Consequently, the concept of universal jurisdiction is capable of avoiding 'a jurisdictional vacuum'.[112]

Traditionally, the most prominent crimes prosecutable in this way were piracy[113] and slavery.[114] More recently, the concept is also deemed to include jurisdiction over genocide, crimes against humanity, war crimes, and torture.[115] Universal Jurisdiction has also been cited as one of the bases of jurisdiction for the Nuremberg Tribunals,[116] granted by states parties to the London Charter,[117] who vested their combined domestic

[109] Kenneth. C. Randall, 'Universal Jurisdiction under International Law', (1988) 66 Tex. L. Rev., 758, 788. See also the discussion in Michael. P. Scharf, 'Universal Jurisdiction and the Crime of Aggression', (2012) 53 (2) Harv. Int'l L. J., 358.

[110] Christopher Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' (1996), 59 LCP 153, 167. Jurisdiction over the person appears to be merged with jurisdiction over the offence, see H. Lauterpacht, 'The Law of Nations and the Punishment of War Crimes' (1944), 21 BYBIL 58, at 61.

[111] See Williams (2000) (n. 108) 545.

[112] *Ibid*, 544.

[113] See for instance *United States v Smith*, [1820] 18 US (5 Wheat.) 153. See also *United States v Klintock*, [1820] 18 US (5 Wheat.) 144. See also the recent resort to universal jurisdiction of the Seychelles over Somali pirates arrested by third states in *Republic v Mohamed Ahmed Dahir & Ten* (10) [2010] SCSL. 81 (Sey.).

[114] See L.C. Green, *International Law* (1984), 179.

[115] See Valerie Paulet, 'The ICC & universal jurisdiction: Two ways, one fight', 23 May 2017, https://www.coalitionfortheicc.org/news/20170519/icc-universal-jurisdiction-two-ways-one-fight, accessed 20th January 2021. For support that genocide, war crimes and crimes against humanity are customary international law prohibitions subject to universal jurisdiction, see *The Prosecutor of the Tribunal v Dusan Tadic*, (hereinafter the *Tadic* case), Case No. IT-94-I-T, Trial Chamber Decision on Jurisdiction, 10 August 1995, paras 46-52. For judicial statements that torture has developed into a *jus cogens* norm subject to universal jurisdiction, see *Prosecutor v Furundzija*, Tribunal for Former Yugoslavia, Case No. 17-95-17/1-T (1998), para 153, and Lord Browne Wilkinson's summary of the majority judgement in *R v Bartle et al., ex parte Pinochet*, [1999] UKHL, 38 ILM, paras 581, 589.

[116] The IMTs at Nuremberg and successor trials by the NMTs are considered in detail in Chapter 1.

[117] London Charter of August 8, 1945, 82 UNTS, 279, Article 6 (a).

jurisdiction in the international tribunals.[118] Consequently, the judiciary at Nuremberg relied on universal standards, established through customary international law, which allowed them to judge aggression committed by the officials of sovereign States irrespective of state consent or national laws.[119] They therefore first introduced the equivalent of an 'international rule of law',[120] independent of nations' consent. The successor tribunals, established under Control Council Law No. 10,[121] also considered their jurisdiction to be universal under customary and treaty law, stating:

> [A]n international crime is […] an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.[122]

---

[118] See Trygve Lie, *UN Secretary-General's Report on the Nuremberg Trials*, UN Doc. A/CN.4/5, UN Sales No. 1949 V.7, at 80 (1949). See also the statement in the Nuremberg judgment (n. 3) that the allied powers had 'done together what any of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.'

[119] Although some commentators infer Germany's state consent to prosecution from the unconditional surrender following defeat. See Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non Party States', (2001) 64 LCP, 13, at 36-7. Note that the International Military Tribunal for the Far East at Tokyo, on the other hand, had the express consent to jurisdiction of the Japanese government (Morris, 37).

[120] For the view of Nuremberg establishing a universal 'international rule of law' by international tribunals, see for instance Jack Goldsmith's article 'The Shadow of Nuremberg' in the New York Times of January 20th, 2012, reviewing William Shawcross' book *Justice and the Enemy - Nuremberg, 9/11, and the Trial of Khalid Sheikh Mohammed*. http://www.nytimes.com/2012/01/22/books/review/justice-and-the-enemy-nuremberg-9-11-and-the-trial-of-khalid-sheikh-mohammed-by-william-shawcross-book-review.html, accessed 15 October 2020.

[121] 'Control Council Law No. 10', *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (1945), (reprinted in Telford Taylor, *Final Report to the Secretary of the Army on Nuremberg War Crimes Trials, under Control Council Law No. 10*, 250-153 (1949)).

[122] *In re List*, 11 Trials of War Criminals 759 (1946-49) (US mil. Trib. Nuremberg 1948), at p. 1241. For similar references to universal jurisdiction, see for instance the *Hadamar Trial*, 1 Law Reports of Trials of War Criminals 46 (1949) (US Mil. Commission – Wiesbaden 1945), p. 53, and the so-called *Einsatzgruppen* case, *United States v Otto Ohlendorf*, (1950) IV Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at p. 462. For a discussion of universal jurisdiction in the Nuremberg tribunals see also Scharf (2012) (n. 109) at pp. 375-9.

The consent of the German aggressor state to the prosecution of its former leaders was neither assumed to exist nor considered to be necessary.[123] Instead, universal jurisdiction was derived from the number and variety of States participating in the prosecution.[124] The Nuremberg precedent may, consequently, provide support for the exercise of universal jurisdiction over aggression at customary law. Following this argument, ratifying member states of the Rome Statute ought to be able to vest their domestically exercisable jurisdiction in the Court, as *the* appropriate organ to exercise universal jurisdiction, just as the individual signatories to the London Charter were deemed to have vested their individual jurisdiction in the tribunals.[125]

In the lead up to the Rome Conference, universal jurisdiction was considered as one of the paths for the ICC's jurisdiction over all of the four crimes in Article 5 in a proposal by Germany.[126] Sharon Williams observed:

> The view central to this proposal was that to limit the potential of the ICC by requiring some form of state consent beyond ratification would detract from the effectiveness of the Court and even its rationale and philosophical underpinnings. Thus, the impact of the German proposal would have been to give the ICC universal jurisdiction over the listed crimes with no need for a separate consent of

[123] See Roger S. Clark, 'Nuremberg and Tokyo in Contemporary Perspective', in Timothy L. H. Mc Cormack & Gerry J. Simpson (eds), *The Law of War Crimes, National and International Approaches* (Kluwer 1997), 172. For a different view of automatic consent due to the unconditional surrender of Germany, see Morris (n. 119).

[124] 19 States took part in the Nuremberg prosecutions and vested their individually exercisable jurisdiction in the tribunals under universal jurisdiction. See Clark, *ibid*, and Chapter 1.

[125] See Williams (2000) (n. 108), 545-546, and 559 at n. 46.

[126] 'German Proposal of 1998', placed before delegations in the Committee of the Whole and contained in the Draft Statute for an International Criminal Court, UN Doc. A/Conf. 183/2/Add.1, Articles 6 (b), 7, 9 (further option, and further option for Article 7. Available at https://www.documents-dds-ny.un.org, last accessed 07 December 2020.

interested States. As Germany indicated in Rome, the universal principle's application would have eliminated loopholes.[127]

The proposal for universal jurisdiction of the ICC failed to attract sufficient support in Rome, resulting instead in the inclusion of Article 12, which established the preconditions to jurisdiction of the Court.[128] The crime of aggression, however, still required its own definition and jurisdictional conditions, and the subject was therefore not entirely closed. The possibility of domestic prosecutions and potential delegation of universal jurisdiction to the ICC sans state consent continued to be a matter of great concern particularly to the observer state of the United States of America during the negotiations.[129] Consequently, the US insisted on the inclusion of an understanding that the amendments 'shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.'[130] This understanding attached to the Kampala aggression amendment, attempts to expressly exclude the crime of aggression from the exercise of such universal jurisdiction by States. Nevertheless, according to Amnesty International's 2012 report, 163 out of 193 UN Member States claim the domestic exercise of universal jurisdiction over one or more crimes under customary international law,[131] and the matter may therefore not be as closed as it appears.[132] Admittedly, like the other arguments introduced above, this view is

[127] Williams, (2000) (n. 108) 545.
[128] Article 12 of the Rome Statute (n. 1). This article is discussed in detail in Chapter 5.
[129] See for instance Kress & von Holtzendorff (2010) (n. 5) 1216. See also Scharf (2012) (n. 109) 365.
[130] Understanding No. 4 *bis*, Annex III, Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression, attached to Resolution 6 (n. 2).
[131] Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*, 2012 update, available at www.amnesty.org/en/library/info/IOR53/019/2012., accessed 15th November 2020. See also International Justice Resource Center, *Universal Jurisdiction*, available at https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/, accessed 20th November 2020.
[132] See the discussion in Chapter 5.

controversial, since it consciously de-emphasises the state consent requirement, the pervading problem for wider jurisdiction of the Court.

The mainstream view prevails that state consent constitutes *the* source of international law, and any attempt to dismantle this consent requirement is undoubtedly contentious and likely to encounter objections. In the face of this strong and traditional resistance, any solutions attempted in this thesis cannot claim to be perfect and unassailable themselves, despite the extent of the research and the pursuit of such a solution with genuine passion. Consequently, a bittersweet caveat is expressed that any suggestions for extension of the Court's jurisdiction are, inevitably, as imperfect as the situation they are attempting to address. This does, however, not detract from the fact that the retention of a greatly reinforced state consent requirement in the crime of aggression provisions practically encourages non-membership, non-ratifications, and opting out even post-ratification. State consent is also a potential obstacle to Security Council referrals on account of its internal voting structure, based on the fact that members are unlikely to vote for a referral, where their interests or those of an ally may be affected adversely. P5 members, in particular, have the capacity to frustrate a referral to the Court in a given situation, potentially for good, through use of the 'veto'.[133] As a result of the state consent problem, deterrence from the commission of the infant crime, and effectiveness of the Court itself are weakened immeasurably.

[133] The veto power and internal Security Council structure is discussed in detail in Chapter 1.

5. Outline of the analysis

This work is divided into six core chapters and a conclusion. Chapter 1 provides an in-depth consideration of the roots of the crime of aggression. This focuses on the historical development from the traditional perception of a sovereign right to go to war to the prohibition of the use of force in Article 2 (4) of the Charter of the United Nations,[134] the ground-breaking post-World War II prosecutions for the 'supreme international crime' of aggression,[135] and the attempts of (and resistance to) achieving a definition of the crime since.

Chapters 2 and 3 examine the provisions contained in Article 8 *bis* of the 2010 Definition of the Crime of Aggression. The particular features to be investigated in Chapter 2 are the threshold an act of aggression must surpass in order to give rise to criminal liability, the limitation of possible perpetrators to political and military leaders only and the culpable conduct itself. Chapter 3 examines the state centricity of the definition and the list of aggressive acts based on traditional warfare. To what extent do these definitional limitations restrict the Court's jurisdiction? How would a wider definition have extended the jurisdiction of the Court, and why was there such a great level of resistance to such an extension?

Chapters 4 and 5 will consider the limitations placed expressly on the Court's jurisdiction in Articles 15 *bis* and *ter*, which are essentially consent-based. Chapter 4 first dissects the

[134] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 2 (4), discussed in Chapter 1.
[135] Robert H. Jackson, 'Opening Statement before the International Military Tribunal', 21 November 1945, Jackson, Robert H., *United States Representative to the International Conference on Military Trials*, HMSO, (London 1945), 305.

jurisdictional conditions for both articles, providing the foundation for the discussion. It then examines the particular relationship between the Security Council and the Court, and States' resistance to independent jurisdiction, which resulted in wide control of the Council over criminal prosecutions. Was this necessary? How does it compare to the other crimes of the Statute? And is the high level of control of a political organ, subject to the consent of its members, particularly the P5, over prosecutions of a crime desirable? How is this feature likely to affect the efficiency of such prosecutions? The second of the jurisdictional chapters (Chapter 5) examines the specific consent-related restrictions placed on the Court's jurisdiction in Article 15 *bis* (4) and (5). These include non-jurisdiction over non-consenting states parties and non-jurisdiction of the Court over non-signatories, unless there is a Security Council referral. States can withhold their consent to the Court's jurisdiction in three ways, first by remaining non-members, second by becoming members, but failing to ratify the aggression amendments, and third by opting out of jurisdiction, despite being a member and having ratified. Additionally, the jurisdiction of the Court has been restricted even more through the application, and most recently the narrowest possible interpretation, of Article 121 (5) of the Rome Statute.[136] This avoidable decision by the 2017 ASP to apply the negative understanding of Article 121 (5) requires the threefold consent to be granted by *both*, aggressor and victim state. These jurisdictional conditions are extraordinary and again raise the question: Why the insistence on such extraordinary restrictions? And how effective can the Court's jurisdiction possibly be in the face of these unusual and far-reaching limitations?

[136] Through the decision by the 2017 Assembly of States Parties (ASP) to interpret application of Article 121 (5) in the narrowest possible way. See Chapter 5.

Finally, Chapter 6 will attempt to make suggestions on how to widen the Court's jurisdiction, based on the analysis of the restrictions in the previous chapters. Much of this may remain a wish list on account of the practical difficulties likely to be encountered. Nevertheless, the contemplation and promotion of at least some of these improvement suggestions is highly necessary to develop and retain relevance of the new crime in modern aggression scenarios, and aid deterrence. It is argued that only if the Court allows itself wider interpretation powers to counteract at least some of the restrictions, will there be any chance of successful prosecutions. A relaxation of the state consent requirement at international law is fundamental to these improvement suggestions. Less controversially, the promotion of wider membership of the Court, particularly of all of the permanent members of the Security Council, and ratifications without reservations, ought to be pursued in order to advance deterrence from the commission of aggression and eradicate the perception of impunity for one of the worst international crimes.

CHAPTER 1: AGGRESSION IN A WORLD OF SOVEREIGN STATES – THE HISTORICAL AND GEOPOLITICAL CONTEXT

1. Introduction

The Kampala consensus on a definition of the Crime of Aggression and jurisdictional conditions represents a significant breakthrough for international criminal law,[137] establishing jurisdiction by the first permanent international criminal court over the illegal use of force. It is also remarkable because of the intrinsic difficulty of arriving at this consensus in light of the historical and geopolitical context, particularly of a 20th century marred by two harrowing World Wars and a lingering Cold War, in addition to continuing disaccord amongst States.[138] This historical context sets the scene for the discussion, central to this thesis, of the limitations placed on the jurisdiction of the Court. It also provides an insight into the difficulties international institutions have in the past encountered in their censorship of state acts of aggression, mostly because of a requirement of state consent to such condemnations.

[137] Kress and von Holtzendorff (2010) (n. 5) 1179. See also Trahan (2011) (n. 5) 50.
[138] Benjamin Ferencz, *Defining International Aggression, The Search for World Peace* (Oceana 1975) II, 5. See also Antonio Cassese (2013) (n. 12) 138.

The following discussion traces the change in States' perceptions from an inherent entitlement to go to war, subject to some form of justification or authorisation, to the widely practiced exercise of a virtually unfettered right to commit aggression and subsequently to emerging notions of aggression as a punishable international crime in the first half of the 20th century.

2. From the *jus fetiale* to the *jus ad bellum* – Early perceptions of aggression

The antecedents to the establishment of formal rules regulating the use of force in the relations between States, known as the *jus ad bellum*, can be traced to at least as far back as the conduct of the Roman Empire. Throughout the Roman Empire, the rules of hostilities had been governed by the *jus fetiale*; legal rules established by a body of priests.[139] Authorisation was necessary for any use of force, and it was provided by these priests if there were 'sufficient grounds justifying the outbreak of hostilities (e.g., violation of a treaty or the sanctity of ambassadors, infringement of territorial rights or offences committed against allies)'.[140] If there were sufficient grounds and authorisation had been granted, the perception of the hostilities was one of a 'just war' (*bellum justum*), as opposed to an 'unjust war' (*bellum injustum)*,[141] or the first concept of an act of aggression.

[139] See Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan, 2nd edn 1954), 10-11.
[140] Yoram Dinstein, *War, Aggression, and Self-Defence* (CUP 5th edn 2011), 65, quoting from Coleman. Phillipson, II *The International Law and Custom of Ancient Greece and Rome* II, at 182, 328.
[141] See Nussbaum (1954) (n. 139) 11.

In the 4th century AD, St. Augustine began to develop the so-called 'just war doctrine', according to which the motivation and justification for the use of force was considered morally acceptable, as long as it was authorised in the name of God.[142] In St. Augustine's world 'the resort to violence that is inherent in war is undertaken, not as a means of self-defence, but as a punitive effort initiated by lawful authority'.[143] Thus, war efforts were exercisable as a Christian duty on the authority and on behalf of a government.[144] A use of force subjectively authorised as morally acceptable, was therefore deemed to be lawful rather than constituting an unacceptable act of unlawful aggression.[145]

Christian theology followed St. Augustine's ideas and the 'just war' theory was subsequently developed further in order to justify the Crusades and later on the discovery and often violent subjugation and colonisation of the New World in the name of Christianity, particularly the Americas. In the 13th Century, St. Thomas Aquinas, whilst admitting that war was contrary to peace, propounded that peace was not always a just order worth preserving.[146] Moreover, he argued that war could be a means to achieve a real ('just') peace and a means to break a false ('unjust') peace.[147] St Thomas Aquinas elaborated on the existing 'just' war theory by establishing three principles. The first principle asserted that war could only be declared by the sovereign authority. The second principle necessitated a 'just' cause for the war, i.e. a fault element by the attacked State. The aim of the use of force was therefore to avenge a wrong, punish a nation, and/or

[142] See St. Augustine, *Contra Faustum Manichaeum*, around 400 AD, in John Langan, 'The Elements of St. Augustine's Just War Theory' (1984), 12 The Journal of Religious Ethics (1), 20, available at www.jstor.org/discover/10.2307/40014967, accessed 3rd March 2020.
[143] *Ibid.*
[144] *Ibid.*
[145] *Ibid*, 22.
[146] St. Thomas Aquinas, *Summa Theologiae* (XXXV Blackfriars 1972) 80-3.
[147] *Ibid.*

restore what had been seized 'unjustly'. The third element required a 'just' intent, i.e. to avoid harm or advance 'the good'. 'The good' here refers to a good result in the sense of a morally justifiable result.[148] Whilst these early principles insisted on some form of moral justification in order to establish legitimacy of the use of force, to be distinguished from aggression, any assessment of these criteria was inevitably subjective and concluded by the sovereign of the State who intended to go to war.[149]

Over the centuries, theologians, philosophers and jurists expanded on the permissible causes of war in an attempt to justify their rulers' use of force. Instead of generally restricting prolific use of force, the 'just war doctrine' therefore simply insisted on subjective justification.[150] Thus, Grotius[151] and Gentili[152] were accepting of the fact that 'just' war could be waged on both sides, depending on the opponents' perceptions. This developing view acknowledged subjectivity as inevitable in individual assessments of a situation and signified a change in attitude towards the use of force, placing increasingly less emphasis on the need for objective justification. This led Thomas Hobbes to come to the conclusion that the state of nature was generally a state of war, and peace merely arose from the need for self-preservation.[153] The prolific use of force, based on a broad range of subjective grounds or none at all, blurred the distinction between 'just' (or justified) wars and wars of aggression.

[148] *Ibid.* See also Anthony C. Arend & Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge 1993), 14.
[149] St. Augustine in Langan (1984), 1887:301.
[150] *Ibid.*
[151] Grotius, *De Jure Belli ac Pacis* II (Clarendon 1925), para XXIII, XIII, 565-6.
[152] Gentili, *De Jure Belli* I, para VI, 48-52 (Clarendon 1933), para VI, 31-3, 48-52.
[153] Thomas Hobbes, *Leviathan*, (Touchstone 2008), Ch. 13.

By the end of the 19th and the very early 20th century, States were embarking on war freely. In the words of Dinstein: '[O]nce war qualifies as objectively 'just' on the part of both adversaries, there is scarcely a reason why any State should feel inhibited from going to war at will'.[154] The diminishing emphasis on the need for justification to go to war therefore led to the use of aggressive force becoming more and more widespread, at a time when the science of warfare also developed exponentially, enabling wars to be fought on a much larger scale and ultimately leading to the two greatest wars of aggression of the 20th century.

3. Attempts to curb aggression in the first half of the 20th century

3.1 The creation of the League of Nations

Colonial expansion, the unification of Germany in the Second Empire under Bismarck with extensive militarisation, and shifting alliances between the European Powers led to mounting international tension towards the end of the 19th century.[155] In an attempt to obtain some form of security from acts of aggression, several States began to consider entering bilateral agreements on dispute settlement, however such treaties were subject to time limits and had no effect on third parties. The signatories to the multi-national Hague Conventions of 1899[156] and 1907[157] agreed to resort to mediation before

[154] Dinstein, *War, Aggression, and Self-Defence* (6th edn CUP 2017), 71.
[155] David Stevenson, 'Europe before 1914', British Library archives, https://www.bl.uk, accessed 4th March 2020.
[156] Hague Convention (I) of 1899 for the Pacific Settlement of International Disputes (29 July 1899).
[157] Hague Convention (II) of 1907 for the Pacific Settlement of International Disputes (18 October 1907).

embarking on aggressive war.[158] Nevertheless, these attempts to limit the outbreak of hostilities were unable to prevent the First World War. The atrocities of the First World War were so shocking to the world that the victors established the *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties* in order to determine responsibility for the acts of aggression committed.[159] In its report to the Preliminary Peace Conference, the Commission stated:

> The premeditation of a war of aggression, dissimulated under a peaceful pretence, then suddenly declared under false pretexts, is conduct which the public conscience reproves, and which history will condemn, but by reason of the purely optional character of the institutions at The Hague for the maintenance of peace […] a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the commission is authorized to consider under its terms of reference.[160]

This quote demonstrates that the Commission regarded the First Wold War as a morally condemnable act of aggression, despite not offending positive international law of the time. As a result the Commission recommended future principles of international law outlawing similar acts of aggression and suggested the future criminalization of such acts, concluding that '[i]t is desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law'.[161]

---

[158] See Dinstein (2017) (n. 154), 83. See also Sergey Sayapin, *The Crime of Aggression in International Criminal Law – Historical Development, Comparative Analysis and Present State* (Asser 2014).
[159] *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 1919-1920.
[160] *Report of the Commission (ibid),* of 29 March 1919. See Claus Kress, 'On the Activation of ICC Jurisdiction over the Crime of Aggression' (2018) 16 (1) JICJ, 2.
[161] *Ibid.*

Significantly, for the first time the trial and punishment of a sovereign, the German Emperor Wilhelm II, was sought for 'the supreme offence against international morality and the sanctity of treaties',[162] namely the crime of aggression. Despite the fact that this trial never took place, the attempt represents a watershed in history, since the international community (or at least the allied victors) perceived aggressive war-making as a punishable crime rather than a sovereign right.[163]

The First World War involved more States than ever before and resulted in a then unparalleled number of casualties. The figures vary, but are generally accepted as being in the region of 9.7 million dead soldiers, 21 million wounded, and more than 10 million civilian deaths.[164] As a result, the international community attempted for the first time in history to limit the right of States to wage aggressive war and to create a permanent international organization dedicated to the maintenance of world peace through disarmament and arbitration. To this end, the League of Nations was created in 1919.[165] In its covenant, member states contracted to 'respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League'.[166] The Covenant provided for arbitration by the League's Council in case of disputes, and members agreed to refrain from entering hostilities for at least three months following an arbitration attempt. Accordingly, Article 12 stipulates:

> The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration

[162] Treaty of Peace between the Allied and Associated Powers and Germany (28 June 1919), UKTS 14, Cmd. 1746, Article 227. See the account in Cassese (2013) (n. 12), 253-5.
[163] *Ibid.*
[164] Centre Europeen Robert Schuman, http://www.centre-robert-schuman.org, accessed 5th March 2020.
[165] Covenant of the League of Nations (1919), UKTS 4, Cmd. 153.
[166] *Ibid*, Article 10.

> or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.[167]

Article 12 therefore provided for specific waiting times, amounting effectively to a 'cooling off' period. After the expiry of this, States were still free to embark on war. Moreover, Article 15 of the Covenant reserved *inter alia* the right to resort to war, if the Council failed to reach unanimous agreement. In particular paragraph 7 stated:

> If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.[168]

Furthermore, the Council was not entitled to make recommendations or pass judgment on domestic matters, and if a dispute arose from such issues, the State in question was free to resort to any action it deemed appropriate, including war.[169] Importantly, as an instrument for the prohibition of war, the Covenant of the League of Nations was therefore ineffective, since it did not outlaw aggressive wars *per se.* Instead, States' rights to resort to war were preserved subject to the said conditions. Consequently, the Covenant

[167] *Ibid,* Article 12.
[168] *Ibid,* Article 15 (7).
[169] *Ibid,* Article 15 (8). For commentary, see Dinstein (2017) (n. 154) 84-6.

of the League of Nations was, at best, a weak attempt at limiting aggressive wars but foremost an agreement of intention of its member states to attempt initial arbitration before resorting to the use of force. The Covenant did not contemplate individual criminal responsibility for aggression.

3.2 The Geneva Protocol on the Pacific Settlement of International Disputes

In an attempt to rectify the shortcomings and loopholes of the Covenant, the British and French Prime Ministers proposed to the League of Nations acceptance of the Geneva Protocol on the Pacific Settlement of International Disputes in 1924.[170] Its preamble declared aggression to be 'an international crime',[171] and it demanded the settlement of disputes through submission to the Permanent Court of International Justice.[172] Member states contracted 'in no case to resort to war' except where there was consent by the Council of the League of Nations or in resistance to aggression.[173]

Notwithstanding the naming of aggression as 'an international crime', no elements for individual criminal responsibility by participants were considered. In reality, the Protocol, like the Covenant for the League of Nations, addressed state responsibility, and sanctions for offending member states were limited to financial and commercial sanctions only.[174] The Protocol also failed to regulate the resort to aggressive war by non-signatories entirely. Despite gaining preliminary approval by all 47 member states of the League of

[170] Geneva Protocol for the Pacific Settlement of International Disputes, 1924, 2 *Int.Leg.* 1378, 1379.
[171] *Ibid*, Preamble.
[172] *Ibid*, Article 3.
[173] *Ibid*, Article 2.
[174] *Ibid*, Articles 11 and 15.

Nations, the Protocol never entered into force and, as a practical result, the sovereign right of States to resort to aggressive war remained, at least technically, lawful.[175] The prohibition of acts of aggression thus continued to be limited to a voluntary agreement by States to arbitrate, and therefore in practice remained in a vacuum between weak and non-existent.

The Geneva Protocol, and the reasons behind the failure to ratify it, later came under scrutiny by the judges of the Nuremberg Tribunal, arriving at the conclusion that '[t]he principal objection appeared to be in the difficulty of defining the acts which would constitute "aggression", rather than any doubt as to the criminality of aggressive war'.[176] This problem foreshadowed the same difficulties incurred by the authors of the Rome Statute in 1998 and the negotiating parties leading up to the Kampala Conference in linking individual criminal responsibility to the state act of aggression.[177]

3.3 The Kellogg-Briand Pact

Despite the difficulty of achieving consensus, international efforts to outlaw aggressive war continued, leading to the conclusion of the so-called Kellogg-Briand Pact in 1928,[178] which contained an express 'renunciation of war as an instrument of national policy' by

[175] Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a radical plan to outlaw war remade the world* (Simon & Schuster 2017), 117-19.
[176] Nuremberg Judgment (n. 3), page 221. This point is considered in Noah Weisbord, 'Prosecuting Aggression' (2008) 49 Harv. Int'l. L. J. 161, 164.
[177] See the discussion in Chapters 2 and 3 in particular.
[178] League of Nations, General Treaty for Renunciation of War as an Instrument of National Policy (*Kellogg-Briand Pact*), 27 August 1928, LNTS (1929) XCIV, 58.

the signatories.[179] This pact represented the first comprehensive attempt at a prohibition of aggressive war, and immediately before the outbreak of the Second World War in 1939, it boasted an impressive 63 Members.

Nevertheless, the Kellogg-Briand Pact did not contemplate individual criminal responsibility for the state act. Furthermore, it had several significant shortcomings and its effectiveness is questionable. Firstly, it is doubtful that the members actually abandoned their right to use of force short of actual war.[180] Secondly, the pact failed to provide an actual definition of prohibited acts of aggression. Thirdly, it also lacked provisions for enforcement or sanctions in case of violation.[181] A fourth flaw is that self-defence was generally understood to be permissible without any parameters, thereby creating 'a potentially large loophole'.[182] Finally, and most importantly, it did not prevent expanding militarisation or aggressive use of force in the inter-war period, despite the strong statement of intent of the signatories to renounce war. Examples of such acts of aggression by signatories, without expressly declaring war, are Japan's invasion of Manchuria in 1931, Italy's invasion of Abyssinia in 1935, the Soviet invasion of Finland in 1939, and the German invasion of Poland in the same year. The Kellogg-Briand Pact was never terminated, however it is deemed to be superseded by the United Nations Charter.[183]

[179] *Ibid*, Preamble, also Article 1.
[180] Dereck Bowett, *Self-Defence in International Law* (Praeger 1958), as quoted in D. J. Harris, *Cases and Materials on International Law*, (7th edn, Sweet & Maxwell 2010) 722. See also Dinstein (2017) (n. 154), 87-89.
[181] See Stephen Neff, 'A Short History of International Law', in Malcolm Evans (ed), *International Law* 3rd edn, (OUP 2010) 22.
[182] *Ibid.* See also Dinstein (2017) (n. 154), 87.
[183] Charter of the United Nations (n. 134). The UN Charter is discussed in detail below.

3.4 The Geneva Conference for the Reduction and Limitation of Armaments

In a separate, contemporary project, and particularly out of concern arising from continuing militarisation by States, the League of Nations together with the United States, congregated in Geneva for the Conference for the Reduction and Limitation of Armaments.[184] Once again, the purpose was to limit the possibility of aggressive wars, but the talks proved to be unsuccessful. States penalised by the Versailles Treaty, led by Germany, insisted on a right to equal militarisation, ostensibly in order to establish a power equilibrium as the basis of international security. France, as the main victim of previous German aggression, insisted on continuing limitations placed on German military expansion.[185] In light of the emphasis on equal militarisation rather than actual disarmament and joint renunciation of aggression, the failure of the negotiations is unsurprising. Nevertheless, a noteworthy draft definition of aggression emerged during these talks and the contemporary London Conventions for the Definition of Aggression in 1933,[186] which was submitted by the Soviet Delegation. Art 1 of the Soviet Draft provided that:

> The aggressor in an international conflict shall be considered that State, which is the first to take any of the following action:
>
> a) Declaration of war against another State;
>
> b) The invasion by its armed forces of the territory of another State without the declaration of war;

[184] League of Nations, Conference for the Reduction and Limitation of Armaments, Geneva, 1932-4.
[185] Thomas Davies, 'France and the World Disarmament Conference of 1932-4' (2004) Dipl. Statecraft 15 (4) 765.
[186] 1933 Disarmament Conference, 147 LNTS 67, 148.

c) Bombarding the territory of another State by its land, naval or air forces or knowingly attacking the naval or air forces of another State;

d) The landing in or introduction within the frontiers of another State of land, naval or air forces without the permission of the Government of such a State, or the infringement of the conditions of such permission, particularly as regards the duration of sojourn or extension of area;

e) The establishment of a naval blockade of the coast or ports of another State.[187]

Whilst the Soviet draft provisions failed to be adopted due to lack of consensus, the wording made several significant reappearances in the attempt to define aggression throughout the decades. Most notably this draft definition was used as the basis for the General Assembly's 1974 definition of the state act.[188] The acts of aggression listed in the Soviet draft also found their way into the definition of the crime in Art 8 *bis* (2) of the Rome Statute describing the essential state acts of aggression, for which criminal responsibility arises.[189]

Ultimately, the inter-war era signalled the beginning of a change in attitude that 'there shall be no violence' by States.[190] For the first time, comprehensive attempts to limit and outlaw aggression were undertaken. A notion of aggression as an international crime had begun to appear, particularly through the consideration of prosecution of the German Emperor[191] and in the wording of the Geneva Protocol,[192] however this was not pursued.

[187] See M. Litvinoff, Union of Soviet Socialist Republics, 'Definition of "Aggressor": Draft Declaration', Doc. Conf D/C.G.38, *Monthly Summary of the League of Nations*, XIII: 2 (1933), Annex.
[188] Resolution 3314 (n. 14).
[189] See Article 8 *bis* (2) Rome Statute, discussed in Chapter 3.
[190] Hersch Lauterpacht, *The Function of Law in the International Community*, (OUP 1933) 64, as quoted by Thomas Franck, *Recourse to Force* (CUP 2002) 1.
[191] See n. 162.
[192] See n. 170.

All of the inter-war instruments and conferences focused on the prevention of aggression and sanctions for such acts committed by States. Despite these efforts, neither the existence of the League of Nations nor the Kellogg-Briand Pact were able to prevent another war of aggression on a massive international scale, the Second World War.

4. The development of collective security and individual criminal responsibility

4.1 The creation of the United Nations and the prohibition on the use of force

The immediate aftermath of the Second World War heralded a new era. Following the harrowing and devastating outcome of this unprecedented war of aggression, a genuine agreement prevailed amongst States that a worldwide collective security system was required in order to prevent future wars of aggression. Consequently, States came together to form the United Nations with the aim of preventing aggression and promoting peace and stability. For the first time in history there existed a real gravitation towards a comprehensive international security system, and a serious prohibition of the use of force. Art 1 (1) lists as the first purpose of the United Nations:

> To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace […].[193]

[193] Article 1 (1) UN Charter (n. 134).

The inception of the United Nations was born out of the alliance of the major victorious powers of the Second World War and aimed to replace an ineffectual League of Nations. At the core of the United Nations was the Security Council, originally consisting of the major victors of the Second World War, namely France, Russia, the UK, and the US, plus China. These nations awarded themselves permanent seats on the Council. It was hoped that they would 'continue their wartime alliance in perpetuity as a collective bulwark against future aggressors'.[194] Once more, war was renounced by the international community, but this time a strict prohibition on the threat of or use of force, i.e. aggression, was enshrined in the Charter of the United Nations. Thus Art 2 (4) provides:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.[195]

This provision goes further than the Covenant of the League of Nations in condemning aggressive violence, as noted by Malcolm Evans, 'by prohibiting not only war as such, but also 'the use of force' in general – thereby encompassing measures short of war, such as armed reprisals'.[196] Unlike the Covenant, Art 2 (4) also prohibits threats of violence. Another notable difference is that, under the Covenant, States did not actually abandon their perceived prerogative to enter war,[197] and consequently it was unsuccessful in preventing States from engaging in aggressive wars.

---

[194] Evans (2010) (n. 181), 24
[195] Article 2 (4) UN Charter (n. 134).
[196] Evans (2010), *supra*, 24.
[197] The Geneva Protocol would have outlawed war and declared aggression to be an 'international crime', however it never entered force (see section 3.2).

The UN Charter prohibition of the use of force is now deeply enshrined in customary international law through state practice, as evidenced for instance by wide international subscription of 193 member states, and *opinio juris* particularly by the UN's own International Court of Justice.[198] Despite the fact that its prohibition on aggressive use of force has thus become a prominent part of international law, the UN Charter itself provides no definition of such acts of aggression. An attempt had been made to incorporate such a definition of aggression at the United Nations Conference on International Organisation in San Francisco in 1945, however it failed.[199] Whilst some States[200] approved of a definition along the lines of the 1933 Soviet draft,[201] the committee, which had been assigned to make recommendations on a definition of aggression, faced objection by a majority of States led by the United States and the United Kingdom.[202] As a result, no consensus was reached, and the committee's report suggested

[198] For a discussion of the prohibition on the use of force at customary international law, see for instance the *Nicaragua* case (1986) (n. 37), paras 172-86. See also Claus Kress' comprehensive summary of ICJ case law in 'The International Court of Justice and the "Principle of Non-Use of Force"', in Marc Weller & Jake Rylatt (eds), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015), 567-70. For a review of customary international law on aggression and domestic application, see *R v Jones* [2006] UKHL 16 (n. 37), para 19.

[199] See *Commission III*, Security Council, Committee 3, *Enforcement Arrangements*, Report of Mr. Paul-Boncour, Rapporteur, on Chapter VIII Section B, at The United Nations Conference on International Organization, Doc. 881 III/3/46, 10th June, 1945.

[200] See for instance Bolivia's draft suggestion, which is based on but would extend the 1933 Soviet draft to include

a) Invasion of another State's territory by armed forces.
b) Declaration of war.
c) Attack by land, sea, or air forces, with or without declaration of war, on another State's territory, shipping, or aircraft.
d) Support given to armed bands for the purpose of invasion.
e) Intervention in another State's internal or foreign affairs.
f) Refusal to submit the matter which has caused a dispute to the peaceful means provided for its settlement.
g) Refusal to comply with a judicial decision lawfully pronounced by an International Court.

See *United Nations Commission on International Organisation*, United Nations, New York, 1948, Vol. 3, 577.

[201] See n. 187.

[202] See the *Report of Committee 3* (n. 199).

to omit any definition of aggression from the Charter and 'to leave to the Council the entire decision as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression'.[203] The UN Charter therefore contains neither a definition of the state act of aggression, nor does it concern itself with individual criminal responsibility for such acts. Nonetheless, under the UN Charter a widely subscribed international system was created specifically to promote collective security and detect and prevent threats of aggression. The execution of such acts of aggression was strictly prohibited with the possibility of imposing wide-ranging actionable consequences under the Security Council's Chapter VII powers, if the prohibition was ignored.[204]

4.2 The institution of the Security Council and the anomaly of the veto power

The powers delegated to the Security Council for the use of collective measures in dealing with threats or actual aggression were comprehensive. Thus Article 39 of the UN Charter provides not only for determination powers of a threat or use of unlawful force, but also for appropriate measures to enforce the Charter provisions:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.[205]

[203] *Ibid*, section I (c).
[204] See Chapter VII, UN Charter (n. 134).
[205] *Ibid*, Article 39.

Consequently, the powers of the Security Council under Chapter VII include economic and political sanctions,[206] as well as, significantly, the authorisation of members' use of force in enforcement of its decisions.[207] This provision represents yet another noteworthy difference to the UN's forerunner, the Covenant of the League of Nations.[208] The Covenant had merely allowed for economic sanctions, although these sanctions were automatic. Security Council sanctions, by comparison, are not automatic; they are open to debate and a vote. Whilst this allows for substantial flexibility in Security Council responses, measures proposed have in the past often been thwarted by the use of the veto power.

The term veto is widely used,[209] if slightly misleading. Substantive decisions of the Security Council require a majority of nine out of 15 votes, including the unanimous votes of the five permanent members (P5).[210] Consequently, a negative or dissenting vote by a permanent member will prevent the passing of a resolution, effectively amounting to a veto. An abstention, however, will not defeat it.[211] Whilst the use of the veto power had originally been considered as a rare possible occurrence,[212] and a tool in aid of the exercise of the responsibility for the maintenance of international peace and security, reality soon proved otherwise. Thus use of the veto was prolific and applied for reasons

[206] *Ibid*, Article 41.
[207] *Ibid*, Article 42.
[208] See section 3.1.
[209] See for instance *Practices, Procedures and Working Methods of the Security Council*, as described on the United Nations own website, available at www.un.org/securitycouncil/content/procedures-and-working-methods, accessed 10th May 2020.
[210] Article 27 (3) UN Charter (n. 134).
[211] See *Security Council Report on the UN Security Council Working Methods*, 'The Veto', 30th October 2017. Also see *Research Report on the Veto*, 19 October 2015, both available at http://www.securitycouncilreport.org/un-security-council-working-methods/, accessed 12th May 2020.
[212] See *Statement of the Four Sponsoring Governments on Voting Procedure in the Security Council*, UNCIO Document 852, III/1/37(1) [8] UN Doc A/578 (7 June 1945).

of national interest even from the very early days.[213] Professor Ferencz places the situation into historical context:

> [I]t was a political reality that the victorious allies were not prepared to give up their military power to any untried international body. They assumed the responsibility to maintain the peace but insisted upon a special right to veto any enforcement action…. Amendments to correct inequitable Charter provisions, as was promised in 1945, never materialised.[214]

The voting structure in the Security Council has been widely criticised as outdated and unfair, as well as open to abuse by the P5 to vote in their particular interest or that of an ally.[215] Reform proposals have suggested a re-organisation of the Security Council to create a better power equilibrium.[216]

Notwithstanding the fact that use of the veto power has, from the outset, had the potential to obstruct the work of the Security Council, their role as the executive organ of the United Nations was of crucial importance. The enforcement by the Security Council of the comprehensive prohibition on the use of force contained in the Charter, with the ability to impose wide-ranging actionable consequences if this prohibition was ignored, sent a warning to actual and potential aggressors. The unequivocal message of deterrence was particularly indicative of the spirit of the international community at the end of the Second

---

[213] Andrew Carswell, 'Unblocking the UN Security Council: The *Uniting for Peace* Resolution' (2013) 18 (3) J.C.&S.L. 453-80. For a full account of veto use see UN Documentation Research Guide, *Veto List*, as compiled by the Dag Hammarskjöld Library, available at http://www.research.un.org, accessed 20th January 2021.
[214] Ferencz (2009) (n. 4), 285-6.
[215] See the discussion on Security Council reform in Chapter 6.
[216] *Ibid.*

World War, instrumental in creating this new, widely-subscribed international system specifically designed to promote collective security and detect and prevent threats of aggression.

In addition, for the first time in history, there existed a real sense of a need for personal accountability at the end of the Second World War, giving rise to prosecutions of individuals through the innovative development of international criminal law.[217] Consequently, the creation of the United Nations coincided with the first comprehensive attempt to prosecute individuals for state acts of aggression. This coincidence of the first wide-ranging international prohibition of the use or threat of force in the UN Charter, and the first international criminal prosecutions for such acts of aggression, was not accidental. Instead, in the aftermath of the most atrocious international war of aggression to date, these events represented a notable and deliberate change in perspective.

4.3 Developing individual criminal liability – The Prosecutions by the International Military Tribunals

The trials of individuals for the crime of aggression by the International Military Tribunals represent a watershed.[218] The intention was to send a strong message to States and their leaders that acts of aggression were now truly outlawed and the bearers of

[217] Resulting in accusations of retrospective law-making by the prosecution, see n. 229 below.
[218] Article 6 of the London Charter (n. 117), provided for the criminalisation of aggressive war. This article became the legal basis for subsequent prosecutions by the Nuremberg Military Tribunals (NMTs) under *Control Council Law No. 10* (n. 121), and the International Military Tribunal for the Far East (IMTFE) (see n. 11).

responsibility would not escape punishment.[219] To that effect, after the Allied victory in the Second World War, unprecedented trials of German and Japanese leaders in their States' acts of aggression took place at Nuremberg and Tokyo.[220] Preparations for the trial of German leaders had begun as early as 1943, when the Allies established the UN War Crimes Commission to investigate the possibility of prosecutions.[221] According to Professor Schabas, '[b]y far the most important issue of substantive law to be studied by the Commission and its Legal Committee was the question of whether aggressive war amounts to a criminal act'.[222] This statement is unsurprising when considering that both the absolute prohibition of aggression and the criminal prosecution of individual participants were in reality new and borne out of the unparalleled devastation caused by the Second World War.

Notably, aggression was included as an undefined crime against peace in the London Charter.[223] Under Article 6 (a), the prosecutors were charged with the investigation and prosecution of 'leaders, organizers, instigators and accomplices' for '[c]rimes against the peace: namely, planning, preparation, initiation or waging of a war of aggression […]'.[224] It has been suggested that, by separating the individual crimes against the peace (planning, starting and waging a war of aggression), the 'Allies could maintain the principle of individual criminal responsibility… without actually having to define a "war of aggression" in categorical terms'.[225]

---

[219] See n. 235 below and related text.
[220] See n. 218.
[221] See William Schabas, 'Origins of the Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime"', in Mauro Politi, *The International Criminal Court and the Crime of Aggression* (Routledge 2004), 17, 22.
[222] *Ibid*, at 22.
[223] In Article 6, see n. 218.
[224] *Ibid.*
[225] See Jackson Maogoto, 'Aggression: Supreme International Offence still in search of definition' (2009), 5 (1) South. Cross Univ. L. Rev., 20-21.

The subsequent prosecution of 24 German defendants, of whom 12 were found guilty on at least one count,[226] was subject to heavy criticism of violating the legality principle,[227] since it was argued that such a crime had previously not existed. Nevertheless, the Tribunal accepted an argument by the Chief Prosecutor at Nuremberg, Justice Robert Jackson, that the Kellogg-Briand Pact, the Geneva Protocols, and resolutions of the Assembly of the League of Nations as well as the Conference of American States had established a customary international law prohibition against waging aggressive war.[228] The retrospectivity argument was, therefore, rejected by the IMT.[229] As Dinstein explains:

> The International Military Tribunal at Nuremberg held that Art 6 (a) of the London Charter [i.e. 'the planning, preparation, initiation or waging of a war of aggression'] is declaratory of modern international law, which regards war of aggression as a grave crime. Hence, the Tribunal rejected the argument that the provision of the Article amounted to *ex post facto* criminalization of the acts of the defendant, in breach of the *nullum crimen sine lege* principle.[230]

[226] The defendants found guilty were Hermann Goering, Rudolf Hess, Joachim von Ribbentrop, Wilhelm Keitel, Alfred Rosenberg, Erich Raeder, Alfred Jodl, Konstantin von Neurath, Wilhelm Frick, Walther Funk, Karl Doenitz, and Arthur Seyss-Inquart, see Nuremberg Judgment (n. 3), pp. 272-331.
[227] This incorporates the maxims *nullem crimen sine lege, and nulla poena sine lege,* respectively meaning 'no crime without law', and 'no punishment without law'. According to these principles, 'a person should not face criminal punishment except for an act that was criminalized by law before he/she performed the act'. See Wex Legal Dictionary, http://www. law.cornell.edu, accessed 3 March, 2020.
[228] Robert H. Jackson (n. 135) 305. See also Keith Petty, 'Sixty Years in the Making: The Definition of Aggression for the International Criminal Court' (2008), 31 (2) Hastings Int'l & Comp. L. Rev., 4.
[229] Nuremberg Judgment (n. 3), 219-223.
[230] Dinstein, (2017) (n. 154), 134.

The principles of *nullum crimen*[231] and *nulla poena*[232] were deemed to be 'at any rate general principles of justice which should not apply where the defendants ought to have known that the acts they committed, or ordered to be committed, were wrong'.[233] Interestingly, the Tribunal applied a very low standard of *mens rea* for the crime, stating that the defendants ought to have known of the wrongfulness of their acts, rather than requiring the demonstration of actual knowledge.[234] The Tribunal famously declared:

> War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is *the supreme international crime* differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[235]

This statement demonstrates the strong condemnation of aggression and the resulting atrocities by the international community, applying a remarkably low standard of *mens rea* for the determination of culpability. Someone had to be held responsible, and individual criminal liability for aggression was born out of this need for accountability.

---

[231] See n. 227.
[232] *Ibid.*
[233] Maogoto (2009) (n. 225), 23.
[234] *Ibid*. The standard is now one of actual awareness, see Article 8 *bis,* Elements of the Crime of Aggression, Rome Statute.
[235] Final Judgment of the Nuremberg Tribunal (n. 3). See also Office of the United States Chief of Counsel For Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, US GPO, Washington D.C., 1946, Vol. I, p. 16, emphasis added.

Shortly after the establishment of the original International Military Tribunal, Control Council Law No. 10 instituted the authority of national tribunals to prosecute individuals for participating in aggressive state acts,[236] and specifically included jurisdiction over private economic actors as well as complicit third-state officials.[237] This provision is remarkable, since it results in much wider jurisdiction than the modern Crime of Aggression in Art 8 *bis* of the Rome Statute, under which the prosecution of private economic actors or third party state officials will be extremely difficult, if not impossible.[238] Once again, this wide jurisdiction of the tribunals demonstrates the great appetite, at the time, for developing individual accountability for aggression. Consequently, the Nuremberg Tribunal *(*NMT) began the prosecution of officials of industry, military officers of rank lesser than 'leaders', and government and party officials. Jurisdiction was derived from the London Charter itself in Article 6, and Control Council Law No. 10,[239] as well as their interpretation in the *Goering* decision that 'Hitler could not make aggressive war by himself. He had to have cooperation of statesmen, military leaders, diplomats, and business men.'[240] The NMT held in the '*Industrialist*', specifically the *Farben* and *Krupp* cases, that private economic actors had the capacity to commit the crime of aggression, as long as they had knowledge that their actions were furthering the aggressive war, despite acquitting the defendants on the facts.[241] Furthermore, the level of leadership in the *High Command*[242] and *Ministries*[243] cases was

[236] See n. 121.
[237] *Ibid*, para 2 (f).
[238] See Chapter 2.
[239] See n. 218.
[240] *Goering and others,* Nuremberg Judgment, (n. 3), at pp. 171-341.
[241] *United States v Krauch et al.,* Military Tribunal VI, Judgment 29th July 1948 (*Farben* case), pp. 6-11, and *United States v Krupp, Von Bohlen und Halbach et al*., Nuremberg Military Tribunal (NMT) III, Judgment 31st July 1948 (*Krupp* case), pp. 76-7. *Industrialist* cases is the summary term for NMT cases against private economic actors.
[242] *United States v Von Leeb et al*., Military Tribunal XII, The *High Command* Case, Case No.12, Judgment 27th October 1948, p. 12, pp. 68-9.
[243] *United States v Von Weizsaecker et al*., Military Tribunal XI, The *Ministries* Case, Case No. 11, Judgment 11th April 1949.

a mere 'responsib[ility] for the formulation and execution of policies'. It was not necessary to be in a position to 'control or direct' a State's political or military action, merely 'to shape or influence the policy of his State'.[244]

In evaluation, the Nuremberg tribunals were ground-breaking for developing an unprecedented concept of individual criminal liability for the state act of aggression. Furthermore, they established that '(1) non-governmental actors can commit the crime of aggression; (2) aggression is a policy-level crime; and (3) an individual is at the policy level if he is in a position to 'shape or influence' a State's political or military action'.[245] The prosecutions also highlighted, because of their novelty, the need for a proper definition of aggression, not only in order to serve as a deterrent for possible aggressors, but also in order to avoid accusations of judicial *ex post facto* law-making in the future. Times were changing, however, and the post-war spirit of unity and consensus began to fade.

[244] Kevin Heller, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 EJIL, 486, quoting from the *High Command* Judgment (n. 242) at 490-491.
[245] Heller, *ibid*, 488. This standard of mere ability to 'shape or influence' rather than 'control or direct' was also adopted by the IMTFE in Tokyo. See n. 11, at 1190.

5. A Cold War U-turn? From individual accountability to sole reliance on the UN's mechanism of collective security

5.1 The early record of the United Nations

Following the creation of the United Nations, the inclusion of the comprehensive prohibition of aggression in their Charter and the criminal prosecution of responsible individuals in the post war tribunals, the apparent consensus of the international community soon dissipated.[246] The newly found appetite for developing individual criminal liability all but evaporated.[247] The concept of aggression was still lacking a definition, both as a state act and as an international crime.

Contemporary events had the additional effect of shifting the focus of the international community away from the divisive subject of a definition and the development of individual criminal accountability. The end of the Second World War heralded the beginning of an ideological conflict between the communist Soviet Union and Western powers, the so-called Cold War,[248] which would eventually develop into a nuclear arms

[246] See, for instance, the discussion in Thomas Bruha, 'The General Assembly's Definition of the Act of Aggression', in Claus Kress and Stefan Barriga (eds), in *Crime of Aggression Library*, *The Crime of Aggression: A Commentary*, I, (CUP 2017) 147-8.

[247] *Ibid*, referring to the ILC's *First Report on a Draft Code of Offences against the Peace and Security of Mankind*, UN Doc. A/CN.4/25, YB ILC (1950), vol. II, 253, and *Second Report on a Draft Code of Offences against the Peace and Security of Mankind*, including commentary, YB ILC (1951), II 133. Both reports failed to provide a useable definition of aggression, and the debate was shelved in light of the developing Cold War disagreements. See the discussion below in section 5.2, and Bruha, *ibid*, at 148. See also M. Cherif Bassiouni, 'Draft Code of Offenses Against the Peace and Security of Mankind', *Proceedings of the Annual Meeting (*ASIL*)*, 80 (9-12 April 1986) (OUP 1986) 120.

[248] Referring to an ideological, political, economic, military and strategic contest between the United States and its allies and the Soviet Union and its allies. See http://www.oxfordbibliographies.com, accessed 12th January 2021.

race. The political world became increasingly polarised. Disagreements between States led to the increased reliance on self-defence arguments, as the only charter-based exception to the prohibition of unauthorised use of force.[249] The new collective security system, entrusted to the United Nations, was the only mechanism potentially capable of decelerating mounting threats of aggression, and yet the frequent use of veto powers often paralysed the Security Council.[250]

This impasse within the Security Council came to particular prominence against the backdrop of the 1950's crisis on the Korean peninsula. The deadlock appears to have been worsening over time, since initially five resolutions were passed referring to aggression in Korea.[251] The Security Council's emphasis on the subject of aggression in Korea gradually dwindled. A sixth resolution, passed in January 1951, removed the issue from the agenda of the Security Council, despite the continuing hostilities.[252] In the meantime, and in the face of the Security Council's inaction, the General Assembly felt compelled to develop their own way to deal with threats to the peace, where the Security Council had failed to act. Consequently, they adopted and utilised the Uniting for Peace Resolution,[253] which allowed and forced the General Assembly to immediately consider threats to the peace where the Security Council failed to exercise their primary

[249] Article 51 UN Charter (n. 134).
[250] See Benjamin Ferencz, 'The UN Consensus Definition of Aggression: Sieve or Substance?' (1975) 10 J Int'l & Econ. 701, 707. See also Dinstein (2017) (n. 154) 342-53.
[251] United Nations Security Council 'Complaint of aggression upon the Republic of Korea'. UN Doc S/RES/82 (25 June 1950) condemned 'the armed attack on the Republic of Korea by forces from North Korea' (Preamble, para 3), constituting 'a breach of the peace' (Preamble, para 4). UN Doc S/RES/83 (27 June 1950) and UN Doc S/RES/84 (7 July 1950) entitled 'Complaint of aggression upon the Republic of Korea' used identical language, whereas UN Doc S/RES/85 (31 July 1950) referred to 'aggression' in the title and an 'unlawful attack' in the Preamble, para 1. UN Doc S/RES/88 (8 November 1950) refers to 'aggression' in the title only.
[252] UN Doc S/RES/90 (31 January 1951), although still entitled 'Complaint of aggression upon the Republic of Korea'.
[253] United Nations General Assembly 'Uniting for Peace' (3 November 1950) UN Doc. A/Res/377 (V) (the *Uniting for Peace* Resolution or U4P).

responsibility due to the exercise of veto power. According to the Uniting for Peace Resolution, the General Assembly:

> *Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security[…].[254]

This new mechanism therefore allowed the General Assembly to determine acts of aggression and make recommendations for collective action in the face of a Security Council deadlock. In the first application of this new procedure, the General Assembly condemned China, which 'by giving direct aid and assistance to those who were already committing aggression in Korea… ha[d] itself engaged in aggression in Korea'.[255] Several years later the resolution was applied in an attempt to defuse the Suez Crisis,[256] which entailed the invasion of Egypt by Israeli, British and French troops and threats of a Soviet nuclear missile strike in retaliation.[257] The Uniting for Peace Resolution was

[254] *Ibid*, para 1.
[255] UN General Assembly 'Intervention of the Central People's Government of the People's Republic of China in Korea' (5 November 1951), UN Doc. A/Res/498 (V).
[256] See for instance UN General Assembly, 1st Emergency Spec. Sess. (2 November 1956) UN Doc A/RES/997; UN Doc A/RES/998 (2 November 1956); UN Doc. A/RES/999 (4 November 1956), all of which applied to the 1956 Suez Crisis.
[257] See Barnaby Crowcroft, 'Egypt's Other Nationalists and the Suez Crisis of 1956', (2016) 59 (1) Hist. J., http://www.cambridge.org/core/journals/historical-journal/article/abs/egypts-other-nationalists-and-the-suez-crisis-of-1956/0C35FA1FA5A92491568487DCBB29C255, accessed 8th October 2020.

subsequently utilised on several other occasions in ten Emergency Special Sessions.[258] U4P, although not applied very frequently, represents a significant tool available to the General Assembly to address, in a subsidiary capacity, international crises including aggression, which would otherwise be allowed to fester because of inaction by the Council.[259]

Importantly, U4P has contributed to keeping the Charter prohibition of the use of force alive, through condemnation of aggression in times of Security Council silence as a result of political differences.[260] Nevertheless, none of the resolutions passed by the General Assembly in the Emergency Special Sessions actually went as far as actively authorising counter measures, for instance the use of force to counteract aggression. The General Assembly may suggest enforcement action,[261] however authorisation remains the prerogative of the Security Council.[262]

The Security Council's own record of exercising their primary responsibility through the censorship of flagrant acts of aggression continued to be inconsistent, reinforcing the impression of the Council's reticence to determine such an act.[263] Consequently, express condemnations of aggression have been extremely rare compared to the considerable

[258] In total, the General Assembly has so far convened ten Emergency Special Sessions under the Uniting for Peace Resolution, dating from 1956 to 1997. The tenth ESS was never terminated and last resumed in June 2018 (see General Assembly of the United Nations, Emergency Special Sessions, available at http://www.un.org/en/ga/sessions/emergency.shtml, accessed 10th October 2020.
[259] See Graham Melling and Anne Dennett, 'The Security Council veto and Syria: Responding to mass atrocities through the "Uniting for Peace" Resolution' (2017) 57 Indian J. Int'l L., 285, 298.
[260] Carswell (2013) (n. 213), 474.
[261] See Article 11 (2) UN Charter (n. 134), providing for GA recommendations and referral to the Council. See for instance UNGA 'Duties of States in the event of the outbreak of hostilities' (17 November 1950) UN Doc A/RES/378 (V).
[262] See Chapter VII UN Charter (n. 134).
[263] See Nicolas Strapatsas, 'Rethinking General Assembly Resolution 3314 (1974) as a Basis for the Definition of Aggression Under the Rome Statute of the ICC', in Olaoluwa Olusanya (ed), *Rethinking International Criminal Law: The Substantive Part* (Europa Law, 2007), 155.

number of actual or arguable acts of aggression.[264] Underlying reasons for Security Council inactivity are inequalities as a result of the weighted voting structure, coupled with geopolitical schisms between some of the P5, resulting in frequent use of the veto and paralysis.[265]

5.2 Cold War efforts to arrive at a definition of aggression

Notwithstanding the occasional use and rare condemnation of the term aggression by the Security Council and, at times, the General Assembly, an actual definition continued to be elusive. It has already been noted that, during the United Nations Conference in 1945, no consensus on a definition of the state act could be reached, leading to the comprehensive determination powers of the Security Council. The post-war tribunals prosecuted individuals for aggression in the contemporary spirit of developing individual criminal responsibility for the international crime, however neither the original London Charter, nor the Charter for the successor tribunals at Nuremberg, established by Control Council Law No. 10, had defined either the crime itself or the underlying state act.

Despite the increasing emergence of political differences between the former allies, and now protagonists of the Cold War, the General Assembly did not abandon their efforts

[264] Between the early Security Council resolutions on Korea and 1974, when a definition of the state act of aggression was adopted in Resolution 3314 (n. 14), only three other Security Council resolutions refer to aggression. UN Security Council 'Complaint concerning acts of aggression against the territory and civilian population in Cambodia' (4 June 1964) UN Doc. S/RES/189; 'Measures to Safeguard Non-Nuclear-Weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons', (19 June 1968) UN Doc. S/RES/255; 'Complaint by Senegal' (15 July 1971) UN Doc. S/RES/294.

[265] See Strapatsas (2007) (in Olusanya, n. 263), Carswell (2013) (n. 213), 456-9, and the account in Dinstein (2017) (n. 154), 342-353.

entirely to arrive at a consensus definition of aggression. In 1950, they referred the issue to the International Law Commission (ILC),[266] who included aggression as an international crime in their 1954 Draft Code of Offences against the Peace and Security of Mankind.[267] However, the ILC failed to define either the crime or the state act, merely stating that aggression included the use of armed force by one State against another. Thus Article 2 (1) of the 1954 Draft Code includes the offence of:

> Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.[268]

The 1954 Draft Code was submitted to the General Assembly, but the project was tabled because of the lack of a definition of aggression and continuing divisiveness of the subject.[269] Cold War disagreements between States meant that the political climate was less than conducive to an agreement on a definition of the Crime of Aggression, not to mention investigations and prosecutions thereof. As Ferencz notes, '[p]owerful States, primarily concerned with preserving their own power, hesitated to accept the idea that aggression was a punishable international crime'.[270] The majority of States viewed the subject of aggression as a political hornets' nest, which could only be addressed through the collective security system.

[266] In resolution A/RES/378 (V) (n. 261).
[267] International Law Commission, *Draft Code of Offences against the Peace and Security of Mankind*, (1954), UN Doc. A/CN.4/44 (the 1954 Draft Code).
[268] *Ibid*, Article 2 (1).
[269] Bassiouni (n. 247), 120.
[270] B. Ferencz (2009) (n. 4), 286.

Meanwhile, in the year of 1952, the General Assembly had decided to set up a Special Committee of 15 members, in a separate project, to arrive at a definition of the state act of aggression.[271] This first of three Special Committees failed to come to a consensus. A second Special Committee of 19 members was established in 1954.[272] It submitted its report to the General Assembly in 1956, but the issue was once again postponed, on account of great disagreement within the Assembly as to whether such a definition was at all desirable.[273] As Benjamin Ferencz sums up, '[w]ith fighting going on all over the globe – including in India, Pakistan, Cyprus, the Congo, Cambodia, Vietnam, and the Middle East – it was clear that it was easier to commit aggression than to define it.'[274]

The discussion in the General Assembly was not resumed for a decade, when a third Special Committee was tasked with the attempt to define aggression.[275] Between 1968 and 1974, this third Special Committee held seven sessions. The work of the third Special Committee coincided with the 25th anniversary of the United Nations in 1970 and the adoption, during a commemorative session, of the so-called 'Friendly Relations Declaration'.[276] This resolution stated in its third principle that a 'war of aggression constitutes a crime against the peace, for which there is responsibility under international law'. The adoption of this resolution signalled a renewed focus on the effort to define and outlaw aggressive use of force, which was mirrored by the growing consensus within the

[271] UN General Assembly 'Question of defining aggression' (20 December 1952) UN Doc. A/RES/688 (VII).
[272] UN Doc. A/RES/895 (4 December 1954).
[273] UN Doc. A/RES/1181 (XII) (29 November 1957).
[274] Ferencz, (1975) (n. 250), 707.
[275] UN General Assembly 'Need to expedite the drafting of a definition of aggression in the light of the present international situation' (18 December 1967) UN Doc. A/RES/2330 (XXII). This Special Committee consisted of 35 members, reflecting 'the principal legal systems and geographic areas of the world'. See Benjamin Ferencz, 'Defining Aggression – The Last Mile' (1973) 12 Colum. J. Transnat'l L., at p. 431.
[276] UN General Assembly 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations' (24 October 1970) UN Doc. A/RES/2625 (XXV).

Special Committee. Thus, the Committee eventually adopted a draft definition of aggression, which it submitted to the General Assembly in 1974. This definition gained consensus within the General Assembly and was adopted unanimously without a vote in Resolution 3314.[277]

5.3 The definition of the State act and its application by the Security Council

Resolution 3314 generically defines the state act of aggression as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations…'[278] The definition includes a non-exhaustive list of acts, for the purpose of illustration,[279] providing guidance to the Security Council in their determinations of aggression.[280] The Council is, however, not bound by the definition, retaining primary responsibility to determine other acts of aggression by virtue of Article 39 of the Charter. Whilst the 'first strike' may serve as evidence in the determination of aggression, the Security Council may decide otherwise.[281] Importantly, this definition of the state act was perceived as a prelude to future criminal prosecutions for aggression. Thus, Article 5 (2) of the resolution asserts the same sentiments expressed in the Friendly Relations Declaration[282] that 'a war of aggression is a crime against international peace', giving rise to 'international

[277] Resolution 3314 (n. 14). For an in-depth discussion of this definition, and comparison with the definition of the crime in Article 8 *bis* of the Rome Statute 1998, see Chapters 2 and 3.
[278] Resolution 3314, *ibid*, Article 1.
[279] *Ibid*, Article 3.
[280] *Ibid*, Preamble, para 4.
[281] *Ibid*, Article 2.
[282] A/RES/2625 (n. 276).

responsibility'.[283] The definition of a state act of aggression in Resolution 3314 was a remarkable achievement after decades of deadlock, serving 'as a warning to decision-makers that there are perimeters to the lawful use of force… and an important stepping stone on the road to enduring peace in a rational world'.[284]

Nevertheless, its status is not binding on the Security Council, [285] and, consequently, the Council's record of determining acts of aggression continued to be disappointing even after the adoption of Resolution 3314.[286] Between 1974 and the end of the Cold War in 1990, a mere 32 Security Council resolutions were passed, which descriptively referred to 'acts of aggression'.[287] In the Falklands War, the Council determined the existence of a breach of the peace without specifying who had committed the armed attack, or naming the act as aggression.[288] Similarly, in the Iran-Iraq War, a breach of the peace was determined, however not until seven years after hostilities broke out, and no actual reference to aggression was made by the Council.[289] Many other acts of aggression can

[283] Resolution 3314 (n. 14), Article 5 (2).
[284] Ferencz (1973) (n. 275), 463.
[285] See Maogoto (2009) (n. 225), 28. See also Weisbord (2008) (n. 176), 168.
[286] See Dinstein (2017) (n. 154), 343. See also Strapatsas (2007) (n. 263).
[287] Twenty of these resolutions condemned South Africa directly some also concerning other African countries: UN Doc S/RES/387 (31 March 1976); S/RES/418 (4 November 1977); S/RES/428 (6 May 1978); S/RES/447 (28 March 1979); S/RES/454 (2 November 1979); S/RES/475 (27 June 1980); S/RES/507 (28 May 1982); S/RES/527 (15 December 1982); S/RES/535 (29 June 1983); S/RES/546 (6 January 1984); S/RES/554 (17 August 1984); S/RES/567 (20 June 1985); S/RES/568 (21 June 1985); S/RES/571 (20 September 1985); S/RES/572 (30 September 1985); S/RES/574 (7 October 1985); S/RES/577 (6 December 1985); S/RES/580 (30 December 1985); S/RES/581 (13 February 1986); and the last of these is S/RES/602 (25 November 1987). Another 6 resolutions condemned acts of aggression by the former Southern Rhodesia: S/RES/326 (2 February 1973); S/RES/328 (10 March 1973); S/RES/386 (17 March 1976); S/RES/411 (30 June 1977); S/RES/423 (14 March 1978); S/RES/424 (17 March 1978); S/RES/445 (8 March 1979); and S/RES/455 (23 November 1979). Two other resolutions condemned Israel: S/RES/573 (4 October 1985), and S/RES/611 (25 April 1988), and another the State of Iraq, namely S/RES/667 (16 September 1990). Three other resolutions did not identify the aggressor: S/RES/405 (14 April 1977); S/RES/419 (24 November 1977); and S/RES/496 (15 December 1981). For a full list of developments relating to aggression, until mid-2001, see *Historical Review of Developments Relating to Aggression* (UN Publications, 2003), 225-36.
[288] UN Security Council 'Falkland Islands (Malvinas)', UN Doc. S/RES/502 (3 April 1982). The Falklands war took place from April till June 1982.
[289] UN Security Council 'Iraq-Islamic Republic of Iran' UN Doc. S/RES/598 (20 July 1987). The Iran-Iraq War took place from September 1980 till August 1988. For a discussion, see Dinstein (2017) (n. 154), 343.

be identified within this timeframe, which have not been condemned for diplomatic and political reasons, frequently due to an internal deadlock because of use of veto powers by the P5.[290] An incomprehensive list of acts of aggression, mostly uncensored by the Council, includes the US invasion of Grenada in 1983, actions by the US in Nicaragua in 1986 and a vast number of transgressions by and against Israel over the decades.[291]

Since 1990, the Security Council has been even more reticent in actually using the word aggression. In 1990 nine resolution were passed concerning the Iraqi invasion and occupation of Kuwait, all bar one avoiding the term aggression.[292] Instead, generally, they refer to a 'breach of international peace and security'.[293] Subsequent Security Council resolutions in other situations of aggression entirely avoid the word, referring to the 'use of armed force', the provision of (political, financial and logistical) 'support and training to armed opposition groups', 'attacks of armed opposition groups' amounting to 'threats' to the country in question and the international community, and the condemnation of attacks by armed opposition groups, constituting 'a terrorist threat' to the country and region in question, as well as the international community.[294] A recent textbook example

[290] See for instance the account in Dinstein, *ibid*, 342-53. See also Strapatsas (2007) (n. 263).

[291] Israeli violations against Palestinian territory and vice versa have been manifold and are well documented. For a comprehensive analysis see for example James L. Gelvin, *The Israel-Palestine Conflict – One Hundred Years of War*, 3rd edn. 2014, CUP.

[292] UN Security Council 'Iraq-Kuwait' (16 September 1990) UN Doc. S/RES/667. The other eight resolutions concerning the same situation follow the general pattern of avoiding the term aggression: S/RES/660 (2 August 1990); S/RES/661 (6 August 1990); S/RES/662 (9 August 1990); S/RES/664 (18 August 1990); S/RES/665 (25 August 1990); S/RES/666 (13 September 1990); S/RES/669 (24 September 1990), and S/RES/670 (25 September 1990).

[293] *Ibid.*

[294] Examples include the Security Council's condemnation of Armenia for the use of armed force against Azerbaijan (UN Doc. S/RES/822 (30 April 1993) (Preamble, paras 4 and 5); S/RES/853 (29 July 1993) (Preamble, paras 5 and 6) and S/RES/884 (12 November 1993), in paras 4 and 5 of the Preamble). The actual words used here were 'escalation in armed hostilities', and the endangering of 'peace and security in the region'. Other examples are the condemnation of Rwanda and Uganda for the use of armed force against the DRC (S/RES/1234 (9 April 1999)). Here the words used are 'continuation of hostilities' (Preamble, para 2) and 'in violation of the national sovereignty and territorial integrity of the country' (para 5), constituting 'a threat to peace, security and stability in the region' (para 10), and reiterating the parties' 'obligation to refrain from the threat or use of force' (operative para 1). S/RES/1304 (16 June 2000), S/RES/1341 (22 February 2001) and S/RES/1355 (15 June 2001) used similar language in respect of the

of unequivocal aggression, uncensored by the Security Council due to use of the veto, are the Russian military intervention in and annexation of the Crimea and the violation of territory in Eastern Ukraine.[295]

Ultimately, the fact is hard to deny that the record of the Security Council's application of Resolution 3314, resulting in actual condemnation of acts of aggression, has been minimal. Nevertheless, in the wake of the end of the Cold War, efforts continued to arrive at a definition for the crime, in order for it to be prosecuted by the first permanent international Criminal Court.

ongoing situation in the DRC, without expressly referring to 'aggression'. The issue of the use of armed force in the DRC has more recently been revisited, for instance in S/RES/2136 (30 January 2014). Thus the Security Council strongly condemned 'any and all internal *and external* support to armed groups active in the region, including through financial, logistical and military support' (emphasis added, see Preamble, para 7). The same language was used in S/RES/2211 (26 March 2015) (see Preamble, para 5) and S/RES/2360 (21 June 2017) (see Preamble, para 8). Further examples of the Security Council's condemnation of the use of armed force, without expressly naming it 'aggression', are the condemnation of 'Eritrea's military action against Djibouti' (S/RES/1862 (14 January 2009) (in Preamble, para 2, and operative para 5), and in S/RES/1907 (23 December 2009) of 'all armed attacks' in that situation (Preamble, para 8), and Eritrea's provision of 'political, financial and logistical support to armed groups' (para 7). The situation in the Ukraine since the Russian annexation of the Crimea and ongoing fighting in Eastern Ukraine has appeared before the Security Council on a number of occasions, but resulted in only two Security Council resolutions without being officially stigmatised expressly as 'aggression.' Thus S/RES/2166 (21 July 2014) condemned the downing of MH17 on 17 July 2014, without apportioning blame or calling it 'aggression', whilst S/RES/2202 (17 February 2015) called for observation of the Minsk Agreement ('Package of Measures', 12 February 2015), particularly paragraph 10, stipulating the 'withdrawal of all foreign armed formations, military equipment, as well as mercenaries from the territory of the Ukraine…' (Operative paragraph 3). The annexation of the Crimea following an illegal referendum would have been condemned in draft resolution S/2014/189 (15 March 2014), but was vetoed by the Russian Federation. See https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_189.pdf. These resolutions by the Security Council are mere examples, however they demonstrate an important trend of avoiding the actual term 'aggression'.

[295] See the vetoed draft resolutions of the Security Council, *ibid.* See also *Veto List* (n. 213).

6. Paving the way for the crime of aggression: The ILC's efforts and a return to the concept of individual criminal liability

The 1974 consensus on a definition of the state act of aggression removed the technical impediment standing in the way of the project of the Draft Code of Offences, which had been postponed in 1954,[296] and ultimately the development of an International Criminal Court. However, as the above discussion shows, the Cold War continued to hamper efforts to codify the criminalisation of aggression. As Bassiouni notes:

> The technical reasons [i.e. the lack of a definition of aggression prior to 1974] for tabling the project were only a cover for the real reason – the 'cold war'. During that period, neither the Eastern nor the Western bloc wanted much to do with the codification of ICL or its enforcement.[297]

Therefore it was not until after the end of the Cold War that serious efforts were resumed to criminalise aggression and incorporate the crime in the statute for the first permanent International Criminal Court. The end of the Cold War also coincided with events which renewed the focus on international crimes in general and the development of individual criminal responsibility for these crimes. The Balkan civil war and genocides in Kosovo and Rwanda in the 1990's involved some of the most large-scale reprehensible atrocities since the Second World War, and re-focused the international community's attention on war crimes, crimes against humanity, and genocide as well as the crime of aggression. It

[296] See n. 267-9 and related text.
[297] M. Cherif Bassiouni, 'International Crimes: Rationae Materiae', in Bassiouni, *Introduction to International Criminal Law*, (Nijhoff, 2nd edn. 2013), 140.

is against this background, that a renewed appetite for bringing individual perpetrators to justice before the World's first permanent International Criminal Court emerged, after decades of sole focus on the collective security response system.

6.1 The ILC Draft Codes of Crimes against the Peace and Security of Mankind in 1991 and 1996

In 1991 the ILC produced a Draft Code which included a consideration of individual criminal responsibility for aggression, once the UN Security Council had made a determination of such an act.[298] According to the related commentary, it was at this time undecided whether only government officials could be prosecuted, or also others with political or military responsibility, or even private actors of sufficient economic or financial influence who enabled the act of aggression.[299] The draft code was unclear as to whether the future International Criminal Court should have independent or concurrent determination powers to those of the Security Council, or none at all. The ILC adopted largely the 1974 definition of the state act contained in Resolution 3314,[300] although there was disagreement as to whether that resolution, serving as a guide to the Security Council, should be used as a basis for criminal prosecution.[301] Consequently, no final decision was made as to whether Resolution 3314 should be included in the final definition of the crime in its entirety, and whether the acts listed in it should be exhaustive, or whether judges

[298] International Law Commission, *Ninth Report on a Draft Code of Crimes against the Peace and Security of Mankind* (hereafter 1991 Draft Code), UN Doc. A/CN.4/435, and Add. 1 (Feb 8 and Mar 15, 1991).
[299] Yearbook of the ILC (1991), Vol. II (Part Two), 72-3, in paragraph 1. This point is of great importance, and will be discussed in detail in Chapter 2.
[300] In Article 15 of the 1991 Draft Code (n. 298).
[301] See the commentary in the 1991 ILC Yearbook (n. 299), paragraph 2.

should be free to determine other acts.[302] As the following chapters show, the ILC's indecision on these points would be mirrored in States' negotiations all the way to Kampala.[303]

The second attempt at a Draft Code of Crimes against the Peace and Security of Mankind in 1996, unlike its 1991 predecessor, rejected the definition of aggression in Resolution 3314 for the purposes of criminal prosecution, and instead looked to the Judgments at Nuremberg and the UN Charter as 'the main sources of authority with regard to individual criminal responsibility for acts of aggression'.[304] Article 16 of the 1996 Draft Code provides simply that '[a]n individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression'.[305] The 1996 Draft Code and its commentary offer no other explanation or details of a definition, or the individual's conduct, and no reference to the definition of the state act in Resolution 3314.

In evaluation of the ILC's draft codes, Professors Bassiouni and Ferencz complained that they were so fatally weak on account of vagueness that 'a comparative analysis of the ILC's … effort to define aggression demonstrates the inconclusiveness of this undertaking'.[306] Similarly, James Crawford described the ILC's endeavours as 'a history of dead ends, evasive or circular formulations, conceptual overreach and repeated

[302] *Ibid*, paragraph 3.
[303] See Chapters 2, 3, and 4.
[304] ILC, *Draft Code of Crimes against the Peace and Security of Mankind* (1996 Draft Code), *Report of the International Law Commission on the Work of its 48th Session*, May 6-July26, 1996, at 83-85, UN Doc. A/51/10 (SUPP) (Jan 1, 1996).
[305] *Ibid*, 83, Article 16.
[306] M. Cherif Bassiouni & Benjamin Ferencz, 'The Crime against Peace' in M. Cherif Bassiouni (ed), *International Criminal Law* (Nijhoff, 2nd ed. 1999), 342.

deferrals to some future conference or session'.[307] In search of an explanation, he continues:

> Some of the reasons for this are political and perhaps intractable: a more precise definition of aggression for example, increases the chances of impugning acts by States that are prone to intervene abroad militarily… Ultimately, this project foundered. From an initial formulation that did little to specify what acts might constitute the 'offence', it swung too far in the opposite direction – towards an overly expansive provision – before coming to rest on a less ambitious one that in effect deferred the question.[308]

These assessments, therefore, lead to the conclusion that the ILC's efforts at a draft definition were plagued by indecision and lack of clarity on vital elements, thus hindering a certain and efficient definition of criminal aggression and sensible jurisdictional conditions. In a separate, but contemporaneous project, the ILC was preoccupied with the development of the future Statute of this International Criminal Court. The ILC presented its final Draft Statute for the creation of an International Criminal Court to the General Assembly in 1994, including the Crime of Aggression as one of the core crimes under the future Statute.[309]

---

[307] James Crawford, 'The International Law Commission's Work on Aggression', in Kress and Barriga (2017), (n. 246), 233.
[308] *Ibid*, 234.
[309] In draft Article 20, 1994 ILC Draft Statute (with Commentary), *Report of the International Law Commission*, 46th Session, Sept. 1, 1994, UN Doc. A/49/355; GAOR, 49th Sess., Supp. No. 10 (1994).

6.2. The Rome Statute 1998 and a move towards jurisdiction over the crime

The above discussion has shown that, particularly since the Second World War and the Nuremberg and Tokyo tribunals, the international community has exhibited the strong conviction that a) a State's act of aggression against another is a prohibited use of force, and b) individuals responsible can and ought to be held criminally liable. The realpolitik of the 20th century, however, also engendered substantial resistance by some States aiming to protect their own sovereignty and perceived impunity, whilst continuing to engage in old and new conflicts, including the Cold War.[310]

This resistance led to the tabling of the 1954 Draft Code, the long delay between this Draft Code and the 1974 Definition of Aggression in Resolution 3314, and the subsequent postponement of the ILC's efforts until the end of the Cold War. This resistance also hampered the efforts to criminalise aggression, and even in the lead-up to the Rome Conference some States continued to oppose the inclusion of the crime in the Rome Statute. For example, the United States and a number of its traditional allies, including the United Kingdom, strongly opposed the new ICC's jurisdiction over aggression.[311] By contrast, a considerable number of non-aligned and Arabic States, as well as some industrialised countries, i.e. Canada, Germany, Greece, Italy, and Japan, pressed for the inclusion of the crime in the Rome Statute, as did the European Union.[312]

[310] See the discussion above and, for instance, Dinstein 2017 (n. 154), 342.
[311] See the discussion in Bassiouni and Ferencz (1999) (n. 306), 346.
[312] *Ibid.*

At the Rome Conference in 1998, it proved impossible for States to agree on a definition of the crime or jurisdictional procedure. Finding consensus on a mechanism for individual accountability for aggression, in particular, remained as problematic and intractable as it had been throughout the decades since Nuremberg. Despite the divisiveness of the issue of aggression, the offence was included in Article 5 (1) (d) of the 1998 Rome Statute[313] as a 'blank-prose' crime,[314] to be defined at a later point. Article 5 (2) provided for the future jurisdiction of the Court in accordance with the amendment procedures of Articles 121 and 123, once a provision was adopted.[315] A provision was included in the Final Act of the Rome Conference for the Preparatory Commission to create its own draft and consider States' proposals on the definition and conditions for the exercise of jurisdiction. The Preparatory Commission established the Working Group on Aggression in its third session at the end of 1999, culminating in the Coordinator's 2002 Discussion Paper, which summarised the main proposals.[316] Subsequently, the work of the Preparatory Commission was taken over by the Special Working Group for the Crime of Aggression established by the Assembly of States Parties. Negotiations took place in a multilateral forum and considered the views of member states and non-members alike. They were collated in a number of papers presented at regular intervals for consideration by the Assembly of States Parties.[317]

[313] For Article 5 (1) Rome Statute, see n. 9.
[314] Glennon (2010), n. 8.
[315] Art 5 (2) Rome Statute, see n. 10.
[316] Discussion Paper Proposed by the Coordinator, 11 July 2002, UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2 in *Report of the Preparatory Commission for the International Criminal Court,* UN Doc. PCNICC/2002/2/Add.2, Part II, (the 'July 2002 Coordinator's Paper').
[317] The most important summaries, discussion papers, Coordinator's and Chairman's report papers of the Special Working Group have been collated in Stefan Barriga and Claus Kress (eds), *Travaux Preparatoires of the Crime of Aggression,* Crime of Aggression Library (CUP 2012). They will be discussed in more detail in the Chapters 2-5.

The extensive negotiations ultimately resulted in the 2009 Discussion Paper, which was the basis for the proposed definition of the Crime of Aggression as presented at the First Review Conference of the International Criminal Court in Kampala in 2010.[318] At this Review Conference, the definition of the crime, including its elements and jurisdictional procedures, was finally adopted and incorporated into the Rome Statute. Article 8 *bis* contains the definition, and the jurisdictional conditions were included in Articles 15 *bis* and *ter*.[319] The provisions are the culmination of twelve years of hard fought negotiations, compromise and no little controversy.[320] As the following chapters will demonstrate, they also have the effect of greatly limiting the Court's jurisdiction, at the same time as enabling it in the first place.

7. The historical background in context

Any enquiry into the difficulty of achieving consensus on the definitional and jurisdictional parameters of the Crime of Aggression, and its resulting limitations, is inextricably linked to the historical and geopolitical background discussed above. The following points are particularly salient for the remaining examination, and will be revisited throughout this thesis.

[318] 'Discussion Paper on the Crime of Aggression Proposed by the Chairman: Revision January 2009', 19 February 2009, ICC/ASP/7/SWGCA/INF.1 (the '2009 Discussion Paper', not published in *ASP Official Records*), as considered in the *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/SWGCA/2, *ASP Official Records*, ICC-ASP/7/20/Add.1, Annex II, 20.
[319] These were incorporated into the Rome Statute by virtue of Resolution 6 (n. 2), and will be examined in great detail in the following chapters.
[320] See Chapters 2, 3, 4 and 5.

Individual criminal responsibility for illegal aggression was until recently still a relative novelty, the notion of an unfettered right to go to war having remained prevalent amongst nation states until as late as the beginning of the 20th century.[321] Attempts to prosecute aggression after the Second World War were subject to the problems of developing a new definitional content of the crime, as well as establishing the jurisdictional parameters for its prosecution. Consequently, granting jurisdiction over the novel Crimes against the Peace to the ad hoc IMTs of Nuremberg and Tokyo,[322] led to accusations of retrospectivity and violation of the *nullem crimen sine lege* principle, although these were refuted by the tribunals.

The discussion also showed that post Nuremberg, the development of an international jurisdiction over the crime remained controversial and was too politically sensitive to find easy agreement.[323] The Security Council was frequently deadlocked, and often failed to determine and condemn state acts of aggression,[324] as a result of which the General Assembly occasionally resorted to determinations of aggression.[325] Eventually a definition of a state act of aggression was developed for the guidance of the Security Council.[326] Additionally, the ICJ passed a small number of judgments and opinions pertaining to aggression.[327] None of these references to and condemnations of acts of aggression, had, however, the effect of creating consensus on the general parameters for the jurisdiction of a permanent future international criminal court over the crime itself.

[321] See section 3 above.
[322] See the discussion in section 4.3 below.
[323] See the account of Bassiouni and Ferencz, (n. 306), 346.
[324] See section 5 above.
[325] Applying the Uniting for Peace Resolution (n. 253), see section 5.1.
[326] Resolution 3314 (n. 14).
[327] Most notable is the ICJ judgment in the *Nicaragua* case (1986) (n. 37), passing opinion (at para 103) that Article 3 (g) of Resolution 3314 was considered 'to reflect customary international law'. This was confirmed in the *Armed Activities* (2005) (also n. 37), at para 223.

Nevertheless, the Crime of Aggression was included as one of the core crimes in the 1994 Draft Statute for an International Criminal Court,[328] despite the substantial disagreement between States about its inclusion, as well as the role to be played by the Security Council.[329] In search of a reason, this lack of consensus has been explained as the result of prevailing and wide-felt scepticism as to whether the ICC was the right organ to have jurisdiction over the crime due to the political nature of aggression, and whether aggression should remain solely the purview of the Security Council. Antonio Cassese's assessment helps to clarify the situation:

> It is striking that in the negotiations leading to the adoption in 1998 of the Statute of the ICC, no agreement was reached on the definition of aggression. […] It would seem, however, that the main bone of contention was about the role to be reserved to the UN Security Council. It was a matter of discussion whether its determinations were binding upon the Court, whether it could thus stop the Court from prosecuting alleged cases of aggression, or whether the Court should instead be free to make its own findings, whatever the deliberations of the supreme UN body.[330]

Cassese's description of the situation just before the Rome Conference demonstrates not only the existence of fundamental disagreement between States on whether criminalising aggression was a worthwhile endeavour at all, but also the more practical concern of the extent of freedom of jurisdiction to be granted to the Court, particularly vis-à-vis the

[328] See n. 309.
[329] See the account by Bassiouni and Ferencz (1999) (n. 306 and section 6.1), 346.
[330] Antonio Cassese (2013) (n. 12), 138.

functions and powers of the Security Council. Essentially, determining the jurisdictional conditions for the International Criminal Court over the Crime of Aggression involved a reassessment of the role of the new Court within the established framework of international institutions, considering and assigning determination powers over an act of aggression by the Security Council, the General Assembly, the International Court of Justice and the ICC itself. Additionally, States were also being asked to relinquish, at least partially, their sovereignty by granting their consent to criminal jurisdiction over political acts committed by their state officials. Taking into account these difficulties, it is remarkable that, despite the inability of States to come to an agreement on either a definition or jurisdictional procedure, a compromise was negotiated in Rome, providing for the inclusion of aggression as a still undefined core crime in Article 5 (1) (d) of the Statute.[331]

After Rome, States and the Special Working Group on the Crime of Aggression continued their negotiations for a definition and jurisdictional conditions.[332] The prevailing, most contentious issue remained, however, whether the International Criminal Court should have automatic and independent jurisdiction, or jurisdiction depending on Security Council authorisation.[333] A number of powerful States continued to resist any jurisdiction of the Court, based on an argument for Security Council prerogative, as well as fundamental scepticism whether the attempt to criminalise aggression was a worthwhile endeavour.[334] Despite the considerable efforts of the SWGCA, consensus on the jurisdictional conditions for the Crime of Aggression seemed out of reach. Negotiations

[331] See n. 9.
[332] The Special Working Group took over from the Working Group on Aggression in 2002.
[333] See Kress and von Holtzendorff (2010) (n. 5), 1194.
[334] See the statements, for instance, by the P5 members, in the 2010 Explanations of Positions in the *Travaux Preparatoires* (n. 317), from p. 810.

nearly failed entirely until the very end of the Kampala Conference due to continuing disagreements and a wide chasm between proponents of Security Council monopoly on the one hand and advocates of independent determination powers of the Court itself.[335] This issue had continued to be a particular problem throughout the negotiations.[336] Eventually, however, a compromise was reached allowing for limited jurisdiction of the Court over a very narrowly defined crime,[337] subject to substantial Security Council control,[338] as well as a reinforced double requirement for state consent, even by signatories.[339]

The remainder of this thesis evaluates whether these provisions are likely to be successful and workable or whether, in fact, they result in rendering the new jurisdiction of the first permanent International Criminal Court ineffectual. Additionally, some suggestions will be attempted as to how the provisions could be altered to make the crime of aggression more appropriate in modern day aggression scenarios.

[335] See Kress and von Holtzendorff (2010) (n. 5), 1194.
[336] *Ibid.* See also Cassese (2013) (n. 12) 138.
[337] Discussed in Chapter 3.
[338] Discussed in Chapter 4.
[339] Discussed in Chapter 5.

CHAPTER 2: THE GRAVITY THRESHOLD AND STRICT LEADERSHIP CLAUSE

1. Introduction

The previous chapter demonstrated that the path leading to the criminalisation of aggression and jurisdiction by the first permanent international criminal court was by no means smooth or unproblematic. Consensus on a definition had been difficult to achieve in the face of a Cold War which lingered for several decades. The post Second World War focus on jointly developing jurisprudence over atrocious international crimes all but disappeared in favour of reliance on the collective security system of the United Nations, until the establishment of the ad hoc international tribunals of the 1990's[340]. Controversy continued to surround the inclusion of aggression in the jurisdiction of the International Criminal Court.[341] Nevertheless, it was listed in Article 5 (1) (d) of the Rome Statute,[342] as a 'blank prose' crime still in search of a definition.[343] Eventually, on 11 June 2010, a consensus agreement on a definition and jurisdictional conditions was achieved at the First Review Conference in Kampala. The purpose of this definition was to identify individual responsibility for the collective act of aggression, and hope was widespread

[340] UN Security Council 'The International Criminal Tribunal for the former Yugoslavia' (ICTY) (22 February 1993) UN Doc. S/RES/808, and 'Establishment of the International Criminal Tribunal for Rwanda' (ICTR) (6 November 1994) UN Doc. S/RES/955.
[341] See Bassiouni and Ferencz (1999) (n. 306), 343.
[342] See n. 9.
[343] See n. 8.

that it would become an effective mechanism to hold individuals to account for their responsibility in a State's pursuit of acts of aggression.[344]

This chapter and the next together examine whether the definition arrived at is capable of achieving this high aim, assessing how effectively modern acts of aggression and the culpability of individual aggressors for those acts are captured by the definition. Article 8 *bis* raises four particular issues, the first two arising from Article 8 *bis* (1),[345] and the latter two from Article 8 *bis* (2).[346] The first two together set a very high bar for the crime, limiting its application. Thus, an act of aggression firstly has to satisfy an elevated gravity threshold, amounting to a manifest violation of the UN Charter to the effect that lesser violations are not covered. Secondly, Article 8 *bis* contains a very stringent requirement of leadership of only high-level politicians or members of the military, to the exclusion of actors in a lesser or different capacity. These two elements of the crime are considered in detail in this Chapter.

The next Chapter assesses two other characteristics of the crime contained in Article 8 *bis* (2), which are based on the types of act included in the definition of the crime. The first of these is the application of the crime to state-on-state aggression only, at a time when most modern threats originate from non-state actors. Secondly, it will be considered whether the limited list of acts, describing outmoded forms of state aggression as perceived in 1974,[347] is suitable for the prosecution of modern day acts of aggression.

[344] See pp. 1-3.
[345] Article 8 *bis* (1) Rome Statute, see below.
[346] Article 8 *bis* (2) is discussed in the next chapter.
[347] Resolution 3314 (14). Note that only Articles 1 and 3 of Resolution 3314 have been incorporated into Article 8 *bis* of the Rome Statute, which is therefore silent on other evidence and circumstances (Article 2 of Resolution 3314), the non-exhaustiveness of the list of acts of aggression (Article 4) (discussed in the next chapter), and the non-availability of political, economic or military justifications for an act of aggression (Article 5).

Ultimately, the discussion of all four of these characteristics raises the question whether the narrow definition results in overly limiting effective jurisdiction of the Court, and whether this consequence could have been avoidable. An examination of the negotiating process,[348] as well as academic concerns expressed in the build-up to the Kampala Conference,[349] reveals that this narrow interpretation was by no means unchallenged. Whilst some States and academics preferred a limited, narrow definition, others viewed Article 8 *bis* as far too restrictive, arguing that a wider definition would capture aggressors more effectively, thus expanding the Court's jurisdiction.[350] Realistically, however, consensus on a wider definition may have proved impossible, considering the divisiveness of the subject.

The effectiveness of the definition of the crime of aggression will undoubtedly be tested in the future. In the meantime, these two chapters provide a critical analysis of Article 8 *bis*, evaluating its limitations and aiming to predict practical implications for such future prosecutions. Additionally, the benefits of a wider interpretation of the definition of aggression, thus extending the ICC's jurisdiction, will be weighed against likely accusations of illegality and retrospective law-making, offending the principle of *nullem crimen sine lege.*[351]

[348] See the discussion below at section 2.3.
[349] See the discussion below at section 2.4.
[350] *Ibid*.
[351] See n. 227.

Article 8 bis (1) in detail

The first two distinct limitations contained in Article 8 *bis* arise from its first paragraph. Article 8 *bis* (1) provides:

> For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[352]

This single sentence establishes a number of conditions, all of which have to be satisfied before individual criminal liability arises. Thus, the definition firstly insists on a state act of aggression, which amounts to a manifest violation of the Charter of the United Nations on account of its character, gravity and scale. This description implies that those three assessment criteria together have to be of such severity that they amount to a manifest violation. The questions arise whether this threshold is too high and whether violations less than manifest could and should be included in order to aid jurisdiction of the Court. Additionally, individual criminal liability ensues only once the initial state act of an unlawful and manifest violation of the UN Charter through the use of armed force or aggression has taken place.[353] This criterion of a completed state act of aggression distinguishes the Crime of Aggression from the other crimes under the Rome Statute, which begin with the act of an individual and are therefore not dependent on such a prior

[352] Article 8 *bis* (1) Rome Statute 1998.
[353] The state element is greatly reinforced in Article 8 *bis* (2) and therefore discussed in Chapter 3.

act committed by a State.[354] This element of state centricity, prevailing throughout the entire Crime of Aggression provisions, also establishes a connection to the examination of the jurisdictional conditions in the second half of this thesis, since it is this multiple reinforcement of consent by States which serves as the basis of jurisdiction under Article 15 *bis.*[355]

The second prominent feature of Article 8 *bis* (1), examined in this chapter, is the inclusion of a stringent requirement of a high level of leadership. Criminal responsibility of the aggressor depends on his or her political or military position as an indicator of their ability to control or direct the state act of aggression.[356] If an act of aggression is committed by a person exercising a lesser degree of control, or that person has control over actions other than political or military (i.e. economic or mere policy-making), the definition does not apply to that person, regardless of the outcome of their actions.[357] Here, the question arises whether a lesser degree of control, or in fact a standard of 'shaping and influencing', as coined by the Military Tribunals after the Second World War,[358] should have been applied, in order to capture modern day aggressors and make the definition more timely and effective, thus aiding jurisdiction of the Court.

A related concern is whether the description of the culpable behaviour, i.e. the 'planning, preparation, initiation and execution of an act of aggression', is too narrow. Any behaviour which falls short of these levels of participation, or taking part in an act which

[354] See Article 6 for Genocide, Article 7 for Crimes against humanity, and Article 8 for War Crimes, Rome Statute 1998.
[355] See the discussion of the limitations arising from the jurisdictional conditions in Articles 15 *bis* and *ter* in Chapters 4 and 5.
[356] See sections 3.1-3.4 below.
[357] *Ibid.*
[358] See section 4.3 in Chapter 1.

amounts to a less than manifest violation of the UN Charter is, by virtue of this definition, not captured.[359] This gives rise to the interesting consideration whether the criminal doctrines of conspiracy and Joint Criminal Enterprise could be utilised to widen the Court's jurisdiction and extend liability to participants at a lower level, for instance accessories and instigators of acts of aggression. Before embarking on the detailed consideration of this leadership clause, let us first examine the high threshold applied to the Crime of Aggression.

2. The gravity threshold

The definition of the crime of aggression provides that an act of aggression constitutes by its character, gravity and scale a manifest violation of the Charter of the United Nations.[360] Although Article 8 *bis* is largely derived from the definition of the state act contained in Resolution 3314, this original source requires mere inconsistency with the Charter rather than its violation at a manifest level. Thus, Article 1 of Resolution 3314 provides:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.[361]

[359] See sections 3.5-3.6 below.
[360] Article 8 *bis* (1) Rome Statute (see p. 85).
[361] Article 1, Resolution 3314 (n. 14).

Article 8 *bis* (1) of the Rome Statute, by comparison, stipulates that the act of aggression has to amount to a manifest violation. The threshold for individual criminal liability is therefore much higher than mere inconsistency. Additionally, the crimes of genocide, war crimes and crimes against humanity have no such qualifier,[362] so the need for the 'supreme international crime' of aggression to be subject to a 'manifest' qualifier does indeed appear to be an oddity.[363] The questions arise why this high threshold was chosen, and whether this was entirely necessary, since the Rome Statute already limits prosecution to only the most serious international crimes.[364] A further question worthy of consideration is whether lesser violations, which are inconsistent with the Charter, but do not amount to manifest violations, could or should attract individual criminal responsibility under any circumstances. In attempting to find an answer to these questions, it may be helpful to begin by examining the ICJ's treatment of the subject, providing guidance on what amounts to a state act of aggression and the gravity threshold such an act has to surpass.

2.1 The ICJ's treatment of the gravity threshold

The ICJ has, in the past, addressed the sliding scale of acts potentially amounting to aggression in the context of state acts. Although not attempting to determine state acts for the purpose of establishing criminal responsibility, the ICJ's findings are relevant in the context of the definition of the crime, because it is the state act itself which amounts to

[362] Articles 6-8 Rome Statute, see n. 354.
[363] The term 'supreme international crime' is derived from Robert Jackson's opening statement (n. 135) and the final judgment of the Nuremberg Tribunal (n. 3), page 186.
[364] See the Preamble, Article 1 and Article 5 (1) of the Rome Statute (n. 1).

the manifest violation of the Charter in Article 8 *bis*. It is also this very state act which triggers the criminal responsibility of the individual in charge of it. Therefore, the ICC will be required to establish the link between the state act, which must be of sufficient gravity, and the act of the individual, in order for criminal responsibility to arise.

Significantly, the ICJ's treatment of acts of aggression establishes a clear relationship between 'armed attack' and act of aggression, impliedly equating the meanings of the two terms.[365] The case of *Nicaragua* is of particular importance, since it specifically establishes a hierarchy of attacks, pitching armed attacks as the gravest use of force against less grave forms.[366] The ICJ derived authority for its equation of aggression with 'armed attack' from the early *Corfu Channel* case,[367] and confirmed its view in the *Oil Platforms* case,[368] the *Armed Activities* case,[369] the *Nuclear Weapons Opinion,*[370] and the *Wall Opinion.*[371] Interestingly, in the *Oil Platforms* case, the ICJ considered even the mining of a single vessel to amount to an 'armed attack', highlighting the fact that what amounts to an act of aggression may depend on the circumstances of each case. Nevertheless, in all of the above cases, aggression was only peripheral to the main proceedings, and in none of them did the ICJ actually declare an express state act of

[365] See Dapo Akande and Antonios Tzanakopoulos, 'The ICJ and the Concept of Aggression', in Kress and Barriga (eds) (2017) (n. 246), 214-232.
[366] The *Nicaragua* case (Merits) (1986), (n. 37), para 191.
[367] *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v Albania)*, [1949] ICJ Rep 4, page 22, cited in *Nicaragua* (*ibid)* at paras 215, 219..
[368] *Oil Platforms (Iran v US)* [2003] Judgment of 6 November 2003, ICJ Rep 161, (*Oil Platforms* case), para 51.
[369] *Armed Activities* (2005) (n. 37), (Merits Decision), 19 December 2005, para 142.
[370] *Legality of the Threat or Use of Nuclear Weapons* (1996), Advisory Opinion of 8 July 1996, ICJ 2, [hereinafter *The Nuclear Weapons Opinion*], para 38.
[371] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep 136, (*The Wall Opinion*), paras 127, 139.

aggression, instead coming to findings of the legality of the use of force and assessing States' adversarial claims under Article 2 (4) and 51 of the UN Charter.[372]

Despite considering the gravity of acts amounting to aggression, it is worth noting that the ICJ provided no clear criteria for such a threshold, still potentially leaving the matter open to discussion. Nevertheless, following the ICJ's treatment of the subject, it stands to reason that, at the high end of the scale, actual 'armed attacks' will satisfy the threshold criteria of gravity, character and scale for a manifest violation of the UN Charter and the purpose of establishing the *actus reus* for the crime of aggression. This still leaves the question whether acts at the lower end of the scale, which are inconsistent with the Charter but fall short of an actual armed attack, could or should attract individual criminal responsibility, i.e. where the exact boundaries of aggression lie. The other issue worthy of contemplation is why the high threshold of 'manifest violation' was chosen in the first place. The consideration of the contemporary background helps to shed some light on the contentious debates surrounding these issues.

2.2 The contemporary context - Aggression in an age of 'humanitarian' interventions

The negotiations for the International Criminal Court coincided with an era in which the necessity of international interventions on humanitarian grounds was suddenly pushed into the headlines. The genocides in Rwanda and the Balkans in the 1990's, and the

[372] For Article 2 (4) of the UN Charter, establishing the prohibition of the use of force, see n. 195 and for Article 51, providing for self-defence, see n. 249.

international community's non-existent or at best untimely response resulted in deep international concern over non-intervention in the face of grave humanitarian crises.[373] In response, and in the face of deadlock within the Security Council and failure to authorise action to prevent further atrocities, NATO took an independent decision to respond to the developing crisis in the Balkans, in particular Kosovo. Despite the initially unauthorised use of force in the name of humanitarian intervention, NATO's actions later gained legitimacy through retrospective authorisation in Resolution 1244.[374] Several years later, and as an extension to an operation against terrorist groups responsible for the atrocities of September 11, 2001, the US and UK decided to invade Iraq on alleged humanitarian grounds in the year of 2003.[375] The legitimacy of this unauthorised invasion has been called into question extensively,[376] but it is against this particular background of the emerging claims of justifiable humanitarian interventions that the negotiations and debates amongst the member states of the Rome Statute must be viewed. As the following discussion shows, States and academics alike wrestled with the question of what amounts to a manifest violation and where the boundaries should lie, the issue having gained particular relevance in light of the controversy surrounding the humanitarian interventions of the late 1990's and the new millennium.

---

[373] See the discussion on pp. 71-2.

[374] UN Security Council, 'The Situation in Kosovo' (10 June 1999), UN Doc. S/RES 1244.

[375] The airstrikes began on 20 March 2003, see the Council on Foreign Relations, http://www.cfr.org/timline/iraq-war, accessed 20th January 2020.

[376] See for instance Alex Bellamy, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq' (2005), 19 (2) Ethics Int. Aff., 31, 54. See also Kenneth Roth, 'War in Iraq: Not a Humanitarian Intervention', in Richard Wilson (ed) *Human Rights in the 'War on Terror'*, (CUP 2005) and Kenneth Roth, 'Was the Iraq War a Humanitarian Intervention?' (19 August 2006), 5 (2) J. Mil. Ethics, https://doi.org/10.1080/15027570600711864, accessed 12 March 2020. For a different view of Iraq as a valid intervention, see Robert Heinsch, 'The Crime of Aggression after Kampala: Success or Burden for the Future' (2010), 2 Go. J. I. L., 713, 726-7. For determination of its unlawfulness in the absence of a second Security Council Resolution, see Elizabeth Wilmshurst' resignation letter of 18 March 2003, see 'Wilmshurst resignation letter', BBC News, 24 March 2005, http://new.bbc.co.uk/1/hi/4377605.stm, accessed 11 August 2020, and the 2016 *Chilcot Report*, John Chilcot, *The Report of the Iraq Inquiry*, Executive Summary, 128-135, http://www.iraqinquiry.org.uk/media/247921/the-report-of-the-iraq-inquiry_executive_-summary.pdf, accessed 11 August 2020.

The only two Charter-based exceptions to the prohibition on the use of force in Article 2 (4) are self-defence under Article 51[377] and authorisation of action by the Security Council under Article 42.[378] Unauthorised use of force, apart from justifiable self-defence, remains illegal under the Charter. Humanitarian intervention has been described as 'the threat or use of force by a state, group of states, or international organisation primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognised human rights.'[379] If unilateral or collective humanitarian intervention is unauthorised, it may indeed appear to be a violation of the UN Charter's Article 2 (4),[380] on account of the use of force being contrary to the Charter's prohibition.

The Charter does not provide for an implied exemption of humanitarian reasons for an unauthorised military intervention,[381] a fact confirmed by the jurisdiction of the ICJ. Thus, the ICJ held in the *Corfu Channel Case* that the parameters of the Charter and the prohibition of the use of force in Article 2 (4) did not include implicit exceptions.[382] In the *Nicaragua* case, the ICJ reiterated the validity of the use of force prohibition in the Charter and at customary international law, and that resort to force was not an appropriate means to ensure respect for human rights.[383] The *Nuclear Weapons* opinion confirmed that self-defence under Article 51 and Security Council authorisation of use of force under

[377] Article 51 of the UN Charter, recognising an 'inherent right of individual or collective self-defence' following an armed attack (n. 249).
[378] Article 42 of the UN Charter providing for authorisation of the use of force 'to maintain or restore international peace and security' (n. 207).
[379] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an evolving world order,* University of Pennsylvania Press (1996), 11-12.
[380] Article 2 (4) of the UN Charter (n. 195). For a discussion, see Thomas Franck (2002) (n. 190), 136.
[381] Franck, *ibid*. See also Ian Brownlie's statement that humanitarian intervention was generally insufficient grounds to go to war at customary international law. I. Brownlie, *International Law and the Use of Force by States*, OUP (1963), 340-341.
[382] *Corfu Channel* case (n. 367) (Merits), pp. 34-5.
[383] *Nicaragua* case (n. 37) (Merits) (1986), paras 257-269.

its Chapter VII powers were the only two valid exceptions to the prohibition of the use of force, thus implicitly precluding humanitarian intervention as a valid third exception.[384] In *The Armed Activities* case the ICJ held that even Security Council recognition of states' responsibility for peace did not equal authorisation and legitimisation of the use of force on another state's territory.[385] These authorities demonstrate that any intervention, and particularly those involving military measures, should, under international law, be authorised by the Security Council in order to be distinguishable from an illegal use of force.[386] If no agreement on sanctions or collective action can be reached within the Security Council,[387] it is possible for the General Assembly to pass resolutions under the Uniting for Peace principle.[388] In the past, these have fallen short of authorising forceful interventions by States, but this route is not entirely barred. Authorisation by either organ would avoid undermining the existing collective security system.

Despite the fact that unauthorised humanitarian interventions are *prima facie* illegal, States have, since Kosovo, demonstrated a growing appetite for unauthorised unilateral or collective interventions involving military action.[389] It is conceivable that evolving

[384] *The Nuclear Weapons opinion* (1996) (n. 370), paras 37-50.
[385] *The Armed Activities* case (2005) (n. 37), para 143.
[386] Article 41 of the UN Charter (n. 206) provides for the authorisation on non-military measures, and Article 42 (n. 207) for the authorisation of military interventions.
[387] See for instance the situation in Syria, where resolutions attempting to authorise collective action have been repeatedly thwarted by use of the veto power. See, for instance, Draft Resolutions UN Doc. S/2011/612 (4 October 2011); UN Doc. S/2012/77 (4 February 2012); UN Doc. S/2012/538 (19 July 2012); UN Doc. S/2014/348 (22 May 2014); UN Doc. S/2017/172 (28 February 2017); and UN Doc. S/2017/315 (12 April 2017). For a discussion, see also Aidan Hehir, 'The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect' (2015), 26 Criminal Law Forum, 153.
[388] Uniting for Peace Resolution 1950, see n. 253 and related discussion.
[389] See for instance the unauthorised 2003 coalition invasion of Iraq (n. 375-6). The 2011 Libyan intervention, beginning on 19 March 2011, by contrast, was authorised by UN SC/Res 1973, but has raised the question whether NATO's action went beyond the mandate (see, for instance Geir Ulfstein and Hege Christiansen, 'The Legality of the Nato Bombing in Libya' (2013) 62 (1), ICLQ, 159, 169. Unilateral and even multilateral unauthorised air strikes in Syria by France, the UK and the US, despite attempts to rely on a justifiable need for humanitarian intervention, remain unlawful (see for instance Marko Milanovic, 'The Syria Strikes: Still Clearly Illegal' (EJIL:Talk! 15 April 2018) http://ejiltalk.org.the-syria-airstrikes-still-clearly-illegal/ accessed 12 December 2020. In the Yemen, the externally supported civil war (the government being backed by a coalition of Arabic States led by Saudi Arabia with substantial support of

state practice may bring about a change at customary international law, a possibility which was hinted at by the ICJ in *Nicaragua*.[390] In this case, the ICJ stated that 'reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.'[391] Thomas Franck, in examining a number of humanitarian interventions, came to the conclusion:

> In this practical reconciliation [of the pursuit of peace and justice] we can detect a pragmatic range of systemic responses to unauthorised use of force, depending more on the circumstances than on strictly construed text…., mitigat[ing] the consequence of such wrongful acts by imposing no, or only nominal, consequences on states which, by their admittedly wrongful intervention, have demonstrably prevented the occurrence of some greater wrong.[392]

Similarly, Leclerc-Gagne and Byers argue that *bona fide* humanitarian intervention ought to be exempt from the possibility of prosecution for the crime of aggression on account of falling short of the *mens rea* requirement in Article 30 of the Rome Statute of intent and knowledge.[393] Nevertheless, whilst humanitarian interventions may be morally excusable, existing international law interprets an action against the sovereignty of a foreign state, which is not justifiable as an act of self-defence under Article 51 and not

---

the United States, whereas the Houthis are backed by Iran) has raised issues of aggression in the form of a proxy war, with little or no forthcoming relief of the humanitarian crisis, see for instance Richard Reeve's article 'War in Yemen' (17 April 2015), available at https://ww.oxfordresearchgroup.org.uk/war-in-yemen-the-african-dimension, accessed 12 December 2020.

[390] *Nicaragua* (1986) (n. 37), para 206.

[391] *Ibid*, at para 207.

[392] T. Franck (2002) (n. 190), 139.

[393] Elise Leclerc-Gagne and Michael Byers, 'A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention' (2009), 41 (2) Case W. Res. J. Int'l Law, 378, 381.

authorised by the Security Council under its Chapter VII powers, *prima facie* as an act of aggression. States participating in the negotiations for the crime of aggression were concerned that their own involvement in such interventions could be construed as an act of aggression capable of incurring criminal responsibility.[394] Only if the measuring bar for the crime of aggression was declared to be so high that humanitarian intervention would not be captured, would this threshold effectively provide an extra-charter based exemption to aggression for such interventions. As the following subsections examine in detail, this reasoning explains the insistence, particularly by powerful states involved in contemporary interventions, on the high manifest threshold, in order to distinguish these acts.

2.3 Negotiating the threshold clause

Even prior to the Rome Conference, and in face of the controversy surrounding even the very idea of including the crime of aggression in the ICC's jurisprudence, states submitted proposed definitions of the crime which included an 'object' or 'result' clause in addition to the already narrow manifest requirement. An early proposal by Germany, for instance, makes the following suggestion for *actus reus* of the crime of aggression:

> For the purpose of the present Statute, the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing political or military action of a State

[394] This concern arose specifically as a result of the unauthorised intervention in Iraq, which involved the illegal use of force under the pretext of a humanitarian intervention (n. 376).

(a) initiating or

(b) carrying out

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken *in manifest contravention* of the Charter of the United Nations and *resulted in* the effective occupation by the armed forces of the attacking State or in the annexation by the use of force of the territory of another state or part thereof.[395]

The delegation derived the object or result clause from Article 3 (a) of GA Res. 3314,[396] and in its almost identical 1999 proposal explained the rationale for combining the manifest requirement and the object or result clause. Thus, they considered it necessary for the definition to 'focus on and try to **cover only the obvious and indisputable cases of this crime** (such as the aggressions committed by Hitler and the one committed against Kuwait in August 1990)'.[397] The rationale continues:

This limitation seems indispensable, in particular for the following reasons: 'It is of utmost importance that the definition does not lend itself to possible frivolous accusations of a political nature against the leadership of a Member State. Furthermore, it must be avoided that the definition somehow negatively affects the legitimate use of armed force in conformity with the Charter of the United

[395] 'Proposal by Germany', 1997, A/AC.249/1997/WG.1/DP.20 (emphasis added).
[396] Article 3 (a) of Resolution 3314 (n. 14), providing for the following example of an act of aggression: '[t]he invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof'.
[397] 1997 'Proposal by Germany' (n. 395), emphasis included.

Nations whose necessity – maybe unfortunately – cannot be ruled out in the future.'[398]

Germany's 2000 proposal went further by suggesting an even more restrictive definition, limiting it to large scale 'wars' of aggression of the 'utmost gravity' in 'manifest violation' of the UN Charter.[399] This proposal required the armed attack to be of 'particular magnitude and dimension', and 'frightening gravity and intensity', leading to 'the most serious consequences.'[400] The intended effect was to further narrow the definition of the crime of aggression to wars of aggression, military occupation or annexation, and, importantly, to distinguish humanitarian intervention.[401]

Whilst these early proposals represented the prevailing view of the majority that the crime of aggression should be restricted to only the gravest violations of the UN Charter, particularly in order to differentiate humanitarian interventions, some states proposed alternative views suggesting a wider definition with a lower threshold. Egypt and Italy, for example, proposed that aggression needed no threshold at all, since it was already considered the 'supreme international crime',[402] and the Rome Statute itself only applied to the most serious international crimes in any case.[403] Thus, simple inconsistency with the Charter involving an act of 'sufficient gravity' was argued to be more appropriate.[404] The delegations of Greece and Portugal expressed a preference for the simple term

[398] The '1999 Proposal by Germany', as incorporated in PCNICC/1999/INF/2, closely mirrored the earlier one (n. 395) and added the above rationale.
[399] 'Proposal submitted by Germany: the Crime of Aggression – A Further Informal Discussion Paper', 13 November 2000, as incorporated into PCNICC/2000/WGCA/DP.4.
[400] *Ibid.*
[401] *Ibid.*
[402] See n. 135.
[403] 'Proposal by Egypt and Italy on the definition of aggression', A/AC.249/1997/WG.1/DP.6, as incorporated into PCNICC/1999/INF/2. The Rome Statute limits the Court's jurisdiction to the most serious crimes only, see the Preamble (n. 85), Article 1 and Article 5 (1) Rome Statute (n. 1).
[404] *Ibid*.

'violation' without a reference to the gravity or a manifest qualifier.[405] Colombia suggested using 'illegitimate use of force', which could include *any* use of force in contravention of Article 2 (4)), rather than a 'manifest violation'.[406]

Another interesting suggestion for a wider definition was submitted by the Cuban delegation. This proposal referred to inconsistency with the Charter rather than insisting on a manifest threshold, and included acts which *directly or indirectly* affected the sovereignty, territorial integrity or the political *or economic* independence of another State.[407] The proposal is remarkable because it would have encompassed less obvious acts of aggression, including potentially the aggressive influencing and interference in another country's sovereignty, whether political or economic. A definition along these lines may also have covered acts of cyber warfare and interference in another country's democratic process, as well as vital systems disruptions, situations which are a growing threat and which are currently not covered by the definition of aggression.[408]

All of these minority proposals are noteworthy for promoting a wider definition, however the most outstanding alternative submission was made by Samoa. Their proposal dismissed both the manifest requirement and an object or result clause, on account of the fact that the definition was already narrow, and supported total independence of the ICC in deciding whether the threshold had been crossed.[409] This proposal would have provided

[405] 'Proposal by Greece and Portugal', 1999, PCNICC/1999/WGCA/DP.1
[406] 'Proposal submitted by Colombia on the definition of the crime of aggression and on conditions for the exercise of jurisdiction of the Court with regard to this crime', 1st March 2000, PCNICC/2000/WGCA/DP.1.
[407] 'Proposal submitted by Cuba', 6th February 2003, Assembly of States Parties, First session, ICC-ASP/1/L.4 (emphasis added).
[408] See for instance the discussion in Chapter 3 and 6, in particular.
[409] 'Elements of the Crime of Aggression – Proposal submitted by Samoa', 2nd June 2002, PCNICC/WGCA/D.P.2.

for a wide definition and liberal determination power of the ICC in order to counteract *any* acts of aggression. Had this suggestion been adopted, the definition would have benefited from being adaptable to developing methods of warfare and changing types of aggressors. Such developing methods of warfare could include proxy or remotely conducted wars, as well as cyberwars and other aggressive interference in another state's sovereignty, the effects of which may be just as devastating as those of a conventional war.[410] The Samoan proposal also may have included aggression committed by non-state actors, a group which has over the last two decades emerged as the main instigators of prevalent aggression around the globe.[411]

The Samoan proposal is particularly noteworthy amongst the minority views, because - had it gained consensus - it would have led to much wider jurisdiction of the ICC by allowing the Court itself to determine which acts of aggression ought to be prosecuted. This thesis argues that such wider jurisdiction, in appropriate cases, would also help to reinforce the purpose of the general prohibition of the use of or threat of force contained in Article 2 (4) of the UN Charter itself. The discussion has already shown that many of the reservations by the majority of States were based on the determination to exclude extra-charter based interventions on humanitarian grounds from the jurisdiction of the Court. The determination of whether an act of humanitarian intervention was indeed genuine or an act of aggression under pretext would, under the Samoan proposal, be left to the Court, able to consider all the available facts and criteria outside of the political arena. The prevailing scepticism of the Court being able to function as an impartial and independent arbiter of alleged or potential acts of aggression is, in the writer's view,

[410] See the arguments presented in Chapters 3 and 6.
[411] See the discussion in Chapter 3.

exaggerated and misplaced. Wider judicial capacity would not necessarily have to be seen as interfering in matters of the Security Council, since the Court could be viewed as acting complementarily to the Council and other political organs rather than as usurping their powers. Following the approach advocated by Samoa, the determination of a state act of aggression would be merely incidental to the determination of criminal responsibility, therefore fears of judicial interference in matters of politics would be unfounded. The Samoan approach is therefore, this thesis argues, highly persuasive.

Nevertheless, this view was not shared by the majority of states who preferred to restrict the Court's jurisdiction over the crime of aggression by insisting on an extremely high threshold. On examination of the *Travaux Preparatoires,* it becomes apparent that this preference for limiting the crime of aggression to only the most serious violations of the utmost gravity became increasingly influential amongst member states, and this slowly emerging majority view began to make an appearance in the summaries of the Working Group and later the Special Working Group for the Crime of Aggression.[412] The Coordinator's Paper of April 2002 presented a number of options, the first of which defined the crime of aggression as an act, which 'by its characteristics and gravity amounts to a war of aggression'. Option 2 defined the crime as having 'the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof,' and option 3 added the words 'in manifest violation of the Charter of the United Nations'.[413] The Coordinator's Paper of July 2002 suggested the term 'flagrant violation' of the UN Charter, with or without the options of an object or result clause.[414]

[412] The Special Working Group took over the deliberations from the Working Group in 2003 (see *Travaux Preparatoires* n. 317).
[413] '2002 Coordinator's Paper (April)', 'Definition of the Crime of Aggression and Conditions for the Exercise of Jurisdiction: Discussion Paper Proposed by the Coordinator', 1 April 2002, UN Doc. PCNICC/2002/WGCA/RT.1, as reproduced in the *Travaux Preparatoires, ibid,* 398-99.
[414] 'July 2002 Coordinator's Paper' (n. 316), and *Travaux Preparatoires* (n. 317), 412-14.

These distinctions reappeared in later recommendations of the Special Working Group, for instance the Annex to the 2007 Chairman's Paper,[415] and the 2007 Princeton Report.[416] Paragraphs 56 and 57 of the 2007 Princeton Report shed light on the different views expressed in the discussion, although States are not named expressly.[417] Thus some States expressed a preference for an amendment of the suggested threshold clause to add 'when the act of aggression in question has been committed in a particularly grave and large-scale manner.'[418] Whilst these States admitted that all acts of aggression are in fact a violation of the Charter, they felt the need to differentiate between the definition itself, and which level of aggression should give rise to criminal jurisdiction. Others argued that the object or result clause should limit jurisdiction further by insisting on a war of aggression or military occupation or annexation, all highly traditional forms of aggression.[419] Despite the fact that neither the Chairman's Paper,[420] the 2007 Princeton report,[421] nor the 2007 SWGCA Report of December,[422] attempt to explain the insistence by some States on an object or result clause, the reasoning is likely to be as expressed in the German Proposals of 1997 and 1999, as wishing to differentiate between prosecutable acts of aggression and borderline transgressions and humanitarian intervention.

---

[415] 'Discussion Paper Proposed by the Chairman', 16 January 2007, ICC-ASP/5/SWGCA/2 (not published in ASP Official Records), see pp. 525-529 in the *Travaux Preparatoires* (n. 317).
[416] 'Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression', Princeton University, 11-14 June 2007, (the 2007 *Princeton Report*), ICC-ASP/6/SWGCA/INF.1 in *ASP Official Records*, ICC-ASP/6/20, Annex III, 96.
[417] *Ibid.* Please note that the reports and papers often refer to States generically as holding the 'majority' or 'minority' view. I have followed these generic references out of necessity, where no other information was available. Wherever it has been ascertainable which particular States tended particular proposals or entertained particular views, I have included the State names for accuracy.
[418] 2007 *Princeton Report*, *ibid*, paras 56 and 57.
[419] *Ibid*.
[420] n. 415.
[421] n. 416.
[422] *Report of the Special Working Group on the Crime of Aggression* (December 2007) (ICC-ASP/6/SWGCA/1, ASP 6/20, Annex II, 87.

Nevertheless, the SWGCA reports in general and the 2007 Princeton Report in particular show that by this time the 'characteristics and gravity' reference in the Chairman's Paper had become more favoured and was considered to sufficiently narrow the definition, whereas general support for an 'object' or 'result' clause was diminishing.[423] Therefore it was suggested to delete the object or result clause entirely and retain the threshold.

Observing non-member states, most notably the United States, also insisted on the highest of thresholds.[424] Throughout the negotiations and even as late as the Kampala Conference, the US expressed their dissatisfaction with draft Article 8 *bis*. Consequently, they demanded the explicit exclusion of certain state acts of aggression, specifically forceful humanitarian intervention, from the umbrella of the crime of aggression.[425] The US delegation was eventually pacified by the inclusion of Understanding No. 7 that the ICC's assessment of whether a violation of the UN Charter is manifest must include consideration of the three elements of character, gravity and scale of the use of force, albeit not necessarily in equal measure.[426] In the meantime, the controversy surrounding the threshold clause continued to reappear in discussions all the way up to the Kampala Review Conference,[427] although the arguments remained largely unchanged. Finally, both the manifest requirement and the reference to the character, gravity and scale were incorporated into Article 8 *bis* (1).

[423] See n. 415-6.
[424] See Kress and von Holtzendorff (2010) (n. 5), 1192.
[425] *Ibid.*
[426] 'Understanding No. 7', included in Annex III of Resolution 6 (n. 2), see *Handbook on the Ratification and Implementation of the Kampala Amendments on the Crime of Aggression*, http://crimeofaggression.info/docments/1/handbook.pdf, accessed 19th March 2020.
[427] See the account in Kress and von Holtzendorff (2010) (n. 5), 1192-5.

2.4 Too high a threshold? – Arguments for and against wider determinations

In practice, the very existence of the threshold clause requires both the Prosecutor and the Pre-trial Division to be satisfied that it has been surpassed before a prosecution can be initiated, unless the Security Council has referred the case to the Court.[428] This may lead to undesirable delays and makes little sense, bearing in mind that all of the elements of the crime, including the threshold, have to be proven later at trial in any event.[429] At the same time, the high threshold applied in the definition of the crime has the effect of greatly restricting determination powers and ultimately jurisdiction of the Court.[430] This point raises the question whether imposing such a high threshold was reasonable and necessary, since the Rome Statute itself is limited to the most serious international crimes already.[431] Should the Court, instead, enjoy wider determination powers in order to decide, on a case by case basis whether an act is capable of giving rise to prosecution for the crime of aggression?

It has already been noted that the exclusion of humanitarian intervention continued to be of the greatest concern to many States, constituting the main reason for the limitation to only the gravest violations of the Charter.[432] It may, however, have been possible to distinguish interventions on genuinely humanitarian grounds from criminal acts of aggression without such a high threshold of the crime. Where a situation arises in which

[428] This is due to the interplay between Articles 8 *bis* and 15 *bis,* insisting on a 'filter' in the form of the Pre-trial Division.
[429] See Keith Petty, 'Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict' (2009), 33 Seattle University Law Rev. 105, 108, 116.
[430] *Ibid.* See also Noah Weisbord, 'Judging Aggression' (2011) 50 (1) Col. J. Transnat'l L., 82, 93,103, 164, and Maogoto, (2009) (n. 225), 21.
[431] See Preamble (n. 85), Article 1, as well as Article 5 (1) of the Rome Statute (n. 1). See also the argument presented in the 'Proposal by Egypt and Italy' (n. 403).
[432] See section 2.2.

intervention may become necessary to avoid or limit the extent of a grave humanitarian crisis and/or extensive loss of lives, there is generally evidence of some consensus by the greater international community, even if authorisation of action may not be forthcoming because of disagreement within the Security Council. This consensus may be evident from expressions of concern or condemnations by the Security Council, the General Assembly, individual States, NGO's, and Human Rights Watch and other civil organisations. There may be support for an intervention by regional organisations.[433] International condemnation of an unauthorised intervention on humanitarian grounds may be muted, signifying at least some implied consensus on the action undertaken. The intervention may even be authorised retrospectively, following the Kosovo precedent.[434] Aggressive interventions under humanitarian pretext would also have to be extremely well disguised in order to detract from the fact that the humanitarian element is, at best, incidental to the main military or political goal. The deployment of civilian relief organisations to alleviate a humanitarian crisis is a main feature of interventions for

[433] See for instance African Union support for the unilateral intervention in Mali by France. For a discussion, see Susanna D. Wing, 'French intervention in Mali: strategic alliances, long-term regional presence?' (5 February 2016) 27 (1) Small Wars & Insurgencies, 59, https://doi.org/10.1080/09592318.2016.1123433, accessed 18 August, 2020.

[434] See the retrospective authorisation of the intervention by the Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) in Resolution 2100 UN Doc. S/Res/2100 (25 April 2013). Note, however, criticism of this operation as a 'permanent military intervention' under a pretext of counter-terrorism, rather than for humanitarian or peacekeeping reasons, 'The Military Intervention in Mali and Beyond: An Interview with Bruno Charbonneau (Sahel specialist and scholar)', 28 March 2019, http://www.oxfordresearchgroup.org.uk/blog/the-french-intervention-in-mali-an-interview-with-bruno-charbonneau, accessed 20 August 2020.

genuinely humanitarian purposes,[435] and an absence of relief efforts is likely to create an impression of action taken for entirely different purposes.[436]

The safest distinction of genuine humanitarian intervention from illegal use of force may be derived from the Kosovo Report itself, which looked to evidence of 'severe violation of human rights or humanitarian law on a substantial basis', and 'state failure, subjecting civilians to great suffering and risks'.[437] Intervention in these circumstances must have the direct purpose of protection of civilians, must be aimed at a quick end to the conflict and the safeguarding of civilians, and the use of force must be necessary.[438] Peaceful attempts should first have been made to resolve the conflict, and UN Security Council authorisation ought to have been at least attempted, particularly on account of the fact that States' unilateral decisions cannot help but contain an element of subjectivity. A useful distinction between genuine humanitarian intervention and aggression has been provided by Noah Weisbord, describing the former as 'time-limited, multi-lateral action,

[435] This was considered a main objective in a number of reports on an emerging Responsibility to Protect. See International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (2001), at VIII. See also *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change,* UN Doc. A/59/565 (2004), available at http://www.un.org/hlp_more_secure_world.pdf (the *High-Level Panel Report*), and *In Larger Freedom: Towards Development, Security and Human Rights for All,* Report of the Secretary-General, UN Doc. A/59/2005, paras 16-22 (2005), available at http://www.un.org/largerfreedom/contents.htm, all accessed 18 August 2020. See also the 2005 *World Summit Outcome*, GA Res. 60/1, paras 138-9 (October 24, 2005).

[436] See the discussion above at n. 376 and related text.

[437] See *The Kosovo Report - Conflict - International Response - Lessons Learned*, (OUP 2000), p. 4. See also *Peace and Governance Programme, Kosovo and the Challenge of Humanitarian Intervention*, (Albrecht Schnabel & Ramesh Thakur eds., 2000), available at http://archive.unu.edu/p&g/kosovo_full.htm, accessed 12 August 2020.

[438] *Ibid.* The developments since the Kosovo intervention have been described as the growing recognition of a 'paradigmatically justified' right or even duty to intervene. See Larry May, *Aggression and Crimes against Peace* (OUP 2008), 276. See also Petty, (2009), (n. 429), 106. The ICJ opinion in the so-called *Genocide Case* referred to an 'obligation of all States parties [] to employ all means reasonably available to them, so as to prevent genocide so far as possible.' See Case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia)*, 2007 ICJ General List No 91 (26 February 2007), para 166. Note that this thesis does not attempt to provide a moral assessment as to whether unauthorised humanitarian interventions are justifiable or not. It is merely attempted to demonstrate that States concerns, leading to the extremely high threshold, were at least partially exaggerated and unnecessary.

divorced from territorial or economic goals and followed by robust humanitarian aid to a supportive victim population'.[439]

Consequently, the failure to install supportive humanitarian infrastructure following an intervention may be a good indicator that an intervention is less than genuine.[440] These are all factors which could be taken into consideration by the Court, in order to determine whether a state act had surpassed the threshold for the crime of aggression, or whether it amounted to a *bona fide* intervention for humanitarian reasons which should be exempt.

Additionally, there is room for argument that a genuine humanitarian intervention by its nature is not inconsistent with the UN Charter, since the Charter itself promotes humanitarian purposes.[441] Consequently, the view can be defended that there was no need in the first place for negotiating states to raise the threshold of aggression to the high level of a manifest violation, with the potential result of excluding other acts of aggression.[442] If genuine humanitarian interventions do not violate the UN Charter, there was no need to exclude them at all through the high threshold.

The reverse side of the coin is that the threshold of the crime may now be so high to exclude even unauthorised aggressive interventions under a humanitarian pretext.[443] It has already been acknowledged that an element of subjectivity is inevitable in States'

[439] Weisbord, (2011) (n. 430), 164.
[440] See for instance the ongoing humanitarian crisis in the Yemen, with little sign of relief but continuing involvement of external forces ((n. 389), see particularly Reeve (2015)).
[441]Article 1 (3), and 55 of the UN Charter.
[442] Petty (2009) (n. 429) 123
[443] A prime example is the 2003 Iraq invasion. See for instance the *Chilcot Report*, n. 376.

unilateral decisions to intervene.[444] Because of this inevitability of subjectivity, combined with the fact that States are unlikely to volunteer for action if this directly counteracts their own interest, it is an unfortunate reality that unauthorised unilateral interventions may, at times, be utilised for purposes other than providing humanitarian relief, for instance regime change or subjective territorial or political advantages.[445] Even the unauthorised but later legitimised Kosovo intervention gave rise to concerns of abuse in other situations, capable of potentially undermining the existing 'imperfect, yet resilient security system… setting dangerous precedents.'[446] And yet, because of the high threshold of the crime, such interventions under pretext may escape criminalisation.

All of these considerations raise concerns that the threshold of a 'manifest violation' may in certain cases be too high, and determinations of what amounts to an act of aggression in a particular situation ought to have been left for the Court to decide, taking into account all of the facts.[447] Admittedly, this may give rise to concerns of legality in criminal proceedings, since liberal determination powers without a clear threshold may make it impossible for a defendant to foresee that his actions could give rise to a prosecution for aggression.[448] Nevertheless, the Court ought to be more than capable of distinguishing acts of aggression, taking into account the criteria of an attempt to seek authorisation, the aim of protection of civilians, threat to or likelihood of loss of life without intervention,

---

[444] *Ibid*.
[445] Petty, (2009) (n. 429), 124.
[446] See Kofi Annan's comments in his *Report of the Secretary-General on the work of the Organization*, UN GAOR, 54th Sess., 4th plenary meeting at 2, UN Doc. A/54/PV.4 (20th September, 1999), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/858/23/PDF/N9985823.pdf? For similar concerns expressed earlier, see Ian Brownlie, 'Thoughts on Kind-Hearted Gunmen', in Richard Lillich (ed), *Humanitarian Intervention and the United Nations* (UPVA 1973) 139, 147-8. See also concerns raised by Lou Henkin, in *How Nations Behave: Law and Foreign Policy*, 144-5 (Columbia University Press 2nd ed. 1979) and Oscar Schachter, *International Law in Theory and Practice*, 123-5 (Nijhoff 1991).
[447] Weisbord, (2011) (n. 430), 163.
[448] See for instance, Andreas Paulus, 'Second Thoughts on the Crime of Aggression', (2009) 20 (4) EJIL, 1117, 1121.

and creation of a supportive infrastructure post-intervention.[449] States' trepidations that genuine humanitarian interventions could be accidentally mistaken for such acts, exposing their leaders to prosecutions for the crime, may have been exaggerated, if such a 'checklist' is used by the Court.

Additionally, the Rome Statute already provides its own safety net against unwarranted and unjustified prosecutions, and States' concerns that genuine humanitarian interventions could be mistaken for acts of aggression appear to have been exaggerated. Thus, as mentioned above, Article 1 limits application of the Statute to the most serious international crimes,[450] excluding crimes of lesser concern. The Court could simply decide for itself that the violation of the prohibition on the use of force did not cross the gravity threshold to be considered one of those most serious international crimes. Furthermore, *bona fide* humanitarian intervention ought to be exempt from the possibility of prosecution for the crime of aggression on account of falling short of the *mens rea* requirement in Article 30 of the Rome Statute of intent and knowledge.[451] Thus, a genuine humanitarian intervention could be distinguished from an act of aggression on the basis that there was no intent by the intervening State to violate the sovereignty, territorial integrity or political independence of the other State, as stipulated in Article 8 *bis* (2).[452] Article 53 (1) (c) of the Rome Statute also provides the Prosecutor with the discretion to decide not to proceed where a prosecution 'would not serve the interests of justice',[453] and importantly there, therefore, appears to be a place for flexibility when considering all the circumstances. All of these arguments rely on an inherent capacity of the ICC to make

[449] See the *Kosovo Report* (n. 437), and Weisbord (2011) (n. 430), 123.
[450] See the Preamble (n. 85) Article 1 and 5 (1) of the Rome Statute (n. 1). See also the argument presented in the 'Proposal by Egypt and Italy' (n. 403).
[451] Leclerc-Gagne and Byers (2009) (n. 393), 381.
[452] For a detailed discussion of Article 8 *bis* (2), see Chapter 3.
[453] Article 53 (1) (c) Rome Statute 1998.

an independent assessment based on the individual facts, employing their own determination and interpretation skills. Coming to these findings, the court should also be allowed to conclude that applying a wider threshold than 'manifest violation' is, in certain circumstances, justified.

The need for wider judicial powers to determine whether a violation of the UN Charter is of sufficient gravity to cross the required threshold can also be envisaged in situations other than relating to humanitarian interventions. Thus, it may be arguable that an apparently aggressive act should not fall within the scope of Article 8 *bis*, where the political, economic, or military circumstances are such that they may serve as justification for the act, for instance if the so-called aggressor state has been subjected to some form of severe coercion. One such example might be where a country's supply route is blockaded, and this country then resorts to the use of force to break the blockade for the supply of essential goods.

An argument could also be posed that alternative forms of aggression, for instance economic or other forms of coercion (i.e. the cutting off of energy supplies), might be taken into account as 'other relevant circumstances' to find that such a prior act of coercion led to an act of legitimate self-defence as distinguishable from aggression. This argument is, to some extent, based on Stone's consideration of loopholes in the 1974 definition of the state act.[454] Additional support for the availability of other considerations to the judges of the ICC can be derived from the fact that Article 8 *bis*, which is largely based on the definition of the state act of aggression in Resolution 3314, unlike its

[454] Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression' (1977) 71 AJIL 224, 234 (1977).

predecessor does not expressly exclude justifications for the use of force. Thus, Resolution 3314 had contained a provision in its Article 5, which expressly excluded other considerations potentially amounting to justifications for what would otherwise constitute an act of aggression.[455] Article 8 *bis*, on the other hand, does not contain a provision akin to Article 5 of Resolution 3314.[456] It is possible to view this omission as deliberate, and therefore as an implied inclusion of the admissibility of other considerations in the determination of whether the threshold of an act of aggression which gives rise to criminal responsibility has been surpassed. The hypothetical ability of the Court to determine justification grounds, based on the absence of a provision corresponding to Article 5 of Resolution 3314, is an interesting consideration, and could be defended in principle by reasoning that the Court makes findings for the determination of criminal liability, not political condemnations of state acts *per se*.

Notwithstanding the plea for wider determination powers of the Court presented in this thesis, a number of counter-arguments presented by critics ought to be considered. The first and most obvious, discussed in detail above, is that the exclusion of humanitarian interventions was paramount to some States.[457] The insistence on a narrow manifest threshold thus represents their express intentions and, specifically, the attempt to ensure that exclusion. Article 31 (1) of the Vienna Convention of the Law of Treaties insists that interpretations of treaty provisions require to be given their 'ordinary meaning,'[458] and

[455] Article 5 of Resolution 3314 (n. 347), which states that 'No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.'
[456] *Ibid.*
[457] See section 2.3.
[458] VCLT (n. 32), Article 31 (1).

proponents of strict treaty interpretations would therefore argue for rigorous adherence to that threshold.[459]

Other concerns are based on a fundamentally protectionist attitude towards the Court, wishing to save it from venturing into the political arena. Thus, Claus Kress for instance, argues that the existing narrow threshold clause 'shields the Court from the need to deal with uses of force that raise questions, which, though amenable to an international *legal* analysis, continue to be a matter of considerable international legal *policy controversy* among states.'[460] It would, for instance, be feasible for the Court to come to a potential judicial finding of actual justification for an act of aggression, following the consideration of political, military or economic reasons. Sceptics may perceive such a finding as amounting to a sanction of the use of force by the Court,[461] which is the remit of the Security Council.[462]

It is, nonetheless, arguable that the requirement of the Court to conduct a legal analysis of the threshold may inevitably lead to the need for wider determinations. Thus, even despite the high threshold and the necessity for the 'qualitative'[463] and 'quantitative'[464] requirements to have been satisfied, the intensity threshold does not necessarily exclude

[459] See for instance Professor Akande, defending strict adherence to the text of the treaty, even over and above the expression of the underlying intentions of treaty parties. Dapo Akande, 'Treaty Interpretation, the VCLT and the ICC Statute: A response to Kevin Jon Heller & Dov Jacobs', August 25, 2013, http://www.ejiltalk.org/treaty-interpretation-the-vclt-and-the-icc-statute-a-response-to-kevin-jon-heller-dov-jacobs/. For a differing view, see Dov Jacobs 'Why the Vienna Convention should not be applied to the ICC Rome Statute: a plea for respecting the principle of legality' (August 24, 2013), *Spreading the Jam*, https://dovjacobs.com/2013/08/24/why-the-vienna-convention-should-not-be-applied-to-the-icc-rome-statute-a-plea-for-respecting-the-principle-of-legality/ both accessed 20 March 2020. See the discussion below, at pp. 112-5.

[460] Claus Kress, 'The State Conduct Element' in Kress and Barriga (eds) (2017) (n 246), 543 (emphasis in original). For other protectionist arguments against wider jurisdiction, see Chapter 5.

[461] Heinsch (2010) (n. 376), 742, raising concerns of legality, amongst others.

[462] Article 39 of the UN Charter (n. 134).

[463] The 'character' criterion in Article 8 *bis* (1), see Kress (n. 460), 519.

[464] 'Gravity and scale' in Article 8 *bis* (1), Kress, *ibid*.

acts of aggression of lesser consequences, for instance 'limited wars'.[465] Consequently, judges may in certain circumstances come to the conclusion that the failure to reach the level of 'full-scale hostilities' and even entirely 'bloodless invasions', violating the sovereignty of the invaded State, are capable of surpassing the threshold.[466] Therefore, Kress' argument, despite highlighting the need to protect the Court from getting embroiled in political controversies, in fact, actually supports wider determination powers.

Other arguments against expansive exercise of judicial discretion also require acknowledgement. Thus, admittedly, the proposition of greater determination powers of the Court is open to the likely criticism that such a wide interpretation of the definition would broaden the 'objective' standard of the 'manifest' requirement in the Elements of the Crime,[467] and this, on its own, could give rise to accusations of uncertainty. Resistance is likely to be incurred, because discretional determinations and justifications potentially offend the principle of *nullum crimen sine lege*, according to which a person should not incur criminal liability for an offence which was not already criminalised at the time of commission of the act.[468] Liberal determination by ICC judges of what amounts to a manifest violation may, therefore, fall foul of criticism of retrospective law-making by extending the provisions, if the criminalisation of the act was unforeseeable.[469]

Related to the question of legality of retrospective determinations is the argument that Article 31 (1) of the VCLT establishes that interpretations of treaty provisions require to

[465] *Ibid.*
[466] *Ibid,* 523. Kress cites the 2014 invasion and annexation of Crimea, 607.
[467] 'Elements of Crime', 8 *bis*, (2) in Resolution 6 (n. 2).
[468] See n. 227.
[469] Similar complaints were raised against the IMTs at Nuremberg, see section 4.3 of Chapter 1. See also Dinstein (2017) (n. 154), 134.

be given their 'ordinary meaning.'[470] If this provision is read strictly into the Rome Statute, it may prevent the Court from exercising wider determination powers. Thus, Resolution 3314, the resolution from which Article 8 *bis* of the Rome Statute is derived, did allow for the consideration of 'other circumstances', permitting some discretion. Article 2 of this resolution provided:

> The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified *in the light of other relevant circumstances*, including the fact that the acts concerned or their consequences are not of sufficient gravity.[471]

Article 8 *bis*, whilst following Article 1 and 3 of Resolution 3314 almost verbatim, does not include the other articles contained in the 1974 resolution. If strict adherence to treaty provisions is sacrosanct, the fact that Article 2 of Resolution 3314, in particular, has been omitted from Article 8 *bis* of the Rome Statute is likely to be read as intentional, potentially precluding the Court's consideration of 'other relevant circumstances'.[472]

The strict application of the VCLT to the Rome Statute has been upheld, for instance, by Dapo Akande.[473] In response, Dov Jacobs has raised the interesting question whether the VCLT ought to apply to the Rome Statute at all, as an instrument of criminal law. He states:

---

[470] Article 31 (1) VCLT (n. 458).
[471] Article 2 of Resolution 3314 (n. 347).
[472] Following Article 31 (1) VCLT (n. 458).
[473] See for instance Akande's engagement with the subject in EJIL:Talk! (August 2013) (n. 459).

> I've always found the question of the applicable rules of interpretation to international criminal law statutes to be an underdeveloped aspect of the literature on the work of the tribunals [on international criminal law]. As international lawyers, the VCLT is our default go-to document to look for rules of interpretation of international documents. But I believe this fundamentally ignores the specific nature of international criminal law and the central role of the principle of legality.[474]

Thus, Jacobs argues that it is the very requirement of legality in international criminal law which should result in non-application of the 'broad and ultimately discretionary rules of interpretation of the VCLT.'[475] The Rome Statute should be interpreted as an internal rule book for the judges of the ICC rather than as a strictly applicable treaty, since the Rome Statute contains *lex specialis* rules, rather than reiterates the *lex generalis* rules of the VCLT.[476] The provision for strict construction in Article 22 (2) of the Rome Statute, according to Jacobs, applies to the Court's interpretations over and above the VCLT.[477] If, however, a judicial analogy could be perceived to have been foreseeable by a defendant, i.e. it is *that* close, it is not in violation of Article 22 (2).[478] Following Jacob's view, this interpretation of the legality argument may, in fact, support wider determination powers of the Court, as long as the analogy applied is sufficiently close.

Ultimately, this discussion has shown that the vagueness of the term 'manifest violation' is likely to require careful and incremental clarification. As long as discretion is used in

[474] Jacobs (August 2013) (n. 459).
[475] *Ibid.*
[476] *Ibid.*
[477] *Ibid.* Article 22 (2) of the Rome Statute provides for strict construction of a crime's definition and non-extension by analogy.
[478] Jacobs (n. 459).

order to avoid the creation of random justifications or inclusion of unforeseeably novel acts of aggression beyond simple analogy and comparison, it should be possible to fend off accusations of violation of the legality principle.[479] Such careful and incremental interpretations are therefore perhaps less likely to encounter resistance, and could at least be a step in the right direction in order to render an extremely narrow definition more workable and applicable to modern aggressive scenarios. Arguably, this would have the benefit of leading to greater effectiveness of the provisions and their general application, thus reemphasising the overall prohibition on the use of force contained in Article 2 (4) of the Charter. This benefit, this thesis argues, outweighs the dangers associated with wider determination powers in the view of some of the above critics.

Nevertheless, the narrow threshold is, in reality, only one of the hurdles presently built into the definitional conditions, which simultaneously enable and limit jurisdiction of the Court. As the following section shows, Article 8 *bis* (1) also entails the highest of leadership requirements.

3. Limitation to political and military leaders and the 'control or direct' requirement

Article 8 *bis* (1) imposes a stringent requirement of leadership of only high-level politicians or members of the military, to the exclusion of actors in a lesser or different capacity. Thus, Article 8 *bis* (1) describes the perpetrator of the crime of aggression as 'a

[479] For support see Marko Milanovic, 'Aggression and Legality: Custom in Kampala' (2012), 10 (1) JICJ, 165, 171.

person in a position effectively to exercise control over or to direct the political or military action of a State…',[480] and this leadership requirement is reiterated in the Elements section and Article 25 (3) *bis,* limiting accessory liability. Whilst the original Article 25 (3) of the Rome Statute dealt with accomplice liability for the other crimes under the Rome Statute,[481] a specific problem arose for the crime of aggression, because of the specific leadership requirement stipulated in Article 8 *bis*. Therefore a new Article 25 (3) *bis* was included, stating:

> In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.[482]

As pointed out by Graziano and Mei, Article 25 (3) *bis* therefore, 'on its face, limits the individual responsibility for crimes of aggression in an extraordinary way, excluding the possibility of accessory liability except for those individuals who are in a position 'effectively to exercise control over or to direct' state and military action.'[483] This represents an exceptional provision and restriction compared with the other crimes under the Statute, none of which carry an equivalent leadership requirement, nor is accessory liability for these crimes limited in the way it is in aggression cases.[484] In the search for an explanation for this unusual clause, and attempting to assess its effect on the jurisdiction of the Court, its origin provides a good starting point.

---

[480] See p. 85.
[481] Article 25 (3) of the Rome Statute (n. 1).
[482] Article 25 (3) *bis.*
[483] Mackennan Graziano and Lan Mei, 'The Crime of Aggression Under the Rome Statute and Implications for Corporate Accountability' (2017), 58 (4) Harv. Int'l L. J., 55, 57.
[484] See Article 25 (3) Rome Statute (n. 481), which generally provides for accessory liability for genocide, crimes against humanity and war crimes.

3.1 The historical roots of the leadership clause

A review of the history of the crime of aggression and its predecessor, crimes against peace,[485] shows that the international community had throughout the 20th century battled with the question of how far down the command chain responsibility for the crime should be applied. The crucial issue was whether culpability should arise merely at policy-making level, or whether it ought to capture the executors of that policy, possibly even all the way down to the foot soldier following orders.[486]

The historical precedents of the Nuremberg and Tokyo tribunals confirmed the limitation of the crime to high level policy makers.[487] Robert Jackson's opening statement at Nuremberg expressed that the Prosecution had 'no purpose to incriminate the whole German people', but was aiming to prosecute only 'the planners and designers, the inciters and the leaders…. of this terrible war.'[488] The crimes against peace precedent was based on a common plan or conspiracy, as well as the individual defendant's effective knowledge of the plan, and actual participation. Article 6 of the London Charter defined crimes against the peace 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.'[489] Nevertheless, Article 6 also expressly included '[l]eaders, organizers, *instigators and accomplices* participating in the formulation of a Common Plan or

[485] See section 3, Chapter 1.
[486] See section 4.3, Chapter 1.
[487] *Ibid.*
[488] See n. 135.
[489] Article 6 (a) of the London Charter (n. 117).

Conspiracy' to commit any of the crimes in the Charter.[490] Successor tribunals were established by Control Council Law No. 10, [491] of which the Nuremberg Charter was an integral part, and which provided authority to the allies to prosecute German war criminals other than the major ones dealt with by the original Nuremberg Tribunal after the Second World War.[492] Article II (2) describes accessory liability for crimes against peace (the crime of aggression forerunner), war crimes and crimes against humanity as applicable to anyone who 'was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime….'[493] Subparagraph (f) continued with a reference to the high political, civil or military position or high position in the financial, industrial or economic life.[494]

These provisions demonstrate the fact that at Nuremberg a wider range of actual power over the acts of the State, and a lesser degree of individual participation in the act of aggression was considered as sufficient for prosecution. Nevertheless, a position at policy level and actual knowledge of the aggressive plot were essential. The following section examines the ground-breaking prosecutions of instigators, accomplices, and economic leaders in addition to political and military actors.

[490] *Ibid*, emphasis added to demonstrate criminal liability of accessories and instigators of aggression.
[491] See Control Council Law No. 10 (n. 121).
[492] See section 4.3, Chapter 1.
[493] Article II (2) of Control Council Law No. 10 (n. 121).
[494] *Ibid.*

3.2. Private economic actors and the development of a 'shape or influence' test

Despite restricting culpability for aggression to policy makers, the tribunals also had to consider the liability of private economic actors. As Noah Weisbord describes:

> The tribunals wrestled with the status of business leaders, non-state actors, who did not hold formal positions or exercise effective control in the Nazi's bureaucratic apparatus, but whom the Allied populations felt should be held criminally responsible nonetheless.[495]

Consequently, the Nuremberg and Tokyo Charters did not restrict jurisdiction to political and military leaders only and included complicit accessories and private economic actors, such as industrialists, as long as they had a sufficiently 'high political, civil or military […] position … or held high position in the financial, industrial or economic life' of one of the belligerent countries.[496] The Nuremberg Tribunal justified these prosecutions by stating that 'Hitler could not make aggressive war by himself. He had to have cooperation of statesmen, military leaders, diplomats, and business men.'[497] Whilst several economic actors were prosecuted, a high number of them were acquitted, unlike their political and military counterparts, due to the difficulty of attributing the requisite level of knowledge and active participation in the atrocities to them.

[495] Noah Weisbord, 'Conceptualizing Aggression' (2009), 20 Duke J. Comp. & Int'l. L. 1, at 45. See also Heller (2007) (n. 244), 480.
[496] See Control Council Law No. 10 (n. 121).
[497] *Nuremberg* Judgment, *United States v Goring et al.,* (n. 3), at para 223.

The successor tribunal in the so-called *Farben*[498] case held that any person 'in the political, military, [or] *industrial* fields [...] who [was] responsible for the formulation and execution of policies' could satisfy the leadership requirement.[499] The tribunal continued:

> The defendants furnished Hitler with substantial financial support which aided him in seizing power and contributed to keeping him in power […] and worked in close cooperation with the Wehrmacht in organizing and preparing mobilization plans for the eventuality of war.[500]

Despite this contribution to Hitler's efforts, they were, however, acquitted because they were followers rather than leaders. Consequently, they did not have the requisite *mens rea* of knowledge for the leadership crime of waging aggressive war. The so-called *Krupp* case confirmed that industrialists could be convicted of aggression as long as they had knowledge that their actions were aiding the aggressive war.[501] The tribunal went further in this case, by holding that actual participation in planning, preparing, or initiating the war of aggression was not required, and mere knowledge coupled with actual aiding was sufficient.[502] On the facts of the case, however, the defendants in *Krupp* were also acquitted. Nevertheless, both of these cases established specifically that private economic actors could be convicted of aggression, as long as they had the requisite knowledge and a sufficiently high level of influence.

[498] The *Farben* case (n. 241), at 1124.
[499] *Ibid*.
[500] *Ibid*, at 1297.
[501] The *Krupp* case (n. 241).
[502] *Ibid*, at p. 450. See also Heller (2007) (n. 244), 482-88.

The subsequent *High Command*[503] and *Ministries*[504] cases, on the other hand, concerned military and political leaders rather than private economic actors and placed high emphasis on the leadership requirement. The tribunals reaffirmed that the defendants clearly had to be in a position of policy-making in order to satisfy this leadership standard. Importantly, however, it was considered to be sufficient that they had the ability to 'shape or influence' the policy rather than exercise actual control over it. The *High Command* case confirmed:

> It is not a person's rank or status, but his power to shape or influence the policy of his State, which is the relevant issue for determining his criminality under the charge of crimes against peace.[505]

The tribunal continued by stating that '[i]nternational law condemns those who, due to their actual power to shape or influence the policy of their nation, prepare for, or lead their country into or in an aggressive war.'[506] The tribunal also rejected claims made by the defence that the crime was being prosecuted retroactively, and considered that aggression had been a crime at customary international law prior to the Second World War, on the basis of the pre-war treaties of the League of Nations and the Kellogg-Briand Pact.[507] The *Ministries* case applied a similar leadership standard to the *High Command* judgment. Here, the tribunal found the defendant guilty because of 'the wide scope of his

[503] The *High Command* Judgment (n. 242), p. 489.
[504] The *Ministries* Judgment (n. 243), p. 425.
[505] *High Command* (n. 242), p. 489.
[506] *Ibid*.
[507] *Ibid*, pp. 490-1.

authority and discretion in the positions he held, and which enabled him to shape policy and influence plans and preparations for aggression.'[508]

Consequently, these cases emphasised that aggression was a leadership crime, which could only be committed by policy makers. The *High Command* case also re-asserted that the criminal act was the actual 'planning, preparation, initiation and waging of war or the initiation of invasion'[509] rather than the mere aiding of such an act, as applied in the *Farben* case. Despite this disagreement with *Farben* on the required level of participation, the *High Command* case confirmed that the ability to 'shape or influence' was the minimum standard rather than the capacity to assert actual and direct control over the actions of a State.[510] The International Military Tribunal for the Far East, followed the Nuremberg reasoning and also applied the 'shape or influence' test, enshrining it further in customary international law.[511] Thus, the question for the Tribunal was whether the defendant had 'attained a position which by itself enabled him to *influence the making of policy*… and had become aware that Japan's designs were criminal.'[512] Dissenting opinions centred on the argument that aggression was, at the time, not a crime at international law, rather than voicing disagreement with the actual test applied.[513]

These precedents demonstrate that the jurisprudence of the tribunals included private economic actors, and applied a standard of 'shape or influence' rather than a more restrictive 'control or direct' test, although it was also clearly established that aggression

[508] *Ministries* case (n. 243), p. 425. Even Judge Powers' dissenting judgment referred to a position of influence rather than 'control', p. 889.
[509] *High Command*, (n. 242), pp. 490-491.
[510] *Ibid*, 489, confirmed in *Ministries* (n. 243), 425.
[511] The *Tokyo* Judgment (n. 11), 1190-1991.
[512] *Ibid*, emphasis added.
[513] *Ibid*, see for instance Justice Pal of India's dissenting opinion. This argument had already been rejected in the *High Command* case (n. 242), p. 489.

is indeed a leadership crime. This discussion raises the question where the control or direct test originated, if not in the post-war tribunals.

3.3 The control or direct test

The origins of a narrower 'control or direct' test, and specifically one of 'effective control', can be found in the civil proceedings of the much later *Nicaragua* case.[514] Here, the International Court of Justice applied the phrase as a test to determine whether the United States had committed a state act of aggression against Nicaragua through their extensive support of the Contra Guerrillas. Nicaragua had brought the case before the ICJ, alleging that the United States were effectively in control of the Contras and their activities against the State. It is in response to this specific allegation that the ICJ applied Nicaragua's own term of effective control, by asserting that 'whether the United States Government at any stage devised the strategy and directed the tactics of the *contras*' depended on the extent to which the United States had 'effective control' of the military or paramilitary forces.[515] The ICJ thus developed a connection between the level of control of the party aiding the act of aggression and directing the tactics involved, and the dependence of the party executing the act of aggression on its controller. Legal responsibility would only arise, if this level of control could be established.

The International Criminal Tribunal for the former Yugoslavia (ICTY) adopted a different 'control' test in the case of *Tadic,* modifying it into a wider one of 'overall

[514] *Nicaragua* (1986) (n. 37), paras 110, 115.
[515] *Ibid*, paras 110, 115.

control'.[516] Although the main issue considered in *Tadic* was whether the armed conflict in Bosnia at the time was internal or international, it was a relevant and important question for the tribunal whether the acts of an organized and hierarchically structured group could be attributed to a State, provided that that State had 'overall control' over the group. The Appeals Chamber held:

> The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.[517]

Thus, the *Tadic* standard of overall control allowed for the fact that subordinates can act independently, and yet remain under the overall control of the State in question.[518] The Appeals Chamber continued:

> The 'effective control' test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the *Nicaragua* test was exercised.[519]

[516] *Tadic* (n. 115), para 117.
[517] *Ibid*.
[518] Dinstein (2017) (n. 154), 238.
[519] *Tadic* (n. 115), para 124.

The ICTY therefore clearly distanced itself from the higher standard of effective control applied in *Nicaragua.* Nevertheless, the ICJ subsequently confirmed its own *Nicaragua* standard in the 2005 *Armed Activities case*,[520] and in the 2007 *Genocide case*,[521] rejecting the 'overall control' test advocated in *Tadic.*

The ILC's commentary on Article 8 of the 2001 Draft Articles on State Responsibility also considered the 'effective control' standard of *Nicaragua* as appropriate,[522] despite conceding that the ICJ's opinion concerned State responsibility rather than the individual criminal responsibility considered by the ICTY in *Tadic.*[523] This view is astounding, because it is in direct contrast to the ILC's earlier approach in their 1996 Draft Code. Not only does Article 16 of that Draft Code apply the term 'leader or organizer' as taken directly from the Charter of the Nuremberg Tribunal,[524] but related commentary clearly confirms an interpretation in line with the Nuremberg precedent:

> These terms must be understood in the broad sense, that is to say, as referring, in addition to the members of a Government, to persons occupying high-level posts in the military, the diplomatic corps, political parties and industry, as recognized by the Nuernberg Tribunal.[525]

[520] *Armed Activities* (2005) (n. 37), para 226. The ICJ here cited the ILC's endorsement in support.
[521] *The Genocide case* (n. 438), paras 207-210. The level of control required was interpreted as 'complete dependence' on the State in this case (at para 207), an even higher degree of control than the one suggested in *Nicaragua* (1986) of a 'degree of dependence' (n. 37, at para 62), see Dinstein (2017), (n. 154), 240.
[522] *Draft Articles on State Responsibility for Internationally Wrongful Acts (with commentaries)*, Report of the International Law Commission, 53rd Session, 2 (2) Yearbook of the International Law Commission, 2001, Annex to GA Resolution A/RES/56/83 (12 December 2001), at 105.
[523] *Ibid*, at 108. For a discussion see Dinstein, (2017), (n. 154), 239.
[524] Article 6 (a) London Charter (n. 117).
[525] Para 2 of Commentary on 1996 ILC *Draft Code of Crimes against the Peace and Security of Mankind*, Yearbook ILC (1996), Vol. II, 15, 55, drawing on a reference to the *Nuremberg* Judgment (n. 3).

This demonstrates that the ILC in 1996 considered the 'shape or influence' standard to be correct, and therefore were able to envisage the potential prosecution of economic leaders and possibly even spin doctors, as long as they were in a position of high influence. The ILC does not provide an explanation for its change in stance, however it seems logical and likely that by 2001 they paid heed to the majority of States' preference for severe restrictions on the Court's jurisdiction over aggression.

As for the different stances taken by the ICJ and the ICTY, it was noted above that the ICJ concerned itself only with state responsibility and the connection between the State and the military or paramilitary group in question. The ICTY, on the other hand, had to consider individual criminal responsibility within a group, as well as its nexus to state responsibility.[526] Because of this application to individual criminal responsibility, and despite the narrower views of the ICJ on state responsibility, the ICTY's advocacy of an overall control standard appears to be more appropriate for the crime of aggression, although it is still far removed from the even wider Nuremberg precedent, which had been recognised as appropriate in the 1996 ILC Draft Code.

Nevertheless, *Nicaragua's* 'effective control' was to become enshrined as the new leadership standard for aggression in the 2010 definition of the crime of aggression. This is extremely narrow and certainly far more restrictive than the Nuremberg standard of being able to 'shape or influence' policies. Consequently, and because the *Nicaragua* case considered state responsibility at civil law rather than individual criminal liability, a plausible argument can be made that its 'effective control' test serves badly as a definitive precedent for the crime of aggression. The Nuremberg test of 'shape or influence' would,

[526] *Tadic* (n. 115), para 137.

therefore, have been more appropriate for the determination of individual criminal responsibility and, this thesis argues, should have been applied by the SWGCA.[527]

3.4 The practical implications of the choice to apply the control/direct test to the crime of aggression

The difference between the Nuremberg test of 'shape and influence', *Nicaragua's* 'effective control' and *Tadic's* 'overall control' is more than semantics. Nuremberg's broad concept, applying a 'shape or influence standard', acknowledges the influence of policy makers on the conduct of States, therefore capturing war mongers, spin doctors and potentially economic supporters of and profiteers from war efforts. The 'overall control' standard in *Tadic*, on the other hand, is more restrictive. *Tadic* viewed the link between state and group acts in the context of individual criminal responsibility thus:

> Control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training...The control required by international law may be deemed to exist when a State (or in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions of the military group,* in addition to financing, training and equipping or providing operational support.[528]

[527] For support, see Weisbord (2008) (n. 176), 165-6.
[528] *Tadic* (Appeals Chamber, Merits) IT-94-1-A, para 137 (emphasis made in original text).

This concept is therefore narrower than the Nuremberg standard, but still considerably wider than the view taken by both the ICJ and latterly the ILC,[529] which applied the highest standard of a requirement for 'effective control or direct[ion]', as eventually adopted in Kampala for the definition of the crime of aggression. This standard creates individual criminal responsibility only where a person is capable of directly controlling the political or military action of a State, at the highest possible level, rather than exercising general or overall control. Even if accessory or lesser participation hadn't been expressly excluded in Article 25 (3) *bis*,[530] the extremely stringent requirement of a high level of control would also serve to exclude such liability by accomplices of a lesser capacity.

This strict leadership requirement, now formally implemented in the Crime of Aggression, has been criticized as representing a substantial retreat from the principles of the International Military Tribunals at Nuremberg and Tokyo.[531] The Special Working Group's elevation of the standard to a 'control or direct' requirement also paradoxically contradicts their own statement that the IMT's and NMT's jurisprudence 'codified customary international law'.[532] Thus the Special Working Group had applied the 'control or direct' standard throughout their discussions, but only in the misguided belief that the IMT and NMT utilized this standard rather than the one of 'shape or influence', which was actually applied by the tribunals.[533] This erroneous perception by the SWGCA is highly puzzling, since it appears that they failed to take account of its predecessor's own

[529] See the 2001 ILC Draft Articles on State Responsibility (n. 522 and related text).
[530] Article 25 (3) *bis* (n. 482).
[531] See Petty (2008) (n. 228). See also Heller (2007) (n. 244), and Ferencz (2009) (n. 4).
[532] *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/4/SWGCA/1 (1 Dec. 2005) Annex II.A, para. 26.
[533] Heller (2007) (n. 244), 479, 488.

Historical Review.[534] This lengthy document examined the jurisprudence of the IMT's at Nuremberg and Tokyo in great detail, and confirmed time after time that the standard applied in those precedents was that of 'shape or influence'.[535]

No reasonable explanation for the SWGCA's perplexing misinterpretation has been encountered during the research for this thesis, but it is likely that they succumbed to the pressure of States' preference for the narrower standard, wishing to keep the definition and its leadership clause highly limited. Even as early as 2002, the Coordinator's Discussion Papers of April[536] and July[537] expressed confidence that general agreement appeared to have been reached over the leadership clause defining the defendant as being in a position 'to exercise control over or direct the political or military actions of a State'.[538] This confidence in general agreement on the clause was based on a number of States' Proposals, demonstrating wide support for this vision of aggression as a highly limited leadership crime. Examples are for instance a number of Proposals by

[534] Preparatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, 'Historical review of developments relating to aggression, prepared by the Secretariat', PCNICC/2002/WGCA/L.1., particularly the set of tables, demonstrating the Nuremberg 'shape or influence' standard, in PCNICC/2002/WGCA/L.1/Add.1, available at http://www.un.org/law/icc/documents/aggression/aggressiondocs.htm, accessed 12 October 2020.

[535] *Ibid.*

[536] n. 413.

[537] n. 316.

[538] Other documents of the Special Working Group to the same effect include the 'Discussion Paper Proposed by the Chairman' (n. 415) at I(1)(a)-(b), ICC-ASP/5/SWGCA/2, Annex (ICC, Assembly of States Parties, Resumed 5th Sess., New York, Jan 29-Feb 1, 2007), available at http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-5-SWGCA-2_English.pdf, and the 'Non-Paper by the Chairman on Defining the Individual's Conduct', in ICC, Assembly of States Parties, Special Working Group on the Crime of Aggression, 6th Sess., New York, Nov. 30-Dec. 14, 2007, *Report of the Special Working Group on the Crime of Aggression*, Annex, ICC-ASP/6/SWGCA/1, http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-6-SWGCA-1_English.pdf.

Germany,[539] the Arab States,[540] Greece and Portugal,[541] Colombia,[542] Guatemala,[543] and Belgium, Cambodia, Sierra Leone and Thailand.[544]

Notwithstanding this majority position, it is noteworthy that some delegations of the Assembly of States Parties to the Rome Statute began to recognise the misinterpretation and dichotomy of the SWGCA's application of the 'control or direct standard' and attempted to widen it to one of 'shape or influence' in line with the Nuremberg precedents. For instance in 2002, Colombia's delegation distanced itself from its earlier insistence on the control or direction requirement,[545] and suggested that criminal liability for aggression should be extended to persons 'in a position to contribute to or effectively cooperate in shaping in a fundamental manner political or military action by a State.'[546] The use of the words 'contribution', 'cooperation', and 'shaping' suggests a far wider standard of policy making capacity than 'control or direct', and applies similar terminology to the Nuremberg standard of 'shape or influence.'[547] It is possible that this more encompassing definition of the Colombian delegation in 2002 could have captured other actors essential to an act of aggression, for instance policy makers, spin doctors, and economic investors and profiteers from war. The Samoan delegation also preferred a wider leadership standard and took the view that the perpetrator need not even necessarily

[539] 'German Proposals' of 1997 (n. 395), 1999 (n. 398), and 2000 (n. 399).
[540] 'Proposal by the Arab States and Iran', 1 July 1998, UN Doc. A/CONF.183/C.1/L.37
[541] 'Proposal by Greece and Portugal' (1999) (n. 405).
[542] 'Proposal by Colombia' (2000) (n. 406).
[543] 'Proposal by Guatemala', PCNICC/2001/WGCA/DP.2, 26 September 2001.
[544] 'Proposal submitted by Belgium, Cambodia, Sierra Leone, and Thailand', 8 July 2002, PCNICC/2002/WGCA/DP.5
[545] 'Proposed text on the definition of the crime and act of aggression submitted for the Delegation of Colombia' (1 July 2002), PCNICC/2002/WGCA/DP.3
[546] *Ibid.*
[547] See section 3.1 and 3.2.

be a formal member of the government or military, in order to control or direct of the political or military actions of a State.[548]

This latter position represents an interesting compromise. Whilst applying the narrow control or direct requirement preferred by the majority, the Samoan proposal would also enable capturing a wider group of possible aggressors in the spirit of the IMTs. Thus the Nuremberg Charter had considered not only the culpability of 'leaders' and 'organizers', but also 'instigators' and 'accomplices participating in the formulation or execution of a Common Plan or Conspiracy' to commit crimes against peace, war crimes or crimes against humanity.[549] Similarly, the Samoan proposal suggests indirectly that the influence of the defendant over the political and military actions of a State and the nexus between his or her actions and the State act of aggression are far more important than his or her actual position.

Such a more comprehensive concept, had it been adopted, would have widened the scope of the narrow Article 8 *bis* significantly, thereby potentially expanding the Court's jurisdiction. An interesting variation of the control or direct standard can also be found in Cuba's 2003 proposal, according to which the definition should apply to individuals 'in the position of effectively controlling or directing the political, *economic*, or military actions of a State.'[550] This appears to slightly widen the influence level of the perpetrators by including economic actors, whilst still insisting on the requirement to exercise actual control. These latter proposals can be distinguished from the mainstream preference for a narrow leadership requirement, by potentially capturing *all* persons in a position to

[548] 'Proposal by Samoa' (n. 409).
[549] Article 6 of the London Charter (n. 117).
[550] 2003 'Proposal by Cuba' (n. 407).

decisively influence the policies of a State, including political, social, business and even spiritual leaders. This leadership standard would have captured culpable instigators of aggression, and incorporating this level of influence would also have been far more in line with the Nuremberg and Tokyo precedents.[551]

Despite eventually succumbing to the majority preference for the application of the stricter 'control or direct' test, the Special Working Group repeatedly acknowledged the existence and validity of the argument that non-military or non-political leaders capable of shaping or influencing the actions ought to be captured. For example, the 2006 Princeton Report referred to 'consensus among participants that aggression should be understood as a leadership crime', but conceded 'that the leadership clause should refer to the ability to influence policy'.[552] The Chairman's Discussion Paper describes the state of negotiations in 2007 as follows:

> Some states' objective had been to replace the phrase 'being in a position… to exercise control over or to direct' with 'being in a position… to shape or influence' and to thus assure in particular the inclusion of private economic actors such as industrial leaders… The Chair pointed out that it had always been understood that the 'control or direct' formula covered this group in any event.[553]

[551] See the discussion of the *Farben, Krupp, Ministries* and *High Command* cases (in section 3.2), and Heller (2007) (n. 244).
[552] 'Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression', held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, United States, from 8 to 11 June 2006, (the 2006 *Princeton Report*), ICC-ASP/5/SWGCA/INF.1, at para 88.
[553] See Coalition for the International Criminal Court, 'Observations about the Discussion Paper Proposed by the Chairman', ICC-ASP/5/SWGCA/2 (25 Jan. 2007), at 5.

This statement reiterated the same point made at the 2006 Intersessional Meeting 'that it had been always understood that the leadership clause would reach just as far [as covering industrialists and financiers] and that it had never been limited to heads of state or individuals in the military'.[554]

Even as late as 2009, the Special Working Group recognized in its report of its final session the existence of the view amongst some States that the leadership clause ought to be sufficiently wide to include non-governmental actors who held 'effective control over the political or military actions of a state,' for instance high-level industrialists.[555] Notwithstanding this acknowledgment, a provision representing this view failed to be incorporated into the final definition of Article 8 *bis* due to the vehement resistance of a number of powerful States against a wider clause. Consequently, Article 8 *bis* employs the narrowest of leadership standards, restricting potential liability to political and military leaders at the highest level only. The prosecution of private economic actors now appears to be entirely precluded.

In practice, the limitation of the definition to only the highest political and military leaders is likely to amount to a vast restriction of the Court's jurisdiction. If interpreted literally, the definition may prove to be inapplicable in a great number of modern aggression scenarios, which are often executed through the exertion of soft influence rather than the exercise of old-fashioned hard power through traditional politics and military operations. The formal position and effective control of individuals may in reality be neither apparent

[554] 'Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression', ICC-ASP/5/SWGCA/INF.1 (5 Sept. 2006).
[555] *Report of the Special Working Group on the Crime of Aggression* (7th session, 2nd resumption, New York, 9-13 February 2009).

nor essential when committing acts of aggression.[556] An example is presented, for instance, by Robert Heinsch, pointing to the modern problem of religious leaders,[557] who may be in a position to influence a State's actions towards aggressive use of force, a situation which has arisen for some time in Iran and Afghanistan, and recently in the Middle East and North Africa following the Arab Spring uprisings. Other influencers could be spin doctors or war mongers supporting aggressive war efforts for power or financial gain. Armament and weapons manufacture is also a profitable business, and the prospect of profit is likely to provide a strong motive for an incitement of aggressive war efforts. Large contributions to election campaigns and lobbying by the armament industry may influence a political leader to consider an act of aggression they might otherwise not be tempted to undertake.

Allowing the ICC discretion to view the political or military position as a mere indicator of the defendant's presumed influence over state acts would be, this thesis argues, a beneficial alternative. Intellectual or economic influencers inciting aggressive state acts could be deemed to be instrumental to such acts, giving rise to potential prosecutions, just as they did in the Nuremberg precedents. Support for the inclusion of such highly influential individuals in a non-political or non-military capacity can also be derived from the application of a similar logic in the crime of genocide, which has been declared as falling within 'the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such.'[558] The crime of aggression has been

[556] See, for instance the arguments presented by Dov Jacobs, 'The Sheep in the Box: The Definition of the Crime of Aggression at the International Criminal Court' (2010) The Review Conference and the Future of the International Criminal Court, Proceedings of the First AIDP Symposium for Young Penalists in Tuebingen, Germany, Kluwer Law International, 131, 144.
[557] Heinsch (2010) (n. 376), 722, 723.
[558] See *Prosecutor v JP Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para 562. Liability for incitement to genocide arises from Article 25 (3) (e) of the Rome Statute.

deemed to be 'the supreme international crime', and as such merits sincere and effective prosecutions of persons instigating aggressive use of force. The Rome Statute already restricts possible prosecutions to only the worst perpetrators of the most serious crimes,[559] greatly limiting the possibility of frivolous prosecutions. An excessive emphasis on and restriction to political and military leadership is as unnecessary as it is inappropriate in the face of modern types of aggressors in an age of a growing phenomenon of cyberwars and information warfare. A wider clause incorporating the potential liability of intellectual, spiritual, or economic influencers at a high-level would have been more appropriate.

3.5 Participation at a lower level and other modes of conduct

An issue closely related to the leadership clause is the question of exactly what conduct amounts to an act of aggression by a person in control over the political or military action of a State. Article 8 *bis* (1) settles this question by simply naming this conduct as 'the planning, preparation, initiation or execution' of an act of aggression. During the negotiation stage, however, some suggestions were made to include other forms of participation, which took into account the possibility that, just as in respect of the other crimes in the Rome Statute, there existed a variety of participation levels including, as considered in Article 25 (3) (b), 'order[ing], solicit[ing] or induc[ing]' the commission of aggression.[560]

[559] See Preamble (n. 85), Articles 1 and 5 of the Rome Statute (n. 1).
[560] Article 25 (3) (n. 481). For the suggestion of applying these modes of participation to the crime of aggression, see the '2007 Discussion Paper on the crime of aggression proposed by the Chairman', ICC-ASP/6/SWGCA/INF.1, and Annex.

In particular during the 6th session of the Special Working Group in 2007, a new differentiated approach proposed that the offender '(leads) (directs) (organizes) and/or directs) (engages in) the planning, preparation, initiation or execution of an act of aggression/armed attack.'[561] The differentiated conduct clause, and the inclusion of other modes of participation did, however, not gain the support of the majority, who insisted on a strict leadership requirement in order to exonerate from criminal responsibility persons of a lesser capacity. Instead, there was much support for the inclusion of the new draft Article 25 (3) *bis*,[562] creating an exception to the other modes of participation in Article 25 (3) and excluding expressly the liability of mere soldiers obeying orders, or aiders and abettors.[563] Despite continuing resistance by the minority, the majority view was eventually adopted into the 2010 definition.[564]

This exception and exclusion of other modes of liability can be seen as another retreat from the principle laid down in the precedents of Nuremberg and Tokyo.[565] Article II (2) of Control Council Law No 10 had described accessory liability for crimes against peace (the forerunner of aggression), war crimes and crimes against humanity as follows:

> Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article if he

[561] ICC-ASP/6/SWGCA/INF.1, and Annex, ICC-ASOP/5/SWGCA/2, pp. 3-5, Variant (a). A monistic option was retained in variant (b) identifying the individual aggressor as a person who simply 'order[ed] or participate[d]' actively in the criminalised act. The precursors of 'intentionally and knowingly' from the 2002 Paper had been dropped in line with the majority opinion. For a detailed discussion of the differentiated versus monistic approach, see Kress and von Holtzendorff (2010) (n. 5), 1184.
[562] See n. 482.
[563] For Article 25 (3) and Article 25 (3) *bis*, see n. 481-2.
[564] See the Discussion Papers in the *Travaux Preparatoires* (n. 317) and Resolution 6 (n. 2).
[565] See the above discussion in section 3.1.

> was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.[566]

This paragraph demonstrates that accessory liability was indeed far wider in the Nuremberg precedent than in the modern definition of aggression.

3.6 The accessory liability doctrines of Conspiracy and Joint Criminal Enterprise

It may be possible to apply the liability doctrine of Joint Criminal Enterprise to the Crime of Aggression, as a way of 'getting around' the narrow conduct clause and the control or direct requirement in the 2010 definition, thereby widening jurisdiction.[567] The doctrine of conspiracy, by comparison, is usually invoked after the event, and this would be certain to raise legality concerns on account of creating liability retrospectively. Furthermore, conspiracy is not recognized by most civil law jurisdictions,[568] and international criminal

[566] Article II (2) of Control Council Law No. 10 (n. 121).

[567] See, for instance, the discussion in Weisbord (2009) (n. 495), at 55-9, who views the Joint Criminal Enterprise doctrine as 'the most appropriate liability doctrine for the definition of aggression', 58. For the purpose of the ICC's jurisdiction over the crimes in Article 5 of the Rome Statute, Cassese contends that it is 'joint control' over the criminal act and potential 'indirect perpetration' through another person, which constitutes the relevant basis of accessory liability. See Cassese (2013) (n. 12), 163-179, in particular 178.

[568] See Robert Cryer et al. *An Introduction to International Criminal Law and Procedure* (CUP 2010), 228.

law currently recognises conspiracy only in relation to the crime of genocide.[569] Whilst the Nuremburg IMT attempted to prosecute conspiracy to commit crimes against peace, this crime was a separate offence rather than a connection by which group culpability could be transferred to an individual.[570] It is therefore doubtful that conspiracy could be easily applied to the modern Crime of Aggression.[571]

The doctrine of Joint Criminal Enterprise, on the other hand, may fare better as a liability doctrine for the Crime of Aggression, since it is 'a common plan, design or purpose which amounts to … the commission of a crime'[572]. In the *Tadic* case the ICTY read JCE into its statute,[573] and in that and subsequent ICTY cases 3 forms of enterprise participation were identified. The first one consisted of a 'shared intent to bring about a certain offence', the second of 'organized systems of repression and ill-treatment', and the third of 'criminal acts beyond the common design, but a natural and foreseeable consequence of effecting it'.[574]

Joint Criminal Enterprise is also recognized generally in the Rome Statute in Article 25 (3) (d).[575] Reading it into the Crime of Aggression therefore would make perfect sense,

[569] In Article III of the 1948 Genocide Convention, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948. However, Article III is only partially included in Article 6 of the Rome Statute, unlike in the Statutes of the ICTY and ICTR.
[570] See the discussion above.
[571] See also Cassese (2013) (n. 12 and 567 above).
[572] *Prosecutor v Kupreskic*, Case No IT-95-16-T, Judgment (Jan 14, 2000), para 772.
[573] For *Tadic*, (IT-94-1-A) (n. 115), Appeals Chamber Decision 15 July 1999, paras 193, 200.
[574] See Weisbord, (2009) (n. 495), 58, citing A.M. Danner &J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', (2005) 9 CAL. L. Rev. 75, 120.
[575] Article 25 (3) (d) of the Rome Statute provides for criminal liability of a person who '[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional or shall either (i) [b]e made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) [b]e made in the knowledge of the intention of the group to commit the crime.'

allowing the ICC and its prosecutors to locate individual responsibility within a wide range of organizations. Roger Clark, for instance, asserts that the drafters of the Aggression amendment considered the application of Article 25 (3) (d) to the crime of aggression, and JCE therefore ought to be a culpable form of participation in aggression.[576] He also derives support for the application of JCE to the crime of aggression from the Nuremberg precedent, citing directly:

> A plan in the execution of which a number of persons participate is still a plan, even though it is conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated.[577]

Whilst Roger Clark's views have received fervent support, and have been developed even further to insist that the entire future of individual liability for the crime of aggression lies within JCE,[578] they have also encountered strong opposition. Thus Robert Heinsch, for instance, interprets the narrow leadership clause of Article 8 *bis*, reiterated by Article 25 (3) *bis*, as determinatively limiting accessory liability.[579] Following this argument, it should not be possible to prosecute perpetrators in a less responsible position simply for the crime of aggression through the 'backdoor' of accessory responsibility. A different, if familiar, argument against the inclusion of JCE has been presented by Mark Osiel,

[576] See Roger S. Clark, 'Individual Conduct', in Kress and Barriga (eds.) (2017) (n. 246), 568.
[577] Clark, *ibid*, citing from the Nuremberg Judgment (n. 3), pp. 223, 226.
[578] See for instance Noah Weisbord, (2009) (n. 495), 58.
[579] See Heinsch, (2010) (n. 376), 734.

criticising the possible application of the doctrine in criminal aggression for violating the legality principle, since the defendant cannot know in advance how inclusively the 'common purpose' will be interpreted.[580] Consequently, Osiel argues, the application of JCE to the Crime of aggression is 'dangerously illiberal'.

This view can, however, be countered by the fact that the high standard of a leadership qualifier and the narrow conduct clause would prevent prosecution on the basis of JCE, where such 'common purpose' is not blatantly obvious. Fears of abuse and illegality should therefore be unnecessary. Interpretations by the judiciary through close analogy may be necessary and ought to be permitted.[581] The development of precedents may be required for effectiveness of the overly narrow conduct and leadership clause, and consistent interpretations will hopefully create a predictable concept of aggression 'consonant with the differing dimensions of mass atrocities,'[582] to use Osiel's own words.

3.7 An overall evaluation of the strict leadership requirement

In evaluation, doubts arise whether the stringent leadership requirement in the Kampala definition of aggression is capable of dealing with modern challenges. Even more traditional forms of warfare now exclude potential culpability of perpetrators of acts of

[580] M. Osiel, 'The Banality of Good: Aligning Incentives against Mass Atrocity', (2005) 105 Colum. L. Rev. 1751, 1770. For the familiar argument of *nullem crimen sine lege*, see the discussion above, and section 4.3 in Chapter 1.
[581] On this point, it is acknowledged that Article 22 (2) of the Rome Statute (n. 477) limits wide analogy, insisting on strict construction of the Statute. Article 31 (1) of the VCLT also reinforces strict application of treaty provisions, and this view has been strongly defended, for instance, by Dapo Akande (n. 459). The point made here is that without wider interpretation, the definition is simply not functional.
[582] Osiel (n. 580), 1770.

aggression at less than the highest political or military level. Mid to upper level support, which is essential to classic aggressive war-making is now not captured, because of the exclusion of accessories in Article 25 (3) *bis*.[583]

The provision therefore makes prosecutions of aides and accessories to the crime of aggression highly unlikely, despite the fact that, without their efforts, the aggressive act might never have succeeded. The resulting likelihood of prosecutions, against top leaders only, can be criticised as taking place 'in a vacuum' in the absence of jurisdiction over these aides and accomplices.[584] This protection afforded to perpetrators at only a slightly lower level is contrary to the Nuremberg and Tokyo precedents,[585] and effectively means 'bestowing collective innocence'[586] on such aides and accomplices without whom an act of aggression could not be executed.

Furthermore, the above discussion on the requirement to 'control or direct' versus 'shape or influence', and reference to political or military leaders only, has demonstrated that it is now virtually inconceivable that any non-governmental or non-military actor could be prosecuted for the Crime of Aggression. Consequently, the application of individual criminal responsibility to private economic actors is now extremely unlikely. The potential prosecution of industrial or financial leaders of sufficient influence could have sent a message to bankers, weapons manufacturers and traders, financiers, and ideological spin doctors that they would not be immune from prosecution for aggression for their participation at instrumental level. This avenue now seems barred.

---

[583] See n. 482.
[584] See M. Drumbl, 'The Push to Criminalize Aggression: Something Lost Amid the Gains?' (2009), 41 (2) Case W. Res. J. Int'l L. 291, 315.
[585] Heller (2007) (n. 244), see also Drumbl, *ibid*.
[586] Drumbl, *ibid*, 316.

Similarly, the leadership requirement would now also render it extremely difficult to attribute liability to complicit third party states' officials, a situation which may arise in a proxy war. The leadership standard has been set so high, that a political or military leader would have to be in a position to control the political and military actions of both their own State as well as those of the third party aggressor state, operating as a puppet. The only possible example of such a high level of control may be 'a superpower's use of a client state to fight a proxy war – a situation that certainly existed during the Cold War.'[587] The post-War history demonstrates third party states' frequent recourse to blatant support of such acts of aggression.[588] Due to the development of modern warfare,[589] and the ability to conduct acts of force with minimal exposure of the aggressor state, such proxy wars have become a far less common occurrence.[590]

It is now extremely doubtful that 'aiding or assisting' by third party state officials would demonstrate sufficient control to satisfy the stringent leadership requirement for individual criminal responsibility for aggression, even though, paradoxically, a third party country could incur state responsibility.[591] This is because, under Resolution 3314, the Security Council is entitled to consider other circumstances,[592] and the list of aggressive acts is not exhaustive.[593] This situation sits uncomfortably with the effort throughout the

[587] See Kahn, *Nuclear Weapons and the Rule of Law*, 31 NYU J Int'l L & Pol (1999) 349, at 402, cited in Heller (2007) (n. 244), 493 at footnote 103. See also the discussion above on pp. 92-3 and fn. 376.
[588] See for instance China's return of 50,000 Korean soldiers to North Korea just prior to the Korean War, which has been cited as 'aiding and assisting' another State's commission of aggression, see C. Jian, *China's Road to the Korean War* (Columbia University Press 1994), 110-111. See also William Schabas, 'The Unfinished Work of Defining Aggression: How Many Times Must the Cannonballs Fly, Before They Are Forever Banned', in D. McGoldrick et al. (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004), at 137.
[589] See the discussion in Chapter 3.
[590] See, however, the situation in the Yemen, and Reeve's account (n. 376).
[591] Under Resolution 3314 (n. 14) providing a wider definition than the crime (see n. 347).
[592] *Ibid,* Article 2, which has been excluded from Article 8 *bis* Rome Statute.
[593] *Ibid,* Article 4, also excluded from Article 8 *bis.*

20th century to eradicate the crime of aggression and develop international criminal law to hold individuals liable. In the words of the IMT at Nuremberg '[C]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[594] The lack of a possibility to prosecute third party officials is as unfortunate as the fact that private economic actors, who are essential to an aggressive state act, will escape criminal liability under the current provisions because of the stringent leadership requirement. Whilst the application of accessory liability to the crime of aggression was pursued at Nuremberg and was considered as a jurisdictional path for the modern crime, this route may now be barred because of the incorporation of Article 25 (3) *bis* and objections on the ground of legality concerns. It will be interesting to look to the Court's own jurisprudence as deciding the question whether accessory liability has been definitively and finally ruled out, or whether it may survive as a mode of participation for the crime of aggression.

[594] See Nuremberg Judgment (n. 3).

CHAPTER 3: THE CRIME'S STATE-CENTRICITY AND THE LIMITED LIST OF AGGRESSIVE ACTS

1. Introduction

The previous chapter considered the elevated gravity threshold of a 'manifest violation', and the stringent leadership requirement in Article 8 *bis* (1), which together set a very high bar for the crime and consequently limit jurisdiction of the Court extensively. This chapter considers the issues arising, in particular, from the second paragraph of the definition of the crime. The first of these examines the characteristic state centricity of the crime, which was also apparent in the first paragraph of Article 8 *bis*. This stipulates that individual criminal liability can only arise for a person in a position 'effectively to exercise control over or to direct the political or military action of *a State*',[595] and this is greatly reinforced in Article 8 *bis* (2). Thus, the crime of aggression can only be committed by one State, through its military and political leaders, against another State. The first sentence of Article 8 *bis* (2) provides:

> For the purpose of paragraph 1, 'act of aggression' means the use of armed force *by a State against* the sovereignty, territorial integrity or political independence

[595] Article 8 *bis* (1) Rome Statute, see Chapter 2 (p. 85).

> of *another State*, or in any other manner inconsistent with the Charter of the United Nations.[596]

This state centricity is a fundamental feature of the crime of aggression, since any individual criminal liability is based on the act of the State. Consequently, the definition in Article 8 *bis* concerns itself solely with state-on-state aggression, raising the question whether this, in reality, provides a sufficiently modern interpretation of aggression scenarios, which are increasingly committed by non-state groups. Statehood itself has traditionally been defined by a set number of criteria,[597] however it will be considered whether the term could be stretched in order to apply to state-like entities and other aggressive groups in order to potentially avoid over-narrowness and extend jurisdiction.

The second issue arising from Article 8 *bis* (2) is the limited list of specific state acts which are capable of amounting to an act of aggression. This is derived directly from the 1974 General Assembly Resolution 3314 and consequently reflects the type of aggressive warfare prevalent at that time.[598] Thus Article 8 *bis* (2) continues in its second sentence:

> Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
>
> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting

[596] Article 8 *bis* (2), emphasis added.
[597] For the Montevideo criteria of statehood, see n. 608 below.
[598] See Article 3 of Resolution 3314 (n. 14).

from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

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

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

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

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

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

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[599]

Only Articles 1 and 3 of Resolution 3314 have been incorporated into Article 8 *bis* of the Rome Statute, which is therefore silent on other evidence and circumstances,[600] the non-

[599] Article 8 *bis* (2) Rome Statute.
[600] Resolution 3314 (n. 14), Article 2.

exhaustiveness of the list of acts of aggression,[601] and the non-availability of political, economic or military justifications for an act of aggression.[602] Consequently, the use of force other than armed seems to be precluded, and the list of acts appears to be closed, as the amendments to the Rome Statute currently do not allow for an extension to other acts of aggression.[603] Here the question arises yet again whether this list of acts is adequate and appropriate in creating efficient jurisdiction over modern types of conflict, and whether any wider interpretation or extension might be possible. Before contemplating this question, let us consider the limitation of culpable acts to state-on-state aggression, which pervades the definition of the crime in Article 8 *bis.*

2. State versus State aggression

Article 8 *bis* (1) and the first sentence of Article 8 *bis* (2) insist on the application of the definition of aggression to state-on-state aggression only, at a time when most modern threats originate from non-state actors.[604] Thus, Article 8 *bis* (1) describes the perpetrators of aggression as controlling or directing the political or military action *of a State*. Article 8 *bis* (2) adds to the emphasis on the State, by describing aggression as the use of a State's armed force against the sovereignty, territorial integrity or political independence *of*

[601] *Ibid,* Article 4.
[602] *Ibid,* Article 5.
[603] See the discussion below.
[604] See for instance John Robb, *Brave New War: The Next State of Terrorism and the End of Globalisation* (Wiley 2007) 7.

another State.[605] All of the examples in paragraph 2 (a)-(g) reiterate the requirement for state-on-state acts of aggression,[606] as do the elements of the crime.[607]

The traditional criteria of statehood were established in Montevideo in 1933 and have been widely accepted as 1) a permanent population, 2) a defined territory, 3) the existence of some form of government, and 4) the capacity to enter into relations with other States.[608] In addition, it may now be possible that the recognition by a significant number of other States may serve as an additional criterion.[609] The emphasis on statehood as a qualifier for the Crime of Aggression is derived from the general prohibition of the use of force by States in Article 2 (4) of the UN Charter[610] and the definition of the state act in Resolution 3314.[611] The statehood qualifier now appears in Article 8 *bis* as a double prerequisite, applying to both the perpetrator and the victim.

Nevertheless, the insistence on state-on-state aggression was not entirely inevitable. A comparison with the other three crimes under the Rome Statute reveals that they do not require such a state act as a prerequisite to individual criminal liability.[612] Furthermore, the International Law Commission had, as early as 1991 considered individual criminal responsibility for acts of aggression committed by non-state actors, in the context of mercenaries.[613] The need for a shift of focus towards the acts of individuals rather than a

[605] Article 8 *bis* (2), emphasis added.
[606] This is unsurprising, as they are taken directly from Resolution 3314 (n. 14), which defines the state act of aggression.
[607] See 'Elements of the crime', Annex I to Resolution 6 (n. 2).
[608] Montevideo criteria of statehood, as established in 1933, see Hersch Lauterpacht, *Recognition in International Law* (1947), 52-8).
[609] See Rosalyn Higgins, *Problems & Process – International Law and How We Use It*, (OUP 1994), 42.
[610] Article 2 (4) UN Charter (n. 195).
[611] Resolution 3314 (n. 14).
[612] Genocide, Article 6, Crimes against humanity, Article 7 and War Crimes Article 8 of the Rome Statute 1998.
[613] In Chapter III A 3 e of the 1991 Draft Code (n. 298).

State has also gained growing support in the academic world.[614] Thus, Weisbord, for instance, criticised the state element in the 2009 Draft definition, as 'riddled with anachronistic concepts that undermine its relevance today',[615] due to its focus on only conventional state-on-state war and state-sponsored insurgency.

Despite the developing recognition of the increased involvement of non-state actors in situations of aggression, it is a surprising fact that the state element was neither discussed in detail nor disputed during the negotiations of the definition of the crime of aggression.[616] This anomaly leads to the conclusion that the majority of States in the lead-up to Kampala felt that the inclusion of non-state actors would have complicated agreement on a definition even more, and endangered consensus. Notwithstanding the apparent certainty of the SWGCA in applying the crime of aggression to States only rather than including non-state actors, the question arises whether this narrow perception of state aggressor and victim state is still valid in modern times. Proxy wars between two States may engage non-state groups only, on the territory of a third State, making attribution of aggressive acts to a specific State very difficult, if not increasingly impossible. Alternatively, a proxy war could take place under the guise of a civil war between an externally supported non-state group and the State government, which is supported by another State.[617] Aggressive acts of non-state groups under control of a State could also be used directly against another State, muddying clear attribution.[618] Another problematic

[614] See for instance Antonio Cassese, 'On Some Problematical Aspects of the Crime of Aggression' (2007), 20 Leiden J. Int'l L., 841, 847. See also Claus Kress, 'The State Conduct Element' (n. 460) in Kress and Barriga (eds) (2017) (n. 246).
[615] Weisbord (2009) (n. 495), 22.
[616] See Astrid Reisinger-Coracini's and Pal Wrange, 'The Specificity of the Crime of Aggression', in Kress and Barriga (2017) (n. 246) 313-4.
[617] See for instance the war in Yemen discussed in Chapter 2 (n. 389).
[618] Mark S. Stein, 'The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?' (2005), 16 Indiana Int'l. & Comp. L. Rev., 4.

situation may arise where non-state actors act independently of a State, but employ traditional methods of aggressive warfare reminiscent of those utilised by States. In any of the above situations, it may be extremely difficult to apply the current aggression provisions to either the non-state group or the State which may instruct or sponsor the non-state group, unless it could be shown that the State exercised a sufficient level of control over the actions of the non-state group in order to attribute them to the State in question itself.

By comparison, customary international law appears to be wider, although in order to establish effective control, attribution to a State is still essential. Furthermore, the State behind the act of aggression would have to provide more than merely logistical support to the non-state group for their actions to be attributable to the State. Thus both *Nicaragua* and the *Armed Activities* case confirmed that the actions of non-state groups could be attributable to a State, where they were employed by that State and it exercised sufficient control over their actions.[619] The *Armed Activities* case specifically established an explicit link between the activities of a non-state armed group and an instructing State, based on Article 8 of the ILC's Draft Articles on State Responsibility.[620] This article provides:

> **Article 8**
>
> The conduct of a person or group of persons shall be considered an act of a **State** under **international** law if the person or group of persons is in fact acting on the

[619] For *Nicaragua* (1986), see n. 37, paras 75-125. For *Armed Activities* (2005), see n. 37, Judgment of 19 December 2005, para 345.
[620] Article 8 of the ILC's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (November 2001) Supplement No. 10 (A/56/10), Chp. IV.E.1.

> instructions of, or under the direction or control of that **State** in carrying out the conduct.[621]

Following these precedents, there should be no reason why responsibility should not be attributed to another State for the actions of a non-state group, at least at customary law, if these essential links and the required level of control could be proved, and their exclusion in the 2010 Kampala definition remains striking.

Moreover, the possibility of applying the aggression provisions to non-state actors would be warranted simply in order to maintain validity of the new criminal aggression provisions in the face of contemporary phenomena. Thus, military experts join academics in pointing to the emerging irrelevance of traditional state-on-state combat and the rise of terrorist and guerrilla warfare. The US counterterrorism expert John Robb, for instance, advises that '[w]ars between States are now, for all intents and purposes, obsolete.'[622] He continues:

> The real threat, as seen in the rapid rise in global terrorism over the past five years, is that this threat isn't another State but rather the super-empowered group […] – with the ability of one man to declare war on the world and win.[623]

Similarly, T.X. Hammes points to a trend '… downward from nation-states using huge, uniformed armies to small groups of like-minded people with no formal organization who simply choose to fight.'[624] Philip Bobbitt adds an interesting twist to this discussion by

---

[621] *Ibid.*
[622] Robb (n. 604), 7.
[623] Robb, *ibid*, at 7-8.
[624] T.X. Hammes, 'Fourth Generation Warfare Evolves, Fifth Emerges' (2007) Mil. Rev., 14, 20.

contemplating the possibility of reinterpretation of 'State' to include non-state groups. Whilst conceding that 'asymmetric warfare will become the norm when great powers are confronted', he also points out that '[t]he state has undergone many transformations in the constitutional order - the basis for the state's legitimacy…Could Al Quaeda be an example of this new form?'[625] Consequently, traditional notions of statehood may require reconceptualisation in order to include powerful non-state groups who are the main actors in modern warfare. Denying the existence of this development, and excluding non-state actors from the crime of aggression, defies logic and reason.

The above statements by military experts also demonstrate that decentralisation of war is now commonplace, and States no longer have a monopoly on maintaining armed forces, and effective control over a territory and its people can unquestionably be held by organisations other than a State. At a time when independent non-state groups have been 'identified as the most important emerging threat to global security',[626] a strict and narrow interpretation of the definition of the crime of aggression failing to capture 'weapons other than the state (as currently conceived) and aggressors besides the statesman…,'[627] is as unhelpful as it is inappropriate.[628]

A timely and innovative reinterpretation of the definition of the crime to include 'groups' or 'state-like entities, on the other hand, might be able to capture 'political-military organizations',[629] which attack States but are not strictly classed as States themselves.

[625] Philip Bobbit, *Terror and Consent: The Battle for the Twenty-First Century* (Knopf 2008), 126. More recently, the non-state group ISIS (Islamic State of Iraq and Syria) have been responsible for many acts of aggression and atrocities. The name is misleading, since application of the Montevideo criteria (p. 148) would preclude the group from being a State.
[626] Weisbord (2009) (n. 495), 27.
[627] *Ibid*, 24.
[628] This view is also shared by May (2008) (n. 438), 319-41.
[629] Weisbord (2009) (n. 495), 30.

This could potentially widen the Court's jurisdiction by extending liability through a link to aggressive organisations other than the traditional State. Determination of such state-like entities would have to be left to the judges of the ICC, which admittedly could lead to accusations of judicial activism. Nevertheless, this thesis argues that judicial determination would be preferable to the effect of a lacuna in the legislation, leading to irrelevance of the definition and ineffectiveness of jurisdiction.

Moreover, organisations and groups already make an appearance in the Rome Statute in the provisions on Crimes against Humanity[630], and War Crimes.[631] Extending this understanding to the Crime of Aggression should not be too outlandish an idea. However, the SWGCA's documents throughout the discussions on the Crime of Aggression demonstrate negotiating parties' tenacious insistence on a strictly limited definition, as part of an ongoing struggle to achieve any consensus at all. Any radical suggestion of change of wording may have overthrown all efforts and any hope of ratification. Nevertheless, without such a wider interpretation of 'State' as a 'group' or 'state-like entity', and a leader who is 'in a position effectively to exercise control over or to direct the political or military action of a State [or group],' the definition is at great risk of being irrelevant from the outset.

[630] Article 7 (2) (a), Rome Statute (n. 1), referring to an '[a]ttack directed against any civilian population, pursuant to or in furtherance of a State *or organizational policy* to commit such attack'.
[631] Article 8 (2) (f), Rome Statute, describing armed conflicts not of an international character, and referring to 'armed conflict between governmental authorities and organized armed groups or between such groups'.

3. The List of acts deemed to be aggressive

The final major issue raised by the definition of the crime of aggression is whether the limited list of acts in Article 8 *bis* (2), describing outmoded forms of state aggression as perceived in 1974,[632] is suitable for the prosecution of modern day acts of aggression. The list of aggressive acts in the Kampala Definition includes invasion, bombardment, blockade, an attack by armed forces or use of those armed forces within another State's territory contrary to agreed conditions, a State's permission to allow its territory to be used for an act of aggression against a third State, and the sending or directing of proxy forces into another State.[633] The list of acts is taken directly from Article 3 of Resolution 3314,[634] but without the reference to possible determination of other acts, which was also contained in Article 4 of that resolution.[635] Consequently, the actual list of acts in Article 8 *bis* reflects only modes of armed conflict experienced up to the time of the drafting of the 1974 Resolution. Additionally, the definition of aggressive acts focuses on bureaucratic organizational forces with permanent infrastructures and institutions, i.e. standing armies, and mainly considers traditional state-on-state combat. To a lesser degree state-sponsored insurgencies are also recognised.[636]

The resort to the limited list of traditional acts of aggression in the final version of Article 8 *bis,* to the exclusion of other provisions, was a perplexing choice by the SWGCA, particularly in light of the prominent emergence of new forms of warfare during the

[632] Resolution 3314 (n. 14).
[633] Article 8 *bis* (2) (a)-(g), see pp. 145-6.
[634] Resolution 3314 (n. 14), Article 3 (a)-(g).
[635] *Ibid,* Article 4.
[636] Article 8 *bis* (2) (g), see p. 146.

prolonged negotiating phase.[637] This feature will be explored in greater detail below, however the salient fact worth mentioning at this point is that a great number of new forms of aggressive threats have, over the last two decades, been recognised.[638] Many of these are capable of great devastation of a foreign State's systems and processes without any of the physical territorial transgression insisted on in Article 8 *bis* (2).

An examination of the negotiations shows that the failure of Article 8 *bis* to reflect modern types of warfare was neither uncontroversial nor entirely predictable. There were, in fact, a number of proposals ranging from even greater restriction to much wider jurisdiction. At one end of the spectrum of proposals considered by the SWGCA, lay suggestions of a result-based definition instead of a limited list, suggesting that, in order to achieve 'legal precision, clarity and certainty, the criminal standard adopted should be higher than for the political compromise achieved in Resolution 3314.[639] This view would have insisted on the armed attack resulting in effective occupation or annexation in order to qualify as aggression. In evaluation, a definition along those lines would be even more restrictive than the outmoded list in Article 8 *bis* (2). Thus, even the traditional acts of aggression which have been included do not, necessarily, require physical occupation or annexation of territory and aggression may take many other forms than traditional usurping and occupation of physical territory. The inclusion of the narrow prerequisite of occupation or annexation would have resulted in even greater limitation.

The second option was for the SWGCA to adopt a limited list along the lines of Resolution 3314. This choice was based on the different, but equally restrictive view that

[637] See section 3.1 below.
[638] *Ibid*.
[639] '1997 German Proposal' (n. 395).

the greater the independent determination powers to be granted to the new Court, the greater the need for such a specific list in order to 'achieve full respect for the principle of legality'.[640] This particular argument, however, also did not take into account the danger to a country's territorial integrity, sovereignty and political independence if subjected to an attack not covered by that restrictive list.[641] Consequently, a third option was introduced, which suggested replacing the list with a general, generic definition,[642] or, if a list was unavoidable, using this as mere examples of aggressive acts, non-exclusive to other perceivable forms of aggression.[643]

In 2006, the SWGCA considered a compromise solution to the impasse between the 'specific list' and generic approaches.[644] This compromise suggested combining the generic and specific options by expressly providing for a *non*-exhaustive list which was to be illustrative, as well as a general 'chapeau' similar to the Crimes against Humanity provisions in Article 7.[645] Legality could thus be safeguarded, because the determination of other acts was subject to the restrictive chapeau, but equally some flexibility was allowed for, because the list was only illustrative. The SWGCA also recommended that a reference should be included to *all* the relevant documents, including the Nuremberg Charter, Resolution 3314 and the 1996 Draft Code.[646]

---

[640] See for instance 'Suggestion made orally by Italy on 13 March 2000 with regard to a structure for discussion on the crime of aggression', PCNICC/2000/WGCA/DP.3

[641] As pointed out by the Colombian delegation. 'Comments by Colombia on the Italian proposal made orally in the Working Group on 13 March 2000', PCNICC/2000/WGCA/DP.2.

[642] *Ibid.*

[643] See the 2000 'Proposal submitted by Greece and Portugal', 28 November 2000, PCNICC/2000/WGCA/DP.5.

[644] 2006 *Princeton Report* (n. 552).

[645] See n. 612.

[646] 2006 *Princeton Report* (n. 552), para 13. This approach gained support, particularly, by Ferencz, see Benjamin Ferencz, 'Enabling the International Criminal Court to Punish Aggression' (2007) 6 Wash. U. Global Stud. L. Rev. 551, pt. I B.

Despite the solid grounds expressed by the SWGCA in 2006 for the compromise of a non-exhaustive list reined in by the chapeau, which could have satisfied both camps, States' disagreements on the subject continued. Thus, the 2007 Princeton Report reflects the ongoing discussion and ambiguity, by reporting on the unwavering view expressed by some States that the list should be open and non-exhaustive,[647] as well as the uncompromising argument by others for a closed list in order to satisfy the legality principle. Yet other States, without specifying which ones, could not decide on either stance, viewing the list as somewhere in between, i.e. 'semi-closed', or 'semi-open.[648] However, consensus had now been reached that, whatever the nature of the list, an act of aggression would have to fulfil the requirements of the chapeau.[649]

The text of the final definition in Article 8 *bis* (2) now contains this chapeau, and then moves on to list the acts amounting to aggression, thus far reflecting the SWGCA's 2006 recommendations. However, the discussion has revealed that Article 8 *bis* does not provide for the determination of acts other than the restrictive list, nor does it refer to other relevant documents, for instance the Nuremberg Charter or the 1996 ILC Draft Code, or the missing articles from Resolution 3314. It also does not state that the list of acts is merely illustrative, which would have expressly allowed for flexibility. Therefore, it falls far short off the 2006 compromise solution.

[647] 2007 *Princeton Report* (n. 416), paras. 46-53. See also the December 2007 *SWGCA Report* (n. 422), para. 21. The reports are not specific as to which States favoured which stance, reflecting opinions generically.
[648] 2007 *Princeton Report* (n. 416), para 46. See also the discussion in Stefan Barriga, 'Negotiating the Amendments on the crime of Aggression', in Barriga and Kress (eds) (2012), *Travaux Preparatoires,* (n. 317), 28.
[649] 2007 *Princeton Report* (n. 416), para. 48.

3.1 The relevance of the list of aggressive acts in a modern context

As a result of the narrow list of acts, the description of forms of war in Article 8 *bis* (2) appears to be greatly outdated, and does not reflect advances in modern warfare, which is constantly developing. The above discussion has already considered this phenomenon with regards to the fact that the concept of 'State' no longer accurately reflects the modern aggressor (or victim).[650] The same problem arises with regards to the limited list of acts. Thus, over the last 20 years, in particular, modern war-making organizations have been re-structuring into 'hundreds of mercurial cells that make up organizations like Al-quaeda',[651] and, more recently, Boko Haram, and ISIS.[652] Non-state sponsored forms of aggression like terrorism and guerrilla warfare are increasingly common, employing new methods. Unfortunately, none of these considerations are currently reflected in the acts listed in Article 8 *bis* (2).

In addition, a new threat of systems disruption has been emerging, which involves no use of arms whatsoever. For example, a State's vital systems are nowadays capable of being disrupted remotely. Such a thoroughly modern threat is currently not included in the list of aggressive acts, and yet it may result in the annihilation of a country's defence mechanism, or paralyse transport, communications or emergency response systems, despite a lack of physical territorial transgression.[653] Examples are the sabotage of critical systems and cyber-warfare, which are capable of causing a vast amount of damage using widely affordable, untraditional means of warfare, and are able to hit the modern world's

[650] See the discussion in section 2, particularly at 150-2.
[651] Weisbord (2009) (n. 495), 16.
[652] See the discussion at pp. 150-3.
[653] This phenomenon was also briefly considered in section 3 of Chapter 2.

Achilles heel of increasing reliance on interdependent networks. This type of sabotage could, for example, severely impede the supply of electricity, telecoms, gas and water, transport, banking, national health services, government operations, as well as election processes.

This emerging threat of sabotaging another country's systems and processes has been widely recognised, for instance in the National Security Strategy and Strategic Defence and Security Review 2015, setting out the UK's Strategy until 2020, and the first annual report in 2016.[654] It was stated:

> The range of cyber threats and cyber actors threatening the UK has grown significantly – both from state and non-state actors. The UK increasingly relies on networked technology in all areas of society, business and government. This means that we could be vulnerable to attacks on parts of networks that are essential for the day-to-day running of the country and the economy.[655]

A similarly prominent recognition of the problem featured in a report by the United States Senate Select Committee on Intelligence.[656] This report acknowledged developing cyber threats to US security, potentially affecting 'critical infrastructure, public health and safety, economic prosperity, and stability'.[657] Additionally, the deployment of anti-

[654] National Security Strategy and Strategic Defence and Security Review 2015 (23 November 2015), setting out the UK's Strategy until 2020, and the first annual report in 2016 (7 December 2016), http://www.gov.uk/government/publications/national-security-strategy-and-strategic-defence-and-security-review-2015-annual-report-2016, accessed 30th October 2020. The latest review is now expected early in 2021.
[655] *Ibid*, para 1.8.
[656] National Security Strategy of the US in 2019, http://www.dni.gov/files/ODN/documents/National_Intelligence_Strategy_2019.pdf, accessed 30 October 2020.
[657] *Ibid*, 4-5.

satellite weapons in order to 'reduce US military effectiveness and overall security' were also recognised as an emerging threat.

Furthermore, the General Assembly has recently mandated two contemporaneous projects. The purpose of the first of these, undertaken by an Open-Ended Working Group (OEWG), is to determine the application of international law to cyber warfare.[658] The purpose of the second, a Group of Governmental Experts (GGE), is to assess how cyber threats impact on international peace and security generally.[659] Additionally, the Permanent Mission of Liechtenstein, with other partners, has created a Council of Advisers on the Application of the Rome Statute to Cyberwarfare.[660] This project, aims to develop an understanding of and identify 21st Century challenges and their alignment with existing international criminal law. Its report is still being awaited, however it is expected 'to propose sensible modification that will update the law for the coming age in order to ensure its relevance in the cyber domain'.[661] These ongoing projects clearly demonstrate a recognition within the international community as a whole, and by experts in the field, that international law and practices ought to apply to modern threats to peace and security, but may need to be modified.

---

[658] The Open-Ended Working Group on Developments in the Field of Information and Telecommunications (OEWG) in the Context of International Security (ICTs) was established in 2018 by UNGA A/RES/73/27 (5 December 2018). This group is currently (20th January 2021), preparing its Zero Draft and will meet for a final session in March 2021.

[659] Group of Governmental Experts on Advancing Responsible State Behaviour in Cyber Space in the Context of International Security (GGE), established by UNGA A/RES/73/266 (22 December 2018). Their final session should take place in May this year and their report will be submitted to the 2021 session of the General Assembly.

[660] See 'The Council of Advisers on the Application of the Rome Statute to Cyberwarfare – Project Background and Goals', 29 October 2019, The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, available at http://crimeofaggression.info/the-campaign/the-council-of-advisers-on-the-application-of-the-rome-statute-to-cyberwarfare/, accessed 30 October 2020.

[661] *Ibid.*

The effect of systems disruptions, cyber-attacks or even mere misinformation may be devastating and provoke military responses, for instance in anticipation of an imminent attack. At other times, the consequences may not be immediately observable or directly result in the physical disabling of a State's systems. Thus, information can be manipulated through the spreading of 'fake news', or democratic elections can be deliberately interfered with. These acts are clearly capable of constituting a threat to the territorial or political sovereignty of a State,[662] but are currently not included in the crime of aggression provisions. One such example is the alleged Russian Interference in the 2016 elections in the United States, as a result of which 12 Russian military officers were indicted for their role in the act of interfering with the democratic process.[663] Similarly, in November 2017, the UK's then Prime Minister Theresa May accused Russia of 'meddling in elections and planting "fake news" in an attempt to "weaponise information" and sow discord in the West,' by hacking the Danish Ministry of Defence and the German Bundestag.[664] Concerns were raised about Chinese interference prior to, and continue even after, the recent Taiwanese presidential elections[665] and China's cyber-attack on Australia's parliament and political parties.[666]

Despite the fact that these emerging threats first began to come to prominence during the negotiations for a definition of the crime, no provision for their consideration exists.

---

[662] See for instance *Disinformation and 'fake news': Interim Report: Government Response to the Committee's Fifth Report of Session 2017-19*¸ (HC 363), published 23 October 2018, available at www.publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1630/163002.htm, accessed 30 October 2020.

[663] For details of this indictment, see the website of the FBI, http://www.fbi.gov/wanted/cyber/russian-interference-in-2016-u-s-elections, accessed 30 October 2020.

[664] See Recommendation 41 of the House of Commons *Interim Report* (n. 662).

[665] Washington Post, 13 January, 2020, 'Opinion: Despite election result, China won't give up on Taiwan', by John Pomfret, https://www.washingtonpost.com/opinions/2020/01/13/despite-election-result-china-wont-give-up-taiwan/.

[666] According to the Australian Signals Directorate. See 'Exclusive: Australia concluded China was behind hack on parliament', September 16, 2019, available at http://www.reuters.com/article/us-australia-china-cyber-exclusive-idUSKBN1W00VF, accessed 30 October 2020.

Consequently, the failure to provide an expressly illustrative list in line with the 2006 compromise suggestion by the SWGCA, renders the definition of aggression subject to the danger of being mostly irrelevant in a modern context, unless the Court adopts wider interpretation powers. Even an addendum to the effect that it may be possible to determine other acts of aggression, similar to Article 4 of Resolution 3314, would have improved this situation. In the meantime, the academic debate on the (non-)exhaustiveness of the list of acts in Article 8 *bis* (2) continues.

3.2 The (non-)exhaustiveness of the list - a continuing academic debate

Notwithstanding the decision made at Kampala to include only certain acts of aggression expressly, academic opinion is still greatly divided as to whether this list is now firmly closed or, in fact, non-exhaustive and whether the ICC judiciary are able to determine other acts of aggression. Thus, one view argues that the list of acts is definitively closed. As Sergey Sayapin states: 'As a conventional provision of international criminal law, Article 8 *bis* (2) of the Rome Statute is exhaustive and must be interpreted restrictively.'[667] This assessment is based on the view that a non-exhaustive list would, by its nature, offend the principles of certainty at law and retrospectivity.[668]

Other scholars critique the existing definition of the crime of aggression, including even the limited list of acts in Article 8 *bis* (2), as overly broad and vague on account of its generally uncertain language taken from Resolution 3314. Thus Michael Glennon, for

[667] S. Sayapin, *The Crime of Aggression in International Criminal Law*, (Springer 2014), 272.
[668] n. 227.

example, regards *any* consideration of Resolution 3314 as entirely inappropriate for application in criminal prosecutions, as it is insufficiently specific by allowing for the determination of future acts of aggression in the original version of 1974.[669] Following this view, judicial determination of other acts would be at least as, if not more, precarious than determinations of other acts by the Security Council provided for in Resolution 3314,[670] by offending the principle of *nullum crimen sine lege,* the principle in Article 31 (1) VCLT,[671] as well as Article 22 (2) of the Rome Statute.[672] Glennon's blanket dismissal of Resolution 3314 as an inappropriate basis for the crime of aggression definition, has, however, been persuasively countered,[673] not least by the SWGCA's own declaration that they considered Resolution 3314 to codify existing customary international law.[674]

Notwithstanding the SWGCA's defence of their reliance on the list derived from Resolution 3314, Glennon's criticism is shared by other academics. Thus, Harold Hongju Koh's statement at the Kampala conference also demonstrates the view that the definition in Article 8 *bis* is too uncertain to serve as a justiciable provision of customary international law, despite approving of the list's limitations.[675] However, in a later statement, Koh and his co-writer Buchwald admit that the list is not only 'over inclusive', but also 'under inclusive'.[676] Thus Koh and Buchwald regard the list as, on the one hand, too vague and too concerned with traditional forms of warfare, however, on the other

[669] Glennon (2010) (n. 8) 71.
[670] Article 4, Resolution 3314 (n. 14).
[671] n. 458.
[672] Article 22 (2) (n. 477). See also the academic debate on legality issues (n. 459 and related text).
[673] See Dinstein's statement that the inclusion of Article 3 (a)-(g) of Resolution 3314 'implies that each of the seven clauses has been deemed by the Kampala Conference to be declaratory of customary international law.' Dinstein (2017) (n. 154), para 395.
[674] See the 2007 *Princeton* Report (n. 416), para 46.
[675] Statement of Harold H. Koh, Legal Adviser for the US Department of State at Kampala, June 4, 2010, available at https://2009-2017.state.gov/s/l/releases/remarks/142665.htm.
[676] Harold H. Koh and Todd F. Buchwald, 'The Crime of Aggression: The United States Perspective' (2015) 109 AJIL, 267.

hand, they also acknowledge that it is remarkably outdated with respect to the modern threat posed by international terrorism, non-state actors, and cyber-warfare. This latter critique, therefore, represents at least a partial change of stance, acknowledging that the list, as it stands, necessitates expansion in order to apply to modern forms of warfare and achieve the purpose of outlawing contemporary acts of aggression.

Similar to Koh's and Buchwald's arguments, Robert Heinsch submits arguments for both a limited and a non-exhaustive list. Thus, he admits that the determination of other acts of aggression, from a criminal law perspective, constitutes a problem. He states that '[t]he principle of legality, at least in national law, would require that the list of punishable actions is clearly defined and not open to interpretation (or amendment) by the judges.[677] Nevertheless, Heinsch also asserts that the legality principle is not as fundamental in international law as it is in national law, citing as an example the possibility of judicial determination power of other acts in Article 7 (1) (k) of the Rome Statute on crimes against humanity which refers to '[o]ther inhumane acts of a similar character…'.[678] Thus, Heinsch does not rule out the possibility of determination of other acts entirely, although he acknowledges the validity of the legality and specificity requirements.[679]

Other academics defend the argument that the list is open and serves merely as an illustration, allowing for the determination of other acts. Thus, Claus Kress considers the list in Article 8 *bis* (2) to be non-exhaustive,[680] although he admits that 'the nature of the list was the subject of controversy, [and] no consensus emerged on the exhaustiveness of

[677] Heinsch, (2010) (n. 376), 724.
[678] Article 7 Rome Statute (n. 612, 630).
[679] Heinsch, (2010) (n. 376), 725.
[680] Kress, in Kress and Barriga (eds) (2017) (n. 460), 435.

the list'.[681] Kress contends that the silence on articles other than 1 and 3 of Resolution 3314 merely restricts the determination of other acts and the consideration of other grounds by the Security Council.[682] The Court, Kress argues by comparison, is not restricted by the lack of an express reference to all the provisions in Resolution 3314, in particular Articles 2 and 4.[683] Consequently, the judges of the ICC are entitled to draw on the entirety of the resolution, allowing for the determination of other acts of aggression, as long as there is no contradiction with the text and spirit of the Kampala Amendment.[684]

Following this argument, the list in Article 8 *bis* (2) could be indeed interpreted as non-exclusive, despite the appearance to the opposite.[685] Moreover, Kress reinforces his argument with the assertion that even the requirement to abide by the legality principle need not be offended, stating:

> In the absence of genuine ambiguity, the second sentence of article 22 (2) of the Rome Statute also does not require a reading of the list as exhaustive.[686] The same is true for the principle of legality, as the first sentence of article 8 *bis* (2) of the Rome Statute ensures that the definition is not unduly vague.[687]

[681] *Ibid*, 436.
[682] Kress, *ibid*, citing Barriga (2012) in *Travaux Preparatoires* (n. 317), 26-7. See also C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court,* (CUP 2013), 97-100.
[683] See n. 600-1.
[684] Kress (2017) (n. 680), 436. This view is also shared by McDougall (2013) (n. 682), 99.
[685] Kress, *ibid*, 451.
[686] For Article 22 (2) of the Rome Statute, see n. 477.
[687] Kress (2017) (n. 680), 435-6. See also Roger. S. Clark, 'Amendments to the Rome Statute of the International Criminal Court' (2010), 2 Go. J. Int'l L., 696; and McDougall (2013) (n. 682), 103-5. For different views, see Kai Ambos, 'The Crime of Aggression after Kampala' (2010) 53 GYIL, 487; and Marina Mancini, 'A Brand New Definition for the Crime of Aggression: The Kampala Outcome' (2012) 81 NordJIL, 227, 235.

Support for the inclusion of other acts can also be derived from Keith Petty.[688] Thus, he argues that the words in Article 8 *bis* (2) 'in any other manner inconsistent with the Charter', not only reinforce Article 2 (4) of the UN Charter, but also indirectly allow for acts other than the ones listed. Similarly, Jennifer Trahan would view the list as being 'semi-open' or 'semi-closed', using the words in the 2007 Princeton Report,[689] as long as any new form of aggression fulfils the manifest qualifier.[690]

In evaluation, the latter arguments allowing for the determination of other acts would undoubtedly alleviate some of the difficulties of applying the definition to emerging threats and contemporary acts of aggression. If the list of aggressive acts could be expanded, whilst still observing the legality requirement, the Court's jurisdiction may be widened sufficiently to incorporate devastating new forms of aggression, which are currently not included, rather than focus solely on 1974-style combat situations.

An approach along these lines would also widen the Court's overall jurisdiction over the crime, aiding application to modern aggression scenarios and furthering deterrence. From this particular point of view, an interpretation of the list as non-exhaustive, allowing for the possibility of the judicial determination of other acts, would serve that purpose better than the current limited list. However, care must be taken not to offend the legality principle. Whilst acknowledging this problem, it is suggested that legality concerns could be addressed by reference to the chapeau contained in the first sentence of Article 8 *bis* (2), which ensures that the definition is not unduly vague.[691]

[688] Petty (2009) (n. 429).
[689] n. 416.
[690] Trahan (2011) (n. 5), 59-60.
[691] See Kress (2017), 435-6, (n. 687 above and related text). See also Weisbord (2009) (n. 495), arguing for a combination of a non-exhaustive list together with a chapeau, 22, 39.

Great concerns have been expressed with regards to wider determination powers by the ICC judiciary over the crime of aggression, based on the underlying fact that the determination of acts of aggression is essentially political.[692] In response to these views, it is contended that this perception is overly restrictive and the concerns are unwarranted. The Court, as an international criminal tribunal, is concerned with the determination of individual criminal liability rather than interference in relations between States *per se*. The determination of the state act of aggression is required solely for the establishment of that individual criminal liability, not for political condemnations of States. Other international courts and tribunals have, on occasion, had to resort to wider determinations,[693] and, in order to fulfil their duty, the judiciary of the ICC has to be entrusted with the power to apply any required analogy for the purpose of essential determinations. Such judicial determinations need not necessarily offend the principle of legality, as long as the analogy is close enough. Other, developing forms of aggression not envisaged at the time of the definition could and should, therefore, be included. A restrictive view of the list in Article 8 *bis* (2) as being exhaustive, without acceptance of other acts or reference to the entirety of the provisions in Resolution 3314, which would have allowed for other considerations, endangers the definition as being unnecessarily narrow and is likely to render it unsuitable to a modern context, hampering effective jurisdiction.[694]

[692] See, for instance, the views expressed post Kampala in the *Travaux Preparatoires* (n. 317), in the statements of position by a number of States, including the P5 (from p. 810).
[693] See for instance, the *Nuremberg* precedent itself (n. 3), see also the ICJ's statement that the Court had 'never shied away from a case brought before it merely because it had political implications'. (*Nicaragua* case (1986) (n. 37), para 96, citing the *Corfu Channel* case (n. 369)). For a discussion, see for instance Christine Gray, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after *Nicaragua*' (2003) 14 (5) EJIL, 867.
[694] See the discussion above, and throughout section 3.2.

Nevertheless, the debate on the (non-)exclusivity of the list remains, at this time, still unresolved. It will be enlightening to see how the Court views its own determination powers in cases involving modern acts of aggression currently not listed. Future judicial declarations by the ICC on the determination of other acts will, ultimately, shed a light on the dilemma.

The discussion of the limitations of the crime to state-on-state aggression only, and inclusion of the highly restrictive list of acts concludes the consideration of the narrow definition of the crime of aggression, limiting the Court's jurisdiction indirectly but significantly through the definition itself. The next two chapters will consider the jurisdictional restrictions arising directly from the conditions placed on the Court's jurisdiction in Articles 15 *bis* and *ter*.

4. An overall evaluation of the definition of the crime of aggression

The definition of the crime of aggression, examined in this and the previous chapter, contains a high threshold requiring a manifest violation of the UN Charter, and additionally insists on political or military leadership and a requirement to control or direct the actions of a State. It also necessitates attribution of an aggressive act to a State against another State, and includes a list of acts which currently takes into account traditional forms of warfare only. The combination of these elements results in severe restriction of the jurisdiction of the Court. Whilst the SWGCA's documents demonstrate

that this effect was deliberately and intentionally sought by some States,[695] others would have preferred even greater restrictions.[696] An entirely different perspective was taken by a number of other States and academics seeking a wider, more flexible definition in order to allow the Court greater jurisdictional powers over modern aggressors.

In evaluation of the provisions contained in Article 8 *bis*, serious doubts can be voiced that the definition is sufficiently wide to capture 21st century acts of aggression and their perpetrators. The limitations of Article 8 *bis* represent a substantial retreat from the precedents set at Nuremberg and Tokyo.[697] Furthermore, the crime of aggression is currently limited to the same situations of conflict contained within the 1974 Resolution 3314, narrowing the scope of the crime even more because of the exclusion of provisions for other interpretations and determinations.[698]

The 'supreme international crime' has now been equipped with a supreme threshold,[699] rendering effective prosecution for modern acts of aggression potentially impossible, unless construed widely. The intended effect of putting leaders of nation states on notice that their aggressive acts may have criminal consequences for them as individuals, has been weakened substantially. Any deterrence may now be ineffective, allowing States to continue criminally aggressive acts without fear of being called to account. The credibility of the Court itself may be called into question, since its own effectiveness will most certainly be assessed by the level of compliance and cooperation. Judicial extension by

[695] See the 2006 and 2007 *Princeton Reports* (n. 552 and 416) and the December 2007 *SWGCA Report* (n. 422).
[696] See for instance the German Proposal of 2000 (n. 399), adding the object or result of an occupation or annexation. See also the Italian stance (n. 640), and concerns expressed by some observer states, for instance the United States (n. 675).
[697] See the discussion in Chapter 1 and 2.
[698] See n. 600-2 and related discussion.
[699] See Robert Jackson's opening statement (n. 135).

analogy is, if strictly interpreted, ruled out by Article 22 (2) of the Rome Statute, and Article 31 (1) of the VCLT,[700] however without such extension, the criminalisation of aggression may be largely ineffective.

Nevertheless, judicial analogy has been commonplace in the history of international tribunals and courts. If the analogy is close enough, provisions against retrospectivity of criminal law need not be offended. The existing filters of Security Council involvement and Pre-Trial Division authorisation are more than capable of preventing what might be perceived as frivolously instigated or politically motivated actions brought before the Court.[701] Alternatively, an argument can be presented for re-writing the definition entirely, allowing for other modern acts of aggression and aggressors of influence at a less controlling level, or simply including a provision for the judicial determination of other acts of aggression over other perpetrators of sufficient influence.

Naturally, these suggestions in particular are likely to incur criticism by sceptics, citing legality concerns. As summed up by Noah Weisbord:

> 'It is no small step to acknowledge that the ICC judges exercise discretion as they interpret the law. The danger is that a spell will be broken, and with it, the law's claim to authority. But the law's authority can be built – and squandered – in various ways. Perhaps the most treacherous is for judges to deliberately remain blind to context as they make decisions that undermine rather than advance the law's purpose.'[702]

[700] Article 22 (2) of the Rome Statute (n. 477), and Article 31 (1) VCLT (n. 458).
[701] See the discussion in Chapter 4.
[702] Weisbord (2011) (n. 430), 168.

Without extending the definition and thereby jurisdiction of the Court, either incrementally through analogy or explicitly through a modernised re-write, the crime of aggression is in great danger of being irrelevant at the point when jurisdiction has only just arisen.

CHAPTER 4: CONSENT OF THE POWERFUL – THE ROLE OF THE SECURITY COUNCIL IN AGGRESSION PROCEEDINGS

1. Introducing Articles 15 *bis* and *ter*

Article 15 *bis* and *ter* contain the jurisdictional conditions imposed on the prosecution of the crime of aggression which, the examination has already revealed, proved to be a matter of the greatest controversy throughout the negotiations. Finding any agreement on the jurisdictional conditions continued to be particularly difficult, due to the controversial and political nature of the crime and the relative novelty of the condemnation and prosecution of aggression.[703] At the root of the disagreement was the prevalent reluctance of many States to relinquish, even partially, their sovereignty and grant their consent to jurisdiction over a novel crime by a new and untested permanent international court.[704] It was also widely felt that the Security Council ought to retain control over aggression proceedings as a matter of peace and security. Its permanent members, in particular, felt that aggression ought to be dealt with solely in the international political sphere, rather than the criminal justice system, thus seeking a monopoly.[705] The main 'bone of contention' during the entire negotiations was therefore the role of the Security Council

[703] See the discussion in section 6.2, Chapter 1.
[704] See the account in Kress and von Holtzendorff (2010) (n. 5), 1179, 1194.
[705] *Ibid.*

and whether its decisions ought to be binding on the Court.[706] As Kress and von Holtzendorff observed:

> To agree on a solution that bridged the wide gap between the monopoly claim of the five permanent council members on the one end and the rejection of any role for the Council beyond the one already recognized in Article 16 of the ICC Statute on the other end of the spectrum posed a formidable challenge.[707]

Despite the remarkable efforts of the SWGCA to resolve these issues, negotiations on the jurisdictional conditions nearly resulted in failure, however eventually a last-minute compromise was agreed. Instrumental for this compromise was the so-called ABCS non-paper,[708] which was highly influential in the closing stages of the negotiations and is largely responsible for the wording of Articles 15 *bis* and *ter*. This paper provided for a) automatic jurisdiction where a Security Council referral exists, b) in the absence of such a Security Council referral, non-jurisdiction of the Court over non-signatories, and c) again in the absence of such a Security Council referral, jurisdiction over signatories limited by a choice of those members to opt out. The resulting compromise involved separating the provisions into two substantially different articles depending on the source of referral. The differences reflect the pervading difficulties incurred during the negotiations. Notwithstanding the substantial differences, Articles 15 *bis* ans *ter* contain identical delay provisions.

[706] See Cassese (2013) (n. 12), 138.
[707] Kress and von Holtzendorff (2010) (n. 5), 1194.
[708] *Ibid*, 1203-4, citing the unpublished *Declaration (Draft of 9 June 2010, 16h00).*

The final Article 15 *bis* confers highly limited jurisdiction to the Court, where a state party has referred a case to the Prosecutor for investigation,[709] or the Prosecutor decides to investigate a case under their own powers (*proprio motu*).[710] This article, at least *prima facie*, provides an alternative to absolute Security Council monopoly over the crime of aggression, allowing for limited jurisdiction of the Court in situations where the Security Council cannot agree on a referral or chooses not to actively authorise investigation and prosecution. Article 15 *bis* provides:

> **Exercise of jurisdiction over the crime of aggression**
>
> **(State referral, *proprio motu)***
>
> 1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
> 2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
> 3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
> 4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
> 5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
> 6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or

[709] Derived from Article 13 (a) of the Rome Statute (n. 1), which provides for jurisdiction in '[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14'.

[710] Derived from Article 13 (c), granting jurisdiction where '[t]he Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15'.

she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Article 15 *ter*, by comparison, confers automatic and unlimited jurisdiction to the Court, where the Security Council refers a case. [711] Article 15 *ter* provides:

Exercise of jurisdiction over the crime of aggression

(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

[711] See Article 13 (b) Rome Statute, granting jurisdiction in '[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Before embarking on an examination of the focal point of this chapter, the Security Council's role in aggression proceedings, let us briefly comment on the special jurisdictional conditions contained within Articles 15 *bis* and *ter*, building the foundation for the discussion in this chapter as well as the next.

1.1 The unusual procedural and temporal delays common to Articles 15 *bis* and *ter*

Articles 15 *bis* and *ter* jointly establish a special procedure for the crime of aggression. Additionally, both articles provide for identical procedural and temporal delays and hurdles, before jurisdiction of the Court comes into force. Common paragraph 2 of Articles 15 *bis* and *ter* stipulates a minimum of 30 ratifications in addition to a delay of one year thereafter.[712] Common paragraph 3 insists on a further 'decision to be taken after 1 January 2017 by the same majority of state parties as is required for the adoption of an amendment to the Statute,'[713] i.e. 2/3 of member states as stipulated in Article 121 (3).[714]

[712] Article 15 *bis* (2), and Article 15 *ter* (2) Rome Statute (n. 1).
[713] Article 15 *bis* (3), and Article 15 *ter* (3).
[714] Article 121 Rome Statute sets out the procedure for amendments to the Statute, and para 3 of that article provides that '[the adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.' This figure applies to the percentage of *all* member states, not just those present at an Assembly of States Parties. The relationship between Article 15 *bis* and Article 121 will be examined in detail in the next chapter.

By comparison, these special provisions can be distinguished from the coming into force conditions for the other crimes under the Statute, which provided for no such delays.[715] The delay provisions in paragraphs 2 and 3 were cumulative,[716] signifying the intent of state parties to delay jurisdiction of the Court for at least 7 years after Kampala. The decision to postpone may have been the result of 'practical discords that [had] not yet been put to rest'.[717] Some of these concerned the question of state consent, even by member states, to jurisdiction of the Court.[718] This divisive issue is the central subject of the next chapter.

Another reason for the unusual delay, directly related to the main topic of this chapter, was the unwavering conviction, particularly by the P5 members, that the Security Council ought to have a monopoly over any aggression proceedings.[719] As Antonio Cassese observes:

> These limitations arose, in part, because of intense debate over whether the UN Security Council would have the exclusive power to refer a situation of alleged aggression to the ICC. Ultimately, the amendments did not give the UN Security Council a monopoly on referrals. Because of controversy over the matter, the vesting of jurisdiction was delayed pending state party vote and ratifications.[720]

---

[715] See Article 6, Article 7, and Article 8 and simple jurisdiction through any of the mechanisms in Article 13 Rome Statute.
[716] Third Understanding included in Annex III to Resolution 6 (n. 2). For commentary, see Cassese (2013) (n. 12), 138, and McDougall (2013) (n. 682), 286. See also Dinstein, (2017) (n. 154), 139-40, paras 371-3.
[717] Dinstein, *ibid,* 141, para 378.
[718] *Ibid.*
[719] Cassese (2013) (n. 12), 138. See also the 'Explanations of Position', particularly by the P5, in *Review Conference Official Records,* RC/11, Annexes VII-IX, 122, and *Travaux Preparatoires* (2012) (n. 317), from 810.
[720] Cassese, *ibid.*

The postponement allowed for another opportunity to revisit the issue before activation and lodge objections. It therefore appeased the concerns of the P5 sufficiently not to object to the adoption of the Kampala amendment.[721] The United Sates, for instance, considered it a 'wise decision to delay implementation of the crime of aggression to permit examination of the practical implication of the two methods [in Articles 15 *bis* and *ter*] being proposed for the operationalization of this crime'.[722] The other P5 members took a similar stance in their post-Kampala statements, and confirmed their continuing conviction that the Security Council ought to have a monopoly over aggression proceedings.[723]

It is also conceivable that the delay provisions may have been incorporated in order to grant the Court sufficient 'breathing room', before facing difficult and complicated political and legal situations concerning the crime of aggression.[724] The postponement of jurisdiction thus allowed the Court to develop sufficient competence, preventing it from being overburdened with decisions on 'major controversies about contemporary international security law through the backdoor of … international criminal justice'.[725] Additionally, the delays effectively enabled States to amend their policies and government and military operations, before jurisdiction arose.[726] Consequently, the postponement of jurisdiction allowed States time to withdraw from questionable and

[721] See Stefan Barriga and Niels Blokker, 'Entry into Force and Conditions for the Exercise of Jurisdiction', in Kress and Barriga (eds), (2017) (n. 246), 634.
[722] 'Statement by the United States of America', in 'Explanations of Position', *supra,* n. 719, at 816.
[723] *Ibid.* 'Statement by France', 811, 'Statement by the United Kingdom', 813, 'Statement by China', 814, and 'Statement by the Russian Federation', 816.
[724] See Stefan Barriga and Leena Grover, 'A Historic Breakthrough on the Crime of Aggression' (2011) 105 (3) AJIL, 517, 530, and Barriga and Blokker (n. 721), at 633, 634, and 636.
[725] Kress and von Holtzendorff (2010) (n. 5), 1211.
[726] Weisbord (2011) (n. 430), 99. See also Heinsch (2010) (n. 376), 734, arguing that ICL is still in its infancy, and the delays allow 'the young ICC time to establish itself, and states […] time to adjust their national legislation to the new crime'.

potentially aggressive interventions in other countries.[727] The encouragement of physical withdrawal from illegal interventions and a change of state policy to non-aggression was most certainly one of the underlying considerations of the negotiators in their choice to delay jurisdiction.[728]

The procedural conditions have now been satisfied, following the 30th ratification by Palestine on 26th June 2016[729] and the decision taken at the 2017 ASP to activate the Court's jurisdiction as of 17 July 2018.[730] Nevertheless, the imposition of the delay, after 12 years of additional negotiating time, represents a stark reminder of the scepticism surrounding the Court's jurisdiction over the crime of aggression in the first place.[731] This perception is also reflected by the other special jurisdictional conditions.

[727] In particular the illegal Iraq War, see section 2.2. in Chapter 2 and n. 376.
[728] See Heinsch, (2010) (n. 376), 734. UK forces had already withdrawn from Iraq by the end of April 2009. See BBC News, *UK combat operations end in Iraq*, 30 April 2009, http://news.bbc.co.uk/1/hi/8026136.stm. US forces completed their withdrawal in December 2011. See Reuters, *Timeline: Invasion, surge, withdrawal; US forces in Iraq*, https://www.uk.reuters.com/article/iraq-usa-pullout-idINDEE7BH05520111218, December 18th 2011. Both accessed 14 December 2020.
[729] See Coalition for the ICC, 'Palestine', https://www.coalitionfortheicc.org/country/palestine, accessed 12 July 2020.
[730] See Coalition for the ICC, 'Historic activation of the Crime of Aggression', https://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression, accessed 12 July 2020.
[731] See Cassese's assessment (2013) (n. 12), 138.

1.2 The special jurisdictional conditions in Article 15 *bis* in comparison with Article 15 *ter*

Where a State has referred the situation to the Court, or the Prosecutor has initiated an investigation *proprio motu,* Article 15 *bis* (4) allows for the possibility of a declaration of non-acceptance of jurisdiction by a member state. Thus paragraph 4 effectively provides for the pre-condition of consent (which is given by failing to take advantage of the right to opt out of the acceptance of jurisdiction) of a member state before one of its political or military leaders can be investigated or prosecuted for the crime of aggression.[732] This provision is fundamentally different to the other jurisdictional conditions and exceptional within the Rome Statute, since neither prosecution for the crime of aggression following a Security Council referral under Article 15 *ter,* nor for any of the other core crimes in Article 5, require a member's consent to jurisdiction.[733] The consent requirement represents a critical handicap to the Court's jurisdiction and will be considered in detail in the next chapter.[734]

Paragraph 5 of Article 15 *bis* stipulates non-jurisdiction of the Court over non-member states. This constitutes a total exclusion of non-signatories from jurisdiction under Article 15 *bis,* even where they are the victim of an act of aggression by a member state. The requirement for both victim and aggressor to be signatories, before jurisdiction arises

[732] Article 15 *bis* (4) Rome Statute 1998, for text and discussion see Chapter 5.
[733] See Article 12 (1) Rome Statute 1998, providing that '[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.'
[734] See Chapter 5.

through state referral or *proprio motu*, is a further substantial difference from the other core crimes under the Court's jurisdiction.[735] Thus it represents another considerable handicap to prosecution of the crime, which will be discussed in detail in the next chapter.

Article 15 *bis* (6) - (8) relate specifically to the main topic of this chapter, the emphasis on the role of the Security Council in, and *inter alia* the Council's consent to, aggression proceedings. Whilst Article 15 *bis* does operate as an alternative mechanism of initiation of proceedings to that of a Security Council referral, prosecutions as a result of state referral or *proprio motu* investigations are still dependent on some form of Security Council involvement. Thus, paragraph 6 creates an obligation for the Prosecutor to ascertain if the Security Council has made a determination of an act of aggression and submit all relevant information and documents to the Secretary General, prior to an investigation.[736] If such a Security Council determination of an act of aggression exists, the Prosecutor is free to commence an investigation (paragraph 7).[737] If, however, no such determination exists, the Prosecutor has to wait for a period of 6 months and submit the request of investigation to the Pre-Trial Division for authorisation before he or she may begin to investigate or prosecute (paragraph 8).[738] Paragraph 8 also expressly reserves the right of the Security Council under Article 16 to shelve any investigation for periods of 12 months at a time, and potentially for good.[739]

---

[735] Article 12(2) Rome Statute 1998 provides that '[i]n the case of article 13, paragraph (a) [i.e. state referral] or (c) [i.e. *proprio motu*], the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.'

[736] Article 15 *bis* (6) Rome Statute.

[737] Article 15 *bis* (7).

[738] Article 15 *bis* (8).

[739] Article 16 of the Rome Statute provides that '[n]o 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

It would not be unreasonable to view these provisions as simply acknowledging the authority of the Security Council over aggression proceedings as a matter of peace and security.[740] It is also possible to regard them as the necessary price to pay for avoiding an absolute monopoly, despite the objections of several powerful States.[741] Nevertheless, the problem arising from the insistence on this high level of Security Council involvement is that, in order to initiate proceedings, effectively the state consent of these five particular permanent members has to be sought, as a result of the internal voting structure of the Council.[742] This applies even where the alleged aggressor and victim are signatories to the Rome Statute, have potentially ratified the amendments and not opted out of jurisdiction.[743] The underlying question here, central to the discussion in this chapter, is whether this is appropriate, and whether it serves to further deterrence from commission of aggression, the Court's reach over the crime and its own reputation as an independent criminal court.

Notwithstanding the contentious emphasis on Security Council involvement established in the previous paragraphs, Paragraph 9 of Article 15 *bis* declares that an existing determination of an act of aggression is without prejudice to the Court's own findings.[744] This provision represents an attempt to rebalance the potentially prejudicial effects of determinations by an external organ, and provide reassurance of a fair trial.[745] Para 10

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'.

[740] See Article 24 and 39 of the UN Charter (n. 134) and detailed discussion below in section 2.

[741] See for Kress and von Holtzendorff (2010) (n. 5), 1186. See also the post-Kampala statements by the P5 (n. 722-3).

[742] See Chapter 1, section 4.2, and the discussion below particularly in section 3.3.

[743] As a result of combining Article 15 *bis* (4) with Article 121 (5), and its negative interpretation. See Chapter 5, section 2 for detail.

[744] Article 15 *bis* (9) Rome Statute.

[745] Nevertheless, it is contended that there is a real danger that a prior determination of aggression by an external organ may, in reality, be prejudicial to the finding that the *actus reus* has been committed, since the state act itself forms part of the crime. See Chapter 3, section 2.

expressly preserves the existing jurisdictional conditions of the other core crimes in Article 5,[746] as established in Article 12. Thus, paragraph 10 of Article 15 *bis* effectively serves to highlight the different treatment of the crime of aggression to that of the other core crimes.[747]

The provisions of Article 15 *ter,* by comparison with Article 15 *bis,* contain few surprises. The temporal restrictions mirror those of Article 15 *bis,* also delaying jurisdiction of the Court.[748] The without prejudice provision and preservation of conditions for the other crimes in Article 5 are also identical to Article 15 *bis.*[749] Except for these provisos, no further limitations apply in cases of Security Council referral, allowing for automatic and unrestricted jurisdiction of the Court.

1.3 The issues to be considered

As this introduction to the jurisdictional conditions of the crime of aggression demonstrates, Article 15 *bis,* in particular, raises two substantive issues, firstly, the amplified requirement of States' consent to jurisdiction in addition to membership,[750] and, secondly, the great emphasis on Security Council scrutiny. The insistence on multiple consent by member states and non-application to non-members will be examined in detail in the next chapter. This chapter will continue to investigate the insistence on substantial

[746] Article 15 *bis* (10) Rome Statute.
[747] See the brief introduction to this problem at p. 180 above, and the discussion in Chapter 5 of the interaction of Article 12, 15 *bis* (4) and 121 (5).
[748] See Article 15 *ter* (2) and (3) Rome Statute.
[749] See Article 15 *ter* (4) and (5).
[750] See Chapter 5.

involvement of the Security Council in any aggression proceedings regardless of the source of the referral to the Court. Because of the internal voting structure within the Council, its resolutions and any referrals to the Court essentially require acquiescence by its permanent members. This is based on the fact that Article 27 (3) of the UN Charter stipulates that substantive decisions of the Security Council require a majority of nine out of 15 votes, including the unanimous votes of the five permanent members.[751] A negative vote by one of the P5, accordingly amounts to a veto.[752] If one of these permanent members uses their veto power, thus expressing lack of consent, a resolution will fail and no referral to the Court will ensue. This effectively amounts to an implicit requirement of consent by the powerful, before the Court is granted jurisdiction over an aggression case under Article 15 *ter*.

By the same token, and in spite of the alternative sources of referral eventually agreed on and incorporated into Article 15 *bis,* these investigations and prosecutions also require some form of consent to jurisdiction by the Council. Thus they have to be 'run past' the Council first, which then has the power to halt investigations or prosecutions temporarily or even permanently through application of Article 16.[753] This requirement of effective Security Council approval prior to investigation or prosecution is unusual within the provisions of the Rome Statute,[754] and amounts to a considerable limitation on the Court's jurisdiction.

[751] Article 27 (3) UN Charter (n. 210), see also the discussion in section 4.2 of Chapter 1.
[752] *Ibid.*
[753] By virtue of Article 16 of the Rome Statute.
[754] See n. 715 above.

Related problems include, for instance, the likelihood of frustrations of proceedings due to Security Council inactivity and legality problems raised by these external retrospective determinations. Is such a high level of control by the political organ of the Security Council appropriate in criminal prosecutions, considering such decisions are subject to the individual consent of its members, particularly the P5? Would alternatives to substantial Security Council involvement have been feasible? Should the Court have been granted wider jurisdiction instead, independent of the political forum of the Council? Is the insistence on Council involvement beneficial, by potentially providing jurisdiction through a referral where the Court would otherwise not have such jurisdiction because of the requirements of membership and consent? Or are those benefits, perhaps, outweighed by the fact that the Security Council itself is dependent on the consent of its powerful permanent members? A good starting point in this evaluation is the examination of the role of the Security Council as envisaged in the UN Charter.

2. The role of the Security Council – exclusivity or mere primacy?

2.1 Security Council responsibility according to the UN Charter

Any attempt to evaluate the appropriateness of Security Council involvement in the Court's jurisdiction over aggression ought to begin by considering the instrument which establishes the Security Council's power, the UN Charter. Article 24 of the UN Charter provides in paragraph 1:

> In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.[755]

This article refers to 'primary responsibility' or primacy, suggesting that other types or levels of responsibility co-exist with that of the Security Council. Article 39 elaborates on the powers of the Security Council and provides:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.[756]

This article does not provide for a hierarchy of determination power, instead referring simply to the powers of the Council. The combination of these two articles consequently raises the question whether the determination power of the Security Council, based on the responsibility allocated to them in Article 24, is merely primary, i.e. it can be executed by and shared with other organs, or whether it is in fact exclusive. In the former case, the UN Charter provisions would grant primary competence to the Council relating to the

[755] Article 24 (1) of the UN Charter (n. 134).
[756] *Ibid*, Article 39 (Chapter VII).

power to take action and maintain peace and security, but not the sole power to authorize judicial action to the exclusion of any other organ.[757] If Security Council authority, on the other hand, could be perceived as exclusive, it would follow that aggression, as a matter of peace and security, ought to be entirely within the Council's prerogative. Each of these two positions was fiercely defended by negotiating States even before the inception of the International Criminal Court and up to and even beyond Kampala, polarising States and academics alike.

2.2 The stance of the ILC and SWGCA on the contentious question of Security Council monopoly

The discussion in Chapter 1 revealed that a large number of States historically considered the Security Council's determination powers over acts of aggression as absolute, one of the possible interpretations derived from a literal reading of Article 39 on its own. In fact, some States' insistence on a literal interpretation of Security Council exclusivity went as far as opposing *any* jurisdiction of the Court over the crime of aggression even in the lead-up to the Rome Conference.[758] Nevertheless, the International Law Commission included the crime of aggression as one of the core crimes under the future Statute in the 1994 Draft Statute for the creation of an International Criminal Court.[759]

[757] See the discussion below, and arguments for shared competency, in section 2.2.
[758] See Bassiouni and Ferencz (1999) and their description of opposition to the inclusion of aggression in the Rome Statute by the United States and some of its allies, including the United Kingdom (n. 306), 346.
[759] 1994 ILC Draft Statute (n. 309), Article 20.

Although the ILC promoted inclusion of aggression in the jurisdiction of the Court, they addressed the contentious question of Security Council monopoly by suggesting that a determination of an act of aggression by the Security Council was indeed an essential prerequisite to any potential prosecution of the crime. Thus, Draft Article 23 (2) provided that '[a] complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint'.[760]

Consequently, because of the voting structure within the Security Council, any determination of an act of aggression would be dependent on the consent of the P5 members. If any of these members were to reject such a determination, no prosecution could take place. The ILC's suggestion to make prosecutions of the new Court over the Crime of Aggression entirely dependent on Security Council approval or scrutiny can be seen as appeasing the prevalent, although not unchallenged, view that jurisdiction over the political crime of aggression ought, ultimately, to be regulated by a political organ.[761] The ILC included the provision for Security Council exclusivity, despite acknowledging some criticism from within that it 'would introduce into the statute a substantial inequality between State members of the Security Council and those that were not members, especially between the Permanent Members of the Security Council and other States'.[762]

[760] *Ibid*, Article 23 (2).

[761] See Barriga (2012), in Barriga and Kress (eds.), *Travaux Preparatoires* (n. 317), 6. See also 1998 Rome Summary Records (18 June through 8 July), *ibid*, 255-314, for the vastly diverging views of States on the inclusion of the crime within the Court's jurisdiction and the level of independence of the Court. These documents demonstrate that most Arab and developing countries favoured independent jurisdiction of the Court, whereas the P5 and many Western States defended Security Council control, with some opposing *any* jurisdiction of the Court.

[762] 1994 ILC Draft Statute (n. 309) with commentaries, para 15 of commentary on Draft Article 23.

The ILC's view of an absolute requirement for Security Council determinations ignored existing evidence for shared, rather than exclusive, determination power. Such evidence can be derived from the occasional application of the General Assembly of its Uniting for Peace Declaration,[763] and other findings and condemnations of 'aggressive acts', 'acts of aggression', or simply 'aggression', where the Security Council has remained silent on violations of the Charter prohibition.[764] Additional support can be found in the *Certain Expenses* case, in which the ICJ confirmed that the Security Council had primary but not exclusive responsibility, permitting the General Assembly to make recommendations where the Security Council remained silent.[765] The contention that the General Assembly ought to be able to provide alternative authorisation of investigation and prosecution of the crime, with or without additional involvement of the ICJ, was considered in some States' proposals.[766] This suggestion of alternative authorisation was also reflected in a number of discussion papers and reports by the SWGCA.[767]

---

[763] *Uniting for Peace* Resolution (U4P) (n. 253). For the ten Emergency Special Sessions of the General Assembly invoked either the Assembly itself or request of the Council, and resolutions passed under U4P, see n. 258.

[764] See the discussion in Blokker, 'The Crime of Aggression and the United Nations Security Council' (2007), 20 Leiden JIL, 881.

[765] *Certain Expenses of the United Nations (Article 17 (2) of the Charter),* (Advisory Opinion) [1962], ICJ Reports, 151, page 163.

[766] See for instance 'Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania on jurisdictional conditions', 23 February 2001, PCNICC/2001/WGCA/DP.1. See also 'Proposal submitted by Samoa', 2 June 2002, PCNICC/WGCA/D.P.2, which emphasised the importance of an external determination of a state act without specifying by which particular organ. Australia submitted the argument that the Security Council should have 'the first bite of the cherry, but not necessarily the last,' citing Article 24 of the UN Charter, as cited in the 2006 *Princeton Report* (n. 552). Similarly, see 'Proposal presented by Belgium on the Question of Jurisdiction of the Court with Respect to the Crime of Aggression', 29 January 2007, ICC-ASP/5/SWGCA/W.P.1., which introduced the idea of the Pre-Trial Division acting as a filter.

[767] See the 'Discussion Paper Proposed by the Coordinator', Conditions, Option 1, Variant 2 (9 December 1999), UN Doc. PCNICC/1999/WGCA/RT.1; the Coordinator's Discussion Paper of April 2002, (n. 413) para 4, Option 3; the Coordinator's Discussion Paper of July 2002 (n. 316) para 5, Option 4; 'Discussion Paper on the Crime of Aggression Proposed by the Chairman', (2008 Chairman's Paper), Article 15 *bis,* Alternative 2, in *Report of the Special Working Group on the Crime of Aggression,* in ASP Official Records, ICC-ASP/6/20/Add.1, Annex II, 9. See also the 2007 *Princeton Report* (n. 416), para 31, and the December 2007 *SWGCA Report* (n. 422), para 39.

There is little room for questioning the ICJ's proficiency.[768] The assumed competence of the ICJ gains support from Article 36 of its constitutive Statute, providing for jurisdiction over its own jurisdictional matters, and therefore autonomy.[769] Additionally, the above discussion of Article 24 of the UN Charter itself has shown that this provision can be interpreted to the effect of granting merely primary competence to the Council, not exclusivity.[770] Examples of past ICJ's condemnations of aggression include the judgments in *Nicaragua*,[771] the so called *Nuclear Weapons* advisory opinion[772] and *Armed Activities* case.[773] Confirmation of the ICJ's competence to determine an act of aggression, can be derived specifically from the separate opinion of Judge Simma in the *Armed Activities* case, who admitted:

> The Council will have had its own – political reasons for refraining from such a determination [of aggression]. But the Court, as the principal *judicial* organ of the United Nations, does not have to follow that course. Its very raison d'etre is to arrive at decisions based on law and nothing but the law, keeping the political context of the cases before it in mind, of course, but not desisting from stating what is manifest out of regard for such non-legal considerations.[774]

[768] For support, see Blokker (2007) (n. 764) 886.
[769] Article 36 (6) of the ICJ Statute (n. 35) provides: 'In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.'
[770] Article 24 of the UN Charter (n. 134).
[771] *Nicaragua* (1986) (n. 37), paras 32-35.
[772] *Nuclear Weapons* (1996) (n. 370), Decision on the Admissibility of the legal question before the Court on the use of force, 8 July 1996, para 13.
[773] *Armed Activities* case (2005) (n. 37), *Joint Separate Opinion of Judges Higgins, Koojimans, Elaraby, Owada, and Simma*, paragraph 23.
[774] *Ibid*, separate opinion of Judge Simma, para 3 (page 335 of the Judgment).

Despite the clear competence of either the General Assembly or the ICJ, it is an interesting observation that the SWGCA's own stance grew to support independence of the Court from either Security Council scrutiny or that of any other organ,[775] in contrast to the ILC and the insistence by some States on external authorisation. The SWGCA recognised that the right of the accused to a due process within the international criminal justice system relies on external determinations not being binding on the Court. Therefore, it was felt that the Court itself, in order to fulfil its role as a criminal court, was the appropriate organ to exclusively determine whether the element of the state act of the Crime of Aggression had been fulfilled, negating any requirement for external involvement.[776] The Court and the Council were deemed to have 'autonomous, but complementary roles'.[777] The 'without prejudice' provision, now contained in Articles 15 *bis* (9) and 15 *ter* (4) originally suggested that any external determination of aggression 'shall be without prejudice to *the Court's determination* of an act of aggression',[778] and was later changed to 'the Court's own findings'.[779] The view of the SWGCA,[780] which considered all the nuances of the various views equally and with apparent impartiality, provides great support for the argument for independent determination powers of the Court, despite the resistance displayed particularly by powerful States and the view of the ILC.

Notwithstanding the growing consensus within the SWGCA that the Security Council's role was, within the framework of international criminal justice, merely procedural,[781] it

[775] See Weisbord's assessment (2008) (n. 176), 206, whilst serving as a delegate to the SWGCA. See also the 2006 *Princeton Report* (n. 552), paras 70-2, and 2007 *Princeton Report* (n. 416), para 54.
[776] 2006 and 2007 *Princeton Reports*, *ibid.*
[777] See the December 2007 *SWGCA Report* (n. 422), para 24.
[778] 2008 *SWGCA Report* (n. 766), para 26 (emphasis added).
[779] *Report of the Special Working Group on the Crime of Aggression* (2009) ICC-ASP/7/SWGCA/2, para 22.
[780] Weisbord (2008) (n. 176), 206.
[781] See the 2006 and 2007 *Princeton Reports* (n. 552 and 416 respectively).

was still felt necessary to attempt placation of the powerful minority of States insisting on some form of external authorisation before permitting exercise of jurisdiction. For this reason, and in the attempt to avoid absolute Security Council monopoly, the SWGCA continued to include the suggestion of alternative authorisation by the external organs of the General Assembly and the ICJ.[782]

In an attempt to assess the benefits of such alternative authorisation, it is undeniable that a General Assembly declaration and referral would have had the benefit of carrying the weight of a condemnation of the state act of a large number of States,[783] although the individual's participation would be a separate matter for the Court to decide. An ICJ opinion, on the other hand, would be likely to raise legal arguments which could subsequently assist the ICC in establishing the elements of the crime,[784] although the ICJ, as a civil court for the adjudication between States, would necessarily apply different evidentiary standards to those of the ICC. A determination by either the General Assembly or the ICJ would circumnavigate Security Council deadlock and forced inactivity of the ICC as a result. If dependence of the Court on external determination was indeed inevitable, either of these options or a combination of both may have been preferable to total dependence on Security Council authorisation alone.

Notwithstanding these potential benefits, the question remained whether the Court's aggression proceedings ought to be dependent on determination by any external organ at all, be it the political organs of the General Assembly, the Security Council, or the ICJ in its capacity of adjudicating on civil matters between States. Should the Court enjoy

[782] See the reports and papers in n. 766.
[783] Weisbord (2008) (n. 176), 211.
[784] *Ibid*, 211-2.

independent jurisdiction, entirely free of external determinations, instead? In order to attempt to answer these questions, it may be helpful to engage in a deeper examination of the cardinal reasons for the powerful resistance to independent jurisdiction over the crime of aggression.

3. Why insist on dependence on the Security Council in the first place?

3.1 Protection of the Security Council's prerogative and the fear of conflicting determinations

Following the inclusion of the still undefined crime of aggression in the Rome Statute 1998, States in favour of absolute Security Council control over aggression proceedings submitted proposals to that effect. Protection of the Security Council's prerogative over aggression was sought particularly by its permanent members and their supporters.[785] Kress and von Holtzendorff confirm that Security Council exclusivity over the issue of aggression continued to be defended strongly by the permanent members of the Council throughout and even beyond the negotiations.[786]

An early proposal by Russia exemplifies the attempt to retain Security Council monopoly, insisting on sole determination power of an act of aggression as a prerequisite to any jurisdiction of the Court.[787] The observer delegation also suggested that no time limits

[785] See Cassese's assessment (2013), 138, cited in Chapter 1, p. 79.
[786] See Kress and von Holtzendorff (2010) (n. 5), 1187.
[787] Proposal by the Russian Federation, 1999, PCNICC/1999/DP.12.

should apply, leaving the matter entirely in the hands of the Security Council in perpetuity. This proposal therefore sought total dependence of any criminal aggression proceedings on the contingencies of agreement within the Security Council and non-application of the veto by any of the P5 members.[788] Otherwise prosecutions would be barred entirely. Similar to Russia, China had already expressed their general distrust of the new Court *per se* and made little effort to participate in the discussions, apart from insisting on Security Council monopoly.[789] The United States, the United Kingdom, France and a number of their allies also opposed the new Court's jurisdiction over the crime of aggression throughout the negotiations, despite their participation in the process.[790]

France and the UK, as signatories, did eventually abandon their resistance to the adoption of the Kampala aggression amendment, if only in the final negotiation stages. Nevertheless, immediately after the adoption of the definition, France and the UK distanced themselves from the provisions, again siding with their fellow P5 members. Thus they expressed disapproval of the Kampala amendment as restricting Security Council powers in contravention of the UN Charter.[791] This perceived flaw was, in their view, only slightly mitigated by the stringent conditions placed on the exercise of the Court's jurisdiction, in particular the continued extensive involvement of the Security Council.[792] The Statement by the United Kingdom referred expressly to Article 39 and insisted that the 'text adopted cannot derogate from the primacy of the United Nations

[788] *Ibid.*
[789] See Bassiouni and Ferencz (1999) (n. 306), at p. 346. For China's and Russia's unchanged stance, see their post-Kampala Statements (n. 723).
[790] See Bassiouni and Ferencz, *ibid,* and Statements by France, the UK (n. 723) and the US (n. 722).
[791] Statements by France and the UK, *ibid.*
[792] *Ibid.*

Security Council'.[793] France's Statement expressed regret that Article 15 *bis* (8) 'restricts the role of the United Nations Security Council and contravenes the Charter of the United Nations under the terms of which the Security Council alone shall determine the existence of an act of aggression.'[794]

The other P5 members, non-signatories China, Russia and the United States, also confirmed in their post-Kampala statements that they continued to hold onto their perception of Security Council monopoly over aggression, equating primary determination power with exclusivity. Thus, the Statement by China expressed disagreement with both Articles 15 *bis* and *ter* for failing to reflect that a Security Council determination was an absolute prerequisite before any jurisdiction of the Court could arise.[795] Similarly, the Statement by the Russian Federation criticised the consensus definition for not reflecting the 'Security Council prerogatives in defining the existence of an act of aggression'.[796] The United States 'associate[d] itself with the critical point of principle' asserted by France and the United Kingdom 'regarding the primacy of the Security Council under Article 39', claiming monopoly over matters of peace and security.[797]

Searching for an explanation for the insistence on Security Council monopoly, it has been posited that these powerful States were simply attempting to preserve their privileges and

[793] See n. 723 and *Travaux Preparatoires* (n. 317), 813.
[794] *Ibid*, 811.
[795] *Ibid*, 814.
[796] *Ibid*, 816.
[797] *Ibid.*

power status due to their special role within the Council,[798] and this reasoning is unsurprising. Retaining these special powers would enable a P5 member to veto a determination of aggression made against itself or one of its allies, therefore effectively gaining immunity from prosecution.[799] This point, addressing the imbalance of power between P5 members and other States, resulting potentially in unequal application of criminal justice, had been highlighted as a problem as early as 1994 in the commentary on the ILC's Draft Statute.[800] Looking back at the past record of the Security Council's determinations of aggression,[801] the argument of self-interest appears hard to refute particularly in situations where the interests of one of the P5 or one of their allies are involved, and the record of the use of veto powers bears its own witness.[802]

In an interesting twist, this argument of a prevailing and natural self-interest has been applied to further promote Security Council exclusivity and abandon the Court's jurisdiction over the crime of aggression entirely.[803] Michael Glennon, for instance, claims that individual strategic self-interest of States, reflecting their security concerns and national interests, will always trump any attempt to regulate criminal aggression

[798] See for instance Bassiouni and Ferencz (1999) (n. 306). See also Kress and von Holtzendorff (2010) (n. 5), 1194.
[799] This situation has arisen recently, for instance, in the case of Russia's annexation of the Crimea, and aggressive incursions in Eastern Ukraine. In the face of Security Council paralysis, the General Assembly adopted Resolution 68, 'Territorial Integrity of Ukraine', A/RES/68/262 on 27 March 2014, condemning the aggressive annexation of the Crimea.
[800] Commentary to the 1994 ILC Draft Statute, see n. 309, 759 and related text.
[801] See the discussion in Chapter 1, section 5.
[802] See the discussion of the veto in Chapter 1, section 4.2. For an example of recent prolific use of the veto, see the Security Council's record concerning Syria. Since 2011, 16 Draft Resolutions concerning the humanitarian crisis, violence, and use of chemical weapons in Syria have been vetoed (by Russia, an historic ally of the Syrian government, and sometimes China), most recently Draft Resolution 667, UN Doc. S/2020/667 (10 July 2020).
[803] Glennon (2010) (n. 8), 111-2.

through international law.[804] For that reason,[805] he suggests, the Court's jurisdiction over aggression should be abandoned entirely.[806] Additionally, this argument defends a narrow interpretation of Article 39 of the UN Charter that monopoly over aggression is plainly and exclusively vested in the Security Council.[807] Additional support for exclusivity is sought from Article 12 of the UN Charter which suspends the power of the General Assembly to make recommendations where the Security Council is considering the same situation.[808] A similar 'pre-emptive power', Glennon argues, exists by analogy with regards to suspending the work of the judicial organ of the Court, despite the fact that the Court has jurisdiction over criminal matters and was not even considered in or established by the Charter.[809] The alternative of allowing the Court concurrent or 'without prejudice' determination powers, would, the argument continues, lead to inevitable conflict by allowing different determinations with regard to state behaviour. Furthermore, it could result in the possible imposition of contradictory obligations on members of both the Security Council and the Court.[810] Glennon admits that the Council's own determinations might amount to a 'political roulette', since they are generally dispensed in an ad hoc, arbitrary and inconsistent fashion, based on policy decisions.[811] This, he argues, is a

[804] *Ibid*, 72-3.

[805] Combined with the failure to satisfy legality requirements (*ibid*, 83-6). See also Michael Reisman, 'Reflections on the Judicialization of the Crime of Aggression', https://digitalcommons.law.yale.edu/fss_papers/4926, accessed 14 March 2020.

[806] Glennon (n.8), 106-9.

[807] *Ibid.*

[808] Article 12 of the UN Charter (n. 134).

[809] Glennon (n. 8), 108. For similar arguments of Security Council exclusivity, see also Saeid Yengejeh, 'Reflections on the Role of the Security Council in Determining Aggression' in Mauro Politi & Guiseppe Nesi (eds) *The International Criminal Court and the Crime of Aggression,* (Routledge 2004) 125, and Theodor Meron, 'Defining Aggression for the International Criminal Court' (2001), 25 Suffolk Transnat'l L. Rev. 1, 13. For a different view see for instance Weisbord (2008) (n. 176), 197-200, and Heinsch (2010) (n. 376), 742, dismissing the legality problem as minor, since it is not as strictly applied at international law as at domestic law, see the discussion below.

[810] See Glennon (n. 8), 106.

[811] *Ibid*, 73. For other inconsistency arguments, see also Mark Stein, 'The Security Council, the International Criminal Court, and the Crime of Aggression: How exclusive is the Security Council's Power to determine aggression?' (2005) 16 Ind. Int'l L. & Comp. L. Rev. 1, 3, discussed below. For an account of Security Council inconsistency see Chapter 1, and n. 802 above. See also 'Historical Review of Developments Relating to Aggression, Prepared by the Secretariat', at 115-121,

necessary and unavoidable evil, concluding that the Council should have sole or absolute determination power over aggression to the exclusion of any other organ, regardless of whether they come to a finding or not. However, retroactive prosecutions for the crime of aggression as a result of the Council's broad discretion and *ex post facto* referrals to the Court, also raise legality issues and would result in 'an impossible compromise'.[812] Consequently, Glennon argues for the summary abandonment of the attempt to subject acts of aggression to any criminal prosecutions.[813]

Michael Glennon is not alone in his view of inevitable conflict between the political organ of the Security Council and the judicial one of the International Criminal Court. The perception of antagonism between the two organs has led to the development of some radical and expansionist visions of Security Council control.[814] In particular, this argument has been utilized to advocate extension of the Council's already substantial powers to curb jurisdiction of the Court over the Crime of Aggression, if political situations require it, notwithstanding the Council's own history of inconsistency.[815] Mark Stein, for instance, would insist on absolute dependence of the Court on the Council in all situations, recommending a strict requirement to seek express Security Council approval in order to proceed with a trial for the crime of aggression. This is surprising, since he does not deem the Security Council's power to determine an act of aggression as exclusive.[816] Any trial would be barred without such unequivocal consent.[817] If the

Doc.PCNICC/2002/WGCA/L.1 (2002), available at http://www.un.org/law/icc/documents/aggression/aggressiondocs.htm, accessed 12 October 2020.
[812] Glennon (n. 8), 109.
[813] *Ibid*, 73, 114.
[814] See Stein (2005) (n. 811).
[815] *Ibid*, 2. For an account of Security Council inconsistency, see Chapter 1 and n. 802.
[816] Stein, *ibid*, 13.
[817] *Ibid*, 5.

Council chose to invoke Chapter VII powers or to make its own determination under Article 39, no other body (including the judiciary of the ICJ or the ICC itself) would, following Stein's recommendations, be allowed to make any independent determination.[818] Stein would also extend Article 16 of the Rome Statute to provide for immediate permanent halting of ICC proceedings at the behest of the Security Council, thereby allowing them to retain ultimate control over the prosecution of the crime of aggression.[819] Yet more controversially, Stein's vision would grant the Security Council quasi-judicial powers to 'vacate charges' and 'expunge convictions'.[820]

Glennon's and Stein's arguments for absolute Security Council control over aggression proceedings are refutable, and will be answered in turn. Glennon's view of supremacy of national interests and security concerns over the applicability of international criminal law ignores and denies the general validity of the prohibition of the use of force under the UN Charter,[821] which has been firmly upheld under customary international law, for instance by the ICJ in the case of *Nicaragua*.[822] Aggressive use of force is prohibited under international law, unless authorised by the Security Council,[823] or in very limited situations of self-defence,[824] regardless of the alleged motive of the aggressor state or their international standing and any national interests. It also seems a little harsh to deny absolutely any well-meaning intentions of States generally, in their attempt to criminalise aggression. If this statement were accurate, consensus on even limited jurisdiction of the

[818] *Ibid.*
[819] *Ibid*, 32.
[820] *Ibid.*
[821] Article 2 (4) UN Charter (n. 195).
[822] *Nicaragua* case (1986) (n. 37), paras 187-201. See also *Armed Activities* (2005) (n. 37), Judgment of 19 December 2005, paras 148-165 and *Oil Platforms* (2003) (n. 368), paras 27-30, 78.
[823] UN Charter, Article 42.
[824] *Ibid*, Article 51.

Court would never have been established at all, and no State would ever ratify the amendments, submitting themselves to the Court's jurisdiction.[825]

Countering Stein's suggestions, this thesis argues that his drastic measures are excessive in even the most delicate political situations. Furthermore, and on principle, they amount to an unacceptable level of political interference in the judicial process. Even if one did not perceive such interference of politics in matters of criminal law to be utterly objectionable, the suggested measure of extending Article 16 would be unnecessary, since orders for deferral can already be made consecutively and in effect permanently.[826] Stein's proposal for severe limitations on the Court's ability to function independently and extensive political interference in judicial proceedings is highly questionable. The ICJ asserted in *Nicaragua*:

> The Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events.[827]

This declaration by the ICJ on the separation of judicial and political functions, and the independence and competence of its own jurisdiction, therefore provides, by analogy, as valid a reply to Stein as it does to Glennon. Furthermore, conflicting determinations by

[825] 39 member states have, as of 25 September 2019 ratified the aggression amendments, see www.crimeofaggressioninfo.com, accessed last 20 January 2021.
[826] See Article 16 Rome Statute (n. 753).
[827] *Nicaragua*, Decision on Jurisdiction of the Court and Admissibility of the Application, Judgment of 26 November 1984, para 95.

the Security Council and the Court need not necessarily be a foregone conclusion, nor would uncertainty as a result of inconsistencies be necessarily a fatal flaw.[828] As Professor Gaja asserts:

> One cannot assume that the absence of a finding by the Security Council that aggression occurred implies that in the Security Council's view there is no aggression and that therefore a conflict would arise with a positive finding by the ICC that an individual has committed a crime of aggression.[829]

Applying this argument, there is no need for the findings by Security Council and the Court to concur, and therefore no need for dependence of the Court on determinations by the Council, relying essentially on the consent of the P5. Even Glennon concedes that concurrent determination powers of the Court and Council would allow for a wider choice of sanctions, i.e. concurrent judicial and political measures to deal with acts of aggression,[830] a statement which, in actual fact, unwittingly provides strong support for independent determination power by the Court and even operational partnership of the two organs.[831]

---

[828] Ian Hurd, 'How not to argue against the Crime of Aggression: A Response to Michael Glennon' (2010) http://buffett.northwestern.edu/documents/working-papers/Buffett_10-001_Hurd.pdf, accessed 15 March 2020. See also Heinsch (2010) (n. 376).

[829] G. Gaja, 'The Respective Roles of the ICC and the Security Council in Determining the Existence of an Act of Aggression' (2004) in Politi and Nesi (eds) *The International Criminal Court and the Crime of Aggression* (n. 809), 124.

[830] Glennon (2010) (n. 8), 104.

[831] Benjamin Ferencz, in 'Speaking Frankly about the Crime of Aggression: Reconciliating Legitimate Concerns and Removing the Lock from the Courthouse Door', (2008), http://www.benferencz.org/arts/93b.html, accessed 19 March 2020. See also Cassese (2007) (n. 614).

In addition to these direct responses to Glennon and Stein, other arguments can be presented in favour of the Court's jurisdictional autonomy over aggression. Article 8 *bis* relies on determinations of a state act of aggression by the Court as an essential element of establishing the *actus reus*,[832] inextricably linking the state act and criminal responsibility of the individual. These determinations are therefore merely tangential to the assessment that the state act element of the crime was actually committed. They are not made for the purpose of political statements or condemnations, unlike determinations by the Security Council. Consequently, a determination by the Court does not venture into the political realm of the Security Council, and, equally, the Security Council has no business establishing individual criminal responsibility of leaders. This point was made, particularly, by Antonio Cassese, asserting that the Security Council has no jurisdiction over individuals, whilst conceding that Article 39 of the UN Charter has the effect of granting the Council 'primary and exclusive jurisdiction' over *States'* breaches of the prohibition of the use of force contained in Article 2 (4).[833] Therefore, he argues, the Court should rightly enjoy free and independent jurisdiction over the Crime of Aggression.[834]

The independence and impartiality of the International Criminal Court ought to be preserved even where the Security Council has made an Article 39 declaration. Article 39 has the effect of granting primary competence to the Security Council to take action to maintain peace and security, in conjunction with Article 24, but not to authorise judicial action to the exclusion of any other institution.[835] Both the General Assembly and the ICJ

[832] See Chapter 3, section 2.
[833] Cassese (2007) (n. 614), 846, emphasis added.
[834] *Ibid*, 846-7.
[835] For Articles 24 and 39 UN Charter (n. 134), see the discussion in section 2.1 above. Support can be gained from the *Certain Expenses Case* (1962) (n. 765, page 163) and the argument for inherent competence

have in the past taken it upon themselves to come to independent findings of aggression,[836] and a reasonable argument can be made that the ICC ought to benefit from equal independence, particularly since the court necessarily requires and applies its own criminal standard of proof. Whilst the Rome Statute contains no express provision for jurisdictional autonomy akin to Article 36 (6) of the ICJ Statute,[837] the general statement in *Tadic* that a tribunal's 'jurisdiction to determine its own jurisdiction' was 'a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents',[838] could be applied equally to the ICC. Deciding on their inherent competence, the tribunal decided that it was 'duty-bound' to exercise its jurisdiction 'regardless of the political background or the other political facets of the issue'.[839] Additional authority can be gained from the *Armed Activities* case, which asserts that '…it is clear that the practice of the International Court reflects this trend for tribunals and courts themselves to pronounce on compatibility with object and purpose, when the need arises'.[840] This opinion thus acknowledges that courts and tribunals other than the ICJ can also pronounce themselves on their own competence. Academic support has been provided, for instance by Dov Jacobs,[841] who argues that the Court ought to be presumed as inherently competent, applying '*mutatis mutandis'* the authority of Article 36 (6) of the ICJ Statute,[842] and the logic adopted in the *Tadic*[843] and *Reparations*[844] cases that where an international organ has been instructed with a certain task, it ought to be

of the ICC by Jacobs (2010) (n. 556), 136, Weisbord, (2008) (n. 176), 197-200, and Heinsch (2010) (n. 376), 742-3.

[836] See Chapter 1, section 5.1, and Chapter 2, section 2.1, and pp. 189-91 of this Chapter.

[837] Article 36 (6) (n. 769) of the ICJ Statute (n. 35).

[838] See *Tadic* (IT-94-1), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (para 18, 24), in which the ICTY cited the *Certain Expenses* case (1962) at p. 163 (n. 765).

[839] *Tadic*, *ibid*, para 24.

[840] *Armed Activities* case (2006) (n. 773), Joint Separate Opinion, para 23.

[841] Jacobs (n. 217 Chapter 2), 135-9. For similar arguments, see also Weisbord (2008) (n. 176), 197-200.

[842] ICJ Statute, Art 36 (6) (n. 769).

[843] *Tadic* (n. 838).

[844] *Reparations for Injuries Suffered in the Service of the United Nations* (hereinafter *Reparations* Case), ICJ, Opinion, 11 April 1949, p. 179.

regarded as having been 'clothed […] with the competence required to enable those functions to be efficiently discharged'.[845]

The Court and the Council operate in very different hemispheres, and therefore it is unnecessary to consider different determinations as conflicting. Precedents for a judicial organ's perceived competence in even politically sensitive and complicated issues were set by the Nuremberg and Tokyo tribunals. Furthermore, the ICJ's above declaration in *Nicaragua* provides a convincing argument for the separation of judicial and political functions and independent exercise of jurisdiction by the ICC through analogy.[846] Importantly, the ICJ also stated that the Court had 'never shied away from a case brought before it merely because it had political implications.'[847] The *Armed Activities* case, specifically the separate opinion of Judge Simma, provides once again an additional profound argument for independent judicial determinations.[848]

Moreover, the Court is more likely to apply a legalistic and consistent definition in order to comply with the general requirement for certainty at law, and is also bound to consider the gravity threshold in Article 8 *bis* in their determinations, whereas the Security Council would have complete discretion due to their Chapter VII powers. Past examples of Security Council (non-)determinations demonstrate inconsistencies,[849] because the Council is bound to take into account political rather than legal considerations. These inconsistent political determinations are also applied retrospectively, and that

[845] *Ibid.*
[846] *Nicaragua*, (1984), see n. 827 and p. 200 above.
[847] *Ibid*, para 96.
[848] *Armed Activities* (2005), Joint separate opinion, para 23 (see n. 773 and related text).
[849] See Chapter 1 and n. 802 above.

combination raises serious legality concerns.[850] Inconsistent, retrospective condemnations are also not likely to inspire deterrence from future acts of aggression, whereas likely determinations by the Court for judicial purposes and resulting prosecutions might. It would follow that the Court is better equipped, and therefore *the* appropriate organ, to consistently determine criminal aggression independently of political considerations and inhibitions.[851] Many other crimes require similar judicial determinations, and the Rome Statute is restricted to the 'most serious crimes of concern to the international community as a whole',[852] intrinsically limiting the scope for excessive judicial expansion. Additionally, the crime of aggression has long been a crime at customary international law, even before a definition was achieved, and to deny the first permanent international criminal court independent jurisdiction is nonsensical. As the UK House of Lords stated in *R v Jones*:

> The core elements of the crime of aggression have been understood, at least since 1945, with sufficient clarity to permit the lawful trial (and, on conviction, punishment) of those accused of this most serious crime. It is unhistorical to suppose that the elements of the crime were clear in 1945, but have since become in any way obscure.[853]

The argument that the Court cannot independently try aggression for legality reasons is, accordingly, unpersuasive, and unfettered judicial determination and interpretation

[850] See Glennon's arguments above, n. 812 and related text.
[851] See Ferencz (2009) (n. 4), 290. See also Jacobs (n. 556), 138-40, and Weisbord (2011) (n. 430), 88, 120-2, and the discussion above, particularly at pp. 189-91.
[852] See Preamble of the Rome Statute (n. 85).
[853] Lord Bingham in *R v Jones* [2006] UKHL 16 (n. 37), para19.

powers, irrespective of political considerations and consent by member states of the Security Council, are both necessary and appropriate.[854] Consequently, an argument can be made for extensive jurisdictional determination powers and wide ranging discretion of the Court, and it may even be conceivable that such judicial interpretations will lead towards a redefining of the international legal order, promoting 'peace as they do justice'.[855] As Weisbord argues, in polar opposition to the arguments presented above by Glennon and Stein:

> Because the criminalization of aggression requires the ICC to intervene in the domain of fundamental national security, an area of discretion warily guarded by states, the stakes will be especially high. Judicial interpretation of the crime of aggression [including the determination of an act of aggression] will not only determine the outcome of particular cases, it will shape the international legal order.[856]

An example of such a need for judicial determination could arise, for instance, where a Security Council determination and condemnation of aggression had failed due to use of the veto. In this case the Court should have the discretion to interpret this failed resolution as mere silence rather than a determination that no act of aggression had occurred, continuing with its investigation and prosecution if the evidence of the case supports it.

---

[854] See also Weisbord (2011) (n. 430) 87-8, advocating extensive jurisdictional determination powers and wide ranging discretion of the Court, in polar opposition to the restrictive view supported for instance by Glennon (n. 8 and 812), Weisbord expresses hope that judicial interpretation will result in redefining 'the international legal order [by intervening] in the domain of fundamental national security, and area of discretion warily guarded by states…' This argument is, however, likely to be countered with accusations of judicial policy-making and undermining of the Security Council's powers.

[855] Weisbord, *ibid*, 88.

[856] *Ibid.*

Such judicial discretion would allow for case by case solutions, incrementally developing the infant crime of aggression, whilst establishing guiding principles.[857] At the same time, criminal prosecutions could be kept separate from political considerations by external organs, permitting the Court to focus on objective evaluations of whether an act of aggression has actually occurred as a precursor to a decision on the defendant's potential criminal liability.

Furthermore, it has been suggested that whilst the Court should not be bound by the findings of the Security Council, conversely international political institutions including the Council should take account of judicial findings.[858] Ideally, there would thus be a working relationship between the Court and the Council, operating in tandem, without encroaching on each other's area of expertise. Such a relationship had been envisaged in a 1998 Proposal by Cameroon.[859] Interestingly, that particular proposal also foresaw the possibility of an enforcement mechanism in the relationship between the Court and the Security Council, suggesting that the Court could ask the Security Council for assistance in investigations, by providing arrest warrants and enforcement of ICC judgements under its Chapter VII powers.[860] In a similar vein, and notwithstanding concerns that aggression investigations might be too 'resource-consuming' for the Court, Norway stated:

> In cases of manifest acts of aggression, we consider that it is incumbent on the Security Council of the United Nations and its individual members to fully take

[857] Weisbord, (2008) (n. 176), 208-10.
[858] Cassese (2007) n. 614, 846.
[859] UN Doc. A/CONF.183/C.I./L.39, Suggested Article 10.
[860] *Ibid*, although, somewhat contradictorily, the proposal also refers to pre-emptory determination power by the Council (10 (1)) prior to proceedings.

into account the possibility of referring such situations to the Court in accordance with the Charter.[861]

Consequently, these views credit the Court with independence and a perception of impartiality, although the court's own decisions may be politically influential, and even compel the Council to take action. This perceived onus to cooperate with the Court and consider judicial outcomes is highly interesting, as it could potentially entail a requirement for justification, where a P5 member continuously blocks a resolution pertaining to an act of aggression and the Court has made an autonomous determination of a state act. Disagreements between the two organs may, therefore, even have the positive impact of resolving a deadlock by placing an onus or duty on member states to cooperate with the Court, or at least justify their decisions of objection.

This concept of a duty of cooperation is reminiscent of some of the theoretical arguments encountered in the Introduction, for instance, as presented by Ronald Dworkin.[862] Following this approach, States were perceived to have a sovereign duty to promote a peaceful, effective international order for the benefit of their own citizens, pursue international stability, as well as cooperate internationally towards the prevention of human rights abuses, war crimes, genocide etc. It takes only a very small imaginary step to include the prevention and prosecution of the supreme international crime of aggression in this list. This envisaged onus or duty of cooperation would also assist in

[861] 'Statement by Norway', in 'Explanations of Positions', *Travaux Preparatoires* (n. 317), 813.
[862] See Dworkin (2013) (n. 43) and pp. 17-20. See also the concept by early liberal internationalists of international cooperation out of necessity to achieve a 'higher unity of mankind', Collins, citing J. Bluntschli (n. 78 and related text).

promoting the 'minimum public world order' devoid of aggression, as envisaged by McDougal and Feliciano.[863] Furthermore, the promotion of such a political order based on States' cooperation was the aim behind the creation of the United Nations in the first place, of which the Security Council is merely the executive organ. The withholding of individual state consent, through use of the veto by any of the P5, ought to at least require justification in referrals of aggression cases to the Court. Accordingly, the perception of an onus placed on the Security Council to cooperate with the Court and take notice of judicial findings is, this thesis argues, persuasive.[864]

On balance, therefore, the above arguments provide compelling evidence for non-exclusivity of the Security Council's powers of determination, but, perhaps even more importantly, independent jurisdiction is also justified by the paramount necessity to observe the rights of defendants to due process before the ICC as a criminal court.[865] For the politically motivated Council to be granted Stein's envisaged extensive powers over judicial proceedings is against all notions of such judicial independence and due process of law. Prosecutions and trials for the crime of aggression would, under this vision, be simply a foregone conclusion without any observance of defendants' rights, or general principles of criminal law based on the political and often arbitrary will of the Security Council, in particular the P5.

Ultimately, the argument presented by advocates of Security Council monopoly of inevitable conflict between the judicial institution of the ICC and the Security Council

[863] See McDougal and Feliciano (1958), 812 (88).
[864] For support, see Cassese, (n. 614) and the suggestions by Cameroon (n. 859) and Norway (n. 861).
[865] This point is also made by Jacobs (2010) (n. 556), 137,

can be refuted by the counter-argument that the Court's responsibility is to determine the criminal liability of individuals rather than to politically stigmatise States by applying sanctions. Some overlap may be incidental because of the prerequisite of identifying the state act of aggression in order to prosecute an individual,[866] but this thesis submits that this is preferable to a Court whose jurisdiction is severely hamstrung.

Having attempted to refute the arguments for Security Council monopoly of determinations based on prerogative and concerns of conflicting outcomes, the following section considers a number of arguments against judicial independence from a protectionist standpoint.

3.2 Protecting the Court from a political quagmire

An entirely different argument in favour of Security Council monopoly is based on the well-meaning intention to protect the court's judicial integrity, rather than a defence of the Council's prerogative, or a fear of inconsistencies and conflict.[867] Following this view, the argument has been presented that it is simply not 'good for the Court in the long run to be faced with the politically charged Crime of Aggression', because international criminal law is still in its infancy and slow to develop.[868] Some negotiating States

[866] See Article 8 *bis*, and paragraph 3 of the Elements section (n. 607) and the discussion below.
[867] See the arguments presented above, particularly by Glennon (2010) (n. 8 and 812) and Stein (2005) (n. 811).
[868] Heinsch (2010) (n. 376), 713, 742.

appeared to share this view. Thus, for instance, the post-Kampala statement by Norway expressed the sentiment that aggression investigations could be 'extremely resource-consuming', detracting from the exercise of jurisdiction over the other crimes in Article 5.[869] Consequently, the Court ought to be protected from having to make independent determinations of aggression.

Similarly, the view has been expressed that the Court is simply the wrong forum for aggression scenarios, and should be saved from having to become engulfed in political controversies between States.[870] As Thomas Meron states:

> Such an immersion would endanger the Court's judicial role and image. Imagine the immense difficulties the ICC, as a court of individual criminal responsibility, would face in dealing even with relatively simple matters of aggression. Is it equipped to consider such matters as historical claims to territory, maritime boundaries, legitimate self-defense under Article 51, or legitimate reprisals? Do we want to expose the ICC to the inevitable accusations of politicization? And is the competence of the ICC, in any event, not limited to jurisdiction over natural persons? We must not turn the ICC into a political forum for discussing the legality of use of force by states.[871]

The intention to protect the Court from having to make political determinations and consequently be subjected to accusations of politicisation may be well-meant, but is,

[869] 'Statement by Norway' (n. 861).
[870] See Meron (2001) (n. 809), 4.
[871] *Ibid.*

arguably, overly protective for the following reasons. Firstly, the Court has now been tasked with making a determination of a state act of aggression in any case, as this is part of the *actus reus* established in Article 8 *bis* and the elements of the crime, and is therefore essential for an assessment of individual criminal liability.[872] Secondly, support for the ICC's independence can be derived by analogy from the ICJ's self-assessment of having 'separate but complementary functions' to those of the Security Council, and there is no reason why this approach should not apply to the ICC.[873] It therefore provides as convincing a response to protectionist concerns, as it does to arguments for absolute political control of the Council over the ICC's jurisdiction.

Moreover, the ICJ's statement in *Nicaragua* provides authority that political implications are no reason for a court to shun a case.[874] Admittedly, the ICJ's perceived capacity derives support from Article 36 of its own constitutive Statute,[875] and no equivalent provision has been expressly included in the Rome Statute. Nevertheless, the ICC should be credited with 'jurisdiction to determine its own jurisdiction', as an essential requirement to exercise their function as a criminal court,[876] deriving support from the ICTY's decision on a similar lacuna in favour of its own jurisdiction in the case of *Tadic*.[877] There is, therefore, sufficient authority for crediting the ICC with the ability to rely on its own expertise and functionality. The Court ought to be seen as competent, both

[872] See n. 607 and 866.
[873] *Nicaragua* (1984) (n. 827), at para 95.
[874] *Ibid*, para 96. The original precedents of the Nuremberg and Tokyo tribunals had already set an early example by having to consider exceedingly complicated political issues, and they were also deemed competent to do so. See Chapter 1.
[875] Article 36 (6) (n. 769) of the ICJ Statute (n. 35).
[876] The argument for competence of the ICC has been developed particularly by Dov Jacobs (2010) (n. 556), 135-9. See also Weisbord (2008) (n. 176), 197-200.
[877] *Tadic*, (1995 Decision on Jurisdiction), n. 838, and related discussion above. See also the *Reparations* case (1949) (n. 844).

out of necessity and principle, on account of being the organ which has been charged with the prosecution of the most serious international crimes regardless of their political nature.

A related and equally protectionist argument for exclusive Security Council determination power is based on the aim to discourage some States from gaining political advantages, or to prevent frivolous referrals to the Court.[878] The delegation of Norway, in their post-Kampala statement, also expressed concern that States' accusations of aggression may be unfounded and politically motivated.[879] Similar concerns have also been raised by David Scheffer, highlighting, particularly, the potential for abuse of the Crime of Aggression provisions.[880] An additional source of consternation for Scheffer is that the optional and patchy jurisdiction of the Court, due to the membership and consent requirement in Article 15 *bis*, may lead to inequality and inequitability.[881] Following this view, Security Council determination powers serve to circumvent the strict membership and consent requirements of Article 15 *bis*.[882]

These arguments, however, rely on a view of the Security Council as an entirely impartial arbiter, unencumbered by political bias, and accredited with extensive determination powers, at the cost of independent decisions by the Court. Furthermore, wide Security Council powers over criminal court proceedings are being advocated in order to capture

[878] See for instance, David Scheffer, 'The Complex Crime of Aggression' (2011), 43 Stud. Transnat'l Legal Pol'y 173, 178.
[879] 'Statement by Norway' (n. 861).
[880] Scheffer (2011) (n. 878).
[881] *Ibid*, 186-8.
[882] *Ibid*. For more on the argument that jurisdiction is actually expanded through Security Council involvement, see the discussion below.

non-member states or non-consenting members, assuming that such Security Council determinations will be straightforward and readily forthcoming. Member states' own referrals, on the other hand, are viewed with great scepticism as to their motives and merit.

These views, arguably, appear to be overly naive and excessively cynical at the same time, and none of the assumptions are necessarily inevitable. For example, the fact is ignored that the Security Council is often polarised and not immune to political self-interest of powerful States. The veto power can and, as recent history has shown, is also likely to be used to prevent Security Council determinations and block resolutions, if directed against one of the P5 or one of their allies.[883] Equally, the argument that all referrals submitted by States are frivolous or meritless, and brought solely for political reasons rather than seeking the prosecution of actual criminal aggressors, is overly simplistic. Thus, Article 15 *bis* has been equipped with a variety of safeguards to prevent abuse, particularly in view of the Security Council's deferral powers in Article 16.[884] In addition, prior to an investigation, the Prosecutor is now required to ascertain whether the Security Council has made a determination, and is obliged to notify the Secretary-General of the UN of the situation.[885] If no determination exists, the Prosecutor then has to delay the investigation for 6 months while he or she waits for the Security Council to consider the matter, and then still has to wait for authorization of proceedings by the Pre-Trial Division.[886] All of these provisions for delays and the requirement for reflection by various organs render the jurisdictional procedure in Article 15 *bis* more than sufficiently

[883] See for instance the vetoed Security Council draft resolutions on the Ukraine and annexation of the Crimea (n. 799) and the situation in Syria (n. 802).
[884] Article 16 of the Rome Statute (n. 739), providing for the power of the Council to halt an investigation or prosecution for a period of 12 months at a time.
[885] Article 15 *bis* (6).
[886] Article 15 *bis* (8).

equipped (in fact, arguably, excessively restricted) to provide a safeguard against the frivolous abuse by States. The added suggestion that the Pre-Trial Division should in all cases and in addition to the Security Council's involvement determine that an act of aggression has occurred, prior to authorising investigations,[887] is therefore unnecessary, and would complicate the procedure even more.

The following subsection examines, in more detail, an additional contention, which was already encountered in David Scheffer's above proposal. This argument for exclusive Security Council determination power suggests that such extensive involvement of the Council actually has the effect of expanding the Court's jurisdiction over non-members and non-consenting members, and is therefore to be seen in a positive light.

3.3 The argument that Security Council involvement expands the Court's reach

The above discussion considered and attempted to refute arguments for Security Council control over aggression proceedings, based on prerogative, fear of conflicting determinations and the wish to protect the Court from becoming entangled in political turmoil. An alternative view propounds that Security Council determinations are essential for the reason of expanding the Court's jurisdiction to situations in which it would

[887] Scheffer (2011) (n. 878), 181.

normally have none.[888] This argument is based on the assumption that international and, in particular, treaty law makes it impossible for the Court to have broad jurisdiction over non-signatories. Consequently, according to Dapo Akande, the Security Council's involvement should be regarded in a positive light as expanding the Court's jurisdiction.[889] Furthermore, the Court should be barred from exercising greater independence, as this would amount to an untenable judicial review of Security Council decisions.[890]

These arguments, as defended by Professor Akande, operate from a completely different angle to the by now familiar arguments of Security Council prerogative and States' national interests,[891] as well as protectionism of the integrity of the Court.[892] They also represent a paradox. On the one hand, the argument defends active restriction of the Court's independent jurisdiction.[893] At the same time, it is being reasoned that the Court's jurisdiction would be expanded through this effective inhibition of independent jurisdiction and the insistence on Security Council determinations.[894] The exercise of Security Council power is, following Professor Akande's view, also necessary due to the requirement for individual state consent to jurisdiction. This individual state consent manifests itself threefold: firstly through membership, secondly through ratification of the aggression amendments, and thirdly through non-application of the additional choice to opt out.[895] This argument is based on the strict application of the VCLT, providing that

[888] Dapo Akande, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council', (2011) Oxford Legal Studies Research Paper No. 10/2011, 37.
[889] *Ibid*, 37.
[890] *Ibid.*
[891] See the arguments of Glennon (2010) (8 and 803 above) and Stein (2005) (n. 811).
[892] See Meron (2001) (n. 809), and Scheffer (2011) (n. 878).
[893] Akande (2011) (n. 888), 37-8.
[894] *Ibid*.
[895] See Chapter 5.

treaty provisions can only bind their signatories, excluding third parties.[896] Consent to be bound by a treaty can be expressed by signature, exchange of the treaty, ratification, acceptance, approval or accession.[897] The crime of aggression provisions, however, take the consent requirement one step further requiring even signatories to the Rome Statute to have individually consented to jurisdiction by accepting the amendments and failing to opt out.[898] In addition to this unusual extra consent layer, and differing from the other crimes under the Statute, jurisdiction only arises, where *both* victim and aggressor have consented to jurisdiction, by virtue of the choice to apply Article 121 (5) in its strictest interpretation.[899]

Security Council determinations and referrals are perceived to be the only way to circumvent this strictly interpreted membership and consent requirement.[900] Consequently, extensive control by the Council, Akande argues, is not only essential, it is also advantageous, since it extends the Court's jurisdiction to non-consenting parties.[901] As a result of this potential application of involuntary jurisdiction to non-consenting States through a Security Council referral, Professor Akande observes:

> There has not been a warm embrace by States who at the very least pay lip service to, and at most worship at the altar of independence, equality and consent. An amended ICC Statute allowing adjudication of aggression by non-consenting

[896] VCLT (n. 32), Article 34.
[897] *Ibid,* Article 11.
[898] Article 15 *bis* (4) Rome Statute (n. 1).
[899] Article 121 (5) Rome Statute, for an in-depth discussion, see Chapter 5.
[900] Article 15 *bis* (4) Rome Statute.
[901] Akande (2011) (n. 888), 40.

> States [through Security Council referral] might well be the first explicit embrace by States (some States) of non-voluntarist principles in a treaty.[902]

The accuracy of this logic, insisting on strict application of the VCLT, appears persuasive, by suggesting Security Council determinations as a solution to the otherwise patchy jurisdiction of the Court. It is undeniable that Security Council involvement may occasionally be effective in overcoming the problem of necessary state consent to prosecutions, thus potentially enabling jurisdiction over an unpopular non-consenting or non-member state.

However, the argument of linking extensive Security Council control over criminal aggression proceedings to the positive result of wider jurisdiction through the possibility of extension to non-consenting parties, may be overly optimistic. In reality such extensive control is unlikely to ease the restrictiveness of the Court's jurisdiction. The past history of Security Council determinations of aggression has shown that they have almost without exception addressed 'specific geographic controversies rather than broad global threats'.[903] States targeted by Security Council condemnations generally enjoy little support by, and are not usually allied to, one of the P5 members.[904] As Andrew Guzman observes, '[i]t is one thing to establish a peacekeeping force in Cote d'Ivoire.[905] It is

[902] *Ibid*. For evidence of a lack of a 'warm embrace', see the statement of positions post-Kampala, in particular by the P5 (n. 722-3). For a deeper discussion of Professor Akande's view of strict application of treaty law generally, see Dapo Akande and Antonios Tzanakopoulos, 'Treaty Law and ICC Jurisdiction Over the Crime of Aggression' (2018), 29 EJIL, 939.

[903] Andrea Bianchi, 'Security Council's Anti-Terror Resolutions and their Implementation by Member States' (2006) 4 J Int'l Crim. Just. 1044, at 1046-47. For an account of Security Council (non-) determinations of acts of aggression, see Chapter 1.

[904] *Ibid.*

[905] Citing Security Council Resolution 1528, S/RES/1528 (2004), which authorised ECOWAS and French deployments in Cote d'Ivoire.

altogether more difficult to get a resolution attempting to resolve global security threats that implicate important interests for the P 5.'[906]

As a result, Security Council determinations of aggression against a non-member state or non-consenting state are only likely to be made, and therefore able to overcome the consent problem, where they have no implications for the interests of the P5. The considerable disadvantage, arguably outweighing the benefit of comprehensive Security Council involvement, is that it is potentially capable of preventing jurisdiction of the Court on far more occasions than it may enable it, because of the Council's very own internal voting structure and the ability to veto a determination.

In reality, prosecutions under Article 15 *ter* are unlikely to take place if there is the slightest objection by a P5 member, due to protection of their own national interests or those of an ally, to a referral to the Court by the Security Council. Consequently, jurisdiction is potentially restricted, via the back door of the requirement for state consent, where one of the P5 fails to grant what effectively amounts to such individual consent, even where the majority of the Security Council would deem an aggression situation to be of sufficient concern to refer it to the Court.

Prosecutions under Article 15 *bis* are also subject to the substantial powers of the Security Council, even where a State is a member. This is because of the requirement for the Prosecutor to first ascertain whether the Council has made a determination,[907] followed by a considerable time delay caused by leaving the matter with the Council,[908] and the

[906] Andrew Guzman, (2011) (n. 25), 43.
[907] Article 15 *bis* (6) of the Rome Statute.
[908] Article 15 *bis* (8).

Council's subsequent ability to defer (or permanently halt) any investigation.[909] Additionally, these prosecutions under Article 15 *bis* require acceptance through the member state's choice not to opt out.[910] It is, however, unlikely that a State which has intentionally perpetrated an act of aggression consents to the prosecution of its officials, unless there has been a change of regime, or policy, or both. These existing loopholes are, therefore, prone to be taken advantage of by States pursuing acts of aggression.

Impunity as a result of optional state consent to jurisdiction is not conducive to overall deterrence. For these reasons, this thesis raises the question whether consent to prosecution for aggression is an appropriate concept at all, regardless of whether this manifests itself through a requirement of Security Council approval, reliant on consent by the powerful, or – as discussed in the next chapter - the multiple consent sought from member states.

4. An evaluation of Security Council involvement

The above discussion considers and aims to refute a variety of arguments defending Security Council monopoly or overall control. These have ranged widely from a claim of exclusive prerogative to deal with any aggression scenarios to the preservation of the existing power structure and sovereign interests, and from the wish to protect the Court

[909] Under Article 16 (n. 739).
[910] Article 15 *bis* (4).

from accusations of politicisation and States' abuse to the requirement for strict observation of treaty law and consent at international law.

Counterarguments have been presented for wide and independent determination powers by the Court. These have ranged from an inherent assumption of competence, akin to that of the ICJ, provided for in Article 36 of its constitutive statute,[911] and confirmed in a number of cases,[912] to the factual need to arrive at these determinations as an integral element of the crime.[913] Such determinations by the Court are also necessary to satisfy legality requirements, and in order to achieve this, the Court requires flexibility and independent determination powers. If the judiciary are expected to fulfil their purpose, their expertise, competence and impartiality have to be trusted. The requirement for legality is also better served by judicial case by case development than *ex post facto* determinations by a political organ,[914] whose history with regards to such determinations is, at best, unreliable.[915]

Security Council paralysis results in a lack of a balanced political solution as well as unjust effective impunity for perpetrators of aggression. This leads to scenarios, where some States with no allies amongst the P5 members of the Council might be subject to determinations and referrals, whilst other aggressors might enjoy effective immunity from prosecution simply because of their relationship with one of the powers capable of

[911] For Article 36 ICJ Statute, see n. 769 and related discussion.
[912] See for instance *Nicaragua* (1984) (n. 827), *Armed Activities* case (2005), n. 37. See also *Tadic*, 1995 Decision on Jurisdiction, (n. 838), and the much earlier *Reparations* case (1949) (n. 844).
[913] See the discussion on pp. 201-3, and the fact that the ICC is concerned with individual criminal liability rather than making determinations for political purposes.
[914] For strong support for this contention, see the SWGCA's own stance, despite their need to placate the majority view (section 2.2).
[915] See the discussion in Chapter 1.

vetoing a Security Council resolution.[916] Inertia within the Security Council and failure to agree to refer a case to the Court should not be allowed to block independent investigation and possible prosecution, particularly since the Security Council, in any case, retains the power to defer a particular investigation potentially forever under Article 16.[917]

A greater focus on independent determinations and prosecutions of acts of aggression would aid deterrence and prevent impunity, particularly if the Court and the Security Council were to cooperate as operational partners. Thus, Benjamin Ferencz, for instance, envisaged such cooperation through the provision of arrest warrants, enforcement of judgments and generally taking note of judicial decisions.[918] Granting ICC judges independent determination powers could indeed be seen to be a positive development, creating the envisaged chance of nuanced case by case solutions and the development of guiding principles, whilst avoiding politicization of decisions. Conversely, if an independent Security Council determination of aggression exists, the Court would have to take care not to inadvertently reverse the burden of proof due to giving this too much weight, bearing in mind that the individual *actus reus* would still have to be proven in each case. The rights of a defendant in a criminal trial must be observed,[919] and this requirement counters an argument by critics of the Court that findings by other organs, specifically the Security Council, should be prejudicial to the Court's own findings in order to create certainty and uniformity.[920] Even well-meaning attempts to preserve the

[916] See for instance enforced Security Council inactivity in the face of blatant aggression, in the Ukraine (n. 799), and serious human rights violations in Syria (n. 802).
[917] See n. 739.
[918] See Ferencz (2008) (n. 831) and Cassese (2007) (n. 614).
[919] See Articles 66 and 67 of the Rome Statute (n. 1).
[920] See for instance Glennon (2010) (n. 8 and 803), and Stein (2005) (n. 811), and related discussion. For a provision against prejudicial findings see Articles 15 *bis* (9) and *ter* (4).

Court's integrity as a non-political organ as grounds for insistence on external determinations,[921] are strongly refutable, since the Court is well-equipped to venture into the political arena on account of its independence and the stringent safeguards placed on its prosecutions of aggression.[922]

The arguments presented also counter those of commentators, who view independent determinations by the ICC as an untenable review of Security Council decisions.[923] Instead, this thesis submits that the Court should be entitled to discretionary judicial interpretations. The Court should be allowed to conduct independent investigations and prosecutions, even if these are deemed by some to constitute an unwarranted intervention in areas of international politics traditionally regarded as the sole preserve of the Security Council. These wider judicial interpretations and independent determinations are also necessary, in light of a definition which may be too narrow to apply to modern versions of aggression, on account of an extremely limited list of acts, and application to state actors and military and political leaders only.[924] As touched upon in the Chapters on the definition, warfare evolves constantly with modern developments and changing geopolitics. In order for the new Crime of Aggression to become and remain relevant, a certain amount of interpretation in judicial determinations is essential and ought to be permissible, as long as the analogy is close enough and the underlying prohibited behaviour is still recognisable as such. The existing high threshold of the crime would help to prevent frivolous abuse of aggression proceedings.[925]

[921] For the protectionist views in favour of Security Council monopoly, see particularly Meron (2001) (n. 809), Scheffer (2011) (n. 878) and section 3.2 above.
[922] For instance the limitation to the worst international crimes only, see Preamble (n. 85).
[923] See for instance Dapo Akande (2011) (n. 888) and arguments in section 3.3.
[924] See the discussion in Chapters 2 and 3.
[925] *Ibid.*

The arguments for independent determination powers are also highly persuasive in consideration of the overarching purpose of the Rome Statute itself, the endeavour to outlaw the worst international crimes, and eradicate the 'supreme international crime' of aggression.[926] However, in making such determinations, the Court would have to be careful not to offend Article 22 (2) of the Rome Statute,[927] ensuring that the analogy applied was sufficiently close not to offend general legality principles.

The debate is certain to continue, however it is difficult not to agree with the great Benjamin Ferencz that '[f]ailure to allow the ICC to punish aggression is a repudiation of Nuremberg and a step backward in the development of international criminal law… Prohibiting the ICC from exercising its jurisdiction is an indefinite guarantee of continuing immunity for future aggressors.'[928] Granting effective and politically unencumbered jurisdiction over aggression, independent of extensive Security Council involvement, and potentially subject to the concept of universality of such jurisdiction – to be explored in the next chapter - would, on the other hand, prevent 'a renewed licence to wage illegal wars with impunity', representing a 'triumph of Reason over Power.'[929]

[926] See Robert Jackson's opening statement (n. 135) at the Nuremberg Trials (n. 3) and the Final Judgment of the Tribunal (n. 235), at page 16.
[927] Article 22 (2) provides for strict construction of the definition of a crime, and, in case of ambiguity, for interpretation in favour of the defendant (n. 477).
[928] Ferencz (2009) (n. 4), 290.
[929] *Ibid.*

CHAPTER 5: THE STRICT REQUIREMENTS OF MULTIPLE CONSENT AND MEMBERSHIP OF STATES

1. Introduction

The previous chapter introduced the special jurisdictional conditions imposed by Articles 15 *bis* and *ter*. The chapter examined in particular the role of the Security Council in aggression proceedings and the attempted justifications for this extensive involvement. The discussion considered the fact that the Court's dependency on the Security Council raises problems of legitimacy in criminal aggression proceedings, on account of the possibility of retrospective determinations of acts of aggression by an external organ.[930] Furthermore, the independence and credibility of the Court's decisions may be compromised by its reliance on the Council's approval.[931] Conversely, the Court's hands may be tied by the decision of the Council to postpone or halt an investigation under Article 16.[932] An additional concern of great importance is that the Council's decisions are reliant on consensus of its powerful permanent members. Despite the fact that the Kampala compromise allowed for alternative referrals to the Court through state referral

[930] See section 3.1 of Chapter 4 and the discussion on pp. 205-7.
[931] *Ibid.*
[932] See n. 739.

or *proprio motu* investigations, the Court is effectively dependent on the approval of and consent to prosecution by the Security Council and, in particular, its powerful contingent with permanent seats.[933]

This chapter focuses on another facet of the requirement of consent to jurisdiction of the Court, arising specifically from Article 15 *bis*.[934] This article, at least *prima facie*, provides an alternative to absolute Security Council monopoly over the crime of aggression, allowing for limited jurisdiction of the Court in situations where the Security Council cannot agree on a referral or chooses not to actively authorise investigation and prosecution. Nevertheless, Article 15 *bis* contains a number of severe limitations on the jurisdiction of the Court.

Most strikingly, Article 15 *bis* (4) insists on fulfilment of very stringent consent conditions, by allowing for the possibility of a declaration of non-acceptance of jurisdiction by a State. As introduced in the previous Chapter, the paragraph provides:

> The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration

[933] See Article 27 (3) of the UN Charter (n. 210).
[934] And its combination with Article 121 (5), see section 2.2 below.

> may be effected at any time, and shall be considered by the State Party within three years.[935]

Thus, a State can opt out of jurisdiction, notwithstanding the fact that they are signatories, and even if they have previously ratified the aggression amendments.[936] This amplified consent requirement in state referral or *proprio motu* investigations constitutes a fundamental difference to the conditions which have been established for the other core crimes in Article 5 (1).[937] Thus Article 12 (1) of the Rome Statute establishes the jurisdictional provisions for the crimes under the Rome Statute generally, stating that '[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.'[938] The opt-out provision in Article 15 *bis* (4) is therefore exceptional within the Rome Statute, and entails a great restriction on the Court's jurisdiction. Still more perplexing, the discussion will show that this unusual consent requirement has been additionally reinforced by the choice of the 2017 ASP to apply the narrowest of interpretations of entry into force conditions contained in Article 121 (5).[939]

A further limitation on the Court's jurisdiction has been established by Article 15 *bis* (5). The article provides:

---

[935] Article 15 *bis* (4) Rome Statute.
[936] Although the actual wording of Article 15 *bis* (4) does not require prior ratification, see the discussion below in section 2.1.
[937] Article 5 (1) Rome Statute lists genocide, crimes against humanity, war crimes, as well as aggression (n. 9).
[938] Article 12 (1) of the Rome Statute (n. 1).
[939] For the text of Article 121 (5) see p. 231 and for discussion see section 2.2 below. For a discussion of the 2017 ASP's decision, see sections 2.5 and 2.6 below.

> In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.[940]

This provision excludes non-members in any capacity, even where they are the victim of aggression by a ratifying signatory of the Rome Statute. It is also exceptional compared with the other core crimes, jurisdiction over which may exist where *either* the perpetrator *or* the victim are signatories to the Court.[941]

As a result of the combination of these conditions, jurisdiction of the Court under Article 15 *bis* only arises where both victim and aggressor a) are members, b) have individually ratified the amendments, and c) have not taken advantage of the extraordinary possibility to opt out of jurisdiction. The following discussion examines the effect of these exceptional provisions, requiring multiple consent in addition to ratification by all parties.

[940] Article 15 *bis* (5) of the Rome Statute 1998 (n. 1).

[941] See Article 12 (2), which stipulates that '[i]n the case of article 13, paragraph (a) [i.e. state referral] or (c) [i.e. *proprio motu*], the Court may exercise its jurisdiction if *one or more* of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.

The existing jurisdictional conditions for the other core crimes of Article 5 (1) are expressly preserved by Article 15 *bis* (10), reinforcing the different treatment of the crime of aggression. Above emphasis added.

2. Combining Article 15 *bis* (4) with Article 121 (5) – The multiple consent requirement

2.1 Article 15 *bis* (4)

Article 15 *bis* (4) of the Kampala Amendment effectively establishes a pre-condition of consent of even a member state, which is given by failing to take advantage of the right to opt out of the acceptance of jurisdiction. Only if the member state impliedly grants this consent by not opting out, can one of its political or military leaders be investigated or prosecuted for the crime of aggression, in situations of state referral or on the initiative of the Prosecutor.[942]

This provision represents a fundamental difference to other jurisdictional conditions and is exceptional within the Rome Statute. Thus Article 12, which lays down the jurisdictional preconditions for the four core crimes under the Statute,[943] simply provides for general acceptance of member states on signature, regardless of the source of the referral to the Court. No mention is made in this article of the possibility of non-acceptance of jurisdiction by a member state, and none of the other crimes in Article 5 require a member's individual acceptance of (or consent to) jurisdiction.[944] Article 15 *bis* (4), consequently, creates an exception for the Crime of Aggression in *proprio motu* or

[942] Unless there is a Security Council referral, in which case the Court's jurisdiction arises automatically (Article 15 *ter*), see Chapter 4.
[943] Article 12 (1) p. 227.
[944] *Ibid.*

state referral situations, requiring consent in addition to membership.[945] Importantly for this discussion, the wording of Article 15 *bis* (4) suggests, however, that denial of consent demands physical action of a State, by actively opting out of jurisdiction. Otherwise consent may be presumed to exist.[946]

In addition to the inclusion of this exceptional consent requirement in Article 15 *bis* (4), jurisdiction of the Court over the crime of aggression has been limited even further. Thus, the restrictions are exacerbated by the final decision of the Kampala negotiators to combine Article 15 *bis* (4) with Article 121 (5).[947]

2.2. The choice to apply Article 121 (5) to the crime of aggression

Article 121 generally considers amendment procedures, and was nominated in the now extinct Article 5 (2) as the procedure to be followed once a definition of the crime of aggression had been achieved.[948] Article 5(2) did however not state which paragraph of Article 121 ought to apply, and the negotiators therefore had a choice, settling on Article 121 (5) in the implementing Resolution 6.[949] Article 121 (5) provides:

[945] For a critique, see Heinsch (2010) (n. 376), 743, stating that the opt-out provisions merely add to the uncertainty surrounding aggression.
[946] Stefan Barriga and Leena Grover (2011) (n. 724 at 517, 526, 532) and Barriga, 'The Scope of ICC Jurisdiction Over The Crime of Aggression: A Different Perspective', (EJIL:Talk! 29 March 2017), https://www.ejiltalk.org/the-scope-of-icc-jurisdiction-over-the-crime-of-aggression-a-different-perspective/, accessed 20 October 2019. See also Nikolas Stuerchler, 'The Activation of the Crime of Aggression in Perspective', (EJIL:Talk! 26 January 2018), https://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/, and Noah Weisbord's presentation before the General Assembly, 'Activation of the Crime of Aggression', 2 June 2017, available at http://sls.sbg.ac.at/data/Weisbord.pdf, both accessed 20 October 2019.
[947] See section 2.4 and 2.5 below.
[948] For Article 5 (2) see n. 10.
[949] Resolution 6 (n. 2).

> Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instrument of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.[950]

The decision made at the Review Conference in Kampala to apply Article 121 (5) arguably does not sit easily.[951] The original Article 5 (2) speaks of 'adoption' of the aggression amendments,[952] whereas Article 121 (5) considers 'entry into force' for individual member states who have ratified the amendments.[953] This particular anomaly was a substantial point of criticism by the Japanese delegation, as expressed in their statement after the Kampala Conference:

> Article 5, paragraph 2, is invoked as the basis with respect to 'amendment', whereas article 121, paragraph 5, is invoked as the basis with respect to 'entry into force'. This is a typical 'cherry picking' from the relevant provisions related to the amendment, that is, in Japan's view, very difficult to justify…. The upshot is a highly accentuated complication in the legal relation after the amendment

[950] Article 121 (5) of the Rome Statute (n. 1).
[951] See sections 2.2 and 2.3 below.
[952] See n. 10.
[953] See above (n. 950).

between States Parties, as well as the relation between States Parties and non-States Parties, which is extremely unclear and hard to understand.[954]

In addition to the contradiction between the term 'adoption', derived from Article 5 (2), and 'entry into force', used in Article 121 (5), other arguments against the application of the provision can be raised. Thus, aggression already forms part of the core crimes under the Rome Statute, albeit undefined, by virtue of its inclusion in Article 5.[955] It is therefore possible to argue that it was not even necessary to view the aggression provisions as an amendment *per se*.[956] The aggression provisions also do not affect the existing Articles 5, 6, 7 and 8, whereas Article 121 (5) refers to amendments of these articles.[957] Following this view, the original reference to Article 121 in the original Article 5 (2) itself was unnecessary, [958] casting doubt on the logic applied. Furthermore, even if the crime of aggression could be considered as amending Article 5, it by far surpasses a simple amendment of that article, dealing with jurisdictional issues as well,[959] and, in fact creating its own special jurisdictional procedure in Articles 15 *bis* and *ter*.[960]

In consideration of these arguments, the Kampala decision to apply paragraph 5 of Article 121 appears contrived and illogical, and would have been avoidable. Attempting to

[954] See Barriga and Kress (eds) (2012), *Travaux Preparatoires*, (n. 317), 'Statement by Japan', at p. 812.
[955] These points have been made, particularly, by Marko Milanovic (2012) (n. 479), 165, 179.
[956] *Ibid.*
[957] *Ibid.*
[958] See Article 5 (2) of the Rome Statute (n. 10).
[959] Milanovic (2012) (n. 479). See also Barriga (2017) (n. 946). For a different interpretation, see Dapo Akande, 'What Exactly was Agreed in Kampala on the Crime of Aggression?' 21 June 2010, available at http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/, accessed 20 October 2019.
[960] See Astrid Reisinger-Coracini, 'The Kampala Amendments on the Crime of Aggression Before Activation' (OpinioJuris, 29 September 2017 and 2 October 2017) http://opiniojuris.org/2017/09/29/the-kampala-amendments-on-the-crime-of-aggression-before-activation-evaluating-the-legal-freamework-of-a-political-compromise/ accessed 19 October 2019.

explain the contradiction, Roger Clark has pointed out that Articles 5 and 121 were drawn up by separate drafting teams at different times in the lead-up to the Rome Conference, and the ambiguities resulting from the insistence on applying Article 121 can be seen to be a natural consequence.[961] Avoiding this entire controversy, it should, instead, have been possible to seek simple application of jurisdiction over the Crime of Aggression to member states, in line with the other crimes under the Rome Statute according to Article 12.[962]

Notwithstanding all of the above arguments against the choice of Article 121 (5), this article was nominated as the procedure to be followed at the Review Conference, and only another amendment could now change that. Considering the extent of disagreement at the time, it is, perhaps, a fair assessment that this prospect is highly unlikely. Still, the question remains: Why was there such strong insistence on the application of Article 121 (5) rather than any other paragraph or even simple adoption?

2.3 Why insist on Article 121 (5) instead of (3) or (4)?

The reasons for the controversial decision to apply Article 121 (5) become clearer when one looks at the result achieved, as well as the fierce defence of a strict consent

[961] See Roger S. Clark, 'Ambiguities in Articles 5 (2), 121 and 123 of the Rome Statute', (2009) 41 Case W. Res. J. Int'l L., 413, 421-5.

[962] Milanovic (2012) (n. 479), and Astrid Reisinger-Coracini, 'The International Criminal Court's Exercise of Jurisdiction Over the Crime of Aggression – at Last…in Reach…Over Some' (2010) 2 GoJIL, 745, 763-9. For a different view that 'the text and spirit of Article 121 suggests that it is paragraph 5 that ought to apply', see Dapo Akande, 'Prosecuting Aggression' (2011) (n. 888), 11, dismissing the argument that the Crime of Aggression amends articles other than Articles 5-8 of the Rome Statute.

requirement, which continued to be insisted on by a number of powerful States.[963] The direct consequence of a combination of Article 15 *bis* (4) with the whole of Article 121 (5) is the creation of an amplified consent requirement, which has to be fulfilled before the Court can exercise its jurisdiction over the crime of aggression.[964] This is as unusual as it is restrictive. Thus, a State is now considered to grant consent to prosecutions only if they a) become or remain a signatory,[965] b) additionally ratify the aggression amendments,[966] and c) fail to opt out of jurisdiction in accordance with Article 15 *bis* (4).[967]

Revisiting the situation the SWGCA found itself in prior to Kampala also sheds some light on the reasoning behind the creation of this reinforced consent criterion and application of Article 121 (5). The previous discussion demonstrated that States continued to remain sceptic of the Court's jurisdiction prior to the Rome Conference, on account of a perception of Security Council monopoly over aggression.[968] This scepticism did not subside during the subsequent negotiations. Even during the preparation of the final proposals for the Kampala Review Conference and beyond, the SWGCA were faced with continuing resistance by powerful States, particularly the P5, to anything short of Security Council monopoly.[969] If such an absolute monopoly had to be diluted at all, by allowing state referrals or *proprio motu* investigations subject to scrutiny by the Council, an additional filter of individual consent to jurisdiction by member states was sought to

[963] See for instance the 2010 Explanations of Positions, particularly of the P5 members (n. 722-3).
[964] Unless there is a Security Council referral (Article 15 *ter*), rendering consent irrelevant.
[965] Article 15 *bis* (5) of the Rome Statute (n. 940).
[966] Applying Article 121 (5) as a whole (n. 950).
[967] Article 15 *bis* (4) (n. 935).
[968] See Cassese (2013) (n. 12), 138. See also Chapter 1.
[969] See the statements by the P5 (n. 722-3) and Chapter 4, section 2.

be applied.[970] Consequently, after developing a compromise between Security Council referrals and alternative initiations of investigation through either a member state's referral or the Prosecutor's own powers, the SWGCA focused on this additional consent issue, and which particular sub-paragraph of Article 121 was to apply to the exercise of jurisdiction of the Court. Several possibilities arose with different levels of consent required.

The first of the alternatives the SWGCA were faced with, the so-called 'Adoption Model', was to simply apply Article 121 (3) of the Rome Statute, in line with the arguments presented above.[971] Thus, Article 121 (3) provides:

> The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.'[972]

Once a two-thirds majority had been achieved at a meeting of the ASP or a Review Conference, the aggression amendments would, under this model, have come into force. Individual ratification of the aggression provisions would not have been required. Despite the logic behind it, such a simple adoption procedure would, however, have ignored States' insistence on consent through individual ratification in cases where a referral originated from a source other than the Security Council.[973] The powerful States, in

[970] Barriga and Grover (2011) (n. 724), 527-9, 532, and Reisinger-Coracini (2010) (n. 962), 763-9.
[971] Milanovic (2012) (n. 479), 179, and Reisinger-Coracini (2010) (n. 962), 764.
[972] Article 121 (3).
[973] See the explanation of states Positions in the *Travaux Preparatoires* (n. 317) from p. 810, particularly the P5 (n. 722-3).

particular, felt that if complete Security Council monopoly over aggression had to be given up, and the Court was to be allowed some form of independent jurisdiction, at the very least individual state consent had to be given.[974] In light of this resistance to independent jurisdiction, the potential possibility of a simple adoption might have been perceived as 'an astonishing consequence, given the political importance of the matter,'[975] and the unwavering insistence on additional consent. Consequently, the SWGCA felt that following the 'Adoption Model' might have endangered the entire negotiations.[976]

The second possibility was to apply Article 121 (4) to the aggression provisions. This would equate 'adoption' with 'entry into force'.[977] Article 121 (4) provides:

> Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.'[978]

Under Article 121 (4), the provisions would enter into force for all members one year after 7/8 of them had ratified them. This model could, eventually, have achieved jurisdiction over all member states, in line with the aim of ending impunity as expressed

[974] *Ibid*, see also Kress and von Holtzendorff (n. 5), 1196.
[975] *Ibid*.
[976] *Ibid.*
[977] Article 121 (4) Rome Statute (n. 1).
[978] *Ibid.*

in the Preamble of the Rome Statute.[979] Nonetheless, similar to Article 121 (3), it also did not provide for a requirement of individual consent of every single State before general jurisdiction over members arose. Furthermore, the SWGCA was faced with the argument that applying Article 121 (4) would require downplaying the aggression provisions as a 'mere filling in' of the already existing Article 5 rather than as an actual amendment.[980] Consequently, the SWGCA felt that applying Article 121 (4) was also likely to be met with resistance by member states who wished to retain the choice of individual acceptance of jurisdiction.[981] An additional consideration may have been that the threshold of achieving a 7/8 ratifications of ICC member states was likely to delay jurisdiction for a very long time. This particular point is admittedly merely an assumption, but is based on the fact that even 10 years after Kampala only 39 States out of 123 ICC members have ratified the amendments.[982]

From this examination, it is apparent that neither of these two options would have been acceptable to States insisting on consent. Consequently, the SWGCA decided to apply Article 121 (5) to the crime of aggression, effectively adding a third layer of consent. Jurisdiction over the crime of aggression was now subject to insistence on membership, additional ratification, and failing to take advantage of the opting out provision in Article 15 *bis* (4).

---

[979] See the Preamble to the Rome Statute (n. 85), '[**a]ffirming** that the most serious crimes of concern to the international community as a whole must not go unpunished… and [**d]etermined** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.'

[980] See Kress and von Holtzendorff (n. 5), 1196. For a view that this interpretation would not have been unreasonable, despite States' resistance, see Barriga (2017) (n. 946), Milanovic (2012), (n. 479), 179.

[981] See for instance the 2009 *Princeton Report*, 'Informal Intersessional Meeting on the Crime of Aggression', hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8-10 June 2009, ICC-ASP/8/INF.2, (hereinafter the 2009 *Princeton Report*) para 38, (not published in the *ASP Official Records*), p. 703 of the *Travaux Preparatoires* (n. 317).

[982] As of 21 Oct 2019, see www.crimeofaggression.info, accessed 24th August 2020.

Article 121 (5) could, however, be interpreted in two different ways, and therefore gave rise to an additional problem for the SWGCA to consider in their deliberations.[983] Was just one of the States concerned, most likely the victim, required to have ratified the amendment in line with the normal procedure under the Rome Statute,[984] or should each State, i.e. victim and aggressor, be required to do so? These two different interpretations of Article 121 (5) have become known as the 'negative' and 'positive' understanding, depending on whether both sentences of Article 121 (5) ought to be read into the crime of aggression, or merely the first.[985] The difference is more than semantics and, as the following discussion shows, is of the greatest significance.

2.4 Consent by whom exactly? – Two different interpretations of Article 121 (5)

Having settled on Article 121 (5) as the procedure to be followed, and thus acquiescing to the insistence on additional consent of member states to jurisdiction,[986] the SWGCA failed to resolve the question of a 'positive' or 'negative' understanding at the time. This led to considerable debate post-Kampala on the appropriate reading of the article in combination with the new Article 15 *bis* (4).[987]

[983] See item No. 9, paragraph 25 of the 2010 *WGCA Report*, submitted in preparation for the Kampala Review Conference. *Report of the Working Group on the Crime of Aggression*, RC/5 in *Review Conference Official Records*, RC/11, Part II, Annex III, 45.
[984] Under Article 12 (2) (n. 941), providing for jurisdiction based on *either* nationality *or* territory, see fn. 11.
[985] For the two sentences of Article 121 (5) see p. 231.
[986] In addition to the consent expressed through membership itself, and failure to take advantage of the opt-out provision of Article 15 *bis* (4).
[987] For the two polarised stances, see, *infra*, n. 989 and 993 respectively, and related discussion.

Under the 'negative' interpretation, Article 121 (5) would be read strictly as a whole, precluding jurisdiction of the Court '[i]n respect of [any] State Party which has not accepted the amendment… when committed by that State Party's nationals or on its territory.'[988] Consequently, this negative understanding insisted on individual acceptance by both aggressor *and* victim. No jurisdiction would arise if only one of the member states in question, most likely the victim of an act of aggression, were to ratify the aggression amendment.[989] This interpretation clashes, however, with the provisions in Article 12 (2), which allows for the Court's adjudication where *either* the perpetrator or the victim have accepted jurisdiction.[990] The conflict between Article 12 (2) and the second sentence of Article 121 (5) has been conceded as problematic even by unwavering supporters of the negative interpretation.[991] Thus Dapo Akande, for instance, admitted in the run-up to the Kampala Conference:

> The lack of clarity in the second sentence of Article 121 (5) is unfortunate. The problems generated by that provision are in all probability attributable to sloppy drafting. It is doubtful that the intention behind the second sentence of Article 121 (5) was (i) to change the normal jurisdictional rules for the ICC; and/or (ii) to

[988] Article 121 (5) (p. 231).
[989] For a prominent defence of this 'negative' interpretation, see Akande 'What Exactly was Agreed in Kampala on the Crime of Aggression' (2010) (n. 959) and Akande, 'The ICC Assembly of States Parties Prepares to Activate the ICC's Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction', (EJIL:Talk! 26 June 2017), https://www.ejiltalk.org/the-icc-assembly-of-states-parties-prepares-to-activate-the-iccs-jurisdiction-over-the-crime-of-aggression-but-who-will-be-covered-by-that-jurisdiction/, accessed 23 November 2019, and Akande and Tzanakopoulos (2018) (n. 902). Continuing support for this position has also been provided by Kevin Heller, see 'The Draft Resolution's Curious Paragraph 3', (OpinioJuris, 15 December 2017), http://opiniojuris.org/2017/12/15/the-curious-paragraph-3/, accessed 3 January 2018.
[990] Article 12 (2) (n. 941).
[991] See Professor Akande's continuing support for the restrictive interpretation based on a strict application of the VCLT, discussed below in section 2.6, pp. 249-50. See also Akande and Tzanakopoulos (2018) (n. 902) and Heller (n. 989).

make a distinction between the effect of the Statute on nationals of non-party States and nationals of State parties that do not accept the amendments.[992]

This acknowledgement of the problematic wording in the second sentence of Article 121 (5), serves to emphasise its incompatibility with the general jurisdictional provisions in Article 12 of the Rome Statute and the negotiated compromise in Article 15 *bis* (4) of a choice to opt out. Additionally, insisting on the negative interpretation also has the effect of raising the already augmented consent requirement to an entirely new level.

Applying the 'positive understanding', on the other hand, would leave the door open for jurisdiction of the Court where *either* the aggressor *or* the victim had previously ratified the amendment, but the other had not, in line with the general jurisdictional provisions of the Rome Statute established in Article 12 (2).[993] Following this interpretation, states parties which had not taken any active steps to either accept the amendments, or officially opt out under Article 15 *bis* (4), could be subject to the Court's jurisdiction, as long as the victim state had previously ratified the amendment.[994] This interpretation made sense from both a logical and legalistic point of view, taking into account the provisions and aims of the Rome Statute as a whole. This particular option was considered in the pre-

[992] Akande, Prosecuting Aggression (2011) (n. 888).
[993] Defending this position is, for instance, Astrid Reisinger-Coracini 'More Thoughts on "What Exactly was Agreed In Kampala on the Crime of Aggression"', (EJIL:Talk! 2 July 2010), https://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/, accessed 10 May 2020; Reisinger-Coracini (2010) (n. 962) and (2017) (n. 960). See also Jennifer Trahan, 'The Rome Statute's Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference' (2011), Int'l Crim. L. Rev., 49; Trahan, 'One Step Forward for International Criminal Law; One Step Backwards for Jurisdiction', (OpinioJuris, 16 December 2017), http://opiniojuris.org/2017/12/16/one-step-forward-for-international-criminal-law-one-step-backwards-for-jurisdiction-the-perspective-of-someone-present-at-the-un-during-negotiations/ accessed 7 January 2018, and 'Activation of the International Criminal Court's Jurisdiction over the Crime of Aggression and Challenges ahead' (OpinioJuris, 18 July 2018), https://opiniojuris.org/2018/07/18/33604, accessed 6 August 2018. See also Barriga (2017) (n. 946), Stuerchler (n. 946), Weisbord (n. 946), and Claus Kress, 'On the Activation of ICC Jurisdiction over the Crime of Aggression', (2018) 16 (1) JICJ.
[994] *Ibid.*

Kampala discussions on the interplay between Article 121 (5) and Article 15 *bis* (4), as summarised in the 2009 Princeton Report:[995]

> Some participants expressed interest in the idea of an opt-out declaration, combined with a system that would otherwise not require that the alleged aggressor State have accepted the amendment on aggression. Such an approach would strongly reduce the number of States who were beyond the Court's jurisdictional reach, as it would exclude only those States who took an active step to that effect. *A system that required potential aggressor States to accept the amendment would not be effective: It was unlikely that such States would move to take such a step.* An opt-out declaration, however, reversed that default situation and provided an incentive for States to reflect on the amendment and to come to a decision as to whether they could live with the amendment or not.[996]

This description demonstrates that the very purpose of the inclusion of Article 15 *bis* (4), allowing for the possibility to opt out of the aggression amendment, was to replace the need for additional individual ratification. The intention expressed was the prevention of wide-scale non-application of the aggression provisions to signatories of the Rome Statute, leading the SWGCA to consciously adopt the specific wording they chose. The Crime of Aggression entails special entry into force conditions, contained in Article 15 *bis* (4), making a literal reading of Article 121 (5), which applies to amendments without special entry into force conditions in general, unnecessary.[997] Thus, Article 15 *bis* (4) deliberately does *not* require individual member states' acceptance before jurisdiction

[995] 2009 *Princeton Report* (n. 981).
[996] *Ibid*, paragraph 41. Emphasis added.
[997] See Noah Weisbord's presentation to the United Nations General Assembly (n. 946), in preparation for the activation decision to be taken by States, prior to the 2017 ASP.

arises, but instead insists on active 'opting out' as the only way to escape jurisdiction. The article simply states that jurisdiction over an aggressive state party exists, 'in accordance with article 12', *unless* that state party has previously declared that it does not accept jurisdiction.[998] Consequently, jurisdiction of the Court can, by virtue of Article 15 *bis* (4), only be avoided by actively opting out, and prior individual acceptance should not be required. [999]

Applying this literal reading of Article 15 *bis* (4), and taking the view that it supersedes Article 121 (5), ratifications by member states ought to be immaterial. This assessment is also supported by the first operative paragraph of the Kampala amendment resolution, in which '[the Review Conference] *notes* that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance.'[1000] Furthermore, the first preambular paragraph of Kampala's aggression amendment expressly recalled Article 12 (1) and the general assumption of states parties' acceptance of jurisdiction over the four crimes in Article 5, including the crime of aggression.[1001]

2.5 Combining Article 15 *bis* (4) with the negative interpretation of Article 121 (5)

Article 15 *bis,* in its entirety, establishes a special jurisdiction procedure, arrived at after exceedingly lengthy and convoluted negotiations. Its deliberate restrictions on the Courts'

[998] See Article15 *bis* (4) (n. 935).
[999] Barriga and Grover (2011) (n. 724), 531. This view is also strongly supported, for instance, by Astrid Reisinger Coracini (n. 962 at 764) and n. 993.
[1000] Resolution 6 (n. 2).
[1001] *Ibid.*

jurisdiction are both unusual and stringent,[1002] evidenced by the procedural delays,[1003] the opt-out provisions,[1004] blanket non-application to non-state parties,[1005] as well as Security Council scrutiny.[1006] A strict application of the negative interpretation of Article 121 (5), allowing non-jurisdiction through mere passive non-acceptance, would render that very special procedure empty of meaning and pointless, in particular the exceptional provision in Article 15 *bis* (4).[1007] In the words of Jennifer Trahan, 'if exercise of jurisdiction were *never* possible without ratification of the amendment by the aggressor State Party, there would be no need for a pre-ratification opt out.'[1008] Similarly, Roger Clark, states that, 'if all States Parties are not to be bound, the opt-out option makes no sense.' [1009] It follows that ratification by the aggressor should not be required, particularly where they have not filed an opt-out declaration and the victim has accepted jurisdiction.

Additionally, the valid critique has been levelled that Article 15 *bis* (4) on its own already creates the 'perverse incentive' for States to reject jurisdiction of the Court. Thus the provision potentially protects them from prosecutions for their own aggressive acts committed post opt-out, whilst simultaneously shielding them against aggression by another State which has not taken advantage of opting out.[1010] Applying the negative understanding of Article 121 (5) makes this situation even more 'perverse', by preventing jurisdiction, even if the aggressor has not done anything, i.e. not ratified but also not opted

[1002] See Milanovic (n. 479), 178-182, arguing that the application of Article 121 (5) is in direct contradiction to Article 15 *bis* (4). See also Weisbord (n. 946).
[1003] Article 15 *bis* (2) and (3).
[1004] Article 15 *bis* (4).
[1005] Article 15 *bis* (5).
[1006] Article 15 *bis* (6)-(8).
[1007] Weisbord (n. 946).
[1008] Trahan (2011) (n. 993), 64. For a different view, see Akande (2010) (n. 959) and (2017) (n. 989), Akande and Tzanakopoulos (2018) (n. 902), and Heller (2017) (n. 989).
[1009] Clark (2010) (n. 687), 704.
[1010] Milanovic (2012) (n. 479), 180.

out, despite actual ratification of the victim state. This effectively provides no protection from aggression even for member states, unless both states individually have ratified and failed to opt out, an unlikely scenario in an aggression case by its very nature.

The perception of perversity is, in fact, reinforced when one looks at the practical effects of the two different interpretations: Under the negative understanding the Court only has jurisdiction over aggression committed by any of the 39 ratifying states parties on the territory of another one of those same 39,[1011] whereas under the positive version the Court would have jurisdiction over aggression committed by any of the 39 on the territory of any of the 123 member states.[1012] Notably, the difference between the two versions is substantial.

Following these compelling arguments for a positive understanding, it seems reasonable to assume that the wording in Article 15 *bis* (4), specifically written for the crime of aggression, was indeed intended to supersede the negative interpretation insisting on individual ratification of both victim and aggressor states. Moreover, support for following Article 15 *bis* (4) over a strict reading of Article 121 (5) can also be gained from emerging state practice. Thus Kenya and Guatemala, the first two member states to actively opt out of the aggression provisions,[1013] had not previously ratified the amendments. They therefore appear to have followed the procedure in Article 15 *bis* (4)

[1011] See www.crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/ [last accessed 20th January 2021].
[1012] These figures apply in prosecutions brought under 15 *bis*. In cases of Security Council referral, Article 15 *ter* confers automatic jurisdiction.
[1013] Kenya declared non-acceptance of jurisdiction of the Court over the crime of aggression in 2015, see MFA.1NT.8/14AVOL.X (86) 30th November, 2015. Guatemala declared non-acceptance on 16 January 2018. See www.icc-cpi.int [last accessed 24 November 2020].

directly. Nonetheless, the contradiction between the different articles remains unhelpful, as it adds to the uncertainty surrounding the new jurisdictional authority of the Court.

The above considerations make the ASP's recent decision to resolve the matter in favour of the more restrictive position, all the more perplexing. Thus, on the 14th December 2017, the Assembly voted to activate the Court's jurisdiction over the crime of aggression as of 17th July 2018, subject to the negative interpretation, deciding that both sentences of Article 121 (5) ought to apply.[1014] The ASP's central purpose was to decide on activation of the Court's jurisdiction, rather than resolve the question of interpretation of Article 121 (5), which could have been left for the Court itself to settle. Instead, the controversy has been amplified by the choice of a negative interpretation of Article 121 (5), in direct contrast to Article 12 (2),[1015] as well as Article 15 *bis* (4) itself. The ASP's decision to apply the restrictive approach has been described as indicating

> […] an intention on the part of a small but powerful minority of States Parties to erode the finely-tuned compromise agreement negotiated in Kampala. If a State which fails to ratify simply cannot be subjected to the Court's Article 15 *bis* jurisdiction at all, then Art 15 *bis* (4) loses its meaning, and the 'political cost' of avoiding the Court's 15 *bis* jurisdiction no longer involves paying the price of having to formally opt out.[1016]

The following discussion examines some potential reasons for this divisive decision.

[1014] Resolution ICC-ASP/16/Res.5, 16th Assembly of States Parties, 14th December 2017 (Resolution 5, 2017).

[1015] See the discussion in section 2.4. For support, see Clark (2009) (n. 961). See also Dapo Akande's comments, p. 239.

[1016] Donald Ferencz, 'Aggression Is No Longer a Crime in Limbo', FICHL Policy Brief Series No. 88 (2018), 3, http://www.toaep.org/pbs-pdf/88-ferencz/, accessed 25 October 2020.

2.6 Yet another 'layer' of consent? – The reasons for the ASP's decision

In December 2017, the ASP provided in Resolution 5 for activation of the jurisdiction of the Court. In operative paragraph 2 of that Resolution, the ASP stipulated that Article 121 (5) ought to apply subject to the negative understanding requiring both victim and aggressor state to have accepted the amendments. This paragraph therefore

> [*c*]*onfirms* that, in accordance with the Rome Statute, the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or *proprio motu* investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments;[1017]

The ASP was not required to make a decision on the understanding of Article 121 (5), and could have proceeded with simple activation of the Courts' jurisdiction as of July 2018. The dilemma could thus have been left for the Court to decide, as a matter of interpretation of the 2010 aggression amendment itself. In coming to its controversial decision, the ASP succumbed to pressure from France and the UK, supported by Japan, Canada, Norway, and Colombia,[1018] a group of States which has also been referred to as

[1017] Resolution 5, 2017 (n. 1014), para 2.
[1018] See Dapo Akande, 'The International Criminal Court Gets Jurisdiction Over the Crime of Aggression' (EJIL:Talk! 15 December 2017), https://www.ejiltalk.org/the-international-criminal-court-gets-jurisdiction-over-the-crime-of-aggression/, accessed 20 February 2018, defending the ASP's decision to

'camp consent'.[1019] 'Camp consent', to be distinguished from 'camp protection', refers to States insisting on consent by the aggressor state by expressly granting jurisdiction to the Court.[1020] The opposing 'camp protection', by comparison, refers to States seeking protection from states parties through jurisdiction without a requirement for individual ratification.[1021] Many states parties present at the 2017 ASP expressed their continuing support for the positive and wider interpretation of Article 121 (5), which had featured strongly since the lead-up to the Kampala Review Conference.[1022] Consequently, and despite the fact that 'camp consent' included a number of powerful States, for instance the P5 and most European States,[1023] the actual majority of states parties present and taking part in the actual debate, preferred either the positive interpretation or favoured a middle ground, rather than the restrictive view.[1024]

Instrumental in developing such a middle ground in the prelude to the December 2017 ASP, was Dapo Akande's and Claus Kress' attempt to build a 'bridge' between the negative and positive interpretations.[1025] The 'bridge' between the two opposing

apply the restrictive view. For a different view, see for instance Stuerchler (2017) (n. 946) and Donald Ferencz (2018) (n. 1016).

[1019] See Barriga and Grover (2011) (n. 724), citing an informal 'roll call' in March 2010, by Prince Zeid Ra'ad Al Hussein in March 2010 (at p. 524 and n. 23 in Barriga and Grover).

[1020] For the distinct division of views between the two camps prior to the 2017 ASP, see *Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression*, ICC-ASP/16/24, 27 November 2017, paras. 11-22. Annex II A of that report contains a paper submitted in March 2017 by Canada, Colombia, France, Japan, Norway, and the UK representing the negative interpretation. Annex II B of that report contains the response by Liechtenstein, and Annex II C summarises the response by Argentina, Botswana, Samoa, Slovenia, and Switzerland, defending the positive interpretation, but suggesting simple activation without a decision by the ASP on the point. See also Trahan (2017 and 2018) (n. 993).

[1021] Barriga and Grover (2011) (n. 724), 524, describe 'camp protection' as including all of the African States, members of the Non-aligned Movement and most Latin American and Caribbean countries.

[1022] See Barriga and Grover, *ibid*, Stuerchler (2017) (n. 946), as well as Kress (2018) (n. 993). For an account of pre-Kampala support for the wider view see the 2009 *Princeton Report* (n. 981), at para 37.

[1023] Barriga and Grover, *ibid*, citing Prince Zeid's 2010 headcount (n. 724 and 1019).

[1024] Stuerchler (n. 946) counted 37 out of 46 state parties taking the floor against the restrictive view, in favour of the positive view or a middle ground.

[1025] See Kress, (2018) (n. 993) and Akande (15 December 2017) (n. 1018).

understandings suggested treating a mere statement by a States Party, advocating the negative interpretation, as a declaration which would effectively negate the Court's jurisdiction without the need to expressly opt out. This was a major concession to the restrictive position, but still incurred remarkably strong opposition. Consequently, this effort at achieving a compromise was ignored due to the pressure applied by a small, but nonetheless powerful, number of States, in particular France, the UK, Japan, Canada, Norway and Colombia.[1026] As stated by Kress, the opposition to this middle ground is particularly incomprehensible, since it would have granted those countries even greater certainty of immunity from prosecution, if a simple record of their views would have counted as a declaration of non-acceptance of jurisdiction.[1027]

The decision by the ASP to apply the negative understanding of the second sentence of Article 121 (5) in the activating Resolution 5 has resulted in a variety of strong reactions.[1028] One such view, in the aftermath of the 2017 ASP, insisted that this double requirement of acceptance by *both* victim and aggressor, in addition to refraining from opting out of the aggression amendments, had now become binding on the Court.[1029] This argument, asserted particularly by Dapo Akande, considered the ASP's decision to confirm the narrow view as amounting to a decisive 'subsequent agreement' under Article 31 (3) (a) of the Vienna Convention on the Law of Treaties.[1030] Professor Akande viewed the ASP's narrow interpretation as conclusive, despite the contentiousness of the subject and the reluctance of many States to accept this restrictive view. According to this view, the ASP's decision was also deemed to be incontrovertible, notwithstanding the addition

[1026] See n. 1026.
[1027] Kress (2018), n. 993, 9-11.
[1028] Resolution 5 (n. 1014), para. 2.
[1029] Akande (December 2017) (n. 1018).
[1030] VCLT (n. 32), Article 31 (3) (n. 458).

of a 3rd paragraph to the activating resolution,[1031] which reaffirmed the Court's independence and its ability to decide on disputes concerning the judicial functions of the ICC.[1032]

Despite continuing to defend the principle of the narrow interpretation,[1033] Professor Akande himself has more recently retreated, at least partially, from the certainty that the ASP's decision was absolutely decisive.[1034] Thus, in a co-authored article of 2018, Akande now expresses some doubt that paragraph 2 of the activating resolution definitely amounts to a 'subsequent agreement', legally obliging the Court to follow this interpretation. He submits that, whilst a consensus resolution may or may not be seen as evidence of a decisive subsequent agreement, at the very least, it *adds considerable weight* to the view that the narrow view is to be regarded as an 'authentic interpretation of the [Rome] treaty'.[1035]

The argument that the ASP's decision in favour of the restrictive interpretation represents a 'subsequent agreement' under Article 31 (3) of the VCLT, can also be countered with the response that this reading did 'not reflect the 'actual' view of most, let alone all, States Parties to the Rome Statute, and was arrived at due to the procedural hurdles imposed on

[1031] Resolution 5, 2017 (n. 1014). For para 3, see below p. 255.
[1032] See Akande (December 2017) (n. 1018), and Akande and Tzanakopoulos (2018) (n. 902). See also Heller (n. 989), who criticises the ASP's decision to include paragraph 3, reasserting the Court's independence and ability to settle disputes related to the Court's own judicial functions.
[1033] Following a strict application of Article 40 (4) of the VCLT (n. 32), stipulating that a treaty cannot bind a non-accepting State, and a state party to an original treaty has a choice whether or not to accept an amendment to that treaty. This general principle was also confirmed in the *Monetary Gold* case (*Italy v France, United Kingdom & United States*), (1954) ICJ Rep. 19. See Akande, (June 2017) (n. 989), and Akande (December 2017) (n. 1018).
[1034] Akande and Tzanakopoulos (2018) (n. 902).
[1035] *Ibid*, 945-6. The reasoning follows the ICJ's statement in the so called 'Whaling Case', *Whaling in the Antarctic (Australia v Japan: New Zealand intervening), Judgment*, ICJ Reports 2014, 226, para. 46.

activation.'[1036] The ASP was attended by a reduced complement of states parties, many of whom left before the close of proceedings. Considering the fact that a two-thirds majority out the less than 100 states present was required to activate the Court's jurisdiction, a potential decision by the ASP in favour of the positive instead of negative interpretation may have caused failure of the resolution. In addition to this concern, there existed a strong desire to achieve activation by consensus rather than a 2/3 majority decision, in order to provide the Court's jurisdiction over the new crime with greater credibility in the face of prevailing scepticism and prevent the appearance of 'divided commitment'.[1037] Nikolas Stuerchler's account, in particular, describes the pressure applied by France, the UK and 6 supporting States, which may have resulted in 10 middle ground States wavering towards the restrictive view.[1038] As a result of this pressure, there was a fair chance that, without the acceptance of the restrictive interpretation of the Court's jurisdiction, a consensus was out of reach. This would have resulted in yet another considerable postponement of the jurisdiction of the Court with no clear indication of the length of the delay.[1039] This potential postponement would, as Stuerchler observed, 'have buried activation'.[1040]

This description of the situation bears witness to the fact that the restrictive interpretation was accepted reluctantly, due to sheer pressure, rather than as a voluntary 'subsequent agreement' of States. Moreover, and notwithstanding the ASP's negative application of Article 121 (5), States widely expressed views of disagreement with this restrictive interpretation after the 'consensus' vote, allowing room for the argument that state

[1036] Stuerchler (n. 946).
[1037] See Trahan (2018) (n. 993), 2. See also Stuerchler's observations (n. 946).
[1038] Stuerchler, *ibid.*
[1039] *Ibid*.
[1040] *Ibid.*

practice and *opinio juris* do not confirm the ASP's negative interpretation.[1041] In addition, the International Law Commission's view also casts doubt on the 'subsequent agreement' argument generally, conceding that consensus does not 'necessarily indicate[…] any particular degree of agreement on substance'. In consideration of all of these factors, an argument can be brought that the ASP's consensus decision should not necessarily be afforded too much weight.[1042]

Additionally, persuasive doubt has also been cast on the legal validity of paragraph 2 of the 2017 ASP's activating resolution confirming the restrictive interpretation, since it contradicts Article 15 *bis* (4) of the Kampala agreement and Article 12, both of which are component parts of the Rome Statute itself.[1043] Paragraph 2 of the ASP's resolution cannot be said to be *amending* Article 15 *bis* (4), since the required amendment procedure was not applied, therefore it can only be interpreted as an attempt to clarify Article 121 (5), with a contradictory result. Consequently, the only absolutely certain way for a State to exempt its officials from prosecution for aggression, remains to file an opt-out declaration in accordance with Article 15 *bis* (4).[1044]

Notwithstanding these powerful arguments, the ASP's decision to weigh in in favour of the restrictive view has, as it stands, narrowed jurisdictional reach over the crime of aggression even further, through the emphasis on dual consent by both aggressor and

[1041] *Ibid*, see also Kress (2018) (n. 993), and Barriga (2017) (n. 946).

[1042] See Conclusion 11(3), *ILC Draft Conclusions on Subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted on second reading in May 2018,* UN Doc. A/CN.4/L.907 (2018).

[1043] Stuerchler (n. 946). This point is also made by Kress (2018) (n. 993), Trahan (2017 and 2018) (n. 993), Barriga (2017) (n. 946) and Donald Ferencz (n. 1016). See also Weisbord's UN presentation (n. 946), and section 2.4 of this chapter.

[1044] Stuerchler, *ibid.*

victim state. The insistence on double ratification, coupled with the ability to subsequently opt out of jurisdiction under Article 15 *bis* (4), enables a State to be protected against aggression committed by another ratifying member state, but can also protect that first State against jurisdiction over its own acts of aggression.[1045] Non-accepting states parties thus enjoy total immunity from prosecution for aggression committed by them unless there is a Security Council referral, however they may paradoxically be entitled to redress if aggression is committed on their territory by an accepting states party. As a result, the victim's state of ratification is effectively immaterial, and jurisdiction is based on the necessary acceptance of the aggressor state. This particular feature has the problematic effect of favouring non-accepting states parties over non-states parties, by affording them exceptional protection from prosecution. The resulting inequality and privilege of non-consenting states parties serves to highlight this reinforced consent problem, which has been exacerbated by the negative interpretation. A defence of this feature as an incentive to join the ICC in the first place, is, this thesis argues, unconvincing.[1046]

Aggression, by its very nature and definition, is rarely committed accidentally or unintentionally, and States with intentions of aggression are therefore unlikely to voluntarily accept jurisdiction. Additionally, States in general are reluctant to relinquish any part of their sovereignty.[1047] The narrow interpretation of Article 121 (5) has had the unfortunate effect of discouraging even member states from ratifying the aggression amendments. Refusing to ratify, or ratifying and then opting out of jurisdiction, would

[1045] *Ibid.* See also Barriga (n. 946).
[1046] See the discussion below at p. 254.
[1047] See the discussion in Chapter 1.

now grant member states protection from aggression by other ratifying member states but shield them from prosecution for their own acts.

The insistence on this extremely high level of consent, expressed through ratification and failure to opt out by both victim and aggressor state, promotes a perception of impunity for the crime.[1048] It also ignores entirely the special jurisdictional conditions arrived at only a few years earlier in Kampala, which already established an exceptional consent requirement in Article 15 *bis* (4).[1049] Expressing similar sentiments, Ambassador Wenaweser's statement for Liechtenstein sums up the consequences of the restrictive interpretation in the activating resolution:

> We are disappointed that a few States conditioned such activation on a decision that reflects a legal interpretation on the applicable jurisdictional regime over the crime of aggression that departs from the letter and spirit of the Kampala compromise, and which aims to severely restrict the jurisdiction of the Court and curtail judicial protection for States Parties.[1050]

The result is the sacrifice of individual accountability for aggression at the altar of state consent. Ultimately, the choice to apply the restrictive interpretation amounts to 'close to an annihilation of the Court's jurisdiction over the Crime of Aggression arising from an act of aggression by a non-State Party and a State party that has lodged a declaration of non-acceptance'.[1051]

[1048] See, for instance, Barriga (n. 946) and Trahan (n. 993).
[1049] See section 2.4.
[1050] See Christian Wenaweser's post-ASP statement**,** as recorded in Kress (2018, at fn. 47) (n. 993).
[1051] Reisinger-Coracini (2010) (n. 962), 773.

It has been suggested that the excessive concession to 'camp consent' and the resulting limitations on jurisdiction could unwittingly serve as an actual incentive for membership of the Court, on account of the perverse protection which non-ratifying or non-consenting member states stand to enjoy.[1052] This thesis submits, however, that allowing such double standards to be applied in new admissions to the ICC would be in complete contradiction to the purposes and aims of the Rome Statute. Its authors expressed their clear intention to eradicate the most serious international crimes, including aggression, universally, [1053] rather than aggression by a select few States who are willing to commit themselves to the jurisdiction of the Court and consequently are probably the least likely to commit the crime in the first place. Additionally, Article 120 of the Statute had aimed to prevent such situations of selective jurisdiction from the outset.[1054] This article stipulates that membership of the ICC does not allow for reservations, suggesting that every signatory to the statute ought to be seen as accepting jurisdiction of the ICC generally. Moreover, admissions of States seeking to gain protection from prosecution for their own acts of aggression would not only be counterintuitive to promoting credibility of the Court, but also simply inequitable, although this view admittedly carries moralistic undertones.

The opinion has been expressed that it may be possible for the Court to interpret a State's declaration of non-acceptance of jurisdiction, where it is followed by a deliberate act of aggression, as part of the process of 'planning, preparation, initiation or execution,[1055] thus invalidating the declaration.[1056] This may provide an interesting possible solution, allowing for wider interpretation by the Court and even disregard of a State's lack of

[1052] Akande and Tzanakopoulos (2018) (n. 902), 958.
[1053] Preamble of the Rome Statute (n. 85).
[1054] Article 120 of the Rome Statute (n. 1).
[1055] Article 8 *bis* (1).
[1056] Reisinger-Coracini (2010) (n. 962), 773.

consent to jurisdiction. Its mere suggestion would, however, be likely to be met with severe criticism by advocates of 'camp consent', on account of ignoring the insistence and emphasis on state consent so fiercely defended in the first place. Severe accusations of judicial activism may also be levelled against the Court.

On the other hand, support for the Court's discretion in such situations can be gleaned from the fact that the ASP, despite their controversial decision in favour of the restrictive interpretation, added an extra paragraph to that effect to the activating resolution. Thus Paragraph 3:

> *Reaffirms* paragraph 1 of article 40 and paragraph 1 of article 119 of the Rome Statute in relation to the judicial independence of the judges of the Court. [1057]

Article 119, first paragraph, stipulates that any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.[1058] This article, and the reference to it in the activating resolution, may therefore provide support for such interpretative powers of the Court. It may even supply the Court with the opportunity to decide that the positive interpretation of Article 121 (5) should be applied after all, in spite of paragraph 2 of the activating resolution, and contrary to the restrictive view.[1059] Such a decision could be based on the fact that the ASP's decision does not itself amount to an amendment of Article 15 *bis* (4), contradicting it on so many levels.[1060] Strong criticism for judicial

[1057] Resolution 5, 2017 (n. 1014), para 3.
[1058] Article 119 (1) Rome Statute (n. 1).
[1059] Resolution 5 (n. 1014), para. 2.
[1060] See the discussion above, and section 2.4.

activism would, admittedly, be likely to ensue.[1061] Nevertheless, the matter may not be as firmly closed as it appears, and the ASP's decision to apply the restrictive view may not be as final as it seems at first glance.

2.7 Assessing the effect of the emphasis on multiple consent by member states

The restrictive interpretation by the ASP, as a result of the pressure applied by a few powerful States, is in direct contradiction to Article 15 *bis* (4). There is no formal link to a legal basis for such a determination by the ASP,[1062] nor does subsequent practice confirm the view expressed as *opinio juris*.[1063] The multiple consent requirement for jurisdiction over aggression is also particularly unprecedented compared with the other crimes under the Rome Statute, and it contradicts Article 12. Furthermore, it cannot be classed as an 'amendment to the [Kampala] amendment',[1064] and its legal effect is therefore uncertain.[1065]

Since there was neither a legal reason to interpret the provisions this strictly nor decide on the point at that particular time, the ASP's interpretation gives the impression of a

[1061] Heller (n. 989), who, similarly to Professor Akande, has consistently defended the legal correctness of the negative view, despite lamenting the restrictive result of impunity of a non-accepting state party. See Heller, 'The Sadly Neutered Crime of Aggression' (OpinioJuris, 13 June 2010), http://www.opiniojuris.org/2010/06/13, accessed 7 January 2018.
[1062] Kress (2018) (n. 993), 8. See also Stuerchler and Barriga (both n. 946).
[1063] Kress, *ibid.*
[1064] *Ibid*, 8.
[1065] For a different view, see Heller (n. 989), Akande (n.959 and 888), and Akande and Tzanakopoulos (n. 902).

deliberate policy decision, having succumbed to the influence exerted by 'camp consent'. It is possible that the insistence on double ratifications in addition to an opt-out possibility might, cynically, serve as a 'sweetener' for States to sacrifice some level of sovereignty by signing up to the International Criminal Court. But the question remains whether this potential enticement to membership came at too high a cost, allowing for largely elective impunity. It also may, unfortunately, result in effective emasculation of the first permanent International Criminal Court at a time when it has only just achieved jurisdiction over the 'supreme international crime' after decades of deliberation.

Protection from acts of aggression may now be mostly ineffective even for signatories of the Rome Statute, since that protection exists only for the 39 ratifying States against another of these same 39 States, who have taken a clear stand against the commission of aggression. It is tempting to view this excessive limitation of jurisdiction as an indictment of generally prevailing scepticism by powerful States, evidenced by historic reticence,[1066] as well as a recent resurgence of sovereign supremacy,[1067] over international cooperation to further the eradication of aggression.[1068]

The possibility remains that the Court itself may, especially after the inclusion of paragraph 3 in Resolution 5,[1069] decide differently to the ASP and apply the positive

[1066] See particularly Chapter 1.

[1067] See the recently popular withdrawal of powerful States from international agreements (the US withdrawal from UNESCO, 2017, UNHRC, 2018, proposed withdrawal from the WHO, as well as threats to withdraw from the WTO and NATO under the Trump administration). See Oona Hathaway 'Reengaging on Treaties and Other International Agreements (Part I), President Donald Trump's Rejection of International Law', (2 October 2020), https://www.justsecurity.org/72690/reengaging-on-treaties-and-other-international-agreements-part-ii-a-path-forward, accessed 1 December, 2020. See also the UK exit from the European Union.

[1068] See Reisinger-Coracini's assessment (2010) (n. 962), 773.

[1069] See n. 1057 and related text, p. 255-6.

interpretation. Thus it may award itself wider jurisdictional powers, at least where the crime has been committed on the territory of one of the ratifying signatories and the aggressor member state has not previously declared to opt out. In doing so, it may feel encouraged by the assimilation of jurisdictional powers of other international courts and tribunals.[1070] Paragraph 3 may therefore yet provide some hope for proponents of greater deterrence from the crime of aggression,[1071] as well as member states seeking protection from acts of aggression, i.e. 'camp protection'. Such assumption of wider jurisdictional powers is, admittedly, likely to be met with strong resistance from critics of judicial activism as well as the so-called 'camp consent'.[1072] It will be interesting to see if, despite the likely resistance, the Court will award itself wider jurisdiction, finding support in paragraph 3 of Resolution 5 and applying the positive understanding. If the Court chooses not to do so, the only certain way to increase their jurisdictional reach is through the exertion of political pressure on member states to ratify the aggression amendments and the persuasion of non-members to become signatories without reservations. Taking into consideration the relatively low number of only 39 ratifications in the ten years since Kampala, as well as the virtual stagnation of new membership to the Court, that is a significant task.[1073]

[1070] See the discussion in Chapter 4, particularly the assumption of competence in *Nicaragua* (1984) (n. 827), *Armed Activities* (2005) (n. 37), *Tadic* (1995 Decision on Jurisdiction) (n. 838), and the *Reparations* case (1949) (n. 844).
[1071] See n. 1057 and related discussion, pp. 255-6.
[1072] See above discussion in section 2.6.
[1073] In 1998 the ICC boasted 120 members. Since then only five States joined and 2 have withdrawn (Burundi (2017), and the Philippines (2019)), leaving 123 members.

3. Article 15 *bis* (5) and the double membership requirement

The above section revealed that the jurisdictional limitations in Article 15 *bis* are extraordinary, even over the statute's own signatories. In light of the strong emphasis on state consent to jurisdiction, it may not come as a surprise that Article 15 *bis* excludes non-member states entirely from the jurisdiction of the Court, in cases of state referrals or *proprio motu* prosecutions. It may be recalled that Article 15 *bis* (5) provides:

> In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nations or on its territory.[1074]

This provision establishes yet another substantial difference for jurisdiction over the crime of aggression compared with the other three core crimes, to which Article 12 (2) applies generally without exception.[1075] Thus, Article 12 (2) provides a jurisdictional link for genocide, crimes against humanity and war crimes to nationals of non-signatories of the Rome Statute by virtue of either the territory or nationality of a member state. This means in practical terms that if nationals of any of the 123 member states commit one of these other three crimes on a non-member state's territory, or a national of a non-member state commits said crimes on the territory of a member state, jurisdiction arises by virtue of Article 12 (2). This link to non-member states is, however, expressly precluded in aggression cases through Article 15 *bis* (5), unless there is a Security Council referral, in

[1074] Article 15 *bis* (5) of the Rome Statute (n. 940).
[1075] See Article 12 (2) (n. 941).

which case jurisdiction arises automatically over any State, member or not.[1076] Consequently, the Court has, under Article 15 *bis,* no jurisdiction over crimes of aggression involving non-states parties in any capacity, and non-states parties cannot be prosecuted for the crime of aggression, nor are they protected as a victim of aggression, even when committed by a state party.

This deliberate deviation from other provisions in the Rome Statute presents a paradox, since, as discussed above, non-accepting states parties are granted greater protection, leading to the 'perverse incentive' to join, ratify, and then opt out.[1077] Thus, they are shielded against aggression committed by an accepting states party, whereas non-member states are not.[1078] The exclusion of non-member states in Article 15 *bis* (5) also has the effect of limiting the overall reach of the Court's jurisdiction even further. These considerations led the Japanese delegation to voice their objections prior to the adoption of the aggression amendments:

> As we have pointed out in various informal settings, we have a serious problem with the new article 15 *bis* 1 *quater*.[1079] For example, the government of a state party surrounded by non-states parties will have a difficulty in selling to its parliament an amendment which unjustifiably solidifies blanket and automatic impunity of nationals of non-States Parties: a clear departure from the basic tenet of article 12 of the Statute.[1080]

[1076] See Article 15 *ter* and Chapter 4.
[1077] See the arguments on pp. 243-4 and 254.
[1078] As a result of Article 15 *bis* (5) (n. 940).
[1079] Article 15 *bis* 1 *quater* has become Article 15 *bis* 5 in the Kampala Amendment, Resolution 6 (n. 2).
[1080] Statement by Japan (n. 954), in explanation of their position before the adoption of the aggression amendments, see *Travaux Preparatoires*, (n. 317), 812.

The exclusion of non-states parties from the jurisdiction of the Court, even as victims of aggression committed by a state party, is likely to lead to unfairness and 'asymmetric results'.[1081] Nevertheless, some commentators perceived this limitation as inevitable and necessary to achieve the Kampala Compromise. As Barriga and Blokker point out:

> [I]t could be argued that fighting impunity is more important than maintaining such symmetry. Fair or not, the exclusion of crimes [of aggression] involving Non-States Parties was a crucial element for the compromise reached in Kampala.[1082]

This statement demonstrates that the decision of blanket non-application to non-member states was based on the desire to achieve any degree of jurisdiction at all, other than through Security Council referral, in the face of continuing resistance by States wishing to protect their sovereignty. The observation, therefore, reinforces the perception of prevailing insistence on individual state consent, encountered throughout the examination in this thesis and in particular in the previous section. The insistence on membership of the Court as a precondition for any jurisdiction to arise in the first place, represents yet another layer of consent, which the Kampala amendments insist on even before the other limiting conditions come into play, as a result of Article 15 *bis* (4) and its combination with Article 121 (5). This consideration leads us to investigate if there is any possibility to circumvent the multiple consent requirement at all in order to develop wider jurisdiction of the Court.

[1081] See Blokker and Barriga, 'Exercise of Jurisdiction: State Referrals and *Proprio Motu* Investigations', in Kress and Barriga (eds.) (2017), (n. 721), 659. See also Barriga and Grover (n. 724), 526: 'To agree to a consent-based regime, which excluded non-states parties entirely, was a massive compromise for the many delegations that had favoured a protective regime.'

[1082] *Ibid.*

4. A way forward? - A teleological interpretation, the *jus cogens* nature of the crime and the principle of universal jurisdiction

In the discussion presented so far, it has been argued that the Court may have to award itself wider jurisdictional powers,[1083] in order to extend its reach to situations where only one of two member states has consented through ratification of the amendments. This section will investigate whether it may be possible to circumvent the consent requirement altogether, regardless of States' membership or ratification status, on account of the higher normativity of the crime and through application of the principle of universal jurisdiction. It will also examine ICJ and ICC decisions, as well as state practice, to discuss whether a trend is now discernible towards a de-emphasis of state consent and a derogation from related procedural rules on immunity with regards to *jus cogens* crimes. This analysis, it is argued, supports the contention that such consent to jurisdiction, irrespective of States' insistence on its amplification in the Kampala Amendments, may not be as immutable as it appears.

It may be recalled from the Introduction Chapter that the principle of universality confers jurisdiction over widely deplored crimes to any State, entitling them to legitimately prosecute such an offence in their domestic courts under customary international law.[1084] The perpetrators are deemed to be '*hostis humanis generis'* or enemies of all mankind.[1085] The crime itself is regarded as offending all common principles of humanity, and is therefore perceived to be of concern to every single State. States are deemed to have 'the

[1083] Applying para. 3 of Resolution 5 (n. 1014), ignoring the negative interpretation applied by the ASP, see the discussion above.
[1084] See Williams (2000) (n. 108), 544.
[1085] *Ibid.*

legal competence and jurisdictional competence to define and punish particular offences, regardless of whether that State had any direct connection with the specific offences at issue.'[1086] Consequently, the territory on which the crime occurred and nationality of the perpetrator or victim are immaterial.[1087] The exercise of universal jurisdiction is therefore not conditional on consent, nor does it require the traditional jurisdictional links based on territory or nationality.[1088] There is no absolute definitive list of crimes subject to the principle, however the prohibition of these crimes is based on their peremptory or *jus cogens* nature. As such, their general or universal prohibition cannot be derogated from, on the basis that they constitute fundamental principles of international law which cannot be set aside.[1089] These crimes include piracy,[1090] slavery,[1091] genocide, crimes against humanity, war crimes,[1092] as well as torture,[1093] and are commonly deemed to be subject to universal jurisdiction. Crimes against the peace, the forerunner to aggression, were also prosecuted at Nuremberg arguably under the universality principle, based on the fact that the signatories vested their domestic jurisdiction in the tribunals.[1094] Consequently, the Nuremberg Tribunal can be interpreted as the exercise of collective universal jurisdiction by a treaty-based international court.[1095] Acts of aggression committed by leaders were

[1086] Joyner (1996) 153. See also Lauterpacht (1944) 61, (both n. 110).
[1087] Randall (1988) 788, Scharf (2012) 358 (both n. 109).
[1088] For a discussion of the traditional links of prescriptive jurisdiction based on territory, active or passive nationality and protection, see Cassese (2013) (n. 12) 272-4, see also Vaughan Lowe and Christopher Staker, 'Jurisdiction', in Evans (2010) (n. 181) 318-326.
[1089] See the *ILC Report on Peremptory Norms of General International Law (jus cogens)* (n. 39), Art 53 VCLT (n. 32). See also the discussion below.
[1090] See *US v Smith*, *US v Klintock*, and *Dahir*, (n. 113), see p. 27.
[1091] Green (1984) (n. 114), 179.
[1092] See Paulet (2017) (n. 115), and *Tadic* (n. 115, at 20) for support that genocide, war crimes and crimes against humanity are crimes subject to universal jurisdiction.
[1093] See *Furundzija* (n. 115) 153, and Lord Browne Wilkinson's summary in *ex parte Pinochet*, stating that torture has developed into a *jus cogens* norm subject to universal jurisdiction (also n. 115), at 589.
[1094] See the London Charter, Article 6 (a) (n. 117). See also Control Council Law No. 10 (n. 121). The 19 signatories to Nuremberg are deemed to have conferred their entitlement to the exercise of universal jurisdiction over the heinous international crimes committed during World War II to the international tribunals. See Clark (1997) (n. 123) at 177 and Williams (n. 108) at 545-6 and 559.
[1095] Michael Scharf, 'The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position', 64 Law and Contemporary Problems (2001), 67, 103-106. See also Randall (n. 109), 804-6.

prosecuted under this delegated universal jurisdiction, or an 'international rule of law', independent of state consent.[1096] The Nuremberg tribunal therefore, conceivably, constitutes a precedent for the exercise of universal jurisdiction by the ICC, derived from delegation by its members.[1097]

Prior to the Rome Conference, an interesting proposal was submitted suggesting universal jurisdiction over all of the crimes under the Statute including aggression, although this jurisdiction was intended to be limited to member states only.[1098] This proposal rejected a state consent requirement beyond ratification as detracting 'from the effectiveness of the Court and even its rationale and philosophical underpinnings.'[1099] In the negotiations leading up to the Kampala Conference, the possibility of crediting the Court with universal jurisdiction was considered again, this time even over non-member states. Thus, the Chairman's Non-Paper, presented in preparation for the 8th Assembly of States Parties in 2009, acknowledged:

> *Some delegations went further* [during the consideration of the previously debated conditions for the exercise of jurisdiction] *by proposing that the Court should have universal jurisdiction even over non-member States in the interest of "[e]nding impunity for the most serious crimes of international concern".*[1100]

[1096] Goldsmith (n. 120). For a partially differing view, see Akande ('Prosecuting Aggression' (2011)) (n. 888), 30-2.
[1097] See Scharf (2001) (n. 1095) 103-6, and Randall (1988) (n. 109) 804-6.
[1098] The 'German Proposal' (1998), contained in the Draft Statute for an International Criminal Court, UN Doc. A/Conf. 183/2/Add.1 (n. 126). See also Williams (2000) (n. 108), 544.
[1099] Williams, *ibid*, 545. However, this proposal failed to attract sufficient support for the express blanket inclusion of universal jurisdiction over all of the crimes and all members in the final text of the Rome Statute, resulting instead in the insertion of Article 12.
[1100] In the 2009 *Princeton Report*, ICC-ASP/8/INF.2 (n. 981), 8 (italics in the original). The individual States advocating this view remain unidentified.

The minority proposal considered here goes even beyond the German Proposal of 1998 and envisages universal jurisdiction, specifically over the crime of aggression, irrespective of consent or the existence of a traditionally required territorial link or a connection through the nationality of the perpetrator. This new proposal, therefore, entails jurisdiction over the universally abhorrent 'supreme' crime of aggression,[1101] regardless of the status of a State's membership or ratification. Jurisdiction would be exercisable, at first instance, in domestic courts by any State over citizens of any other State, but would potentially also be transferrable to an international tribunal, following the precedent of Nuremberg.[1102] This proposition of transferability of jurisdiction to the Court is further strengthened through the provision for complementarity of jurisdiction, which runs through the Rome Statute.[1103]

Notwithstanding the support provided by these arguments for the applicability of universal jurisdiction over the crime of aggression, a number of counterarguments also require consideration. Firstly, it is hard if not impossible to ignore that the most influential negotiating States and their allies insisted on the deliberate limitations placed on the Court's jurisdiction and their incorporation into the aggression amendment. These powerful States, although not in the majority, continued to demand and consequently achieved the highest consent threshold, including the blanket non-application to non-member states unless a Security Council referral exists.[1104] If taken as an absolute

[1101] See Robert Jackson's statement (n. 135) in the Introduction Chapter. See also the final Nuremberg judgment itself (n. 3 and 235, at p. 16): 'To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.'

[1102] See Joyner (1996) (n. 110) 167, Clark (1997) (n. 123) at 177 and Williams (n. 108) at 545-6 and 559. See also Scharf (2001) (n. 1095) 103-6, and Randall (1988) (n. 109) 804-6.

[1103] See Art 1 and Art 17 (1) (a) of the Rome Statute (n. 1), which provides for jurisdiction of the Court where states with jurisdiction are 'unwilling or unable genuinely to carry out the investigation or prosecution.'

[1104] See for instance the so-called ABCS non-paper, and the related account of the negotiating history in Kress and von Holtzendorff (2010) (n. 5) 1193-4.

determinant, the strict observation of the intentions of the negotiating parties and the emphasis placed on state consent to jurisdiction indeed appears to provide a powerful rebuttal of the proposed application of universality of the aggression provisions.[1105]

Additionally, and on the insistence of the observer state of the United States, an express understanding was attached to the Kampala amendments, that it 'shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.'[1106] This understanding represents a deliberate attempt to exclude universal jurisdiction over the crime of aggression, as exercisable by individual States domestically. Nonetheless, the understanding does not contemplate the transfer of such jurisdiction to the ICC as supported by the complementarity principle enshrined in the Rome Statute, nor was it included in the actual amendments. Additionally, it is doubtful that the understanding is capable of having the effect of limiting the availability of universal jurisdiction of States under customary international law. This latter aspect, discussed in detail below, refers to the fact that the crimes under the Rome Statute are of a *jus cogens* nature, from which derogation by treaty provision is not possible.[1107] Consequently, the legal effect of the understanding remains in doubt.[1108]

The discussion, nevertheless, merits consideration of a second potential counterargument to the proposed availability of universal jurisdiction. Thus, it has to be acknowledged that international organisations generally, including the ICC, are designed to perform specific

[1105] See for instance Akande (2011) (n. 888, 17-8) and for a continued defence of strict application of Arts 31 (1) and 2 (a) of the VCLT in particular, see Akande's blog entries of 2013 (n. 459) and 2017 (n. 989). For a differing view of non-application of the VCLT on the grounds of legality considerations, see Jacobs (2013) (n. 459).
[1106] Understanding No. 4 *bis*, Annex III, attached to Resolution 6 (n. 2).
[1107] See Art 53 VCLT (n. 32) and the discussion below.
[1108] See *Handbook for the Ratification and Implementation of the Kampala Amendments*, p. 11, available at http://www.crimeofaggression.info, accessed 28 January 2021.

tasks and are therefore perceived to be subject to the principle of speciality. As such, they are 'invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.'[1109] Consequently, a narrow view of the ICC's speciality is likely to focus on the deliberate limitations on the Court's jurisdiction, and its dependence on amplified state consent to that jurisdiction, the pervading subject matter of this Chapter.

In response to this particular counterargument, it can, however, be posited that the principle of speciality also takes into account special functions and objectives, relative to the international body in question. To that effect, Article 31 of the VCLT states that a treaty ought to be interpreted 'in the light of its object and purpose'.[1110] This purpose or *telos* of the institution may be implied rather than explicitly provided for.[1111] As a general but wider rule of interpretation, Art 31 (3) (c) provides for taking into account 'together with the context… any relevant rules of international law applicable in the relations between the parties.'[1112] Applying this teleological approach, the special purpose of the Rome Statute in its Preamble will be remembered as:

[1109] As stated by the ICJ in the *Nuclear Weapons Opinion* (1996) (n. 370), para 25.

[1110] Art 31 (1) VCLT (n. 32), although that article also refers to interpretation in accordance with the 'ordinary meaning to be given to the terms of the treaty in their context'. This article therefore does not envisage a conflict between the ordinary or literal meaning of the treaty terms and its object and purpose. In case of the aggression provisions, this thesis has argued that there exists a conflict between the treaty terms on account of their limitations and restrictiveness of jurisdiction and the object and purpose of the Rome Statute as stated in the Preamble (n. 85). On this conflict, the VCLT provides, it is argued little guidance. For a critique of strict application of the VCLT to the Rome Statute see Dov Jacobs (2013) (n. 459), for a counter-argument see Dapo Akande's blog entries of 2013 (n. 459) and 2017 (n. 989).

[1111] This point has arisen, particular in cases concerning the European Convention of Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms), Nov. 4, 1950, 213 UNTS 221 (entered into force Sept 3, 1953).

[1112] Art 31 (3) (c) VCLT, n. 32. See also the reliance of the European Court of Human Rights (ECtHR) on this principle in *Loizidou v Turkey* (1996) VI Eur.Ct.H.R. 2216, 2231, para 43. For a discussion of the relevance of a teleological interpretation, particularly within Human Rights Law, see Vassilis P. Tzevelekos, 'The Use of Article 31 (3) (c) in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology – Between Evolution and Systemic Integration (2010), 31 Mich. J. Int'l L. 621, 623.

> **Affirming** that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured…; and
>
> D**etermined** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.[1113]

The authors of the Rome Statute thus envisaged the primary purpose of the Court to be the universal eradication of the most heinous international crimes through wide jurisdiction. Although the Court was formed technically as an international treaty subject to voluntary membership and agreed limitations, its speciality could be viewed more widely as an institution with the higher normative purpose of delimiting criminal state and individual behaviour through the codification, investigation and prosecution of the universally objectionable international crimes under its Statute. The special character of the International Criminal Court, applying this teleological interpretation, is derived from the combination of its multiple functions. Thus the ICC can be perceived to be a specialised institution within the international system, which gains its competence only partly from its express subscription by its membership but, more significantly, from its special purpose of universal eradication of the worst international crimes and the pursuit of impunity for their commission. This interpretation, in fact, was the very point of the German Proposal of 1998, which considered the Court's effectiveness as well as 'rationale and philosophical underpinnings'.[1114]

[1113] Preamble, Rome Statute 1998 (n. 85).
[1114] German Proposal of 1998 (n. 126 and n. 1098)

The specificity of the Court's *telos* is also reinforced by the special normative quality of the prescription of the crimes within its jurisdiction, derived from their inherent peremptory nature. As the following discussion develops, this interpretation of the special normative nature of the Court's jurisdiction may, in fact, permit its expansion beyond the confines of ordinary treaty law and absolute insistence on voluntarist principles, propounding and promoting universality. It may also provide a rebuttal to the first counterargument above, which focused on a narrow observance of the treaty parties' intentions, by recognising the prohibition of aggression as a *jus cogens* norm, from which it is impossible to derogate.[1115] As addressed in Article 53 of the VCLT:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[1116]

Jus Cogens or peremptory norms are owed *erga omnes partes*, i.e. towards all.[1117] These generally applicable legal norms are deemed to be compelling and 'non-negotiable',[1118] and thus potentially capable of superseding the requirement for state consent to their

[1115] See Report of the International Law Commission, A/74/10, 16th May, 2019, *Chapter V: Peremptory Norms of General International Law (jus cogens)* (n. 39) and the discussion below. For a critique of *jus cogens* and *erga omnes* obligations as eroding traditional international law, see for instance Prosper Weil, 'Towards Relative Normativity in International Law' (1983), 77 AJIL, 413.
[1116] Article 53 VCLT (n. 32).
[1117] See the ICJ's *obiter dicta* in *Case concerning the Barcelona Traction Light and Power Company Ltd. (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, para 34. However, not all *erga omnes* obligations qualify as *jus cogens* norms, see ILC, *Final Report of the Study Group on Fragmentation of International Law*, UN Doc. A/CN.4/L.682 (April 13, 2006), para 408, emphasising that all *jus cogens* norms have 'necessarily an *erga omnes* scope, whereas not all *erga omnes* obligations have weight as *jus cogens*.'
[1118] Dworkin (2013) (n. 43) 6.

application. Since, under international law, an obligation to abide by a rule of *jus cogens* normativity is owed to all States, all States are allowed to react to the violation of a peremptory norm.[1119] In 2019, the International Law Commission adopted a number of draft conclusions on peremptory norms.[1120] The second draft conclusion defined a *jus cogens* norm identically to Article 53 of the VCLT:

> **Conclusion 2**
>
> **Definition of a peremptory norm of general international law (*jus cogens*)**
>
> A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[1121]

The third conclusion confirms that *jus cogens* rules rank higher than ordinary treaty law provisions:

> **Conclusion 3**
>
> **General nature of peremptory norms of general international law (jus cogens)**
>
> Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.[1122]

[1119] Art 48 (1) (b) ILC Articles on the Responsibility of States (n. 620).
[1120] See the 2019 ILC Report on Peremptory Norms (n. 39).
[1121] *Ibid*, 142.
[1122] *Ibid.*

The prohibition of aggression is the first peremptory norm specifically identified in a non-exhaustive list contained in the annex to this part of the ILC's Report,[1123] and has, therefore, clearly been recognised as such a rule. Consequently, a conceptual link can be created between this special, higher normativity of the prohibition of the crime of aggression as a *jus cogens* rule, the ability of States to invoke universal jurisdiction over the crime and, *inter alia,* the transfer of that jurisdiction to the Court where States are unwilling or unable to exercise their jurisdiction.

It is therefore the special character of the Court, as derived from its inherent *telos* and the specific peremptory nature of the crimes under its jurisdiction, combined with the provision for complementarity between its own and States' domestic jurisdiction, which may enable the exercise of universal jurisdiction despite the attempts to exclude it, rendering these ineffective. States traditionally have 'the first bite at the cherry' but, where unable or unwilling to investigate and/or prosecute, their own universal jurisdiction may be transferrable to the Court on behalf of the international community as a whole,[1124] on the grounds of complementarity within the Statute and historical precedent.

This interpretation derives support from the argument that *jus cogens* rules are not affected by the treaty-based limitations placed on the jurisdiction of the Court.[1125] They prevail on account of their higher status in the normative hierarchy and the fact that they cannot be contracted out of.[1126] Thus it is possible to contend that the *jus cogens* nature

[1123] *Ibid*, 205.
[1124] See the commentary in n. 1094 and the discussion of the NMT in Chapter 1, section 4.3.
[1125] See Art 53 VCLT (n. 32).
[1126] This phenomenon itself and its interpretation can be regarded conceptually in one of two ways, as either part of a fragmentation process (see Martii Koskenniemi & Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden J. Int'l L. 553, or as part of a greater evolution of international law towards the acceptance of wider responsibilities as a result of the socio-normative

of the Crime of Aggression prohibition pushes aside the notion of entirely optional and voluntary acceptance of jurisdiction, rendering it a universally applicable international obligation, towards the *telos* of the eradication of international crimes and impunity for their commission.

Universal Jurisdiction over aggression may, as a result, be able to survive as a type of extra-treaty based jurisdiction on account of the higher normativity of the prohibition of the crime, in which case the statutory restrictions would not be applicable. The ordinarily required bases for jurisdiction, i.e. territoriality and nationality,[1127] would be sidestepped. The right and responsibility to exercise universal jurisdiction would, at first instance, continue to lie with individual States in their domestic jurisdiction, perceived to have 'the legal competence and jurisdictional competence to define and punish particular offences, regardless of whether that State had any direct connection with the specific offences at issue.'[1128] Jurisdiction over the individual would be derived from jurisdiction over the offence itself,[1129] and, following the Nuremberg precedent and applying a purposive approach, would be transferrable to the Court in situations of inability or unwillingness of the State.[1130]

This discussion raises the valid question whether this purposive and admittedly not uncontroversial approach, effectively devaluing the importance of state consent in international criminal law, can derive support from judicial decisions and state practice.

---

prohibition of aggression and a related and arguably necessary de-valuation of state consent and sovereignty. See the discussion in the Introduction Chapter, pp. 16-26.

[1127] See n. 1088 and related text.

[1128] Joyner (1996) (n. 110) 153, 167. Jurisdiction over the person appears to be merged with jurisdiction over the offence.

[1129] See Lauterpacht, (1944) (n. 110), 61.

[1130] See the discussion above, and in particular n. 1094 and 1103 and related text.

To that effect, the ICJ has in the past had the opportunity to consider the domestic exercise of universal jurisdiction. Thus, in the *Arrest Warrant* Case, the Democratic Republic of the Congo complained that Belgium had, under universal jurisdiction, issued an arrest warrant for of the DRC's incumbent Foreign Minister for the commission of war crimes.[1131] Although the ICJ's majority opinion supported the DRC's complaint on the basis of immunity of incumbent Foreign Ministers in regard to national jurisdictions,[1132] the separate and dissenting opinions express support for the availability of universal jurisdiction for international crimes generally, and war crimes specifically. The Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, for instance, stated that universal jurisdiction for crimes of a heinous nature was available and lawful where these crimes are detrimental to the interests of humanity,[1133] and where there existed a duty under international criminal treaties to deliver or prosecute the suspect (*aut dedere aut prosequi*).[1134] As the judges asserted:

> [T]he international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play.[1135]

Judges Higgins, Koojimans and Buergenthal also confirmed that the availability of universal jurisdiction continues to reflect current customary international law, applicable

[1131] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, 14 February 2002, ICJ Reports 2002 [hereinafter *Arrest Warrant Case*].
[1132] *Ibid*, para 58.
[1133] *Arrest Warrant Case, Joint Separate Opinion of Judges Higgins, Koojimans and Buergenthal*, para 61.
[1134] *Ibid*, para 46.
[1135] *Ibid*, para 51.

regardless of the links of territoriality or nationality,[1136] on account of the higher normativity of the prohibition of and jurisdiction over such heinous crimes. This phenomenon was perceived to be part of an ongoing evolution,[1137] a 'slow but steady shifting to a more extensive application of extra-territorial jurisdiction by States reflect[ing] the emergence of values which enjoy an ever-increasing recognition in international society.'[1138]

The dissenting opinions in the Arrest Warrant case also provide support for a perception of an inherent peremptory nature of international crimes, from which derogation is not permissible,[1139] reinforcing the argument for the availability of universal jurisdiction. Thus, the dissenting opinion of Judge Al-Khasawneh asserted that the 'effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance', rendering the prohibition and prosecution of these crimes a 'hierarchically higher norm'.[1140]

Judge van den Wyngaert, in his dissenting opinion, underwrote this interpretation of a higher normativity of international crimes,[1141] criticising the majority judgment for ignoring the development of modern international criminal law towards greater individual

[1136] *Ibid*, see also *R v Bow Street Metropolitan Stipendiary, ex parte Pinochet Ugarte (Amnesty International Intervening) (no. 3)* [1997] UKHL 17.
[1137] *Arrest Warrant case, Joint separate opinion* (n. 1144), paras 62 and 65. For a similar view of an evolution of international criminal law, see also (n. 1162 below) Judge Trinidade's dissenting opinion in the case of *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ, Judgment of 3 February 2012, hereinafter *Germany v Italy.*
[1138] *Joint separate opinion, Arrest Warrant case* (*ibid*) (n. 1144), para 73. As the judges expanded on, 'a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited.' (Para 75).
[1139] See Art 53 VCLT (n. 32).
[1140] *Arrest Warrant Case* (n. 1142*),* Dissenting opinion by Judge Al-Khasawneh, para 7.
[1141] *Arrest Warrant Case* (n. 1142), Dissenting opinion by Judge van den Wyngaert, para 26.

accountability for the commission of core crimes.[1142] These core crimes were customary international law crimes of a *jus cogens* nature, and their prohibition ought to be considered as a general principle of law in the sense of Art 38 of the ICJ's Statute.[1143] Universal jurisdiction was available, based on wide international condemnation of these serious international crimes and in order to avoid impunity.[1144] This jurisdiction, in the opinion of Judge van den Wyngaert, remained illimitable by either the national or territorial principles of jurisdiction or even by the statutory jurisdictional conditions of the ICC itself.[1145] This dissenting opinion expressly emphasises the prevalence of a teleological interpretation of the Rome Statute as derived from its Preamble,[1146] and derives support for a higher normativity of individual criminal liability, impunity and the responsibility of all States to punish core crimes from the *opinio juris* of UN resolutions.[1147]

The question of a hierarchy of *jus cogens* violations and procedural rules arose again in the ICJ Judgment in *Germany v Italy*.[1148] Although this case does not consider the exercise of universal jurisdiction directly, it also raises the question of whether procedural impediments should be able to bar jurisdiction where *jus cogens* violations are alleged.

[1142] *Ibid*, para 27.

[1143] *Ibid*, para 28, citing M. C. Bassiouni in 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996), 59 Law and Contemporary Problems (4), 63-74 and *Crimes against Humanity in International Criminal Law* (Nijhoff 1999) 210-217, Randall (n. 109) 829-832, the opinion by Senior Counsel C.J.R. Dugard in *Re Bouterse* (2001), para. 4.5.5, available at: http://www.icj.org/objectives/opinion.htm, accessed 27 August 2021, and the ICTY judgment in *Furundzija* (n. 115), para 153.

[1144] Judge van den Wyngaert's dissenting opinion (n. 1152), para 46.

[1145] *Ibid*, para 64.

[1146] *Ibid.*

[1147] *Ibid*, referring to, for instance, Sub-Commission on Human Rights, Res. 2000/24, 'Role of Universal or Extraterritorial Competence in Preventive Action against Impunity', 18 August 2000, E/CN.4/SUB.2/RES/2000/24; Commission on Human Rights, Res. 2000/68, 'Impunity', 26 April 2000, E/CN.4/RES/2000/68; Commission on Human Rights, Res. 2000/70, 'Impunity', 25 April 2001, E/CN.4/RES/2000/70.

[1148] *Germany v Italy* case, n. 1148.

In a policy decision,[1149] the Court held that there was no conflict between the status of peremptory norms and rules on immunity, on account of the fact that the latter had to be decided on procedural grounds *before* a substantive decision could be considered on the former.[1150] *Prima facie*, the majority judgment in the case of *Germany v Italy*, therefore, appears to devalue the status of *jus cogens* rules, as taking second place after preliminary procedural considerations.

Judge Trinidade's dissenting opinion, however, voiced strong disagreement with the majority opinion, criticising it on account of leading to 'a groundless deconstruction of *jus cogens*, depriving this latter of its effects and legal consequences.'[1151] Thus he asserted:

> Grave breaches of human rights and of international humanitarian law, amounting to international crimes, are not at all acts *jure imperii*. They are anti-juridical acts, they are breaches of *jus cogens* that cannot simply be removed or thrown into oblivion by reliance on State immunity. This would lock the access to justice and impose impunity. It is, in fact, the opposite that should take place: breaches of *jus*

[1149] In a majority decision, the Court decided not to reopen the debate on reparations and the compensation of individuals, payable by the German State for gross human rights violations and war crimes committed during the Second World War. For a critique, see for instance Kimberley N. Trapp and Alex Mills, 'Smooth Runs the Water where the Brook is Deep: The Obscured Complexities of Germany v Italy' (2012), 1 Cambridge J Int'l Comp L (1), 153, 154.

[1150] *Germany v Italy* (n. 1148), para 82. The Court referred to both the *Armed Activities* case (n. 37, paras 64 and 125) and *Arrest Warrant* case (n. 1142, paras 58 and 78) in its ruling to confirm that *jus cogens* does not bear on either the ICJ's jurisdiction or on a state's prerogative arising from immunity. For a critique of the Court's ruling and circular logic applied as overly simplistic and avoiding 'conducting more delicate balancing exercises between conflicting values' (citing the Joint separate opinion in the *Arrest Warrant* case, n. 1144), see for instance Andrea Bianchi, Gazing at the Crystal Ball (again): State Immunity and *Jus Cogens* beyond *Germany v Italy* (2013), 4 J Int'l Dispute Settlement (3), 457, 461. See also Alexander Orakhhelashvili, 'Jurisdictional Immunities of the State (*Germany v Italy: Greece Intervening*)' (2012) AJIL 106, 609, 615.

[1151] *Germany v Italy*, Dissenting Opinion of Judge Trinidade, para 297.

cogens bring about the removal of claims of State immunity, so that justice can be done.[1152]

Notably, even the conservative ruling of the majority explicitly emphasised that the judgment concerned the jurisdictional immunity of *States*, distinct from the availability of *individual* liability for international crimes in the context of immunity,[1153] which it declined to address.[1154] Consequently, it may be possible to distinguish this restrictive majority opinion and argue that any potential preliminary procedural limitations, like immunity or state consent are, at best, capable of providing a limitation of state liability only.[1155] It is therefore arguable that the majority judgment in the *Germany v Italy* case fails to dismantle the hierarchy established by *jus cogens* norms, and their status, as confirmed in Art 53 of the VCLT,[1156] would remain immutable in relation to the establishment of individual criminal liability.[1157] Support for this contention can, again, be derived from Judge Trinidade's dissenting judgment, denying the availability of procedural prerogatives which permit sheltering behind the shield of immunity or state

[1152] *Ibid,* para 129. Judge Trinidade supported Greece's argument that 'a procedural rule cannot take precedence over the substantive *jus cogens* rule' (para 123, citing Greece's argument (in Doc. CR 2011/19, p. 36, para 102). In his opinion, Judge Trinidade relied extensively on the conclusions of, amongst other authorities, the *Institut de Droit International* (n. 1162, paras 44-49).

[1153] *Germany v Italy* Judgment, Majority Opinion, n. 1148, para 87. Note here that the ICJ distinguishes the case of *ex parte Pinochet* (No. 3) (n. 1147) on the grounds that the *Pinochet* case concerned the personal immunity of a former Head of State from individual criminal liability rather than the liability of the Chilean State.

[1154] *Ibid,* para 91. For a critique of the ICJ applying one of the 'conflict avoidance techniques' in order to circumnavigate the discussion of a normative hierarchy, see for instance P. Webb, 'Human Rights and the Immunities of State Officials', in E. de Wet and j. Vidma (eds) *Hierarchy in International Law: The Place of Human Rights* (OUP 2012), 114, 147. Support for the higher normativity of *jus cogens* rules is provided generally by Alexander Orakhelashvili, 'Peremptory Norms as an Aspect of Constitutionalisation in the International Legal System', in M. Frishman and S. Muller (eds), *The Dynamics of Constitutionalism in the Age of Globalisation* (Hague Academic Press 2010) 153, 165. For a different outlook, critiquing the concept of a normative hierarchy, see L. M. Caplan, 'State Immunity, Human Rights, and *Jus Cogens:* A critique of the Normative Hierarchy Theory (2003) 97 AJIL 741, 771-2. See also Hazel Fox, *The Law of State Immunity* (3rd edn. OUP 2008) 151, for a dismissal of *jus cogens* as ineffective in procedural immunity decisions.

[1155] Applying the reasoning in paras 87 and 91 in *Germany v Italy* (n. 1148).

[1156] Art 53 VCLT (n. 32).

[1157] See Alexander Orakhelashvili (2012) (n. 1161) 615.

consent, on account of the fact that international crimes amount to 'grave breaches of absolute prohibitions of *jus cogens,* for which there can be no immunities.[1158]

If the procedural prerogative of state immunity is capable of being suspended in criminal prosecutions for *jus cogens* violations, as asserted by Judge Trinidade and conceded even by the conservative majority, [1159] the same logic ought to apply to the availability of the shield of state consent, a sovereign right of a procedural nature very closely related to and of the same effect as immunity. As Andrea Bianchi points out:

> The argument is one of logic. International law cannot grant immunity from prosecution in relation to acts which the same international law condemns as criminal and as an attack on the interests of the international community as a whole. Nor can the principle of sovereignty, of which immunity is clearly a derivative, be persuasively set forth to defeat a claim based on an egregious violation of human rights.[1160]

The limitation of the right of States to insist on their consent to prosecution of their leaders for international atrocity crimes can be directly assimilated to the limitation of the reliance

---

[1158] *Germany v Italy*, Dissenting opinion by Judge Trinidade (n. 1162), para 297. He continues (at para 299): '*Jus cogens* stands above the prerogative or privilege of State immunity, with all the consequences that ensue therefrom, thus avoiding denial of justice and impunity.' See also Art 27 of the Rome Statute, providing for the unavailability of an immunity defence for individual criminal responsibility for the crimes under the Statute, which are of a *jus cogens* nature (see the 2019 ILC Draft conclusions (n. 39)). This stance was also adopted by the ICC in its pursuit of an arrest warrant for the Sudanese President Al Bashir (n. 1210 below and related text), although the issue of the arrest warrant was also based on the referral to the Court by the Security Council (Appeal Chamber's decision, n. 1212 below, para 7).

[1159] See the concession by the majority in the *Germany v Italy* case that the *jus cogens* nature of international crimes remains unaffected by procedural issues such as immunity (n. 1148, para 87).

[1160] Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case' (1999) EJIL 10, 217, 260-1, citing the *dicta* of the NMT in 22 Trial of the Major War Criminals Before the International Military Tribunal (1949), 466. 'The principle of international law, which under certain circumstances, protects the representative of the state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings…'

on immunity for the commission of such crimes. They are, in fact, part of the same coin. If immunity from prosecution is unavailable for the commission of international crimes of a *jus cogens* nature, including the crime of aggression, so too should be sheltering behind the procedural prerogative of state consent to such prosecution.

The protection and promotion of the interests of the international community and the eradication of and impunity for the worst international atrocity crimes, i.e. the *telos* of the Rome Statute,[1161] justify setting aside an insistence on state consent and voluntarism as an absolute. Consequently, the crime of aggression and the other international crimes of such a peremptory nature, arguably justify a potential limit to democratic state consent on account of their 'imperative norms that may not be derogated from'.[1162] Individual States gain the right and, as contended, are under a compelling obligation to exercise universal jurisdiction over these widely deplored crimes of a peremptory nature, which are committed against the international community as a whole, regardless of territorial boundaries or nationality and irrespective of consent.[1163] A State which captures an indicted perpetrator of such *jus cogens* crimes 'either may extradite him to the state where the offense was committed or to an international tribunal established to try such offenders, or retain him for trial under its own legal processes',[1164] applying the principle of universality. Jurisdiction over the peremptory crimes under the Rome Statute, including the crime of aggression, could therefore be available under customary international law,

[1161] As stated in the Preamble to the Rome Statute, n. 85.
[1162] See Art 53 VCLT, n. 32. See also Samantha Besson, 'State Consent and Disagreement in International Law-Making' (2016), 29 Leiden Journal of International Law 289, stating that 'democratic state consent only amounts to an exception to the obligations arising out of international treaties on other grounds and an exception whose justification is not necessarily granted, especially in the context of imperative and core duties…' (at p. 314). See also Andrew Guzman, 'Against Consent' (2012), 52 Virginia Journal of International Law, 747.
[1163] See Joyner (1996) (n. 110) 168-9.
[1164] *Ibid*, 170.

even where state consent to prosecution, in form of membership and/or ratification of the aggression amendment, is non-existent.[1165] As Dapo Akande observed in 2003:

> The rule permitting delegation of universal jurisdiction to international courts can be regarded as a 'structural' rule of international law that does not require the positive consent of states but rather is deduced from other clearly-established rules. The structural rule established above is supported by pre-and post-ICC delegations of criminal jurisdiction by states to international tribunals, including the delegation of jurisdiction over nationals of states not party to the relevant treaty.'[1166]

The most prominent precedent for such delegation is the Nuremberg Tribunal itself.[1167] The International Criminal Tribunals for the Former Yugoslavia[1168] and the International Criminal Tribunal for Rwanda,[1169] may differ on account of being established by the exercise of Chapter VII powers of the Security Council, however both statutes expressly stipulated that no Head of State immunity existed before an international criminal

[1165] *Ibid*, 169. See also Scharf (2001) (n. 1095), 99-103, and Randall (1988), n. 109, 815. The availability of universal jurisdiction and its transferability to the ICC was also recognised by Dapo Akande in a 2003 article, 'The Jurisdiction of the ICC over Nationals of Non-Parties: Legal Basis and Limits', JICJ 1 (2003), 618, 626. He states that 'it would be extraordinary and incoherent if the rule permitting prosecution of crimes against the collective interest by individual states – acting as agents of the community – simultaneously prevented those states from acting collectively in the prosecution of these crimes...', and 'where states are acting individually to protect collective interests and values, they are not prohibited and should rather be encouraged, to take collective action for the protection of those collective interests' (p. 626). Notably however, Professor Akande's views in later writings appear to shift towards an acceptance of a greater authoritative weight of state consent as expressed through agreed treaty provisions and membership. (Akande (2011) n. 888, (2013) n. 459, (2017) n. 989). For a sceptical view of the ICC's exercise of jurisdiction over non-consenting parties, and non-members in particular, see also Madeleine Morris (2001) (n. 119), 27.

[1166] See Dapo Akande (2003), *ibid*, at 626.

[1167] See n. 1094 and related text.

[1168] Established by UN Security Council Resolution 827 (1993), S/RES/827, adopted 25 May 1993. The relevant article suspending Head of State immunity is Art 7 (2) ITCY Statute.

[1169] Established by UN Security Council Resolution 955 (1994), S/RES/955, adopted 8 November 1994, the relevant article being Art 6 (2) of its Statute.

tribunal, and state consent to prosecution of its nationals was therefore not required. These tribunals can, therefore, also be interpreted as operating under a delegation of jurisdiction by the international community at large through the organ of the Security Council of the United Nations, on account of the fact that consent of the countries, whose nationals were being prosecuted, was not essential.[1170]

The Special Court for Sierra Leone, on the other hand, was created in form of a treaty between the UN and a consenting Sierra Leone, but without limitation of jurisdiction to nationals of that State.[1171] In 2012, the Special Court convicted Charles Taylor, the former Head of State of Liberia, a non-party to the treaty, in a precedent for jurisdiction over international crimes irrespective of Head of State immunity.[1172] Other examples of a form of delegated criminal jurisdiction, irrespective of state consent, are that of the European Court of Justice (ECJ), on account of the fact that Article 234 EC Treaty provides for the referral of questions on EC law to the ECJ,[1173] including those regarding non-consensual criminal proceedings, and the jurisdiction of the Caribbean Court of Justice.[1174] All of these examples provide support for the availability of delegated criminal jurisdiction, whether consensual or not, and exercisable by international courts and tribunals.

[1170] See Scharf (2001) (n. 1095), 103-6.

[1171] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone 2002, and its annexed Statute, available at http://www.sierra-leone.org/specialcourtagreement.html.

[1172] The Court's Appeals Chamber upheld his 50 year sentence for crimes against humanity, war crimes and other serious violations of international humanitarian law in 2013. See Lansana Gberie, 'The Special Court for Sierra Leone rests - for good', (April 2014) Africa Renewal, available at https://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rest---good, accessed 3rd September 2021

[1173] European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, Art 234.

[1174] Agreement Establishing the Caribbean Court of Justice, 14 February 2001, available at http://www.caricom.org/ccj-index.htm.

The ICC's own recent practice also has, on occasion, provided evidence for the availability of its jurisdiction over international crimes irrespective of a lack of state consent or membership.[1175] In the case of Sudanese President Al Bashir, the ICC made a number of decisions, following the issue of arrest warrants in 2009 and 2010,[1176] which considered the immunity of Heads of State of non-state parties under customary international law vis-à-vis the ICC. Thus, in 2011, the Pre-Trial Chambers addressed the failure of Malawi to arrest and surrender Al-Bashir, whilst present within their territory, and stated that the President was not entitled to immunity before the ICC, regardless of the fact that Sudan was not a member state. UN Security Council Resolution 1593 (2005) conferred jurisdiction onto the Court in any event, and therefore Art 27 (2) of the Rome Statute had the effect of suspending any such immunity even of a Head of State of a non-member state.[1177]

On 6 May 2019, the highest Chamber of the ICC unanimously confirmed the Pre-Trial Chambers' decisions in the Jordan Referral that the Court had jurisdiction as a result of the Security Council referral. The Appeals Chamber held that this permitted stripping Mr. Al Bashir of his Head of State immunity in accordance with Art 27 (2).[1178] Significantly

[1175] Arguably at least where there is an additional basis for jurisdiction. The least controversial of these decisions rely on a pre-existing Security Council referral, see the discussion which follows in the main text.
[1176] *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Arrest Warrant of 4 March 2009, ICC-02/05-01/09-1; Arrest Warrant of 12 July 2010, ICC-02/05-01/09-95.
[1177] Pre-Trial Chamber I, *Corrigendum to the Decision Pursuant to Article 87 (7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), 13 December 2011, available at https://www.icc-cpi.int/CourtRecords/CR2011_21750.PDF. Pre-Trial Chamber II, *Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir*, (ICC-02/05-01/09), 6 July 2017, available at https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF . Pre-Trial Chamber II, *Decision under article 87 (7) on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir*, (ICC-02/05-01/09), 11 December 2017, available at https://www.icc-cpi.int/CourtRecords/CR2017_07156.PDF, all accessed 3rd September 2021.
[1178] Appeals Chamber, *Judgment in the Jordan Referral re Al-Bashir Appeal* (ICC-02/05-01/09) OA2, 6 May 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF, para 7, accessed 3rd September 2021.

and also unanimously, the Chamber added an additional pillar to their justification for non-consensual jurisdiction over an individual of a non-member country, asserting that, in general and regardless of consent, under customary international law no immunity applied for Heads of State before the ICC. Thus, the Appeals Chamber declared that neither State practice nor *opinio juris* supports the existence of Head of State immunity vis-à-vis an international court,[1179] or even horizontally (i.e. at national level) between States, once an international court has jurisdiction and has requested arrest and surrender of an individual.[1180] Following this decision, the ICC has refuted calls to seek an advisory opinion from the ICJ,[1181] relying on the general international law principle that a Court is competent to rule on its own competence, as well as Article 119 (1) of the Rome Statute, stipulating that disputes concerning the judicial functions of the Court are to be settled by the Court's own decisions.[1182]

Other recent assumptions of investigation and potential prosecuting powers by the ICC against non-member States can be seen as confirming this trend. This practice of the Court, on occasion, demonstrates an expansion of the reach of jurisdiction over international crimes regardless of consent, even where the Court has not been able to rely on Security Council referrals as a basis for jurisdiction (and is unlikely to in the future). The relevant situations include, for example, the assumption of investigation powers regarding the forced deportation of the Rohingya from Myanmar,[1183] on the basis that the

[1179] *Ibid*, para 1.
[1180] *Ibid*, para 2. This latter statement, in particular, potentially provides at least an indirect challenge to the restrictive interpretation of the majority of the ICJ in the *Germany v Italy* case, although the ICC's decision concerns immunity in the context of individual criminal liability, whereas the *Germany v Italy* case was decided in the context of state responsibility, immunity and compensation (see the discussion above).
[1181] See ICC, *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Questions and Answers, available at https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qu-eng.pdf, accessed 3rd September 2021.
[1182] Art 119 (1) Rome Statute (n. 1).
[1183] ICC Pre-Trial Chamber III, *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of*

alleged crime began in the latter non-member state but continued into Bangladesh, which is a member state.[1184]

In a different investigation, the Prosecutor's Office 2020 Report concluded that, after preliminary examination, there were reasonable grounds to believe that war crimes and crimes against humanity were committed on the territory of Ukraine and the Crimea,[1185] the latter having been unlawfully annexed by the Russian Federation in early 2014.[1186] Whilst the Ukraine had accepted jurisdiction of the Court for events from 21 November 2013, the Court will assume jurisdiction over these crimes on territory claimed by non-member and non-consenting state Russia,[1187] if the Pre-trial Chamber authorises prosecution. Consequently, this investigation and potential future prosecution is another example of the expansion of the Court's jurisdiction without strict adherence to consent and/or membership requirements.

Myanmar, ICC-01/19, 14 November 2019 [the *Myanmar* decision]. Note here the purposive approach of the PTC, taking into account the gravity (paras 34-7) and the interests of justice (paras 38-9).

[1184] The ICC again expanded its territorial jurisdiction to non-consenting and non-member states, relying on the 'continuing *actus reus* theory' in customary international law (*Myanmar decision*, para 61-2). For a critique, see for instance Douglas Guilfoyle, 'Is the International Criminal Court destined to pick fights with non-state parties? EJIL:Talk!, 14 July 2020, available at https://www.ejiltalk.org/is-the-international-criminal-court-destined-to-pick-fights-with-non-state-parties/, accessed 5th September 2021. Note, however, that so far the Prosecutor's Office has declined to seek authorisation of investigation of alleged forced deportations of Uyghur Muslims into the non-member state China from Tajikistan and Cambodia (both member states). See the 'Prosecutor's Report on Preliminary Examination Activities 2020', 14 December 2020, available at https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf [hereinafter the 2020 Prosecutor's Report], accessed 5th September 2021. The report here states that the alleged criminal conduct on the territory of the States Parties did not fulfil the material elements of the crime of deportation (para 76), and it had no jurisdiction over alleged crimes committed solely within the non-member state of China (paras 73-4).

[1185] See 2020 Prosecutor's Report, *ibid*, para 267-90.

[1186] *Ibid*, para 274. The United Nations General Assembly condemned the illegal annexation of Crimea in Resolution A/RES/68/262 (n. 799), and has reiterated the condemnation on a number of occasions, most recently in A/RES 75/29, 7 December 2020.

[1187] For a discussion, see for instance Iryna Marchuk, Aloka Wanigasuriya, 'The ICC concludes its preliminary examination in Crimea and Donbas: What's next for the situation in Ukraine?' EJIL:Talk! 16 December 2020, available at https://www.ejiltalk.org/the-icc-concludes-its-preliminary-examination-in-crimea-and-donbas-whats-next-for-the-situation-in-ukraine/, accessed 3rd September 2021.

A further example and landmark decision on non-consensual jurisdiction, is the Appeals Chamber's reversal in March 2020 of the Pre-trial Chamber's decision to stop the Prosecutor's investigation into claims of war crimes, crimes against humanity and torture committed by US military personnel and members of the CIA in Afghanistan, an ICC state party since 2003.[1188] Importantly, the Pre-trial Chamber was held to have unduly taken into consideration the non-membership and non-consent of the United States, as well as political and financial considerations and chances of success. Additionally, the Pre-trial Chamber had expressed doubts as to the Prosecutors assessment of the investigation serving the interests of justice,[1189] and the Appeals Chamber rebuked the Pre-trial Chamber's policy decision sharply as inappropriate.

Another example of the ICC's proactive approach in situations of potentially controversial jurisdiction in situations of lack of consent, non-membership and disputed territories, is the assumption of jurisdiction and investigation into the situation in Palestine, in particular the areas of the West Bank, East Jerusalem and the Gaza Strip.[1190] Whilst Palestine is both a member state of the ICC and has also expressly accepted the Court's jurisdiction,[1191] Israel remains a non-member state. Consequently, continuing controversy exists over the ICC's assumption of jurisdiction over crimes committed on the disputed and/or occupied territories, in addition to the fact that Palestine's statehood itself (and therefore its capacity to accept jurisdiction) is not universally recognised.[1192]

[1188] ICC Appeal's Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17 OA4, available at https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF, accessed 3rd September 2021.

[1189] *Ibid*, paras 5, 20, 25, 45 and 46.

[1190] See Pre-Trial Chamber I, Decision on the 'Prosecution request pursuant to article 19 (3) for a ruling on the Court's territorial jurisdiction in Palestine', 5 February 2021, ICC-01/18, available at https://www.icc.cpi.int/CourtRecords/CR2021_01165.PDF accessed 3rd September 2021.

[1191] Palestine accepted jurisdiction of the ICC on 1 January 2015 with regards to crimes committed since 13 June 2014 and acceded to the Rome Statute on 2 January 2015.

[1192] 22 out of 42 *amicus curiae* who submitted their views to the Pre-Trial Chamber argued that the conditions for the exercise of the Court's jurisdiction had, at the time of the decision (n. 1201), not been

These situations demonstrate that the ICC itself is prepared to challenge not only immunity, but even pierce the shield provided by the traditional jurisdictional parameters of state membership and consent to its own treaty, where international atrocity crimes of a *jus cogens* nature have been committed. They also confirm the expanding 'evolution' of individual accountability in international criminal law, as perceived by the dissenting judges in the ICJ's *Arrest Warrant* and *Germany v Italy* cases.[1193]

General state practice also corroborates this development of greater individual accountability for *jus cogens* crimes through the revival of universal jurisdiction at customary international law. The number of States claiming such universal jurisdiction over international crimes is ever growing. According to Amnesty International's 2012 report, 163 out of 193 UN member states acknowledge the potential exercise of universal jurisdiction over one or more crimes under international law.[1194] An example is the recent recommendation by the International Fact-Finding Mission on Myanmar set up by the Human Rights Council for individual States to resort to universal jurisdiction in order 'to investigate and prosecute alleged perpetrators of serious crimes under international law committed in Myanmar.'[1195] A first case was brought in Argentina in 2020,[1196] which is, at the time of writing, before the Court of Appeal in Buenos Aires. In a recent landmark

fulfilled (*ibid*, paras 51-52). For a critique of the PTC's decision, see for instance Kai Ambos, '"Solid jurisdictional basis"? The ICC's fragile jurisdiction for crimes allegedly committed in Palestine', EJIL:Talk! 2 March 2021, https://www.ejiltalk.org/solid-jurisdictional-basis-the-iccs-fragile-jurisdiction-for-crimes-allegedly-committed-in-palestine/, accessed 3rd September 2021.

[1193] See Judge van den Wyngaert's dissenting opinion in the *Arrest Warrant* case, n. 1152, and Judge Trinidade's dissenting opinion in the *Germany v Italy* case, n. 1162.

[1194] Amnesty International Report on universal jurisdiction (n. 131). See also International Justice Resource Center, *Universal Jurisdiction* (n. 131).

[1195] 'Compilation of all recommendations made by the Independent International Fact-Finding Mission on Myanmar', para 102, A/HRC/42/CRP.6, 16 September 2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/201090916/A_HRC_42_CRP.6.pdf, accessed 3rd September 2021.

[1196] Tun Khin, 'Universal Jurisdiction, the International Criminal Court, and the Rohingyan Genocide', OpinioJuris, 23 October 2020, available at http://opiniojuris.org/2020/10/23/universal-jurisdiction-the-international-criminal-court-and-the-rohingya-genocide/, accessed 5th September 2021.

decision, the High Regional Court of Koblenz, Germany, convicted a former member of the Syrian intelligence services at the beginning of this year for complicity in crimes against humanity and torture, exercising universal jurisdiction.[1197] Other cases against members of the Syrian regime have been brought in France and Sweden.[1198]

This evolution towards a de-emphasis of state consent and related procedural rules on immunity with regards to *jus cogens* violations strengthens the argument for wide jurisdiction of the ICC over these crimes, as uninhibited by procedural consent restrictions as the jurisdiction of domestic States under the principle of universality. The peremptory nature of the crimes, the teleological interpretation of the Rome Statute and its principle of complementarity reinforce this contention. Additionally, the argument has been presented that acts of aggression committed by leaders were prosecuted at Nuremberg under such delegated universal jurisdiction,[1199] subject to an 'international rule of law' and independent of state consent.[1200] This precedent, therefore, lends extra support to the exercise of collective universal jurisdiction by a treaty-based international court,[1201] particularly over the crime of aggression.

Such universal jurisdiction over the crime of aggression, exercisable by the ICC where its member states are unwilling or unable to prosecute, [1202] may be capable of overriding

[1197] See BBC News, 'Syria Torture: German court convicts ex-intelligence officer), 24 February 2021, http://www.bbc.co.uk/news/world-europe-56160486, accessed 27 February 2021. See also Jennifer Triscone, 'Universal Jurisdiction, the only hope for prosecuting international crimes committed in Syria', 6 September 2021, Trial International, available at https://trialinternational.org/latest-post/universal-jurisdiction-the-only -hope-for-prosecuting-international-crimes-committed-in-syria/, accessed 8th September 2021.

[1198] *Ibid.*

[1199] See n. 1094 and related commentary.

[1200] *Ibid*.

[1201] See Scharf (2001) (n. 1095) 103-6, and Randall (n. 109), 804-6.

[1202] To date 39 member states have ratified the aggression amendments, and a number of these have, since the Kampala Conference, incorporated domestic legislation, see www.crimeofaggression.info. Even as early as 2010, some countries had already enacted domestic legislation of universal jurisdiction over the

the greatly reinforced consent requirement within Article 15 *bis*, rendering the aggression provisions applicable to all member states despite the loopholes created. This possibility follows from the argument that the peremptory prohibition of aggression cannot be derogated from by treaty.[1203] If this admittedly contentious supposition was successful, the exercise of universal jurisdiction by individual States could, therefore, revert back to the ICC, just as it reverted back to the Nuremberg tribunals and allow for jurisdiction over non-consenting states parties. It would also constitute an alternative to the requirement for a Security Council referral, where the strict double membership requirement has not been satisfied, and the effect would be to de-emphasise the currently great dependence of the Court on the Council. Universal jurisdiction under customary international law might, therefore, allow the ICC to adopt jurisdiction where it is otherwise restricted by its very own Statute insisting on membership and consent.

crime of aggression. See UN Secretary-General, *Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments: The Scope and Application of the Principle of Universal Jurisdiction*, at 29, UN Doc. A/65/181 (July 29, 2010).

[1203] See Article 53 VCLT (n. 32) and Conclusion 2 of the 2019 ILC Report (n. 39).

Conclusion

The fact is not denied that any exercise of universal jurisdiction over aggression is, considering all the effort expended at creating a highly limiting multiple consent requirement for the crime, likely to encounter fierce objections. States prosecuting domestically, as well as the Court itself, would be subject to accusations of attempting to circumvent or undermine the specific state consent provisos, which were deliberately sought by a powerful minority of States and incorporated in the amendment. Critics may also argue that strict interpretation in accordance with the ordinary meaning of a treaty provision, as per Article 31 (1) VCLT,[1204] and the exclusion of non-states parties, as per Art 34,[1205] counters the possibility of universal jurisdiction over the crime of aggression. Attempts to prosecute non-member states or non-consenting member states without a prior Security Council referral and under assumption of universal jurisdiction is, furthermore, likely to attract condemnation by defenders of extensive Security Council control.[1206]

Nevertheless, it is contended that the prohibition of aggression is a peremptory norm under Art 53 VCLT, which supersedes the other treaty provisions, including insistence on state consent. Norms prohibiting international atrocity crimes of a *jus cogens* nature supersede other provisions and are accorded greater weight in the hierarchy of norms.[1207] The availability of universal jurisdiction over such crimes therefore survives regardless

[1204] VCLT ((n. 32), Article 31 (1).)
[1205] *Ibid,* Article 34.
[1206] See the arguments considered in section 3 of Chapter 4.
[1207] See the dissenting opinions in the *Arrest Warrant* case, n. 1151 and n. 1152, and the *Germany v Italy* case, n. 1148.

of the attempts of exclusion.[1208] As has been argued above, this phenomenon can be interpreted as part of an evolution of modern international law,[1209] towards the greater normativity of *jus cogens* violations.[1210] This development, in the words of Judge Trinidade, 'gradually resolves the tension between state immunity and access to justice rightly in favour of the latter, particularly in cases of international crimes,'[1211] leading to a more universal recognition of individual liability within international criminal law.[1212]

Evidence for such a trend can be seen all around, from the quest for impunity pursued by the first permanent international criminal court, declared as its *telos* in the Preamble and reflected in the recent decisions of this fledgling court, to the judicial practice of other international tribunals since Nuremberg and growing state recognition.[1213] Despite the likely objections, the potential application of universal jurisdiction offers at least a partial solution to the tightly restricted, marginalised jurisdiction of the Court as accepted at Kampala. Without this possibility of escaping the straightjacket of statutory restrictions, prosecutions for aggression involving non-member states in any capacity would effectively be barred, unless there is a Security Council referral. As the discussion showed, non-members, as a result of Article 15 *bis* (5), do not even enjoy protection

[1208] For support, see the fact that even the joint separate opinion in the *Arrest Warrant* hinted at this possibility (n. 1144), and to some degree also the conservative majority in the *Germany v Italy* case (n. 1148).
[1209] See the Joint Separate opinion in the *Arrest Warrant* case (n. 1144), and the dissenting opinion of Judge van den Wyngaert (n. 1152).
[1210] For an elaboration on this evolution, evidenced by domestic jurisdictions but ignored by the ICJ in its consideration of case law in *Germany v Italy*, see Andrea Bianchi, n. 1184 at 474. He cites in particular a case by the High Court of Justice, Queen's Bench Division, Administrative Court, *Khurts Bat v The Investigating Judges of the German Federal Court*, Judgment of 29 July 2011 (2011) EWHC, 2029 (Admin) (denying immunity to foreign state officials for criminal charges in respect of acts committed in the territory of a third State while in post) and by the Swiss Federal Criminal tribunal in *A v Ministere Public de la Confederation*, 25 July 2012 (denying immunity *ratione materiae* to a former foreign state's defence minister for war crimes and acts of torture allegedly committed while he was in post), available at http://www.trialch.org/fileadmin/user_upload/documents_/affaires/algeria/BB.2011.140.pdf, accessed 27 August 2021.
[1211] Dissenting opinion by Judge Trinidade, n. 1162, para 303.
[1212] *Ibid*.
[1213] See the discussion presented above.

against aggression committed by signatories.[1214] The argument has been presented that this latter fact, on its own, may inadvertently operate as an incentive to join the Rome Statute,[1215] depending on the strength or vulnerability of a State relative to its neighbours. However, once the State in question has signed up to the treaty, the greatest protection is derived from non-acceptance of the amendment and/or opting out. The new member state would be immune from prosecution, under Article 15 *bis*, over their own acts of aggression whilst enjoying protection from aggression by other signatories who have ratified the amendments. This combination acts as a great disincentive for acceptance of jurisdiction, as a direct result of the insistence on multiple consent layers. It also counteracts any real chance of wide membership of the Court without reservations and the eradication of the crime of aggression.

Divorcing individual criminal liability from state responsibility by allowing States or their leaders to hide behind the shield of state consent to jurisdiction, or immunity, is contrary to the *telos* of the Rome Statute and its express aim of impunity.[1216] It also ignores the *jus cogens* nature of the Crime of Aggression. Elective impunity of States is likely to result in greatly emasculated jurisdiction rather than effective deterrence. The first permanent International Criminal Court has only very recently obtained jurisdiction, after nearly a century of attempts to eradicate the crime. To curtail its jurisdiction in quite such a comprehensive way, through reinforced insistence on state consent, is counterintuitive to the aims of the Rome Statute, and indeed the imperative need of the global community at large to eliminate the worst international crimes. A parallel can be drawn with the remarks

[1214] See section 3 of this Chapter.
[1215] Akande and Tzanakopoulos (2018) (n. 902), 958.
[1216] See the Preamble, n. 85.

of the International Court of Justice in the *Armed Activities Case*,[1217] commenting on claims that its own jurisdiction over acts of genocide was limited due to lack of state consent. As stated in the separate joint opinion:

> It is a matter for serious concern that at the beginning of the twenty-first century it is still for States to choose whether they consent to the Court adjudicating claims that they have committed genocide [or crimes of aggression]. It must be regarded as a very grave matter that a State should be in a position to shield from international justice scrutiny any claim that might be made against it concerning genocide [or aggression]. A State so doing shows the world scant confidence that it would never, ever, commit genocide [or aggression], one of the greatest crimes known.[1218]

This statement is, it is argued, as applicable to the 'supreme' international crime of aggression, as it is to the crime of genocide. The combination of the wholesale exclusion of non-signatories contrary to Article 12 and the multiple consent requirement, even for signatories,[1219] make it difficult not to view the restrictions as a deliberate policy decision sacrificing impunity for the perpetuation of state sovereignty and consent. Despite the fact that jurisdiction has now, at least technically, been bestowed on the Court, the question arises whether the compromise leading to this limited jurisdiction has been achieved at too high a cost. The Kampala consensus and subsequent policy decision by the 2017 ASP may have placated sceptics of the Court's independence at least

[1217] *Armed Activities* (2005) (n. 37 and 773), Joint separate opinion of Judges Higgins, Koojimans, Elaraby, Owada and Simma (para 25).
[1218] *Ibid.* Text in brackets added.
[1219] Applying the negative interpretation of Article 121 (5) combined with Article 15 *bis* (4) (see section 2.5).

temporarily, but at the expense of widely restricting effective jurisdiction over the supreme international crime. In light of these extraordinary and tight restrictions incorporated into the amendments, the assumption of universal jurisdiction may, despite its contentiousness, be one of the very few ways of expanding jurisdictional reach over the crime in practice.

CHAPTER 6: TRANSCENDING THE JURISDICTIONAL LIMITATIONS

1. Introduction

The evaluation of the jurisdictional limitations placed on the new Crime of Aggression has dissected the detailed provisions contained in Articles 8 *bis* and 15 *bis* and *ter*. Comparisons have been drawn with the historical precedents at Nuremberg, the definition of the state act in Resolution 3314 and the other crimes under the Rome Statute.[1220] It has also been attempted to draw conclusions on the insubstantial appetite of the international community since Nuremberg to expressly condemn such acts of aggression, as demonstrated by the political organs of the Security Council and the General Assembly and occasionally also the International Court of Justice.[1221] The examination has shown that the new crime of aggression provisions have been extensively and deliberately restricted, providing for an extremely narrow definition,[1222] great control by the Security Council over Court proceedings, even in ostensibly independent prosecutions,[1223] and the strictest state consent requirements imaginable.[1224] So, where does this leave the new jurisdiction of the first permanent International Criminal Court over the Crime of

[1220] See Chapters 2 and 3.
[1221] See section 5, Chapter 1 and section 2.1, Chapter 2.
[1222] As argued in Chapters 2 and 3.
[1223] As argued in Chapter 4.
[1224] See Chapter 5.

Aggression? How might these limitations placed on the Court's jurisdiction be surmountable, in order to be at all effective in a modern context? In order to provide suggestions of how to broaden jurisdiction, whether they are entirely realistic or not, let us first briefly sum up the specific problems encountered in this analysis, and the arguments presented.

2. Revisiting the need to reconceptualise the definition

The definition of the crime firstly poses the problem of a very high gravity threshold.[1225] This leads to undesirable delays even before prosecution of a crime can begin, since it is a precondition, which has to be established before the start of proceedings, but also constitutes an element of the crime which has to be proven again during the trial. The intention of negotiators was to exclude humanitarian interventions, however the argument has been presented that the *mens rea* threshold of intent and knowledge to commit an act of aggression, derived from Article 30 of the Rome Statute, is unlikely to have been crossed in such interventions.[1226] Additionally, Article 1 (1) of the Rome Statute limits prosecutions to the most serious international crimes only, and an intervention for humanitarian purposes is not likely to be viewed as such by either the Prosecutor, who has to decide whether a prosecution would serve the interests of justice in accordance with Article 53 (1),[1227] or the Pre-Trial Division, which serves as an authorisation 'filter', by virtue of Article 15 *bis* (8).[1228] Furthermore, the Security Council is entitled to a

[1225] Article 8 *bis* (1) of the Rome Statute.
[1226] See section 2.2 in Chapter 2.
[1227] See Article 53 (1) Rome Statute (see n. 453 and section 2.4 Chapter 2).
[1228] Article 15 *bis* (8).

consideration period of six months,[1229] and can halt investigations and prosecutions by the Court.[1230]

The argument has also been presented that a genuine humanitarian intervention is not inconsistent with the UN Charter, and there was therefore no need to insist on such a high threshold in the first place.[1231] The Court should be entitled to use their discretion in order to distinguish acts of aggression incrementally, however this view is likely to encounter accusations of politicisation, interference in matters of peace and security, violation of the Vienna Convention on the Law of Treaties, as well as the prohibition of analogy contained in Article 22 (2) of the Rome Statute itself.[1232] Nevertheless, the inherent safeguards within the Rome Statute ought to be sufficiently effective to prevent abuse. Furthermore, incremental clarification, careful interpretation and close analogy are necessary to make sense of the aggression provisions in a modern context, and achieve greater applicability, at a time when the crime of aggression may take on many different guises not envisaged in the definition.[1233] Enforcement of the aggression provisions subject to these considerations would also place renewed emphasis on the general prohibition of the use of force contained in Article 2 (4) of the UN Charter.[1234]

The second problem arising from the definition is the limitation to political and military leaders of a State only.[1235] It was noted that this is a substantial retreat from the Nuremberg prosecutions, which also considered the culpability of economic and

[1229] *Ibid.*
[1230] Article 16 of the Rome Statute (n. 739).
[1231] Chapter 2.
[1232] Section 2.4 in Chapter 2.
[1233] *Ibid.*
[1234] *Ibid.* For Article 2 (4) of the UN Charter see n. 195.
[1235] Chapter 2.

industrial leaders. Moreover, Nuremberg set the precedent of a wider 'shape or influence' standard.[1236] If a leader was capable of shaping or influencing the policies of the aggressive State, they were deemed capable of attracting individual criminal liability, if their actions led to an act of aggression.[1237] The much higher 'control or direct' test, which has now been adopted for the crime of aggression, was derived from the ICJ's consideration of state responsibility in *Nicaragua*, which did not contemplate individual criminal liability.[1238] The negotiating history demonstrated that the SWGCA was misguided in their interpretation of the test at Nuremberg as one of 'control or direct', despite their own highly elaborate Historical Review, which time after time confirmed the 'shape or influence' standard.[1239] The higher standard was incorporated into the Kampala Amendments, even though the 2006 Princeton Report acknowledged the culpability of non-military and non-political leaders capable of shaping and influencing a State's policies, and despite the inclusion in the 2009 Report of the Special Working Group of 'non-governmental actors, for instance high-level industrialists'.[1240]

The practical effect is that culpable influential war mongers, spin doctors, religious leaders and economic leaders profiteering from aggressive wars, are not captured, unless the Court applies wide judicial discretion to decide otherwise. Some support for the inclusion of non-military and non-governmental actors can also be derived from the crime of genocide, which considers culpability of actors in a lesser capacity who incite the commission of the crime.[1241] The modern accessory liability doctrine of Joint Criminal

[1236] See section 4.3, Chapter 1 and section 3.1 and 3.2, Chapter 2.
[1237] *Ibid.*
[1238] *Ibid.*
[1239] n. 534, Chapter 2.
[1240] See Chapter 2, n. 555.
[1241] See Article 6 Rome Statute, particularly in combination with Article 25 (3). See also *ICTR v Akayesu* (n. 558) and related discussion in Chapter 2, section 3.4 (p. 134).

Enterprise (JCE), involving a 'common plan,[…] which amounts to the commission of a crime'[1242] as well as a shared intent, may also provide a path to wider application. To that effect, the discussion considered the argument that Article 25 (3) d) Rome Statute includes JCE generally, and consequently JCE ought to be read into the crime of aggression as well.[1243] Some views even contended that the entire future of the crime of aggression lies within JCE.[1244] All of these suggestions, however, require ignoring the fact that JCE appears to have been deliberately excluded by Article 25 (3) *bis*, and critics also counter the suggestion of including JCE as offending the legality principle.[1245] Nevertheless, this thesis argues that if the common purpose is so obvious that the culpability of the defendant's behaviour ought to have been foreseeable, this should provide a sufficient basis for the Court's jurisdiction.[1246] To hold otherwise would render the aggression provisions ineffective, and constitute an even greater 'retreat from Nuremberg'.[1247]

A third limitation on the jurisdiction of the Court arises from the fact that the definition currently does not extend to include non-state actors and acts of aggression committed by and against non-state entities.[1248] Consequently, the definition may not be equipped to consider modern threats which have, over the past 20 years, often involved non-state actors.[1249] Similarly, proxy wars, external interference in civil wars and foreign state support of non-state groups raise problems of clear attribution.[1250] Modern warfare is also

[1242] See *Tadic* (IT-94-1-A) (n. 115), Appeals Chamber Decision 15 July 1999, paras 193, 200 and related discussion in section 3.4 of Chapter 2.
[1243] See section 3.6, Chapter 2.
[1244] See particularly Weisbord's arguments, pp. 138-9 and section 3.6, Chapter 2.
[1245] See Heinsch and Osiel, pp. 139-40 (n. 579 and 580).
[1246] See the argument presented in Chapter 2, section 3.4.
[1247] Petty (2008) (n. 531 and related arguments).
[1248] See Chapter 3, section 2.
[1249] *Ibid.*
[1250] *Ibid.*

often asymmetric and decentralised. The state element within the crime of aggression definition therefore requires reinterpretation to include groups or state-like entities, and render it capable of capturing political-military organisations other than States.[1251] The potential extension of liability to such organisations would widen the Court's jurisdiction, however such reinterpretation is also likely to raise the familiar legality concerns which pervade any attempt to extend jurisdiction to situations other than the very limited circumstances in which jurisdiction of the Court was envisaged.[1252]

Furthermore, the Court's jurisdiction over the crime of aggression is greatly restricted by the limited list of 1974-style traditional warfare scenarios.[1253] Whilst Article 4 of Resolution 3314, from which the crime of aggression is largely derived, had provided for the determination of other acts, rendering the list non-exclusive, Article 8 *bis* includes no such provision for extension to other types of aggression.[1254] State proposals, which attempted to include a provision that the list was to serve merely as examples of acts and could be extended, were ignored.[1255] Even the SWGCA's own suggestion of a compromise between a non-exhaustive list and a chapeau, for the purpose of reigning in excessively wide interpretations whilst still providing some flexibility, were unsuccessful.[1256]

As a result, it is now extremely difficult to extend the current definition to include modern and emerging threats of systems disruptions, sabotage, cyber warfare, terrorism, guerrilla warfare, and information warfare including the spreading of fake news etc. This fact leads

[1251] *Ibid.*
[1252] *Ibid.*
[1253] Section 3, Chapter 3.
[1254] *Ibid.*
[1255] *Ibid*, Proposals by Colombia, Greece and Portugal (n. 641, 643) and related text.
[1256] See the 2006-7 *Princeton Reports* (n. 416 and 552).

to the realisation that wider interpretations are required in order to render the crime of aggression fit for prosecutions in a modern context. Support for such wider interpretations can also be gained, for instance, from the fact that a number of new projects have recently been mandated by the General Assembly in order to establish the application of international law to cyberwarfare,[1257] and attempt to assess how cyber threats impact on international peace and security.[1258] Additionally, the Permanent Mission of Liechtenstein with other partners, has created a Council of Advisers, specifically in order to investigate the application of the Rome Statute to cyberwarfare.[1259] These ongoing projects clearly demonstrate the increasing recognition that international law and practices need to be adapted in order to apply to modern threats to peace and security.

The recognition of a requirement to apply existing law to new and developing situations also provides support for wider judicial determinations, despite likely criticism of offending the principle of *nullum crimen sine lege.* Concerns of judicial interference in political matters are, this thesis argues, exaggerated, since the Court is required to determine the existence of an act of aggression in each situation in any case, in order to establish individual criminal liability. Determinations of state acts and the exact type of individual behaviour amounting to aggression, are partial elements of the crime,[1260] and therefore incidental to the prosecution of aggression without necessarily evidencing politically motivated judicial interference and undue expansion of existing law. Support for a presumption of inherent competence and independent determination powers of the

[1257] Open-ended working group (OEWG) on developments in the field of information and telecommunications in the context of international security. See n. 658.
[1258] Group of Governmental Experts (GGE) on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security. See n. 659.
[1259] The Council of Advisers on the Application of the Rome Statute to Cyberwarfare, n. 660.
[1260] As stipulated in Article 8 *bis.*

Court can, the argument was presented, be derived from *Nicaragua*,[1261] and the *Reparations* case,[1262] as later applied by the ICTY in *Tadic*.[1263] Additionally, the treatment of the other crimes in the Rome Statute also provides evidence for permissible judicial interpretation.[1264]

An alternative possibility could be to simply view the list as non-exhaustive, despite the appearance to the opposite.[1265]. This is based on the argument that the exclusion of Articles 2 and 4 of Resolution 3314 merely restricts determination of other acts and consideration of other grounds by the Security Council, not the Court itself.[1266] Following this argument, the Court can draw on Resolution 3314 as a whole, and neither Article 22 (2) nor the legality principle require a reading of the list as exclusive of other acts.[1267] Here again arguments can, therefore, be presented for careful, incremental interpretations by the Court, as long as the principle of *nullum crimen sine lege* is not blatantly offended, and the analogy is sufficiently close to have been foreseeable.[1268] A number of safeguards are in place to prevent overly wide interpretations, for instance the limitation of the Statute to the worst international crimes only, the high threshold of the crime, the filter of the Pre-Trial Division, and the ability of the Security Council to halt investigations and prosecutions under Article 16.[1269]

[1261] *Nicaragua* case (1984), (n. 827), para 96, in which the ICJ stated that it had 'never shied away from a case brought before it merely because it had political implications.'

[1262] *Reparations* case (1949) (n. 844). Here the ICJ held that where an international organisation had been instructed with a certain task, it had also been 'clothed […] with the competence required to enable those functions to be efficiently discharged.'

[1263] See the discussion of *Tadic* (n. 115 and 838, at para 18) and section 3.4 of Chapter 2. The ICTY, citing the *Certain Expenses* case (1962) at p. 163 (n. 765), considered itself competent and 'duty-bound' to exercise its jurisdiction 'regardless of the political background or the other political facets of the issue'.

[1264] See for instance Article 7 (1) (k) of crimes against humanity.

[1265] See for instance, Kress (2017), n. 614 in Chapter 3 and related text, as well as section 3.2 and particularly pp. 164-5.

[1266] *Ibid.*

[1267] *Ibid.*

[1268] *Ibid.*

[1269] See the discussions in Chapters 2 and 3.

Without such incremental extension, the crime of aggression is likely to be irrelevant in a modern context, at the very time when jurisdiction by a permanent international Court has only just been established. The only other option would be to re-write the definition entirely, however the negotiating history has demonstrated that agreement and consensus by States is difficult to achieve.[1270] Any amendment would have to be subject to the amendment procedure in Article 121 (3), stipulating acceptance by two thirds of the Court's members.[1271] In light of the protracted negotiations and the jurisdictional limitations intentionally sought at the insistence of powerful States, resulting in near failure at Kampala,[1272] the predictions for finding easy agreement on a wider definition and expansive jurisdictional reach are not promising. On the other hand, the developing recognition of the need to match current international criminal law to modern threats like cyberwarfare,[1273] may operate to put some pressure on States to reconsider their position and accept such an extension.

3. Revisiting the stringent jurisdictional restrictions

In addition to the definitional limitations, the examination also revealed that the jurisdictional conditions contained in Articles 15 *bis* and *ter* add substantially to the restrictions on the Court's independent jurisdiction over the crime of aggression. Thus, the level of Security Council control over aggression proceedings in situations where the

[1270] Here, a conclusion by the Council of Advisers (n. 660), the OEWG (n. 658) or the GGE n. 659) that the crime of aggression ought to apply to cyberwarfare would be extremely useful, and might even negate the need to rewrite the definition as it stands, as long as the Court feels free to take note of this potential conclusion.
[1271] See Article 121 (3) Rome Statute (n. 972).
[1272] See Kress and von Holtzendorff (2010) (n. 5).
[1273] See for the OEWG, GGE and Councils of Advisers (n. 658-60).

referral emanates from a member state or the Prosecutor's own powers, is remarkable.[1274] Security Council referrals are subject to consensus by the P5, and if any of those five States withhold what effectively amounts to their consent, no referral ensues.[1275] The powerful States, in particular, consider the prerogative of the Security Council over aggression proceedings to be exclusive,[1276] and underlying reasons for continuing insistence of Security Council monopoly are the desire to preserve the existing power structure and protect their sovereign interests.[1277] Their defence of this view, however, ignores evidence that the determination power of the Security Council is, and always has been, shared,[1278] and the privilege of the Council over aggression is not exclusive of determinations by other organs.[1279] This was confirmed for example by the ICJ in *Nicaragua*,[1280] and *Armed Activities*,[1281] and also a number of General Assembly resolutions.[1282]

Some delegations of States and academics also expressed strong preference for Security Council scrutiny in order to protect the Court from accusations of politicisation and States' abuse of aggression referrals to the Court.[1283] Other arguments defend significant Security Council involvement, because it extends jurisdiction to situations in which the Court would otherwise have none. This view is based on the fact that treaties bind only consenting signatories, and Security Council involvement is regarded as a way to achieve

[1274] See the discussion in Chapter 4.
[1275] *Ibid.*
[1276] See the post-Kampala Explanations of Positions in the *Travaux Preparatoires* (2012), Barriga and Kress (eds.) (n. 722-3) from p. 810.
[1277] See Chapter 4, sections 2-3.
[1278] *Ibid.*
[1279] *Ibid.*
[1280] See the determination of acts of aggression by the ICJ in *Nicaragua* (1986) (n. 37), (1984) (n. 827).
[1281] See the determination of acts of aggression in *Armed Activities* (2005) (n. 37).
[1282] Through, for instance, application of the U4 P resolution, n. 253. For a discussion, see section 2.2 and pp. 189-90 in Chapter 4.
[1283] Chapter 4, section 3.2.

jurisdiction over non-signatories or non-consenting state parties.[1284] Even though this fact is not disputed, such extension of jurisdiction to non-signatories is only likely to arise if a State is unpopular and does not enjoy the support of at least one P5 member, who could prevent a referral by use of their veto power.

The most radical argument for Security Council exclusivity encountered during the research for this thesis asserted that Security Council powers over the crime of aggression ought to be extended even more, by granting the Council the power to vacate charges before the Court and expunge convictions.[1285] This thesis strongly refutes this argument. The extension and exercise of such power would amount to unacceptable political interference in criminal proceedings and the judicial process, as well as prevent any future deterrence from committing the crime. Jurisdiction of the Court would be rendered a farce.[1286] The contention of inherent competence of the Court, reiterated above in the context of wider judicial determinations of other acts of aggression,[1287] has been defended throughout this discussion, and gains support from a similar assumption in Article 36 of the ICJ Statute,[1288] as well as case law.[1289] Furthermore, it has also been contended that Article 8 *bis* requires the ICC to make its own determinations of a State act as an element of the crime.[1290]

The two organs of Court and Council are separate entities, and decisions by the Security Council should not be prejudicial to the Court's determinations, a principle which has in

[1284] Chapter 4, section 3.3.
[1285] See Stein's arguments (n. 811 and pp. 198-200 in Chapter 4).
[1286] See the counterarguments presented in section 3.1 of Chapter 4, from p. 200.
[1287] *Ibid.*
[1288] *Ibid.* For the ICJ Statute, see n. 35.
[1289] *Ibid.* See also n. 1295-6 above.
[1290] See pp. 201-3, Chapter 4.

fact been expressly affirmed in Articles 15 *bis* (9) and 15 *ter* (4).[1291] *Ex post facto* determinations by the Security Council as a political organ, if viewed as binding by the Court, raise serious legality concerns and impede the rights of the defendant in a criminal trial.[1292] Consequently, it is the very requirement to abide by the legality principle, which requires the Court to make these determinations without prejudice and independently, based on the facts of each case, whilst avoiding politicisation. In order to do this, the Court requires flexibility and independent determination powers.

In addition to Security Council control, the specific state consent requirements incorporated into the crime of aggression provisions constitute yet another fundamental restriction placed on the jurisdiction of the Court.[1293] Thus Article 15 *bis* (4) specifically allows for member states to opt out of jurisdiction. This acknowledgment of a member state's reservations is contrary to Article 120 and the jurisdictional regime for the other crimes under the Statute in Article 12 of the Rome Statute.[1294] The argument has been presented that the combination of Article 15 *bis* (4) with Article 121 (5) was an irrational choice.[1295] Article 121 (5) requires ratification as an expression of consent, whereas Article 15 *bis* (4), specifically adopted for the crime of aggression, requires a choice not to opt-out as the necessary expression of consent to jurisdiction, irrespective of ratification.[1296] State practice appears to confirm application of Article 15 *bis* (4) over that of Article 121 (5).[1297]

[1291] See section 4 in Chapter 4.
[1292] *Ibid.*
[1293] See the discussion in Chapter 5.
[1294] *Ibid.*
[1295] See Chapter 5, section 2.5. See also Donald Ferencz' assessment (n. 1016 and related text in Chapter 5), and the 'Statement by Japan', accusing the negotiators of 'cherry-picking' (n. 954) and related discussion.
[1296] Chapter 5.
[1297] See Kenya's and Guatemala's choice to opt out without having ratified first (n. 1013).

The combination of Article 121 (5) with Article 15 *bis* (4), exceptional by itself, creates in fact a triple consent requirement. Thus, States express their consent to jurisdiction by being or becoming a signatory of the Rome Statute, additionally ratifying the amendment, due to the decision to apply Article 121 (5), and failing to opt out.[1298] Since the decision to apply Article 121 (5) on its own was controversial at Kampala, no decision was made at the time as to whether the article was to be interpreted with a negative or a positive meaning, i.e. whether just one of the member states had to have ratified the amendment, or whether both victim and aggressor state had to have ratified the amendment. The 2017 ASP decided in favour of the negative interpretation, which narrows jurisdiction of the Court even further.[1299] This interpretation is contrary to the first operative paragraph of the Kampala amendment in Resolution 6,[1300] and also acts as a perverse incentive to join the ICC and ratify, but then opt out of the aggression amendments. This combination gives protection against aggression by another ratifying member state, but shields a State from prosecution for their own acts of aggression under Article 15 *bis.*

The negative interpretation of Article 121 (5) and combination with Article 15 *bis* (4) provides yet another exception to the normal jurisdictional procedure under Article 12 of the Rome Statute. If allowed to stand, the negative application of Article 121 (5) renders the special procedure of Article 15 *bis*, arrived at after difficult and lengthy negotiations, irrelevant.[1301] The practical effect is that jurisdiction under Article 15 *bis* arises now only if one of the 39 ratifying States commits aggression against another of those ratifying 39

[1298] Chapter 5.
[1299] *Ibid.*
[1300] Chapter 5, section 2.4. For Resolution 6 see n. 2.
[1301] See Ambassador Wenaweser's statement for Liechtenstein (n. 1050) and related text in Chapter 5. See also Coracini, who describes it as 'close to an annihilation' of the negotiated Kampala compromise, n. 1051, at 773.

States. The majority of States' opinion, as expressed after the ASP, does not support this interpretation, [1302] notwithstanding its insistent pursuit by the small but powerful minority group of 'camp consent'.[1303] In addition to the evidence of dissenting state opinion, the ASP's narrow interpretation can also be challenged on the grounds that their decision is not actually capable of amending Article 15 *bis* (4) itself, and its legal validity is therefore questionable.[1304] These arguments provide support for a future decision by the Court to a different effect. Furthermore, the addition of paragraph 3 of the 2017 activating resolution, which reemphasises the Court's judicial independence, effectively supports the notion that the Court may be free to come to a different decision than the ASP and apply the positive meaning of Article 121 (5) after all.[1305]

The final limitation on the Courts jurisdiction, considered in this examination, is the fact that Article 15 *bis* (5) provides a blanket exemption for non-member states in any capacity.[1306] This paragraph also represents a highly unusual exception to the normal jurisdictional procedure in the Rome Statute,[1307] excluding jurisdiction even where a non-member state is the victim of aggression by an accepting states party. This provision creates asymmetric results to the effect that a non-consenting states party is afforded the greatest protection for their acts of aggression.[1308] Ultimately, the jurisdictional limitations placed on the crime of aggression, in their entirety, create an overall perception of impunity rather than greater accountability at international criminal law, as a result of the extraordinary emphasis placed on state consent.

[1302] See the discussion in section 2.6, Chapter 5.
[1303] *Ibid.*
[1304] See Kress (2018) (n. 993), 8.
[1305] See n. 1057 and the discussion in section 2.7 of Chapter 5.
[1306] See section 3, Chapter 5.
[1307] Article 12 (2) of the Rome Statute.
[1308] See sections 3 and 4, and p. 291, Chapter 5.

4. Proposals to overcome the difficulties

4.1 Rewriting aggression, room for analogy and determinative independence of the Court

This summary of problematic issues has highlighted that, ideally, the definition of aggression and its jurisdictional conditions ought to be re-written, in order to enable it to capture modern acts of aggression and modern types of aggressors. Explicit inclusion of other specific acts, for instance cyberwarfare, would be the only absolutely certain way to avoid the possibility of offending the legality principle.[1309] Support can be gained from the fact that projects to determine the relevance of existing international law to cyber threats,[1310] and specifically application of the Rome Statute to cyberwarfare,[1311] are underway. Nevertheless, it may not be possible to foresee today all of the future ways in which the crime of aggression may be committed, on account of constantly developing technology. Building a certain amount of flexibility into the definition would, therefore, serve the purpose of covering a wider range of acts better. Sceptics will, quite understandably, continue to raise concerns about the need for certainty, in order to satisfy the legality requirements of criminal law.[1312] Nevertheless, this thesis argues that if an act of aggression, by analogy, was *that* close, or its effects were so devastating that they ought to have been foreseen, the *actus reus* can be established. Otherwise, the attempt to criminalise aggression is, in a modern context, pointless. The use of analogy is,

[1309] See Chapter 3.
[1310] See the work of the OEWG (n. 658) and GGE (n. 659).
[1311] See the work of the Council of Advisers (n. 660).
[1312] See the arguments above, and in Chapter 3.

admittedly, far more likely to be acceptable to States with common law jurisdictions than those subject to civil law, on account of the fact that judicial interpretations are less commonplace in the latter.[1313]

An argument can also be presented that it would also be beneficial for certain exceptions to be included explicitly, for instance self-defence, corresponding to Article 51 of the UN Charter,[1314] and genuine humanitarian interventions involving concerted efforts to alleviate suffering, improve humanitarian welfare and rebuild essential infrastructure.[1315] Distinguishable as an illegal use of force, on the other hand, ought to be actions for the political purpose of regime change, undertaken under humanitarian pretext but lacking evidence of substantial humanitarian efforts post-intervention.[1316] In addition to self-defence and genuine humanitarian intervention, it may also be possible to envisage a new defence of necessity for survival, on account of increasing global shortages of essential natural resources, i.e. water or food, as a result of climate change. This issue has been recognised as a matter of serious concern to the United Nations, and it is now reasonably foreseeable that future wars may be conducted over such essential resources.[1317] The ILC has considered the subject of necessity in the context of humanitarian interventions and in its projects on the Responsibility for Internationally Wrongful Acts,[1318] however such a defence is currently not considered in the crime of aggression provisions. In 2001, the

[1313] See for instance Giacomo Ponzetto and Patricio Fernandez, 'Case Law versus Statute Law: An Evolutionary Comparison' (2008), 37 (2) JLS, University of Chicago Press, 379, 382.
[1314] Article 51 of the UN Charter (n. 249).
[1315] Chapter 2, section 2.2.
[1316] *Ibid.*
[1317] See *UN World Water Development Report 2019*, available at http://www.unwater.org/publication/world-water-development-report/2019/. See also the warning issued in *The State of Food and Agriculture* (SOFA) 2020, report, available at http://fao.org/3/cb1447en/online/cb1447en.html, accessed 21st January 2021.
[1318] *Report of the International Law Commission on the Work and Its Thirty-Second Session*, UN Doc. A/35/10 (1980), and Draft Articles on Responsibility for Internationally Wrongful Acts with Commentaries, UN Doc. A/56/10 (2001) (see also n. 522 and 620), Article 25, 80.

ILC defined necessity as: 1) essential interest; 2) grave peril; 3) no alternative; 4) balancing of interests; 5) no violation of a peremptory norm or treaty; and 6) no fault of the State undertaking the intervention in bringing about the humanitarian crisis. These criteria have been developed specifically in order to distinguish humanitarian interventions from aggression,[1319] however the question arises whether similar criteria may, in exceptional circumstances, justify the violation of another State's territory in order to gain access to resources essential for survival. It may be possible to argue that such an ostensible act of aggression is distinguishable by not constituting a manifest violation of the UN Charter, similar to the argument presented with regards to external interventions in Chapter 2. The subject is, however, under-explored and the necessity defence would pose a pertinent and interesting subject for separate research.

These potential exemptions are mere examples, and re-writing the definition to accommodate new acts of aggression, and possibly also new defences, would require extensive research and canvassing of experts in modern technological warfare, international humanitarian lawyers, NGOs and regional organisations, to name just a few. Furthermore, a proviso ought to be added here that achieving consensus within the membership of the Rome Statute on a completely revised definition of the crime and jurisdictional conditions would, in all likelihood, be extremely difficult, considering the negotiating record to date. As mentioned above, the amendment procedure in Article 121 (3) of the Rome Statute requires a minimum of a two thirds majority if consensus cannot be achieved,[1320] but even this threshold may, in reality, be too high.

[1319] For a discussion, see for instance Christopher DeNicola, 'A Shield for the "Knights of Humanity": The ICC should adopt a Humanitarian Necessity Defense to the Crime of Aggression', (2009) 30 (2) U. Pa. J. Int'l. L., 641, 674-681.
[1320] See Article 121 (3) of the Rome Statute.

Leaving these practical difficulties to one side for the time being and continuing the list of desiderata, rewriting the definition of aggression should also entail providing for wider and independent jurisdiction of the Court, in order to avoid elective impunity.[1321] If non-jurisdiction due to the lack of consent of an individual P5 member, attempting to protect their own interests or those of an ally, is to be avoided, the tight control of the Security Council over aggression proceedings must be relaxed.

The development of a more organic, forward looking definition and jurisdictional approach should also be accompanied by a change of view of the Court as an independent partner of the Security Council,[1322] rather than as the usurper of the Council's political privileges, a perception encountered in the post-Kampala statements particularly by the P5.[1323] Following this partnership approach, and notwithstanding the independence of the two organs, judicial decisions may provide persuasive evidence for the Council to take political action against a State.

Such a symbiotic relationship is not unprecedented. Thus, Article 36 (3) of the UN Charter provides for a similar relationship of the Council with the ICJ, enabling the Council to settle international disputes utilizing the ICJ's jurisdiction.[1324] Article 96 (1) of the Charter provides for the ability of the Council to seek advisory opinions on legal questions within its work.[1325] If States fail to comply with ICJ judgments, Article 94 (2)

[1321] See for instance the arguments made by Weisbord in his trilogy of articles (2008 (n. 176), 2009 (n. 495) and 2011 (n. 430)).
[1322] See the argument made by B. Ferencz (2008) (n. 831) stating that it is imperative to regard the Security Council as the operational partner of the ICC rather than its adversary. See also Cassese's interesting view that political institutions ought to take note of judicial decisions, whereas courts are not bound by political determinations (2007) (n. 614), 25.
[1323] See the 'Explanations of Positions' in the *Travaux Preparatoires,* (n. 317) from p. 810.
[1324] UN Charter (n. 134), Article 36 (3).
[1325] *Ibid,* Article 96 (1).

of the Charter places a duty on the Council to address any relevant non-compliance.[1326] Admittedly, as recently acknowledged in the January 2017 Security Council Report, the tool of cooperation between the Council and the ICJ has, in the past, been underused,[1327] however this does not detract from the fact that the Charter envisaged and encouraged such cooperation, and a similar relationship between the Council and the ICC would be highly beneficial, enhancing credibility of both organs.[1328]

The ICC will have had to apply a high legal threshold in their consideration of the facts establishing the existence of an act of aggression, and their findings may consequently be helpful to the Council. This partnership approach also requires the Security Council to deal with requests by the prosecutor as a matter of priority and endeavour to cooperate with the Court, by enforcing decisions.[1329] Unity within the Council would certainly send a strong message to aggressors. As expanded on in the following section, the perception of an onus of the Council to take note of judicial decisions should also require justifications of a P5 member for the use of their veto and denial of consent to a determination of aggression.

[1326] *Ibid*, Article 94 (2).

[1327] See Security Council Report, *In Hindsight: The Security Council and the International Court of Justice*, 28 December 2016, https://www.securitycouncilreport.org/monthly-forecast/2017-01/in_hindsight_the_security_council_and_the_international_court_of_justice.php, accessed 3rd March 2021. Thus, the only time the Council utilized Article 36 (3) UN Charter, was in the early *Corfu Channel* case, through Resolution 22 (UN Doc. S/324) (9 April 1947). An advisory opinion under Article 96 (1) has been sought only once in Resolution 284, concerning South Africa's presence in Namibia (UN Doc. S/RES/284) (29 July 1970). As for Article 94 (2), Nicaragua requested such enforcement of an ICJ judgment against the US in 1986, but, unsurprisingly, the draft resolution (S/18428 of 28 October 1986) was vetoed by the US.

[1328] See the conclusions of the Security Council Report, *ibid*: 'The potential usefulness of the ICJ to the work of the Council should not be overlooked, and interaction with the Court, as envisioned by the UN Charter, could regularly be considered….A more prominent role for the Court with respect to the Security Council's work, whether on the Council's initiative or otherwise, would likely strengthen and enhance the legitimacy of the Council as an institution.' This statement is, it is contended, equally applicable to the ICC.

[1329] See the arguments by Ferencz (2008) and Cassese (2007) (n. 1337).

4.2 The duty not to withhold consent

The argument that States' sovereign rights to consent to jurisdiction ought to be viewed as an obligation instead, owes a great debt to Dworkin's reinterpretation of a sovereign right to consent as a sovereign duty, as encountered in the Introduction to this thesis.[1330] Similarly, the right of a P5 member to grant their consent through casting a decisive vote, i.e. the right to veto, could and should be viewed as a duty not to withhold their consent unduly. The strongest support for such a perception of a duty not to withhold consent by *mala fide* use of the veto is provided by the UN Charter itself.[1331] Thus, Article 2 (2) poses a duty on member states of the United Nations to 'fulfil *in good faith* the obligations assumed by them',[1332] and the Security Council exercises their responsibility on behalf of these members.[1333] Article 24 (2) stipulates explicitly that this responsibility of the Council includes acting 'in accordance with the Purposes and Principles of the United Nations',[1334] and the primary purpose, as established in Article 1 (1) is the maintenance of international peace and security.[1335] From the combination of these articles, therefore, a clear onus is placed on Security Council members, particularly the P5, to exercise their responsibility in good faith, and that duty includes not withholding their consent through improper use of the veto.[1336] If consent is withheld, solid justification ought to be required. The perception of an onus rather than a right to consent would thus lead to pressure on the Council to come to unanimous and resolute decisions, aid deterrence from acts of aggression, and further eventual eradication of the crime.

[1330] See Dworkin (2013) (n. 43) and the arguments on pp. 16-9.
[1331] Although Article 27 (3) (n. 210) admittedly does not on its own require bona fide exercise of the right.
[1332] UN Charter (n. 134), Article 2 (2) (emphasis added).
[1333] *Ibid*, Article 24 (1).
[1334] *Ibid*, Article 24 (2).
[1335] *Ibid*, Article 1 (1).
[1336] For support, see Carswell (n. 213), 470.

Furthermore, the ultimate purpose of particularly the Security Council is the maintenance of peace and security for the benefit of the international community.[1337] Their work should therefore aid promotion of a 'minimum world public order', as envisaged by McDougal and Feliciano.[1338] To that effect, the argument encountered in the Introduction may be recalled that the 'economy in the use of force' constitutes a generally applicable rule of coexistence.[1339] Following this interpretation, the prescription of aggression is in the interest of the international community at large, and is consequently, once again, transposed into a duty of States. Interpreting the specific privilege of the P5 States as a specific duty instead, also supports the argument presented for abstention from use of the veto, or a requirement of substantive justifications if the veto is applied. The likely result would be greater cooperation within the Council to react to threats to the peace coherently, decisively, and in a timely manner, including referring a situation to the Court where appropriate.

It is consciously admitted that these ideas for overcoming the limitations of the crime of aggression very much represent a wish list. In reality, past evidence of Security Council reluctance to make determinations of acts of aggression has demonstrated that the Security Council is prone to inactivity and paralysis, particularly if the interests of the P5 or one of their allies are involved.[1340] The voting structure within the Council effectively requires the consent of the P5 to a Security Council referral or determination. Failure to grant this consent by use of the veto may block UN action against the P5 member itself

[1337] Article 24 of the UN Charter, *supra*.
[1338] See n. 87 and the related discussion from p. 20 Introduction.
[1339] *Ibid*, p. 19.
[1340] See the Record of the Security Council in relation to determinations of aggression in Chapter 1. For an argument that abolishing the veto would increase the ratio of successful decisions within the Council greatly, see for instance Madeleine O. Hosli, Rebecca Moody, Brian O'Donovan, Serguei Kaniovski and Anna C. H. Little, 'Squaring the circle? Collective and Distributive Effects of United Nations Security Council Reform' (2011) 6 (2) Rev. Int. Organ., 163, 180-1.

or their ally,[1341] as well as result in immunity from criminal prosecution. Prolific and unjustifiable use of the veto continues to be unavoidable due to the existing power structure within the Council,[1342] highlighting the need for reform.[1343]

Admittedly, despite the concern expressed above of excessive Security Council control in aggression proceedings, the Council's involvement may, on occasion, extend the reach of the Court to situations in which it would otherwise not have jurisdiction under the current provisions. Thus, a referral to the Court in case of aggression committed by non-member states or non-consenting member states does have the effect of bestowing jurisdiction where the Court cannot otherwise instigate proceedings.[1344] However, such a situation is only likely where the aggressor state in question is either generally unpopular, or not in favour with one of the P5. This benefit of occasional extension of jurisdiction, through Security Council control over aggression proceedings, therefore struggles to outweigh the problems it causes. As the following discussion shows, the need to reform the voting structure within the Security Council and its working methods has been widely recognised, however the required consensus for change is far from within reach.

[1341] Recent examples are Russia's and occasionally China's vetoing of draft resolutions on Syria (S/2014/348, 22 May 2014; S/2016/846, 8 October 2016; S/2016/1026, 5 December 2016; S/2017/172, 28 February 2017; S/2017/315, 12 April 2017, S/2017/962, 16 November 2017, S/2017/970, 17 November 2017, S/2018/321, 10 April 2018, S/2019/756, 19 September 2019, S/2019/961, 20 December 2019, S/2020/654, 7 July, 2020, S/2020/667, 10 July 2020, Russia's use of the veto on a draft resolution concerning the Yemen. S/2018/156, 26 February 2018, a draft resolution condemning the genocide at Srebenica in the year of its 20th anniversary (S/2018/508, 8 July 2015), and a draft resolution concerning Russia's own actions post-annexation of Crimea (S/2014/189, 15 March, 2014) and condemning the downing of Malaysia Airlines flight MH17 in S/2015/562, 29 July, 2015)/ The United States have regularly vetoed draft resolutions concerning Israel and Palestine, see S/2017/1060, 18 December 2017. Most recently, the United States have vetoed a draft resolution reemphasising domestically exercisable jurisdiction over international acts of terrorism, see S/2020/852, 31 August 2020. For a full list of vetos, see *Security Council – Veto List*, UN Dag Hammarskjold Library (n. 213), available at http://research.un.org/en/docs/sc/quick, last accessed 23 January, 2021.

[1342] See Hosli et al, n. 1242.

[1343] See 4.3 below. Security Council reform entails an ongoing debate and constitutes an interesting and pertinent subject for further research.

[1344] See Chapter 5, section 3 and the recap above.

4.3 The need for Security Council reform

The UN General Assembly began debating Security Council Reform against the background of Security Council division and inaction in the 1990's, particularly in Rwanda, Somalia and the Balkans.[1345] Since then, the development of reform proposals has garnered wide support. The so-called 'Razali Proposal' of 1997, supported by Germany, India, Japan, and Brazil sought to enlarge the Security Council to 24 members, but was unsuccessful.[1346] In the build-up to the 2005 World Summit, the then Secretary-General Kofi Annan also pushed for reform and enlargement of the Council. The World Summit Outcome expressed:

> We support early reform of the Security Council – an essential element of our overall effort to reform the United Nations – in order to make it more broadly representative, efficient and transparent and thus to further enhance its effectiveness and the legitimacy and implementation of its decisions[...].[1347]

The General Assembly remains supportive of the development of proposals for widening of the membership of the Council.[1348] Intergovernmental negotiations on Security Council reform have been ongoing since the late 1990's, and their mandate was renewed in 2008 in the decision entitled 'Question of equitable representation on and increase in

[1345] See Background on Security Council Reform – Global Policy Forum, http://globalpolicy.org/security-council/security-council-reform.html, accessed 20 January 2021.
[1346] See Dimitris Bourantonis, *The History and Politics of UN Security Council Reform* (Routledge, 2005), 76, 79.
[1347] 2005 World Summit Outcome, Resolution A/Res/60/1, 24 October 2005, para 153.
[1348] For expression of support speeches in the General Assembly, see for instance, UN General Assembly, 23 December 2007, 5 September 2008, 107, A/62/49 (Vol. III). http://undocs.org/A/62/PV.49 (Vol. III), see also UN General Assembly, 12 November 2014, 6, A/69/PV.49, at http://undocs.org/A/69/PV.49, both accessed 20 January 2021.

the membership of the Security Council and related matters'.[1349] Any proposed solution must garner 'the widest possible political acceptance', or at least two-thirds of UN member states.[1350] In addition, any proposed solution is subject to the consent (i.e. non-use of the veto) of the P5 themselves,[1351] as stipulated in Article 27 (3) of the UN Charter on substantive decisions, which includes decisions on extension of membership and voting structure within the Council. The P5 may agree to extension of the Council, but are reluctant to voluntarily relinquish their special powers.[1352]

Agreement on proposals has, to date, proved impossible. Thus the G4, consisting of Germany, Japan, India and Brazil, are seeking additional permanent seats for their own States, plus representation of Africa through a permanent and a non-permanent seat, in addition to four other non-permanent members and reform of the working methods of the Council.[1353] A different group, the Uniting for Consensus Group, which includes Italy, Spain, Argentina, Canada, Mexico, South Korea and Pakistan are in favour of abolishing or at least limiting the use of the veto. Their most recent proposal envisages 26 seats in the Council in total, with 9 permanent seats distributed among regional groups and the remaining non-permanent seats held for two years with the potential of re-election.[1354]

[1349] See Decision 62/557 of 15 September 2008, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6-D27-4E9C-8CD3-CF6E4FF96FF9%7D/Decision%2062_557.pdf, accessed 20 January 2021.

[1350] *Report of the Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council*, A/AC.247/1998/WP.1/Rev.2, adopted by the General Assembly on 24 August 1998. See Press Release GA/9430, https://un.org/press/en/19981980824.ga9430.html, accessed 20 January 2021).

[1351] See Article 27 (3) UN Charter (n. 210) on substantive decisions, which includes decisions on extension of membership and voting structure within the Council.

[1352] For support, see the reference to the P5's positions in GA Press release, GA/12288, 16 November 2020, https://www.un.org/press/en/2020/ga12288.doc.htm, accessed 21 January 2021.

[1353] See G4 Ministerial Joint Press Statement, 23 September 2020, German Federal Foreign Office, accessed 21 January 2021, http://www.mofa.go.jp/files/100095828.pdf.

[1354] See UN GA Press Release, GA/12288 (n. 1367).

The African Group's latest proposal suggests at least two additional permanent seats and two non-permanent seats for African States.[1355] The African Group has repeatedly highlighted the 'historic injustice' of less than adequate representation.[1356] African membership of the UN consists now of 55 countries out of 193, and at least two thirds of the Security Council's work concentrates on Africa. Nevertheless, no African country has a permanent seat within the Security Council and even the African Union struggles to have a definitive influence on any proposed action on its own continent. Consequently, the Security Council has been accused of failing to take into account the views of key States or regional organisations who are insufficiently represented in the Council, raising questions of the legitimacy of decision-making.[1357] The underrepresentation of African States has also been acknowledged by a number of other groups and States.[1358] Consequently, the African Group advocates either complete abolishment of the veto, or if the veto power is to persist, extension by two additional permanent seats for themselves.[1359]

Yet another group, named the L69,[1360] includes a number of African States, Small Island States, Latin American States and Caribbean Community members, as well as Brazil and India who are also part of the G4 group. The L69 seek six new permanent seats and six

[1355] *Ibid.*

[1356] See for instance UN GA Press Release, GA/12217 of 25 November 2019, https://www.un.org/press/en/ga12217.doc.htm, accessed 21 January 2021.

[1357] See Ville Laettilae and Aleksi. Yloenen, 'United Nations Security Council Reform Revisited: A Proposal' (2019), 30 (1) Dipl. & Statecraft, 164, 166. For example, the Security Council ignored the views of the African Union in its draft resolution against Zimbabwe in 2008, S/2008/447 of 11 July 2008. See also SC Press Release, SC/9396, 11 July 2008, https://www.un.org/press/en/2008/sc9396.doc.htm, accessed 21 January 2021.

[1358] See for instance the L.69 group, 'Security Council Update 2015', https://centerforunreform.org/2015/01/12/security-council-reform-update-2015-similar-scenarios-same-positions-new-outcomes/, accessed 21 January 2021, and UNGA press release GA/12288 (n. 1367). See also the statement by China (press release GA/12288), and the G4 (n. 1368).

[1359] See Press Release GA/12288 (n. 1367).

[1360] *Ibid.*

additional regional non-permanent seats. Similar to the African group, they advocate either abolishment of the veto altogether, or extension to the new permanent seats.[1361] The Caribbean Community (CARICOM) on its own is proposing a rotating seat for Small Island States, due to the need for greater representation.[1362] The Arab Group, a group of 22 Arab States, also demands a permanent seat.[1363] Despite being heavily critical of the veto power, the group presents no alternative proposal.

Finally, a group named ACT, consisting of 21 member states, including Ireland, Switzerland, Peru, Uruguay and Liechtenstein, are working on proposals to improve the operation of the Security Council, including its accountability, coherence, and transparency.[1364] Liechtenstein's representative, speaking for the group, recently lamented the Security Council record and suggested enlarging the Council with term extensions to 8-10 years and re-election opportunity.[1365] Additional two-year seats should be possible, and no veto power should be extended to any new seats of whatever term length.[1366]

These examples of diverging views on the terms of Security Council reform demonstrate that the UN membership itself remains cataclysmically divided on concrete reform proposals, even more than 20 years after intergovernmental negotiations on Security Council reform began. The German Government has recently warned that

[1361] See 'Security Council Update' (n. 1373), and Press Release GA/12288 (n. 1367).
[1362] *Ibid.* See Grenada's statement in GA/12288.
[1363] GA/12288, *ibid.*
[1364] See William Pace, '21 Member States Launch New Initiative to Improve the Working Methods of the Security Council' (21 May 2013), available at http://www.centerforunreform.org/?q=node/541, accessed 21 January 2021.
[1365] GA/12217 (n. 1371).
[1366] *Ibid.*

> [i]f it is not adapted to the geopolitical realities of the 21st century, that is, if it does not ensure in particular adequate representation of the global South and major contributors to the UN system, the Security Council's legitimacy and authority are at risk.[1367]

Intergovernmental Negotiations on Security Council reform held in February and March 2020 were subsequently adjourned due to COVID-19, although the subject was last debated in the General Assembly on 16 and 17 November 2020 and another round of negotiations has now been scheduled for 2021.[1368] In the meantime, G4 Ministers have been calling for an abandonment of debates 'based solely on general statements without actual negotiations' and resumption of intergovernmental negotiations with concrete proposals on Security Council reform to be voted on.[1369] Nevertheless, it is unlikely that a dramatic change of the working procedures and veto rights within the Council are, realistically, within reach.

Consequently, if the International Criminal Court is to remain reliant on and constrained by a Security Council, which is, at least for the foreseeable future, subject to a flawed decision-making process, this fact only serves to re-emphasise the arguments presented for finding other ways to overcome the limitations placed on the Court's jurisdiction. These included revision of the aggression provisions, widening the Court's jurisdiction through application of appropriate analogy, greater assumption of independence of the Court from the Council, as well as a reinterpretation of States' right to consent as a duty

---

[1367] 22nd September 2020, 'Reform of the United Nations Security Council', German Federal Foreign Office, http://www.auswaertiges-amt.de/en/aussenpolitik/internationale-organisationen/vereintennationen/reformsr/231604, accessed 21 January 2021.
[1368] GA Press Release GA/12289 of 17 November 2020, available at http://www.un.org/press/en/2020/ga12289.doc.htm, accessed 21 January 2021.
[1369] G4 Statement (n. 1368).

not to withhold that consent unduly. In addition, this thesis has advocated a revival of universal jurisdiction.

4.4 The revival of universal jurisdiction

The argument for an essential revival of universal jurisdiction, presented in section 4 of the previous Chapter, is based on the fact that aggression is perceived as a heinous international crime, the prohibition of which has become a peremptory or *jus cogens* norm under customary international law.[1370] The *telos* of the Rome Statute,[1371] the achievement of impunity for and eradication of the worst atrocity crimes known to the international community, supports this interpretation of a hierarchically greater normativity of the prohibition of the crime of aggression.[1372] Additionally, Article 53 VCLT confirms that jurisdiction over crimes of this nature cannot be derogated from by treaty provisions or contracted out of.[1373]

Territoriality and nationality, the traditional bases for jurisdiction, are immaterial where jurisdiction for crimes of this nature arises, as is the requirement for States' consent to jurisdiction.[1374] The universality concept therefore allows for jurisdiction regardless of an aggressor state's membership or ratification status.[1375] Consequently, the application of

[1370] See Art 53 VCLT (n. 32), See also the 2019 *ILC Report and Draft Conclusions on Peremptory norms* (n. 39), which lists aggression as the first crime of a *jus cogens* nature.
[1371] See n. 85.
[1372] See also the great support for a hierarchy of norms derived from the separate and dissenting opinions in the *Arrest Warrant* case (n. 1144 and 1152) and Judge Trinidade's dissenting opinion in the *Germany v Italy* case (n. 1162).
[1373] *Ibid.* See also Article 53 VCLT (n. 32).
[1374] See n. 1088 and 1138 and related text in the previous Chapter.
[1375] See Chapter 5, section 4.

this principle may be capable of overriding the multiple consent requirement, as reinforced by Article 121 (5) in its negative application.[1376] At first instance, universal jurisdiction is exercisable by individual States domestically but member states ought to be able to vest their jurisdiction singly or jointly in the Court, as the appropriate organ to consider all the legal facts.[1377] A precedent can be found within the universal jurisdiction exercised at Nuremberg, delegated to the tribunal by the 19 signatories to the London Charter.[1378] The exercise of jurisdiction by more recent international criminal tribunals also confirms the availability of jurisdiction by such courts in situations where consent to that jurisdiction and/or membership was not necessarily present.[1379] The ICC's recent preliminary rulings on its own jurisdiction demonstrate that the Court does not shrink away from assuming investigation or prosecution powers over non-consenting or non-member states, even where only a tenuous link to an additional basis for jurisdiction can be established.[1380] Moreover, state practice confirms the popularity of a revival of the concept, since more than three quarters of UN member states acknowledge universal jurisdiction over one or more crimes under international law,[1381] and incidents of cases brought domestically under such jurisdiction are also on the increase.[1382]

[1376] See Chapter 5, section 4.
[1377] See the principle of complementarity, Article 1 and 17 (1) (b) Rome Statute (n. 1), and n. 1104.
[1378] Article 6 (a) of the London Charter (n. 117), and Control Council Law No. 10 (n. 121). See also Chapters 1 and 5, section 4 at pp. 263-4 (including n. 1094). See also Scharf (2001) (n. 1095), 103-6, and Randall (n. 109), 804-6, and Goldsmith (n. 120). See also Dapo Akande's 2003 article (n. 1176, at 626) confirming the availability of universal jurisdiction as a 'structural rule', although he appears to retract from this view, at least partially in his 2011 article (n. 888), at 30-2.
[1379] See the discussion in section 4, Chapter 5, and the jurisdiction of the ICTY (n. 1179), the ICTR (n. 1180), the Special Court for Sierra Leone (n. 1182) and recent practice by the ICC itself (pp. 282-7).
[1380] See the recent assumption of investigation powers concerning Myanmar, Russian activities on Ukrainian territory, US and CIA actions in Afghanistan, and actions by (and against Israel) in Palestine, pp. 282-7.
[1381] See Amnesty International's 2012 Report (n. 131).
[1382] See section 4, Chapter 5, pp. 286-7.

Notwithstanding this apparent evolution towards wider and non-consensual jurisdiction over heinous international crimes,[1383] it is acknowledged that any attempts to apply universal jurisdiction to the crime of aggression may be seen as consciously defying the provision of Articles 15 *bis* and *ter* and their strict consent and membership requirements, as well as Understanding No. 4 *bis*, which attempted to explicitly exclude domestic (and thus universal) jurisdiction.[1384] Arguments for universal jurisdiction over the crime of aggression, as proposed in this thesis, are therefore likely to incur fierce objections. A proposal along the same lines, made prior to the Rome Conference and suggesting universal jurisdiction as the general basis for prosecutions over member states at least, had been expressly rejected, despite being included in Article 9 of the 1998 Draft Statute for the Court.[1385] Immediately prior to Kampala, another visionary minority proposal suggested applying universal jurisdiction over aggression to any State, regardless of consent or membership,[1386] but again failed to be adopted, resulting instead in the stringent conditions now deliberately put in place. A strict reading of the Rome Statute alone, it is therefore admitted, does not lend itself to the acceptance universal jurisdiction without controversy. Advocates of a narrow interpretation of treaty provisions, in particular,[1387] are likely to continue arguing for stringent application of the negotiated elements of Articles 15 *bis* and *ter*, excluding non-consenting and non-member states from jurisdiction.[1388]

[1383] See the Joint Separate Opinion in the *Arrest Warrant* Case (n. 1144), Judge van den Wyngaert's interpretation in his dissenting opinion in that case (n. 1152), and that of Judge Trinidade in the *Germany v Italy* case (n. 1162).

[1384] As expressly included on the insistence of the United States at Kampala, see Understanding No. 4 (n. 1107).

[1385] See A/CONF.183/2/Add.1 (The German Proposal, n. 126), and the discussion of universal jurisdiction in the previous chapter, section 4.

[1386] See Chairman's Non-Paper, in preparation for the 8th Assembly of States Parties in 2009, ICC-ASP/INF.2 at p. 8, and the discussion in the previous chapter, section 4.

[1387] See Article 31 (1) and 34 VCLT (n. 32).

[1388] See for instance some of Dapo Akande's arguments, defending a literal reading of, for instance Article 121 (5) Akande ('Prosecuting Aggression' (2011), 11 (n. 888)).

And yet it may be possible to counter the insistence on strict application of the VCLT to the crime of aggression provisions. One alternative, for instance is to view the Rome Statute first and foremost as an internal rule book for the Court's judiciary, rather than a classically interpreted treaty, creating an exemption from the requirement of strict application.[1389] Defending this point, Dov Jacobs asserts that it is the 'broad and ultimately discretionary rules of interpretation of the VCLT', combined with the specific requirement of legality in international criminal law which demand disapplication of inflexible adherence to the Rome Statute's treaty provisions.[1390] This view potentially opens the path to wider application of jurisdiction of the Court. Additionally, a number of other arguments, conceivably even more persuasive, have been presented.

The most powerful contention, as reiterated throughout this thesis, is derived from Article 53 of the VCLT itself, which states that a treaty is rendered void if found to be conflicting with a peremptory norm of general international law, as recognised by the international community as a whole. No derogation from a *jus cogens* norm by treaty is, therefore, permitted. Judicial *dicta*, mostly found in the separate and dissenting opinions of the ICJ's *Arrest Warrant* and *Germany v Italy* cases,[1391] emphasise this hierarchy, as does Chapter V of the 2019 Report of the International Law Commission on peremptory norms.[1392] Thus, Conclusion 3 of that Report confirms that peremptory norms are 'hierarchically

[1389] See Dov Jacob's argument, in 'Why the Vienna Convention should not be applied to the ICC Rome Statute: a plea for respecting the principle of legality' (n. 459).
[1390] *Ibid.*
[1391] See n. 1144, 1151 and 1152 for the separate and dissenting opinions in the *Arrest Warrant* case and n. 1162 for Judge Trinidade's dissenting opinion in the *Germany v Italy* case. The majority decisions in these cases, whilst not contradicting the status of *jus cogens* crimes generally, decided that issues of immunity, on account of their procedural nature, had to be decided *before* the consideration of substantive questions. See n. 1142 for the majority decision in the *Arrest Warrant* case, n 1148 for the majority decision in the *Germany v Italy* case, and for a discussion of the policy basis for these, see n. 1160 and 1161).
[1392] Conclusion 2, 2019 Report of the ILC on Peremptory Norms (n. 39).

superior to other rules of international law and are universally applicable.'[1393] The prohibition of aggression is expressly identified as the first such norm in a non-exhaustive list attached to the ILC's Report.[1394] Universal jurisdiction over the crime of aggression at customary international law, may therefore still be capable of overriding the insistence on consent and even membership in Articles 15 *bis* and *ter*.

The evolution of a growing recognition of the principle, as well as recent opening of the floodgates of domestic proceedings based on universal jurisdiction over '*hostis humanis generis',*[1395] provide additional evidence of continuing and expanding state support for the concept. The 2017 Review of Universal Jurisdiction by Trial International had reported a then unprecedented number of 47 cases of universal jurisdiction in 13 countries, including 14 charges of torture, 6 charges of genocide, 15 charges of crimes against humanity, and an overall increase of war crimes charges of 55% to previous years.[1396] Eleven of these cases alone were brought for alleged crimes in Syria, a non-member state of the International Criminal Court, which has long been enjoying military and political support from Russia, which is a P5 member and also non-signatory of the Court. Russia, and its fellow P5 member China, again a non-member of the Rome Statute, have on a number of occasions intentionally prevented Security Council referrals to the Court.[1397] Whilst the most recent 2020 Report of Trial International demonstrates a shift to charges for terrorism offences,[1398] there were a record 146 charges for crimes against

[1393] *Ibid,* at 142 (n. 1123).
[1394] *Ibid,* 205.
[1395] See the discussion in Chapter 5, pp. 286-7.
[1396] Trial International, Make Way for Justice #3, Universal Jurisdiction Annual Review 2017, https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP_A4_012.pdf, accessed 23 January 2021.
[1397] See *Security Council – Veto List,* UN Dag Hammarskjold Library (n. 213).
[1398] Trial International, Terrorism and international Crimes: Prosecuting Atrocities for what they are, Universal Jurisdiction Annual Review 2020, https://trialinternational.org/latest-post/universal-jurisdiction-annual-review-2020-atrocitites-must-be-prosecuted-soundly-and-rigorously/ accessed 23 January 2021.

humanity, 92 for torture, 21 for genocide and 141 for war crimes brought under universal jurisdiction by States domestically.[1399] These figures demonstrate that the appetite by the international community to prosecute the worst international crimes under the principle of universal jurisdiction has grown enormously. If domestic jurisdiction under the principle is transferrable to the International Criminal Court, just as it was at Nuremberg,[1400] this would create a potential for much wider jurisdiction over the crime of aggression. Universal jurisdiction, therefore, may yet provide a way to circumvent the tight restriction of application to merely consenting member states.

5. Transcending the limitations? – An overall assessment

Some of the suggestions for widening the jurisdictional limitations placed on the crime of aggression, presented above and throughout this thesis, are, admittedly, more pragmatic than others. The least contentious way to widen jurisdiction of the Court would be to promote universal membership and voluntary acceptance of the aggression provisions without reservations. Signature should equate acceptance without the ability to avoid jurisdiction by opting out, or failing to individually ratify the amendment, in line with Article 120 of the Rome Statute. This point was made, in particular, by the Japanese delegation post Kampala in light of the uncertainty surrounding entry into force for member states.

[1399] *Ibid.* See also the recent domestic cases considered in Chapter 5, Section 4, pp. 286-7.
[1400] See Chapter 1 and the arguments in Chapter 5, section 4.

> What happens to a non-State Party that desires to accede to the Rome Statute after the adoption of the amendments? How can we be certain that such a newly acceding country will be bound by the amended Rome Statute, while we see no provisions stipulating about the entry into force of the amendments per se? This is an issue that should be squarely addressed, if we are genuinely serious about enhancing the universality of the International Criminal Court.[1401]

Subscription to the Rome Statute entails a State's voluntary subjection to the Court's jurisdiction, and there should be no room for a 'perverse incentive' to become a member and subsequently withhold consent by failing to ratify and/or opt out.[1402] The prohibition of aggression constitutes a peremptory norm at customary international law,[1403] and opting out through taking advantage of a treaty provision which allows for a loophole should, applying Article 53 of the VCLT, not be permissible.

It may be possible to 'shame' States currently withholding their consent to membership or ratification into granting their consent through political and diplomatic pressure. Furthermore, such pressure could become a tool for compliance, once States have accepted jurisdiction, furthering deterrence. Wide membership and ratifications without reservations would have the additional benefit of enhancing the credibility and reputation of the Court.[1404] Wide-scale international cooperation for the promotion of peace and

[1401] See the 'Statement by Japan' in the *Travaux Preparatoires* (n. 317), p. 812.
[1402] See the discussion in Chapter 5.
[1403] See Article 53 VCLT (n. 32), and the 2019 ILC Report on Peremptory Norms (n. 39).
[1404] The ICC has often been portrayed as prosecuting nationals of unpopular States only, and has been accused of undermining the sovereignty of and unfairly targeting African States, see for instance 'African Union backs mass withdrawal from ICC', BBC News, 1 February 2017. http://www.bbc.com/news/world-africa-38826073, accessed 18 November 2020.

security also entails a duty to prevent, prosecute and abolish the worst international crimes.[1405] Impunity for the crime of aggression would bring the world closer to achieving a 'minimum world public order' for the benefit of all people. This concept, as developed by McDougal and Feliciano and encountered at the beginning of this thesis, would aid the development of 'maximum human dignity and minimum destruction of human values',[1406] a goal which is as essential in contemporary times as it was in the era of the Cold War under the threat of potential global destruction through nuclear weapons. The pursuit of such a world public order and the peace and stability it promotes, requires an equilibrium of power between States, complementary humanitarian policies, organisation and centralisation of international authority through their institutions, as well as, importantly, participation in the international legal process.[1407]

A reinterpretation of a perceived right of States to grant their consent as a duty instead, as advocated by Ronald Dworkin, is a persuasive starting point. Dworkin's comments on the interpretation of international documents, although made with respect to the UN Charter, could be applied to the Rome Statute and provide justification for the waiving of state consent to aggression prosecutions, the central obstacle to wider jurisdiction:

> The correct interpretation of an international document, like the UN Charter [or the Rome Statute], is the interpretation that makes the best sense of the text, given the underlying aim of international law, which is taken to be the creation of an international order that protects political communities from external aggression, protects citizens of those communities from domestic barbarism, facilitates

[1405] See McDougal and Feliciano (1961 (n. 87), and 1958 (n. 88)).
[1406] See n. 77.
[1407] See pp. 20-2.

> coordination when this is essential, and provides some measure of participation by people in their own governance across the world. These goals must be interpreted together: they must be understood in such a way as to make them compatible.[1408]

If all States are subject to the jurisdiction of the Court for acts of aggression committed by them or on their behalf, the likelihood of such acts will be diminished substantially. All States would enjoy the same protection, and be subject to the same criminal jurisdiction. The existence of such protection, on its own, could be used to promote the benefits of becoming a signatory.

Admittedly, this still leaves the problem of great Security Council control and the existing power to block referrals to the Court. Similar to the argument above, it may be possible to 'shame' the three P5 members, who currently remain non-signatories, into signature of the Rome Treaty. Reinterpreting the right to grant consent as a duty not to withhold it unduly would be essential. The use of the veto should at the very least entail the need for public justifications and ideally be abolished entirely, as part of substantial Security Council reform. The Security Council's role of prevention of threats to the peace ought to be perceived as a shared responsibility, allowing the Court to act independently, but also providing for a partnership between the two organs, which could result in the Council enforcing decisions of the Court.[1409]

[1408] Dworkin (2013) (n. 43), 22.
[1409] As envisaged by Ferencz (2008) and Cassese (2007), see n. 1337 above.

It has also been argued that it is essential to allow for extension of the definition itself to cover modern acts of aggression. To that effect, a number of promising projects have recently been established for the purpose of examining the relationship between international law and cyber threats and warfare.[1410] Their findings are likely to lead to a wider recognition of the need to include acts of aggression, other than the narrow list included in Article 8 *bis* (2), and actors other than the State, in support of the arguments presented in this thesis. Extension to other acts and a wider group of actors would certainly extend jurisdiction of the Court, however attribution, admittedly, may remain a problem in any type of remote warfare. This fact only serves to reinforce the argument for re-writing the crime of aggression provisions in their entirety, reflecting the possibility of including other acts of aggression, committed by other actors, including culpable accessories.

Finally, this thesis also examined the possibility of extending jurisdiction of the Court through the principle of universality. The growing appetite of individual States for the application of universal jurisdiction over the most heinous international crimes demonstrates the increasing recognition of the principle itself. Universal jurisdiction under customary international law is currently the only potential way to extend jurisdiction over aggression to a non-consenting state, unless the State is sufficiently unpopular to attract Security Council condemnation. This fact alone serves to demonstrate that the existing consent-based system of international accountability is deficient, allowing for elective impunity, and requires a substantive rewrite of the crime of aggression in order to overcome the limitations placed on it, as well as far-reaching reform

[1410] See the efforts by the OEWG (n. 658), GGE (n. 659) and the Council of Advisers (n. 660).

of the Security Council itself and a reconsideration of its relationship with the Court. Only then is there a chance of eradicating the supreme international crime.

CONCLUSION

The Kampala consensus on the crime of aggression was celebrated as a ground breaking innovation and a 'milestone'[1411] in the development of international criminal law, heralding the end of an 'old era of impunity' and the beginning of a 'new age of accountability'.[1412] As the discussion revealed, the compromise achieved at Kampala is, however, far from perfect, and the limitations placed on the jurisdiction of the Court over the crime are stringent.

The question remains whether this compromise came at too high a price in light of these limitations, and whether the provisions, as they stand, are fit for purpose on account of the fact that the face of war is changing. Has the crime been so severely restricted that it may fail to regulate significant newly emerging forms of aggression? And is the reach of the Court so limited that it is in danger of becoming irrelevant at the very time when jurisdiction over the crime has only just arisen, and deterrence from the crime is as important as it has ever been? Answering these questions closes the circle of this inquiry, the purpose of which was an assessment of the potential effectiveness of the Court's new jurisdiction as a result of the restrictions placed on it.

To that end, a number of important factors were identified, which impact on any prediction of the jurisdictional effectiveness of the Court. Thus, the overly narrow

[1411] See Kress and von Holtzendorff (2010) (n.5), 1179. See also Trahan (2011) (n. 993), 50.
[1412] Ban Ki-moon, 'An Age of Accountability', Address to the Review Conference on the International Criminal Court, Kampala, 31 May, 2010, https://www.un.org/africarenewal/web-features/secretary-general's-"-age-accountability"-address-icc-review-conference, accessed 12 April 2018.

definition itself poses several problems, including a high gravity threshold and its restriction to traditional warfare as considered in Resolution 3314.[1413] The Kampala definition, unlike the 1974 resolution, does not explicitly provide for extension and consideration of other acts. As a result, it is in danger of being irrelevant in a modern context at a time when criminal jurisdiction has only just arisen. Modern types of warfare, ranging from the remote disruption of a country's vital systems to cyber threats and the asymmetrical deployment of untraditional weapons, for instance, have not been captured.[1414] And yet, the resort to such methods has, over the last two decades, vastly increased, as is openly recognised by experts, concerned NGO's, and a number of national security agencies.[1415] The reach of the Court is also unlikely to extend to non-state actors or influential participants other than official political or military leaders of a State, on account of the state-centricity of the crime and a restrictively high standard of control or direction of a state act of aggression.[1416] Consequently, the effectiveness of the recently activated jurisdiction of the Court is, in a modern context, impaired on account of the narrow definition of the crime, unless the Court assumes wider powers to determine other acts and to consider a wider range of aggressors or, alternatively, the definition itself is widened.[1417]

The potential effectiveness of the Court's jurisdiction has been curbed further by the extraordinary level of Security Council control over criminal aggression proceedings.[1418] The restrictions were, as the negotiating history and the post-Kampala statements demonstrate, incorporated deliberately on the insistence of a small number of powerful

[1413] See Chapters 2 and 3. For Resolution 3314, see n. 14.
[1414] See particularly section 3.1 of Chapter 3.
[1415] *Ibid*, n. 654 and 656.
[1416] As a combination of the different elements of Art 8 *bis*, discussed in Chapters 2 and 3.
[1417] See section 4, Chapter 3, and Chapter 6.
[1418] See Chapter 4.

States, who ideally wished to retain absolute Council exclusivity over the political crime of aggression in all situations.[1419] In the view of these States, investigations and prosecutions of aggression should always rely on a prior Council referral. If such an absolute monopoly could not be retained, the Court's jurisdiction was sought to be restricted by a number of cumulative consent requirements for both victim and aggressor. Combining Article 15 bis (4) with the negative interpretation of Article 121 (5) delivers on this extreme level of state consent pursued so ardently by the powerful minority. These restrictions have the greatest impact on the potential effectiveness of the Court's jurisdiction and are, it is contended, excessive.[1420] The combination of the surviving high level of Security Council control over criminal aggression proceedings, albeit short of an absolute monopoly, and the extreme consent requirement results in, at best, 'jurisdiction a la carte' and, at worst, elective impunity.

Admittedly, it is conceivable that a Security Council referral may have the effect of extending jurisdiction over non-signatories or non-consenting states parties, over whom the Court would otherwise have none.[1421] However, history shows that the record of the Council taking action in aggression scenarios is unconvincing,[1422] and any potential referral is particularly unlikely to be forthcoming if this would affect the interests of one of the P5 members or those of an ally. Extensive Security Council control, as well as retrospective determinations and referrals, may also raise legality concerns and diminish the credibility of the Court as an independent criminal tribunal.

[1419] See Chapter 4, and 'Explanations of positions', *Travaux Preparatoires,* (n. 317, from 810).
[1420] See Chapter 5.
[1421] See Dapo Akande's argument in Chapter 4, section 3.3.
[1422] See the account in Chapter 1.

The overall conclusion arrived at is, therefore, that the likely effectiveness of the new jurisdiction of the first permanent International Criminal Court has, indeed, been substantially impaired by the severe restrictions placed on it. Nevertheless, there may be room for hope that some of the damage can be 'undone'. To that effect, and attempting to address the specific problems perceived, a number of changes have been suggested throughout this thesis, which are hoped to be improvements, although perhaps not perfect solutions.

Thus, it was suggested that the definition itself ought to be widened in order to include political, economic or spiritual puppet masters, for instance, who may exercise sufficient control to be accountable for the commission of aggression.[1423] The threshold of a manifest violation of the UN Charter, currently too high to capture modern acts of aggression with the most serious consequences, for instance remote warfare, may have to be lowered to 'violations inconsistent with the Charter'. Similarly, the list of aggressive acts also requires extension, since it does not provide for such modern types of warfare, and is limited to state-on-state aggression only, at a time when aggressive non-state groups have emerged as the most prolific instigators of acts of aggression.

The argument for re-writing the definition of aggression is likely to gain support from a number of ongoing projects investigating the applicability of international law to such modern types of warfare. These are currently undertaken by the Permanent Mission for Liechtenstein,[1424] a Working Group of a number of UN member states,[1425] and a group of experts.[1426] The result of their findings may have an impact on considerations by the next

[1423] As was the case at Nuremberg, see Chapter 1, section 4.3, and Chapter 2, sections 3.1 and 3.2.
[1424] See n. 660.
[1425] See n. 658.
[1426] See n. 659.

Assembly of States Parties, which is scheduled for 2025. Whether there will be sufficient appetite to amend the existing definition, in reality, remains to be seen. In the meantime, it has been contended, the Court itself may have to widen the definition incrementally, through close analogy and on a case by case basis, in order to give effect to the aggression provisions, although it is acknowledged that this will raise concerns of offending the *nullum crimen sine lege* principle, and Article 22 (2) of the Rome Statute.

Additionally, it was contended that Security Council control needs to be at least relaxed, if not relinquished, particularly on account of the fact that referrals to the Court may currently be prevented through use of the veto by one of the P5. Security Council reform, a subject worthy of extensive further research in its own right, will be required, or at least a change of perception from a P5 member's right to refuse consent, to a duty not to withhold consent unduly.[1427] The Security Council and the Court should operate in partnership, without prejudice to the rights of a defendant before the Court.

Suggestions to overcome the consent problem are rather more complicated and not uncontroversial. The strict consent and membership requirements, which must be fulfilled before jurisdiction arises in situations where no Security Council referral is forthcoming, pose severe restrictions on the Court's reach. It is striking that the supreme international crime, often leading to the commission of other humanitarian crimes committed in the context of an illegal war,[1428] requires multiple consent by both aggressor and victim state, whereas this reinforced consent requirement is alien to the other crimes under the Rome

[1427] See Dworkin (2013) (n. 43) and the arguments on pp. 15-19 Introduction.
[1428] Particularly crimes against humanity, under Article 7, and war crimes under Article 8 of the Rome Statute (n. 1).

Statute.[1429] This fact, combined with the resistance to the Court's independent jurisdiction by a small number of powerful states, headed by the P5, leads to the cynical conclusion that these States sought and achieved protection from the Court's scrutiny of their own extant and future potential acts of aggression.[1430] Three of the P5 have remained non-signatories and the other two, France and the UK, have not ratified the amendments. Consequently, none of these States can currently be prosecuted for any act of aggression under Article 15 *bis*, even if the victim state has ratified the amendments and has not opted out. If a referral to the Court under Article 15 *ter* was sought, any of the P5 could veto it, and they therefore enjoy total impunity. The problem was addressed by the former UN Secretary-General, Kofi Annan, at Kampala:

> [Q]uestions of credibility will persist so long as three of the five permanent members of the Security Council refuse to reconsider their position and join those who have taken the courageous step to become parties to the Statute. The same is valid for countries that aspire to permanent membership. Indeed the problem is not limited to the Security Council. Six of the G20 have not ratified the Rome Statute.[1431] The States Parties to this historic Statute must therefore pose the question, "What kind of leadership is this which would absolve the powerful from the rules they apply to the weak?"[1432]

[1429] See Chapter 5. See also the argument by Kevin Jon Heller in his presentation before the UN General Assembly prior to the activating decision by the ASP in 2017, 'My UN Presentation on the Aggression Amendments' (OpinioJuris, 5 May 2017), http://opiniojuris.org/2017/05/05/my-un-presentation-on-the-aggression-amendments/, accessed 30 October 2020.

[1430] A recent prime example is the aggressive annexation of Crimea, see Chapters 1, 2, 4, 5 and 6.

[1431] Indeed in 2021, seven of the G20 States have not ratified the Rome Statute, namely China, India, Indonesia, Russia, Saudi Arabia, Turkey, and the United States, see http://www.g20.org and http://asp.icc-cpi.int.

[1432] Address by Kofi Annan (Kampala, Uganda, 31 May 2010), https://www.kofiannanfoundation.org/speeches/kofi-annan-addresses-the-first-review-conference-of-the-assembly-of-states-parties-to-the-rome-statute-of-the-international-criminal-court/, accessed 12 April 2018.

In a similar vein, Claus Kress has pointed out that it is becoming increasingly difficult 'for any victorious power whose judges sat in judgment at Nuremberg and Tokyo to explain why they still do not wish fully to embrace the legacy of their own pioneering course of action after the Second World War.'[1433] It can only be hoped that it may be possible to shame the group of powerful, sceptic States, who have not yet expressed their support for the Court's work through signature, into membership and unconditional ratification. Exerting diplomatic pressure to set a positive example, become a signatory, and ratify the aggression amendment is therefore the most practical suggestion.

This particular issue also harks back to the argument presented for a reinterpretation of the right of States to grant their consent as a duty not to withhold it, in order to promote peace and security and in the attempt to create a global 'minimum world public order', as envisaged by McDougal and Feliciano.[1434] Additionally, universality of the Court's jurisdiction ought to be pursued and actively promoted, firstly through the concerted encouragement of universal membership of all UN States to the Court, beginning with the permanent members of the Security Council. Ratifications, as stated above, ought to be made without reservations, accepting unconditional jurisdiction of the Court through failing to opt out.[1435]

The second, and more controversial way of achieving universality, is the application of the customary international law concept of universal jurisdiction, which is based on the fact that the Crime of Aggression is a peremptory norm, which cannot be derogated from by treaty provisions.[1436] As such, the crime is justiciable by any State regardless of

[1433] See Kress (2018) (n. 993), 10.
[1434] McDougal and Feliciano (1961) (n. 87).
[1435] As permitted by Article 15 *bis* (4).
[1436] See the discussion in the Introduction and Chapter 5.

territory or nationality and membership of the Court. The member states of the Court could derogate their individually exercisable universal jurisdiction to the Court, following the Nuremberg precedent. Whilst this may provide a convoluted way for the Court to overcome the stringent consent requirements and obtain wider jurisdiction, the application of the concept is likely to incur objections by defenders of Security Council prerogatives, the state consent principle, and advocates of strict application of the VCLT.[1437] Notwithstanding these likely objections, recent state practice certainly appears to support a re-emergence of universal jurisdiction generally, in light of potential impunity for international crimes without state consent or Security Council referral.[1438]

The price paid for arriving at a consensus on the Court's recently activated jurisdiction is undoubtedly high on account of its limitations. Nevertheless, the very existence of jurisdiction over the crime of aggression 'sends a timely appeal to the conscience of mankind',[1439] thus importantly reinforcing the prohibition of the use of force in Article 2 (4) of the UN Charter.[1440] As Ambassador Wenaweser stated after the ASP's activation decision:

> The historic significance of the decision we have taken today to activate the Court's jurisdiction over the crime of aggression cannot be overstated. Never has humanity had a permanent international court with the authority to hold

[1437] Although the VCLT itself provides for recognition of the superiority of peremptory norms over treaty application, see Article 53.
[1438] See the *Reports by Trial International*, n. 1435 and 1437. See also the discussion of recent domestic cases under universal jurisdiction, pp. 286-7.
[1439] Ferencz, (2009), 289 (n. 4).
[1440] Kress (2018) (n. 993), 1.

> individuals accountable for their decision to commit aggression – the worst form of the illegal use of force. Now we do.[1441]

Even if the effect of active jurisdiction of the Court over the crime of aggression is merely to put leaders on notice that their actions are now, at least potentially, subject to scrutiny by the first permanent international criminal court, that is an important achievement in its own right. The mere fact that States will now have to consider if their acts could amount to criminal aggression and seek to distinguish them publicly, serves to reinforce the prohibition of aggression. Even imperfect jurisdiction over aggression is better than no jurisdiction at all. As Nikolas Stuerchler eloquently expressed after the 2017 activation decision by the ASP, despite venting disappointment at the restrictive interpretation of that decision:[1442]

> In all of this, let us not forget that the activation of the crime of aggression is meant to be a contribution to the preservation of peace and the prevention of the most serious crimes of concern to the international community as a whole. More than 70 years after the Nuremberg and Tokyo trials, the ICC has received the historic opportunity to strengthen the prohibition of the use of force as enshrined in the UN Charter and complete the Rome Statute as originally drafted. This is the perspective we should preserve.[1443]

Notwithstanding this achievement of jurisdictional activation and the hopes expressed, an important caveat has to be added that serious deterrence can only be achieved if States

[1441] Statement for Liechtenstein, cited in Kress, *ibid*, at fn. 48.
[1442] See sections 2.2.5 and 2.2.6 of Chapter 5.
[1443] See Stuerchler (n. 946).

are actually subject to jurisdiction of the Court without exception. Otherwise, a perception of elective impunity is allowed to persist, as demonstrated, for example, most prominently by Russia's unpunishable aggressive annexation of Crimea,[1444] and credibility of the Court's jurisdiction over the crime of aggression will continue to be seriously impaired. In order for the Court's jurisdiction to be effective, it is therefore essential to promote the widest possible membership with unconditional ratifications of the crime of aggression. Universal jurisdiction of the Court over the crime of aggression furthers the aims of the Rome Statute of eradication of the worst international crimes as well as those of the UN Charter of promoting peace and security at global level.

Additionally, the 20th century definition now incorporated into Article 8 *bis* requires far wider interpretation, in order to respond to 21st century challenges, and allow for prosecutions of modern acts of aggression. Projects are underway to examine the relationship and applicability of international law to modern acts of aggression like cyberwarfare,[1445] however they come undeniably late. An opportunity may arise to amend the definition at the 2025 Review Conference, but it remains to be seen whether the international community and the membership of the Rome Statute will have the appetite to reopen the perpetual controversy surrounding aggression and modernise the definition. Even if the member states are willing to consider amending the definition, the jurisdictional limitations of consent and Security Council control, subject to the privileges and questionable internal voting structure within the Council – itself long overdue for revision - pose a continuing incontrovertible problem for jurisdiction of the Court.

[1444] Although see the Prosecutor's conclusion in her 2020 Report that there was sufficient grounds to investigate war crimes and crimes against humanity committed on Ukrainian territory, including the illegally annexed territory of Crimea, see the discussion in Chapter 5.4, n. 11196-8 and related text.
[1445] See n. 658-60.

The 'lock' has now been 'removed from the courthouse door',[1446] however the Court's jurisdictional powers have been severely curbed. If the Court is to exercise its jurisdiction efficiently in the future, reinforcing the use of force prohibition of the Charter and furthering impunity, the definition has to be extended and the jurisdictional restrictions have to be eased, allowing for wider application. Resorting to the words of Benjamin Ferencz:

> Failure to allow the ICC to punish aggression is a repudiation of Nuremberg and a step backward in the development of international criminal law… Prohibiting the ICC from exercising its jurisdiction is an indefinite guarantee of continuing immunity for future aggressors… Every legal step should be taken that might help deter nations from the incredible horrors of armed conflicts. Aggressors should not be granted a renewed license to wage illegal wars with impunity.[1447]

Elective impunity should not be an option, and there is no longer a place for the insistence on sovereignty, individual state consent, and consent of the powerful via a flawed determination and referral system which relies on agreement within a highly political forum, subject to individual state interests and unequal voting powers. In an ideal world, States would voluntarily subject themselves to the Court's jurisdiction through universal membership with unconditional ratifications, to be treated equally before the Court, in the knowledge that their acts of aggression will attract individual criminal responsibility. If that is not achievable in the foreseeable future, it may be necessary to retreat from the insistence on a strictly consent-based approach and advance customary universal

[1446] See B. Ferencz, n. 831.
[1447] B. Ferencz (2009), 290, (n. 4).

jurisdiction regardless of consent or territory, leading to powerful deterrence from aggression and effective prosecutions. The world no longer has a 'choice between peace and justice',[1448] they must go hand in hand.

Suggestions for further research

Important projects are currently underway to determine responsible state behaviour in the context of international security, and the application of the Rome Statute to cyber threats and cyberwarfare. The first two are mandated by the General Assembly of the UN. Thus resolution A/RES/73/266 established a new Group of Governmental Experts (GGE) on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security.[1449] The GGE aims to outline the global agenda, examining applicable norms, rules and principles, and to address how international law applies to the digital space. The GGE consists of 25 selected member states of the UN, and has been scheduled to hold 6 consultations with regional organisations with the African Union, the European Union, Organisation of American States, Organisation for Security and Co-operation in Europe and the ASEAN Regional Forum, and 2 with all member states. Its report will be made to the 76th GA Session in 2021.[1450]

[1448] See Kofi Annan's speech (n. 1448).
[1449] See n. 659.
[1450] *Ibid.* See also 'UN GGE and OEWG', Geneva Internet Platform Digital Watch observatory for Internet governance and digital policy, http://www.dig.watch/processes/un-gge, last accessed 20 January 2021.

The UN-authorised Open-Ended Working Group (OEWG) on Developments in the Field of Information and Telecommunications in the Context of International Security (ICTs) was established in 2018.[1451] The working group involves all interested UN member states and has been holding intersessional meetings with interested stakeholders consisting of business, NGOs, and academic scholars. Its purpose was to further develop and potentially change applicable norms, rules and principles, consider how international law applies to cyberspace, identify existing and potential threats, and establish a regular institutional dialogue within the UN. This group is, at the time of writing preparing its Zero Draft and meet for a final session in March 2021.[1452]

Both groups state (at the time of writing) that there is broad agreement that international law applies to cyberspace.[1453] Additionally, there is agreement that jurisdiction over ICT lies with a State on its territory.[1454] As far as international law is concerned, there is agreement that States should not conduct internationally wrongful acts nor use proxies for such acts.[1455] Open issues for both groups are:

- how humanitarian law should apply to ICT
- how international law applies to cyber-attacks in peacetime (as a form of 'hybrid warfare')
- whether discussions should include control of arms proliferation or a more precise use of the law of armed conflict

[1451] See n. 658.
[1452] Geneva Internet Platform, n. 1466 above.
[1453] *Ibid.*
[1454] *Ibid.*
[1455] *Ibid.*

- how to deal with ICTs which may have dual use, i.e. for peaceful use, but also capable of endangering peace and security.[1456]

Additionally, a Council of Advisers on the Application of the Rome Statute to Cyberwarfare has been established by the Permanent Mission of Liechtenstein, along with Argentina, Belgium, Estonia, Luxembourg, Spain, Switzerland and the Global Institute on the Prevention of Aggression, academics, and civil society members,[1457] discussing specifically, whether cyberattacks can be understood as 'armed attacks' for the purpose of Article 8 *bis* of the Rome Statute, potential jurisdiction over state and non-state actors, the applicable threshold potentially giving rise to self-defence under Article 51 of the UN Charter, and the application of international humanitarian law (Articles 7 and 8 of the Rome Statute) to cyberattacks.[1458] The project is, at the time of writing also still ongoing. The subject of cyber-aggression, in particular, poses a highly interesting and pertinent topic for future research.

Finally, it will be interesting to see whether States, having implemented domestic jurisdiction over the crime of aggression, will in the future assume universal jurisdiction over the crime, as they have done over the other crimes under the Rome Statute. All of these projects and campaigns will, in the near future shed light on how jurisdiction of the Court over the crime of aggression may be widened in practice.

[1456] *Ibid.*
[1457] See n. 660.
[1458] *Ibid.*

Cases, International Treaties and other documents

Table of Cases

United States v Klintock, [1820] 18 US (5 Wheat.) 144.

United States v Smith, [1820] 18 US (5 Wheat.) 153.

S.S. 'Lotus' (France v Turkey), [1927] PCIJ Rep Series A No. 10.

Nuremberg Judgment, France and ors v Goering (Hermann) and ors, Judgment and Sentence, [1946] 22 IMT 203. - The Trial of German Major War Criminals: Proceedings of the International Military tribunal sitting at Nuremberg, Germany, Part 22 (22nd August 1946 to 1st October 1946).

Tokyo War Crimes Trials, The International Military Tribunal for the Far East (3 May 1946 to 12 November 1948), established by its Charter, 1946, 14 *DSB* (Article 5 a)) 361, 362 (1946) (Judgment reprinted in reprinted in R. Pritchard (ed); The Tokyo Major War Crimes Trial (1998), at 1190).

United States v Krauch et al., Military Tribunal VI, Judgment 29th July 1948.

United States v Krupp, Von Bohlen und Halbach et al., Nuremberg Military Tribunal (NMT) III, Judgment 31st July 1948.

In re List, at 1241, 11 Trials of War Criminals 759 (1946-49) (US mil. Trib. Nuremberg 1948).

United States v Von Leeb et al., Military Tribunal XII, Case No.12, Judgment 27th October 1948.

United States v Von Weizsaecker et al., Military Tribunal XI, Case No. 11, Judgment 11th April 1949.

The Hadamar Trial, 1 Law Reports of Trials of War Criminals 46 (1949) (US Mil. Commission – Wiesbaden 1945).

Reparations for Injuries Suffered in the Service of the United Nations [1949] ICJ, Opinion, 11 April 1949.

Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v Albania), [1949] ICJ Rep 4.

United States v Otto Ohlendorf, (Einsatzgruppen), IV Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950).

The Asylum Case [1950] ICJ Rep. 266.

Monetary Gold case (Italy v France, United Kingdom & United States), (1954) ICJ Rep. 19.

Certain Expenses of the United Nations (Article 17 (2) of the Charter), (Advisory Opinion) [1962], ICJ Reports, 151.

North Sea Continental Shelf cases (Germany v Denmark) [1969] ICJ Rep. 3.

Case concerning the Barcelona Traction Light and Power Company Ltd. (Belgium v Spain) [1970] ICJ Rep 3.

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits), [1986] ICJ Rep. 14.

The Prosecutor of the Tribunal v Dusan Tadic, (1994) Case No. IT-94-I-T.

Loizidou v Turkey (1996) VI Eur.Ct.H.R. 2216.

R v Bow Street Metropolitan Stipendiary, *ex parte* Pinochet Ugarte (Amnesty International Intervening) (no. 3) [1997] UKHL 17.

Prosecutor v JP Akayesu, Case No. ICTR-96-4-T, Judgment, 2 September 1998.

Prosecutor v Furundzija, Tribunal for Former Yugoslavia, Case No. 17-95-17/1-T (1998).

R v Bow Street Metropolitan Stipendiary, *ex parte* Pinochet Ugarte (Amnesty International Intervening) (no. 3) [1997] UKHL 17.

R v Bartle et al., *ex parte* Pinochet, [1999] UKHL, 38 ILM.

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

Re Bouterse, Case No. HR 00749/01 CW2323, NL, 18 September 2001.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, 14 February 2002, ICJ Reports 2002.

Oil Platforms (Iran v US) [2003] ICJ Rep 161, (Oil Platforms case).

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004] ICJ Rep 136, (*The Wall Opinion*).

Case Concerning Armed Activities on the Territory of the Congo (Congo v Uganda), [2005] ICJ Rep. 168.

R v Jones [2006] UKHL 16.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia) [2007] ICJ General List No. 91.

Republic v Mohamed Ahmed Dahir & Ten (10) [2010] SCSL. 81 (Sey.).

Khurts Bat v The Investigating Judges of the German Federal Court, Judgment of 29 July 2011 (2011) EWHC, 2029

Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) [2012] ICJ, Judgment of 3 February 2012.

A v Ministere Public de la Confederation, 25 July 2012, Swiss Federal Criminal Tribunal, available at http://www.trialch.org/fileadmin/user_upload/documents/affaires/algeria/BB.2011.140.pdf, accessed 27 August 2021.

Whaling in the Antarctic (Australia v Japan: New Zealand intervening) [2014] Judgment, ICJ Reports, 226.

ICC Proceedings

The Prosecutor v Omar Hassan Ahmad Al Bashir, Arrest Warrant of 4 March 2009, ICC-02/05-01/09-1;

The Prosecutor v Omar Hassan Ahmad Al Bashir, Arrest Warrant of 12 July 2010, ICC-02/05-01/09-95.

Pre-Trial Chamber I, Corrigendum to the Decision Pursuant to Article 87 (7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09), 13 December 2011, available at https://www.icc-cpi.int/CourtRecords/CR2011_21750.PDF, last accessed 3rd September 2021.

Pre-Trial Chamber II, Decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, (ICC-02/05-01/09), 6 July 2017, available at https://www.icc-cpi.int/CourtRecords/CR2017_04402.PDF, last accessed 3rd September 2021.

Pre-Trial Chamber II, Decision under article 87 (7) on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, (ICC-02/05-01/09), 11 December 2017, available at https://www.icc-cpi.int/CourtRecords/CR2017_07156.PDF, last accessed 3rd September 2021.

Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal (ICC-02/05-01/09) OA2, 6 May 2019, available at https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF, last accessed 3rd September 2021.

Pre-Trial Chamber III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, 14 November 2019.

Appeals Chamber, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020, ICC-02/17 OA4, available at https://www.icc-cpi.int/CourtRecords/CR2020_00828.PDF, last accessed 3rd September 2021.

ICC Pre-Trial Chamber I, Decision on the 'Prosecution request pursuant to article 19 (3) for a ruling on the Court's territorial jurisdiction in Palestine', 5 February 2021, ICC-01/18, available at https://www.icc.cpi.int/CourtRecords/CR2021_01165.PDF, last accessed 3rd September 2021.

Table of Treaties and other documents

Hague Convention (I) of 1899 for the Pacific Settlement of International Disputes (29 July 1899).

Hague Convention (II) of 1907 for the Pacific Settlement of International Disputes (18 October 1907).

Treaty of Peace between the Allied and Associated Powers and Germany (28 June 1919), UKTS 14, Cmd. 1746.

Covenant of the League of Nations (1919), UKTS 4, Cmd. 153.

Geneva Protocol for the Pacific Settlement of International Disputes, 1924, 2 Int.Leg. 1378.

League of Nations, General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), 27 August 1928, LNTS (1929) XCIV, 58.

League of Nations, Conference for the Reduction and Limitation of Armaments, Geneva, 1932-4.

1933 Disarmament Conference, 147 LNTS 67, 148.

London Charter of August 8, 1945, 82 UNTS, 279, Article 6 (a).

United Nations, Charter of the United Nations, 24 October 1945, 1 UNTSXVI.

United Nations, Statute of the International Court of Justice (18 April 1946) 33 UNTS 993 (ICJ Statute).

Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (1945), (reprinted in Telford Taylor, Final Report to the Secretary of the Army on Nuremberg War Crimes Trials, under Control Council Law No. 10, 250-153 (1949)).

European Convention of Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms), Nov. 4, 1950, 213 UNTS 221.

European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957.

United Nations, Vienna Convention on the Law of Treaties (23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

Agreement Establishing the Caribbean Court of Justice, 14 February 2001.

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone 2002.

Rome Statute of the International Criminal Court 1998 (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544.

European Commission on Human Rights Reports

Sub-Commission on Human Rights, Res. 2000/24, 'Role of Universal or Extraterritorial Competence in Preventive Action against Impunity', 18 August 2000, E/CN.4/SUB.2/RES/2000/24.

Commission on Human Rights, Res. 2000/68, 'Impunity', 26 April 2000, E/CN.4/RES/2000/68.

Commission on Human Rights, Res. 2000/70, 'Impunity', 25 April 2001, E/CN.4/RES/2000/70.

United Nations Documents

Security Council Resolutions

22 (1947)
82 (1950)
83 (1950)
84 (1950)
85 (1950)
88 (1950)
90 (1951)
189 (1964)
255 (1968)
284 (1970)
294 (1971)
326 (1973)
328 (1973)
386 (1976)
387 (1976)
405 (1977)
411 (1977)
418 (1977)
419 (1977)
423 (1978)
424 (1978)
428 (1978)
445 (1979)
447 (1979)
454 (1979)
455 (1979)
475 (1980)
496 (1981)
502 (1982)
507 (1982)
527 (1982)
535 (1983)
546 (1984)
554 (1984)
567 (1985)
568 (1985)
571 (1985)
572 (1985)
573 (1985)
574 (1985)
577 (1985)
580 (1985)
581 (1986)
598 (1987)
602 (1987)
611 (1988)
660 (1990)
661 (1990)
662 (1990)
664 (1990)
665 (1990)
666 (1990)
667 (1990)
669 (1990)
670 (1990)
808 (1993)
822 (1993)
827 (1993)
853 (1993)
884 (1993)
955 (1994)
1234 (1999)
1244 (1999)
1304 (2000)
1341 (2001)
1355 (2001)
1528 (2004)
1862 (2009)
1907 (2009)
1973 (2011)
2023 (2011)
2093 (2013)
2100 (2013)
2136 (2014)
2147 (2014)
2166 (2014)
2202 (2015)
2211 (2015)
2232 (2015)
2277 (2016)
2293 (2016)
2297 (2016)
2348 (2017)
2360 (2017)
2463 (2019)
2472 (2019)

Vetoed Draft Resolutions
(For a full list, see Veto List, compiled by the UN Dag Hammerskjold Library)

S/18428 (1986)
S/2011/612
S/2012/77
S/2012/538
S/2014/348
S/2014/189
S/2015/562
S/2016/846
S/2016/1026
S/2017/172
S/2017/315
S/2017/962
S/2017/970
S/2017/1060
S/2018/156
S/2018/321
S/2018/508
S/2019/756
S/2019/961
S/2020/654
S/2020/667
S/2020/852

General Assembly Resolutions

Uniting for Peace (3 November 1950) UN Doc. A/Res/377 (V).

Intervention of the Central People's Government of the People's Republic of China in Korea (5 November 1951), UN Doc. A/Res/498 (V).

Question of defining aggression (20 December 1952) UN Doc. A/RES/688 (VII).

Question of defining aggression (4 December 1954) UN Doc. A/RES/895 (IX).

Question of defining aggression (29 November 1957) UN Doc. A/RES/1181 (XII).

'Need to expedite the drafting of a definition of aggression in the light of the present international situation' (18 December 1967) UN Doc. A/RES/2330 (XXII).

Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (24 October 1970) UN Doc. A/RES/2625 (XXV).

Definition of Aggression (14 December 1974), XXIX, UN Doc A/RES 3314.

Territorial Integrity of Ukraine (27 March 2014), UN Doc A/RES/68/262.

Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security (5 December 2018) UN Doc A/RES/73/27.

Group of Governmental Experts on Advancing Responsible State Behaviour in Cyber Space in the Context of International Security (22 December 2018) UN Doc A/RES/73/266.

Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov (14 December 2020), UN Doc A/RES/75/29.

Resolutions on the Suez Crisis in the 1st Emergency Special Session (1956)

A/RES/997 (2 November 1956)
A/RES/998 (4 November 1956)
A/RES/999 (4 November 1956)

UN Ancillary documents

Statement of the Four Sponsoring Governments on Voting Procedure in the Security Council, UNCIO Document 852, III/1/37(1) [8] UN Doc A/578 (7 June 1945).

Commission III, Security Council, Committee 3, Enforcement Arrangements, Report of Mr. Paul-Boncour, Rapporteur, on Chapter VIII Section B, at The United Nations Conference on International Organization, Doc. 881 III/3/46, 10th June, 1945.

United Nations Commission on International Organisation, Draft Suggestion by Bolivia, United Nations, New York, 1948, Vol. 3, 577.

Lie T, UN Secretary-General's Report on the Nuremberg Trials (1949) UN Doc. A/CN.4/5, UN Sales No. 1949 V.7.

UN Press Release GA/9430, Report of the Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council, A/AC.247/1998/WP.1/Rev.2, adopted by the General Assembly on 24 August 1998, https://un.org/press/en/19981980824.ga9430.html, accessed 20 January 2021).

Annan K, Report of the Secretary-General on the work of the Organization, UN GAOR, 54th Sess., 4th plenary meeting at 2, UN Doc. A/54/PV.4 (20th September, 1999), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/858/23/PDF/N9985823.pdf?

Historical Review of Developments Relating to Aggression (UN Publications, 2003).

The High-Level Panel Report: 'A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change', UN Doc. A/59/565 (2004).

Annan, K, 'In Larger Freedom: Towards Development, Security and Human Rights for All', Report of the Secretary-General (2005), UN Doc. A/59/2005.

2005 World Summit Outcome, GA Res. 60/1 (October 24, 2005).

Security Council Press Release 9396, SC/9396, 11 July 2008, https://www.un.org/press/en/2008/sc9396.doc.htm, accessed 21 January 2021.

Speeches in UN General Assembly, 23 December 2007, 5 September 2008, 107, A/62/49 (Vol. III), http://undocs.org/A/62/PV.49 (Vol. III), accessed 20 January 2021.

Decision 62/557 of 15 September 2008, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6-D27-4E9C-8CD3-CF6E4FF96FF9%7D/Decision%2062_557.pdf, accessed 20 January 2021.

Ki-Moon, Ban, Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments: The Scope and Application of the Principle of Universal Jurisdiction, UN Doc. A/65/181 (July 29, 2010).

Speeches in UN General Assembly, 12 November 2014, 6, A/69/PV.49, at http://undocs.org/A/69/PV.49, accessed 20 January 2021.

Research Report on the Veto, 19 October 2015, http://www.securitycouncilreport.org, accessed 12th May 2020.

Security Council Report, In Hindsight: The Security Council and the International Court of Justice, 28 December 2016, https://www.securitycouncilreport.org/monthly-forecast/2017-01/in_hindsight_the_security_council_and_the_international_court_of_justice.php, accessed 3rd March 2021.

Security Council Report on the UN Security Council Working Methods, 'The Veto', 30th October 2017, http://www.securitycouncilreport.org/un-security/council-working-methods/, accessed 12th May 2020.

United Nations, World Water Development Report 2019, available at http://www.unwater.org/publications/world-water-development-report-2019/, accessed 21st January 2021.

Compilation of all recommendations made by the Independent International Fact-Finding Mission on Myanmar', A/HRC/42/CRP.6, 16 September 2019, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/201090916/A_HRC_42_CRP.6.pdf, last accessed 3rd September 2021.

UN GA Press Release 12217, GA/12217 of 25 November 2019, https://www.un.org/press/en/ga12217.doc.htm, accessed 21 January 2021.

Food and Agriculture Organization of the United Nations, 'The State of Food and Agriculture' (SOFA), 2020 Report, available at http://fao.org/3/cb1447en/online/cb1447en.html, accessed 21st January 2021.

UN GA Press release 12288, GA/12288, 16 November 2020, https://www.un.org/press/en/2020/ga12288.doc.htm, accessed 21 January 2021.

UN GA Press Release 12289, GA/12289 of 17 November 2020, available at http://www.un.org/press/en/2020/ga12289.doc.htm, accessed 21 January 2021.

Practices, Procedures and Working Methods of the Security Council, https://ww.un.org/securitycouncil/content/procedures-and-working-methods, accessed 10th May 2020.

UN Documentation Research Guide, Veto List, as compiled by the Dag Hammarskjöld Library, available at http://www.research.un.org/en/docs/sc/quick, last accessed 23rd January 2021.

Documents related to the ICC

Proposal by Germany, 1997, A/AC.249/1997/WG.1/DP.20.

Proposal by Cameroon, 1998, UN Doc. A/CONF.183/C.I./L.39, Suggested Article 10.

'German Proposal of 1998', contained in the Draft Statute for an International Criminal Court, UN Doc. A/Conf. 183/2/Add.1, Articles 6 (b), 7, 9 (further option, and further option for Article 7). Available at https://www.documents-dds-ny.un.org, last accessed 07 December 2020.

Proposal by the Arab States and Iran, 1 July 1998, UN Doc. A/CONF.183/C.1/L.37.

Proposal by Germany, 1999, in PCNICC/1999/INF/2.

Proposal by Egypt and Italy on the definition of aggression', 1999, A/AC.249/1997/WG.1/DP.6, in PCNICC/1999/INF/2.

Proposal by Greece and Portugal, 1999, PCNICC/1999/WGCA/DP.1.

Proposal by the Russian Federation, 1999, PCNICC/1999/DP.12.

Discussion Paper Proposed by the Coordinator (9 December 1999), UN Doc. PCNICC/1999/WGCA/RT.1.

Proposal submitted by Colombia, 1st March 2000, PCNICC/2000/WGCA/DP.1.
'Suggestion made orally by Italy on 13 March 2000 with regard to a structure for discussion on the crime of aggression', PCNICC/2000/WGCA/DP.3

Comments by Colombia on the Italian proposal made orally in the Working Group on 13 March 2000, PCNICC/2000/WGCA/DP.2.

Proposal submitted by Germany: the Crime of Aggression – A Further Informal Discussion Paper, 13 November 2000, in PCNICC/2000/WGCA/DP.4,

Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania on jurisdictional conditions, 23 February 2001, PCNICC/2001/WGCA/DP.1.

Proposal by Guatemala, PCNICC/2001/WGCA/DP.2, 26 September 2001.

Historical Review of Developments Relating to Aggression, Prepared by the Secretariat, Doc.PCNICC/2002/WGCA/L.1 (2002), available at http://www.un.org/law/icc/documents/aggression/aggressiondocs.htm, accessed 12 October 2020.

Definition of the Crime of Aggression and Conditions for the Exercise of Jurisdiction: Discussion Paper Proposed by the Coordinator, 1 April 2002, UN Doc. PCNICC/2002/WGCA/RT.1.

Elements of the Crime of Aggression – Proposal submitted by Samoa, 2nd June 2002, PCNICC/WGCA/D.P.2.

Proposed text on the definition of the crime and act of aggression submitted for the Delegation of Colombia (1 July 2002), PCNICC/2002/WGCA/DP.3.

Proposal submitted by Belgium, Cambodia, Sierra Leone, and Thailand, 8 July 2002, PCNICC/2002/WGCA/DP.5.

Discussion Paper Proposed by the Coordinator, 11 July 2002, UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2 in 'Report of the Preparatory Commission for the International Criminal Court', UN Doc. PCNICC/2002/2/Add.2, Part II.

Preparatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, 'Historical review of developments relating to aggression, prepared by the Secretariat', PCNICC/2002/WGCA/L.1., http://www.un.org/law/icc/documents/aggression/aggressiondocs.htm, accessed 12 October 2020.

Proposal submitted by Cuba, 6th February 2003, Assembly of States Parties, First session, ICC-ASP/1/L.4.

Report of the Special Working Group on the Crime of Aggression, ICC-ASP/4/SWGCA/1 (1 Dec. 2005) Annex II.A.

Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at Princeton University, New Jersey, United States, from 8 to 11 June 2006, (the 2006 Princeton Report), ICC-ASP/5/SWGCA/INF.1.

Discussion Paper Proposed by the Chairman, 16 January 2007, ICC-ASP/5/SWGCA/2 (not published in ASP Official Records but included in the *Travaux Preparatoires*).

Coalition for the International Criminal Court, 'Observations about the Discussion Paper Proposed by the Chairman', ICC-ASP/5/SWGCA/2 (25 Jan. 2007).

Proposal presented by Belgium on the Question of Jurisdiction of the Court with Respect to the Crime of Aggression, 29 January 2007, ICC-ASP/5/SWGCA/W.P.1.

Informal Intersessional Meeting of the Special Working Group on the Crime of Aggression, Princeton University, 11-14 June 2007, (the 2007 Princeton Report), ICC-ASP/6/SWGCA/INF.1 in ASP Official Records, ICC-ASP/6/20, Annex III, 96.

Report of the Special Working Group on the Crime of Aggression (December 2007) (ICC-ASP/6/SWGCA/1, ASP 6/20, Annex II, 87.

Discussion Paper on the Crime of Aggression Proposed by the Chairman: Revision January 2009, 19 February 2009, ICC/ASP/7/SWGCA/INF.1, in the 'Report of the Special Working Group on the Crime of Aggression' (2009) ICC-ASP/7/SWGCA/2, *ASP Official Records*, ICC-ASP/7/20/Add.1, Annex II.

Informal Intersessional Meeting on the Crime of Aggression, hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8-10 June 2009, ICC-ASP/8/INF.2 (2009 Princeton Report).

Report of the Working Group on the Crime of Aggression, 2010, RC/5 in Review Conference Official Records, RC/11, Part II, Annex III, 45.

Resolution 6, Review Conference, Assembly of States' Parties, 'The Crime of Aggression', ICC Doc. RC/Res. 6 (11 June 2010).

Explanations of Position, in Review Conference Official Records, RC/11, Annexes VII-IX, 122.

Declaration of Non-Acceptance of Jurisdiction by Kenya, MFA.1NT.8/14AVOL.X (86) 30th November, 2015.

Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression (2017) ICC-ASP/16/24, 27 November 2017.

Resolution 5, ICC-ASP/16/Res.5, 16th Assembly of States Parties, 14th December 2017.

Declaration of Non-Acceptance of Jurisdiction by Guatemala, 16 January 2018. http://ww.icc-cpi.int, accessed 24 November 2020.

Handbook on the Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, http://crimeofaggression.info/docments/1/handbook.pdf, accessed 19th March 2020.

ILC Documents

First Report on a Draft Code of Offences against the Peace and Security of Mankind, UN Doc. A/CN.4/25, YB ILC (1950), vol. II, 253.

Second Report on a Draft Code of Offences against the Peace and Security of Mankind, including commentary, YB ILC (1951), II 133.

Draft Code of Offences against the Peace and Security of Mankind, (1954), UN Doc. A/CN.4/44.

Report of the International Law Commission on the Work and Its Thirty-Second Session, UN Doc. A/35/10 (1980).

Ninth Report on a Draft Code of Crimes against the Peace and Security of Mankind (1991) UN Doc. A/CN.4/435, and Add. 1 (Feb 8 and Mar 15, 1991).

Yearbook of the ILC (1991), Vol. II (Part Two).

1994 ILC Draft Statute (with Commentary), Report of the International Law Commission, 46th Session, Sept. 1, 1994, UN Doc. A/49/355; GAOR, 49th Sess., Supp. No. 10 (1994).

Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its 48th Session, May 6-July 26, 1996, UN Doc. A/51/10 (SUPP) (Jan 1, 1996).

Commentary on 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, Yearbook ILC (1996), Vol. II.

Draft Articles on State Responsibility for Internationally Wrongful Acts (with commentaries), Report of the International Law Commission, 53rd Session, 2 (2) Yearbook of the International Law Commission, 2001, Annex to GA Resolution A/RES/56/83 (12 December 2001).

International Law Commission, *Final Report of the Study Group on Fragmentation of International Law,* UN Doc. A/CN.4/L.682 (13 April 2006)

International Law Commission, Draft Conclusions on Subsequent agreements and subsequent practice in relation to the interpretation of treaties, adopted on second reading in May 2018, UN Doc. A/CN.4/L.907 (2018).

International Law Commission, Report of the International Law Commission on Peremptory Norms of General International Law *(jus cogens)*, Chapter V, (16th May 2019) UN Doc A/74/10.

Bibliography

Books

Aquinas St T, *Summa Theologiae* (XXXV Blackfriars 1972).

Arend A and Beck R, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (Routledge 1993).

Arend A, *Legal Rules and International Society* (OUP 1999).

Augustine St, *Contra Faustum Manichaeum*.

Aust A, *Handbook of International Law* (CUP 2005).

Bassiouni MC, *Crimes against Humanity in International Criminal Law* (Nijhoff 1999).

Bassiouni M C, *Introduction to International Criminal Law*, (Nijhoff, 2nd edn. 2013).

Bernstorff J v, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (CUP 2010).

Bluntschli J, *The Theory of the State*, English translation from the 6th German edn (Clarendon 1885).

Bobbit P, *Terror and Consent: The Battle for the Twenty-First Century* (Knopf 2008).

Bourantonis D, *The History and Politics of UN Security Council Reform* (Routledge, 2005).

Bowett D, *Self-Defence in International Law* (Praeger 1958).

Brierly J, *The Law of Nations: An Introduction to the Modern Law of Peace* (Clarendon 1963).

Brownlie I, *International Law and the Use of Force by States*, OUP (1963).

Brownlie I, *Principles of Public International Law* (6th edn, OUP 2003).

Cassese A, *International Criminal Law* (3rd edn, OUP 2013).

Crawford J, *Brownlie's Principles of Public International Law* (9th edn, OUP 2012).

Cryer R et al, *An Introduction to International Criminal Law and Procedure* (CUP 2010).

Dinstein Y, *War, Aggression, and Self-Defence* (CUP 5th edn 2011).

Dinstein Y, *War, Aggression, and Self-Defence* (CUP 6th edn 2017).

Dworkin R, *A Matter of Principle* (HUP 1985).

Dworkin R, *Law's Empire,* (HUP 1986).

Ferencz B, *Defining International Aggression, The Search for World Peace* (Oceana 1975).

Finnis J, *Natural law and natural rights* (2nd edn, OUP 2011).

Fox H, *The Law of State Immunity* (3rd edn. OUP 2008).

Franck T, *Fairness in International Law and Institutions* (OUP 1995).

Franck T, *Recourse to Force* (CUP 2002).

Gelvin J, *The Israel-Palestine Conflict – One Hundred Years of War* (CUP 2014, 3rd edn).

Gentili A, *De Jure Belli* I, para VI, 48-52 (Clarendon 1933).

Green L, *International Law* (1984).

Grotius H, *De Jure Belli ac Pacis* II (Clarendon 1925).

Harris D J, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010).

Hart H.L.A, *Essays in Jurisprudence and Philosophy* (OUP 1983).

Hart H.L.A, *The Concept of Law* (2nd edn. OUP 1994).

Hathaway O and Shapiro S, *The Internationalists: How a radical plan to outlaw war remade the world* (Simon & Schuster 2017).

Henkin L, *How Nations Behave: Law and Foreign Policy,* 144-5 (Columbia University Press 2nd ed. 1979).

Henkin L, *International Law: Politics and Values* (Nijhoff 1995).

Higgins R, *Problems and Process, International Law and How We Use It,* (OUP 2010 reprint).

Hobbes T, *Leviathan* (Touchstone 2008).

Jian C, *China's Road to the Korean War* (Columbia University Press 1994).

Kelsen H, *General Theory of Law and State* (Harvard University Press 1945).

Koskenniemi M, *From Apology to Utopia: The Structure of International Legal Argument* (1989 CUP, reissue 2005).

Koskenniemi M, *The Politics of International Law* (Hart 2011).

Lauterpacht H, *The Function of Law in the International Community* (OUP 1933).

Lauterpacht H, *Recognition in International Law* (1947).

May L, *Aggression and Crimes against Peace* (OUP 2008).

McDougall C, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, (CUP 2013).

McDougal M and Feliciano F, *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, (YUP 1961).

McDougal M and Reisman WM, *International Law Essays* (Minneola 1981).

Murphy S, *Humanitarian Intervention: The United Nations in an evolving world order,* University of Pennsylvania Press (1996).

Murphy M, *Natural Law in Jurisprudence and Politics* (CUP 2006).

Nussbaum A, *A Concise History of the Law of Nations* (Macmillan, 2nd edn 1954).

Orakhelashvili A, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008).

Rivier A, *Principes du Droit des Gens*, Tome I (Arthur Rousseau 1896).

Robb J, *Brave New War: The Next State of Terrorism and the End of Globalisation* (Wiley 2007).

Sayapin S, *The Crime of Aggression in International Criminal Law – Historical Development, Comparative Analysis and Present State* (Asser 2014).

Schachter O, *International Law in Theory and Practice,* 123-5 (Nijhoff 1991).

Edited Books

Barriga S and Kress C (eds), *Travaux Preparatoires of the Crime of Aggression*, Crime of Aggression Library (CUP 2012).

Bassiouni M C (ed), *International Criminal Law* (Nijhoff, 2nd edn. 1999).

Dinstein Y, Tabory M (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Nijhoff 1989).

Donnelly E, McGoldrick D and Rowe P (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart 2004).

Evans M (ed), *International Law* (OUP 2010 3rd edn).

Frishman M, Muller S. (eds), *The Dynamics of Constitutionalism in the Age of Globalisation* (Hague Academic Press 2010).

Kammerhofer J and d'Aspremont J (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014).

Kress C and Barriga S (eds), *The Crime of Aggression: A Commentary*, Crime of Aggression Library, Vol. I and II (CUP 2017).

Lauterpacht E (ed), *International Law: Collected Papers of Hersch Lauterpacht*, (CUP 2009).

Lillich R (ed), *Humanitarian Intervention and the United Nations* (UPVA 1973).

Mc Cormack T and Simpson G (eds), *The Law of War Crimes, National and International Approaches* (Kluwer 1997).

Olusanya O (ed), *Rethinking International Criminal Law: The Substantive Part* (Europa Law, 2007).

Pegis A (ed), *Basic Writings of St. Thomas Aquinas* (Hackett Publishing Co. 1997).

Perreau-Saussine A, Murphy J (eds), *The Nature of Customary Law* (CUP 2007).
Peters A, Klabbers J and Ulfstein G (eds), *The Constitutionalization of International Law* (OUP 2009).

Politi M and Nesi G (eds), *The International Criminal Court and the Crime of Aggression* (Routledge 2004).

Weller M and Rylatt J (eds), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015).

Wet, de E. & Vidma J. (eds) *Hierarchy in International Law: The Place of Human Rights* (OUP 2012).

Wilson R (ed), *Human Rights in the 'War on Terror'* (CUP 2005).

Journal Articles

Akande D, 'The Jurisdiction of the ICC over Nationals of Non-Parties: Legal Basis and Limits', JICJ 1 (2003), 618.

Akande D, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council', (2011) Oxford Legal Studies Research Paper No. 10/2011, 37.

Akande D and Tzanakopoulos A, 'Treaty Law and ICC Jurisdiction Over the Crime of Aggression' (2018), 29 EJIL, 939.

Barriga S and Grover L, 'A Historic Breakthrough on the Crime of Aggression' (2011) 105 (3) AJIL, 517.

Bassiouni M C, 'A Functional Approach to 'General Principles of International Law' (1990) 11 Mich. J. Int'l. L. 768.

Bassiouni M C, in 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996), 59 Law and Contemporary Problems (4).

Bellamy A, 'Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq' (2005), 19 (2) Ethics Int. Aff. 31.

Besson S, 'State Consent and Disagreement in International Law-Making' (2016), 29 Leiden J Int'l L 289.

Bianchi A, 'Immunity versus Human Rights: The Pinochet Case' (1999) EJIL 10, 217.

Bianchi A, 'Security Council's Anti-Terror Resolutions and their Implementation by Member States' (2006) 4 J Int'l Crim. Just. 1044.

Bianchi A, Gazing at the Crystal Ball (again): State Immunity and *Jus Cogens* beyond *Germany v Italy* (2013), 4 J Int'l Dispute Settlement (3).

Blokker N, 'The Crime of Aggression and the United Nations Security Council' (2007), 20 Leiden JIL, 881.

Caplan L M, 'State Immunity, Human Rights, and *Jus Cogens:* A critique of the Normative Hierarchy Theory (2003) 97 AJIL 741.

Carswell A, 'Unblocking the UN Security Council: The *Uniting for Peace* Resolution' (2013) 18 (3) J.C.&S.L, 453.

Cassese, 'On Some Problematical Aspects of the Crime of Aggression' (2007), 20 Leiden J. Int'l L., 841.

Clark R, 'Ambiguities in Articles 5 (2), 121 and 123 of the Rome Statute', (2009) 41 Case W. Res. J. Int'l L., 413.

Clark R, 'Amendments to the Rome Statute of the International Criminal Court' (2010), 2 Go. J. Int'l L., 696.

Crowcroft B, 'Egypt's Other Nationalists and the Suez Crisis of 1956', (2016) 59 (1) Hist. J.

Davies T, 'France and the World Disarmament Conference of 1932-4' (2004) Dipl. Statecraft 15 (4) 765.

DeNicola C, 'A Shield for the "Knights of Humanity": The ICC should adopt a Humanitarian Necessity Defense to the Crime of Aggression', (2009) 30 (2) U. Pa. J. Int'l. L., 641.

Drumbl M, 'The Push to Criminalize Aggression: Something Lost Amid the Gains?' (2009), 41 (2) Case W. Res. J. Int'l L. 291.

Dworkin R, 'Natural Law Revisited' (1982), 34 (2) U. Fl. L. Rev. 165.

Dworkin R, 'A New Philosophy for International Law', (2013) Wiley, Phil. & Pub. Aff.

Ferencz B, 'Defining Aggression – The Last Mile' (1973) 12 Colum. J. Transnat'l L.

Ferencz B, 'The UN Consensus Definition of Aggression: Sieve or Substance?' (1975) 10 J Int'l & Econ. 701.

Ferencz B, 'Enabling the International Criminal Court to Punish Aggression' (2007) 6 Wash. U. Global Stud. L. Rev. 551.

Ferencz B, 'Speaking Frankly about the Crime of Aggression: Reconciliating Legitimate Concerns and Removing the Lock from the Courthouse Door', (2008), http://www.benferencz.org/arts/93b.html, accessed 19 March 2020.

Ferencz B, 'Ending Impunity for the Crime of Aggression' (2009) 41 Case W. Res. J. Int'l L. 281.

Ferencz D, 'Aggression Is No Longer a Crime in Limbo', FICHL Policy Brief Series No. 88 (2018), http://www.toaep.org/pbs-pdf/88-ferencz/, accessed 25 October 2020.

Fitzmaurice M, 'Consent to be Bound – Anything New Under the Sun' (2005) 74 Nord. J. Int'l L. 484.

Fuller L, 'Positivism and fidelity to law: A reply to Professor Hart' (1958) 71 (4) Harv. L. Rev. 630.
Glennon M, 'The Blank Prose Crime of Aggression' (2010) 35 Yale J. Int'l L. 71.

Gray C, 'The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after *Nicaragua*' (2003) 14 (5) EJIL, 867.

Graziano M and Mei L, 'The Crime of Aggression Under the Rome Statute and Implications for Corporate Accountability' (2017), 58 (4) Harv. Int'l L. J. 55.

Guzman A, 'Saving Customary International Law', (2005) 27 Mich. J. Int'l L., 115.

Guzman A, 'The Consent Problem in International Law' (2011), UC Berkeley: Berkeley Program in Law and Economics, https://escholarship.org/uc/item/04x8x174, accessed 6 November 2020.

Guzman A, 'Against Consent' (2012), 52 Virginia J Int'l L., 747.

Hammes T, 'Fourth Generation Warfare Evolves, Fifth Emerges' (2007) Mil. Rev., 14.

Hart H.L.A, 'Positivism and the Separation of Law and Morals' (1958) 71 (4) Harv. L. Rev. 593.

Hehir A, 'The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect' (2015), 26 Criminal Law Forum, 153.

Heinsch R, 'The Crime of Aggression after Kampala: Success or Burden for the Future' (2010), 2 Go. J. I. L., 713.

Heller K, 'Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression' (2007) 18 EJIL, 486.

Hosli M, Moody R, O'Donovan B, Kaniovski S and Little A, 'Squaring the circle? Collective and Distributive Effects of United Nations Security Council Reform' (2011) 6 (2) Rev. Int. Organ. 163.

Jacobs D, 'The Sheep in the Box: The Definition of the Crime of Aggression at the International Criminal Court' (2010) The Review Conference and the Future of the International Criminal Court, Proceedings of the First AIDP Symposium for Young Penalists in Tuebingen, Germany, Kluwer Law International, 131.

Joyner C, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability' (1996), 59 LCP 153.

Kingsbury B, 'The Concept of 'Law' in Global Administrative Law', (2009) 20 (1) EJIL, 23.

Koh H and Buchwald T, 'The Crime of Aggression: The United States Perspective' (2015) 109 AJIL, 267.

Koskenniemi M & Leino P, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden J. Int'l L. 553.

Krasner S, 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2004) 25 Mich. J. of Int'l L. 1075.

Kress C and von Holtzendorff L, 'The Kampala Compromise on the Crime of Aggression' (2010) 8 (5) JICJ, 1179.

Kress C, ‘On the Activation of ICC Jurisdiction over the Crime of Aggression’ (2018) 16 (1) JICJ 1.

Laettilae V and Yloenen A, ‘United Nations Security Council Reform Revisited: A Proposal’ (2019), 30 (1) Dipl. & Statecraft, 164.

Langan J, ‘The Elements of St. Augustine’s Just War Theory’ (1984), 12 The Journal of Religious Ethics (1), 20.

Leclerc-Gagne E and Byers M, ‘A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention’ (2009), 41 (2) Case W. Res. J. Int’l Law, 378.

Mancini M, ‘A Brand New Definition for the Crime of Aggression: The Kampala Outcome’ (2012) 81 NordJIL 227.

Maogoto J, ‘Aggression: Supreme International Offence still in search of definition’ (2009), 5 (1) South. Cross Univ. L. Rev. 1.

McDougal M and Feliciano F, ‘International Coercion and World Public Order: The General Principles of the Law of War’ (1958), https://digitalcommons.law.yale.edu/fss_papers/2451/, accessed 25 November 2020.

Melling G and Dennett A, ‘The Security Council veto and Syria: Responding to mass atrocities through the “Uniting for Peace” Resolution’ (2017) 57 Indian J. Int’l L., 285.

Meron T, ‘Defining Aggression for the International Criminal Court’ (2001), 25 Suffolk Transnat’l L. Rev. 1

Milanovic M, ‘Aggression and Legality: Custom in Kampala’ (2012), 10 (1) JICJ, 165.

Morris M, ‘High Crimes and Misconceptions: The ICC and Non Party States’, (2001) 64 LCP, 13.

Orakhhelashvili A, ‘Jurisdictional Immunities of the State (*Germany v Italy: Greece Intervening*)’ (2012) AJIL 106.

Osiel M, ‘The Banality of Good: Aligning Incentives against Mass Atrocity’, (2005) 105 Colum. L. Rev. 1751.

Paulus A, ‘Second Thoughts on the Crime of Aggression’, (2009) 20 (4) EJIL, 1117.

Petty K, ‘Sixty Years in the Making: The Definition of Aggression for the International Criminal Court’ (2008), 31 (2) Hastings Int’l & Comp. L. Rev. 1.

Petty K, ‘Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict’ (2009), 33 Seattle University Law Rev. 105.

Ponzetto G and Fernandez P, ‘Case Law versus Statute Law: An Evolutionary Comparison’ (2008), 37 (2) JLS, University of Chicago Press, 379.

Randall K, ‘Universal Jurisdiction under International Law’, (1988) 66 Tex. L. Rev., 758.

Reisinger-Coracini A, ‘The International Criminal Court’s Exercise of Jurisdiction Over the Crime of Aggression – at Last…in Reach…Over Some’ (2010) 2 GoJIL, 745.

Roth K, ‘Was the Iraq War a Humanitarian Intervention?’ (19 August 2006), 5 (2) J. Mil. Ethics.

Scharf M, ‘The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position’, (2001) 64 Law and Contemporary Problems, 67.

Scharf M, ‘Universal Jurisdiction and the Crime of Aggression’, (2012) 53 (2) Harv. Int’l L. J., 358.
Scheffer D, ‘The Complex Crime of Aggression’ (2011), 43 Stud. Transnat’l Legal Pol’y 173.

Schmitt M (ed), ‘International Law across the Spectrum of Conflict’, 75 International Law Studies, US Naval War College, 539.

Simma B and Paulus A, ‘The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View’ (1999) 93 AJIL, 302.

Stein M, ‘The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council’s Power to Determine Aggression?’ (2005), 16 Indiana Int’l. & Comp. L. Rev. 1.

Reisman M, ‘Reflections on the Judicialization of the Crime of Aggression’, https://digitalcommons.law.yale.edu/fss_papers/4926, accessed 14 March 2020.

Stone J, ‘Hopes and Loopholes in the 1974 Definition of Aggression’ (1977) 71 AJIL 224.

Trahan J, ‘The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference’ (2011) 11 Int’l Crim L. Rev. 50.

Trapp K & Mills A, ‘Smooth Runs the Water where the Brook is Deep: The Obscured Complexities of Germany v Italy’ (2012), 1 Cambridge J Int’l Comp L (1).

Tzevelekos V, ‘The Use of Article 31 (3) (c) in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology – Between Evolution and Systemic Integration (2010), 31 Mich. J. Int’l L. 621.

Ulfstein G and Christiansen H, ‘The Legality of the Nato Bombing in Libya’ (2013) 62 (1), ICLQ, 159.

Weil P, ‘Towards Relative Normativity in International Law’ (1983), 77 AJIL, 413

Weisbord N, 'Prosecuting Aggression' (2008) 49 Harv. Int'l. L. J. 161.

Weisbord N, 'Conceptualizing Aggression' (2009), 20 Duke J. Comp. & Int'l. L. 1.

Weisbord N, 'Judging Aggression' (2011) 50 (1) Col. J. Transnat'l L., 82.

Wing S, 'French intervention in Mali: strategic alliances, long-term regional presence?' (5 February 2016) 27 (1) Small Wars & Insurgencies, 59.

Contributions in Yearbooks

Akehurst M, 'Custom as a Source of International Law' (1975) 47 BYIL 1.

Ambos K, 'The Crime of Aggression after Kampala' (2010) 53 GYIL, 487.

Lauterpacht H, 'The Law of Nations and the Punishment of War Crimes' (1944), 21 BYBIL 58.

International Law Blogs

Akande D, 'What Exactly was agreed in Kampala on the Crime of Aggression?' 21 June 2010, available at http://www.ejiltalk.org/what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/, accessed 20 October 2019.

Akande D, 'Treaty Interpretation, the VCLT and the ICC Statute: A response to Kevin Jon Heller & Dov Jacobs', August 25, 2013, http://www.ejiltalk.org/treaty-interpretation-the-vclt-and-the-icc-statute-a-response-to-kevin-jon-heller-dov-jacobs/, accessed 20 March 2020.

Akande, 'The ICC Assembly of States Parties Prepares to Activate the ICC's Jurisdiction over the Crime of Aggression: But Who Will be Covered by that Jurisdiction', (EJIL:Talk! 26 June 2017), https://www.ejiltalk.org/the-icc-assembly-of-states-parties-prepares-to-activate-the-iccs-jurisdiction-over-the-crime-of-aggression-but-who-will-be-covered-by-that-jurisdiction/, accessed 23 November 2019.

Akande D, 'The International Criminal Court Gets Jurisdiction Over the Crime of Aggression' (EJIL:Talk! 15 December 2017), https://www.ejiltalk.org/the-international-

criminal-court-gets-jurisdiction-over-the-crime-of-aggression/, accessed 20 February 2018.

Ambos K, '"Solid jurisdictional basis"? The ICC's fragile jurisdiction for crimes allegedly committed in Palestine', EJIL:Talk! 2 March 2021, https://www.ejiltalk.org/solid-jurisdictional-basis-the-iccs-fragile-jurisdiction-for-crimes-allegedly-committed-in-palestine/, last accessed 3rd September 2021.

Barriga S, 'The Scope of ICC Jurisdiction Over The Crime of Aggression: A Different Perspective', (EJIL:Talk! 29 March 2017), https://www.ejiltalk.org/the-scope-of-icc-jurisdiction-over-the-crime-of-aggression-a-different-perspective/, accessed 20 October 2019.

Guilfoyle D, 'Is the International Criminal Court destined to pick fights with non-state parties? EJIL:Talk!, 14 July 2020, available at https://www.ejiltalk.org/is-the-international-criminal-court-destined-to-pick-fights-with-non-state-parties/, accessed 5th September 2021.

Hathaway O, 'Reengaging on Treaties and Other International Agreements (Part I), President Donald Trump's Rejection of International Law', (2 October 2020), https://www.justsecurity.org/72690/reengaging-on-treaties-and-other-international-agreements-part-ii-a-path-forward, accessed 1 December, 2020.

Heller K, 'The Sadly Neutered Crime of Aggression' (OpinioJuris, 13 June 2010), http://www.opiniojuris.org/2010/06/13, accessed 7 January 2018.

Heller K, 'My UN Presentation on the Aggression Amendments' (OpinioJuris, 5 May 2017), http://opiniojuris.org/2017/05/05/my-un-presentation-on-the-aggression-amendments/, accessed 30 October 2020.

Heller K, 'The Draft Resolution's Curious Paragraph 3', (OpinioJuris, 15 December 2017), http://opiniojuris.org/2017/12/15/the-curious-paragraph-3/, accessed 3 January 2018.

Hurd I, 'How not to argue against the Crime of Aggression: A Response to Michael Glennon' (2010) http://buffett.northwestern.edu/documents/working-papers/Buffett_10-001_Hurd.pdf, accessed 15 March 2020.

Jacobs D, 'Why the Vienna Convention should not be applied to the ICC Rome Statute: a plea for respecting the principle of legality' (August 24, 2013), *Spreading the Jam*, https://dovjacobs.com/2013/08/24/why-the-vienna-convention-should-not-be-applied-to-the-icc-rome-statute-a-plea-for-respecting-the-principle-of-legality/, accessed 20 March 2020.

Khin T, 'Universal Jurisdiction, the International Criminal Court, and the Rohingyan Genocide', OpinioJuris, 23 October 2020, available at

http://opiniojuris.org/2020/10/23/universal-jurisdiction-the-international-criminal-court-and-the-rohingya-genocide/, accessed 5th September 2021.

Marchuk I & Wanigasuriya A, 'The ICC concludes its preliminary examination in Crimea and Donbas: What's next for the situation in Ukraine?' EJIL:Talk! 16 December 2020, available at https://www.ejiltalk.org/the-icc-concludes-its-preliminary-examination-in-crimea-and-donbas-whats-next-for-the-situation-in-ukraine/, last accessed 3rd September 2021.

Milanovic M, 'The Syria Strikes: Still Clearly Illegal' (EJIL:Talk! 15 April 2018) http://ejiltalk.org.the-syria-airstrikes-still-clearly-illegal/ accessed 12 December 2020.

Reeve R, 'War in Yemen' (17 April 2015), available at https://ww.oxfordresearchgroup.org.uk/war-in-yemen-the-african-dimension, accessed 12 December 2020.

Reisinger-Coracini A, 'More Thoughts on "What Exactly was Agreed In Kampala on the Crime of Aggression"', (EJIL:Talk! 2 July 2010), https://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/, last accessed 10 May 2020.

Reisinger-Coracini A, 'The Kampala Amendments on the Crime of Aggression Before Activation' (OpinioJuris, 29 September 2017 and 2 October 2017) http://opiniojuris.org/2017/09/29/the-kampala-amendments-on-the-crime-of-aggression-before-activation-evaluating-the-legal-freamework-of-a-political-compromise/ accessed 19 October 2019.

Stuerchler N, 'The Activation of the Crime of Aggression in Perspective', (EJIL:Talk! 26 January 2018), https://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/, accessed 20 October 2019.

Trahan J, 'One Step Forward for International Criminal Law; One Step Backwards for Jurisdiction', (OpinioJuris, 16 December 2017), http://opiniojuris.org/2017/12-16/one-step-forward-for-international-criminal-law-one-step-backwards-for-jurisdiction-the-perspective-of-someone-present-at-the-un-during-negotiations/ accessed 7 January 2018.

Trahan J, 'Activation of the International Criminal Court's Jurisdiction over the Crime of Aggression and Challenges ahead' (OpinioJuris, 18 July 2018), https://opiniojuris.org/2018/07/18/33604, accessed 6 August 2018.

Triscone J, 'Universal Jurisdiction, the only hope for prosecuting international crimes committed in Syria', 6 September 2021, Trial International, available at https://trialinternational.org/latest-post/universal-jurisdiction-the-only -hope-for-prosecuting-international-crimes-committed-in-syria/, accessed 8th September 2021.

Reports

Amnesty International, Universal Jurisdiction: *A Preliminary Survey of Legislation Around the World*, 2012 update, available at www.amnesty.org/en/library/info/IOR53/019/2012., accessed 15th November 2020.

Bensouda F, 'Prosecutor's Report on Preliminary Examination Activities 2020', 14 December 2020, available at https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf, accessed 5th September 2021.

Chilcot J, *The Report of the Iraq Inquiry*, Executive Summary, 128-135, http://www.iraqinquiry.org.uk/media/247921/the-report-of-the-iraq-inquiry_executive -summary.pdf, accessed 11 August 2020.

Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (1919-1920), Report of 29 March 1919.

House of Commons, *Disinformation and 'fake news': Interim Report: Government Response to the Committee's Fifth Report of Session 2017-19*¸ (HC 363), published 23 October 2018, available at https://www.publications.parliament.uk/pa/cm201719/cmselect/cmcumeds/1630/163002.html, accessed 30 October 2020.

Report of the International Commission on Intervention and State Sovereignty (ICISS), 'The Responsibility to Protect' (2001).

The Kosovo Report - Conflict - International Response - Lessons Learned, (OUP 2000).

Lie T, UN Secretary-General's Report on the Nuremberg Trials (1949) UN Doc. A/CN.4/5, UN Sales No. 1949 V.7.

Paul-Boncour J, *Report of Commission III, Enforcement Arrangements on Chapter VIII Section B*, at the United Nations Conference on International Organization, Security Council, Committee 3, Doc. 881 III/3/46, 10th June, 1945

Schnabel A and Thakur R (eds), *The Kosovo Report*, Peace and Governance Programme, Kosovo and the Challenge of Humanitarian Intervention, (2000) available at http://archive.unu.edu/p&g/kosovo_full.htm, accessed 12 August 2020.

Other Sources

Annan K, 'Address by Kofi Annan' (Kampala, Uganda, 31 May 2010), https://www.kofiannanfoundation.org/speeches/kofi-annan-addresses-the-first-review-conference-of-the-assembly-of-states-parties-to-the-rome-statute-of-the-international-criminal-court/, accessed 12 April 2018.

Background on Security Council Reform – Global Policy Forum, http://globalpolicy.org/security-council/security-council-reform.html, accessed 20 January 2021.

Bassiouni M C, 'Draft Code of Offenses Against the Peace and Security of Mankind', *Proceedings of the Annual Meeting (*ASIL*),* 80 (9-12 April 1986) (OUP 1986) 120.

Center for UN Reform, 'Security Council Update 2015', https://centerforunreform.org/2015/01/12/security-council-reform-update-2015-similar-scenarios-same-positions-new-outcomes/, accessed 21 January 2021.

Charbonneau B, An Interview: 'The Military Intervention in Mali and Beyond', 28 March 2019, http://www.oxfordresearchgroup.org.uk/blog/the-french-intervention-in-mali-an-interview-with-bruno-charbonneau, accessed 20 August 2020.

Coalition for the ICC, 'Palestine', https://www.coalitionfortheicc.org/country/palestine, accessed 12 July 2020.

Coalition for the ICC, 'Historic activation of the Crime of Aggression', https://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression, accessed 12 July 2020.

Council on Foreign Relations, Timeline of the Iraq War, http://www.cfr.org/timeline/iraq-war, accessed 20th January 2020.

Status of ratification and implementation, Crime of Aggression Info, https://www.crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/, accessed 20th January 2021.

Federal Bureau of Investigation, Russian Interference in 2016 US elections, http://www.fbi.gov/wanted/cyber/russian-interference-in-2016-u-s-elections, accessed 30 October 2020.

Gberie L, 'The Special Court for Sierra Leone rests - for good', (April 2014) Africa Renewal, available at https://www.un.org/africarenewal/magazine/april-2014/special-court-sierra-leone-rest---good, accessed 3rd September 2021.

G4 Ministerial Joint Press Statement, 23 September 2020, German Federal Foreign Office, http://www.mofa.go.jp/files/100095828.pdf, accessed 21 January 2021.

Geneva Internet Platform Digital Watch Observatory for Internet Governance and Digital Policy, 'UN GGE and OEWG', http://www.dig.watch/processes/un-gge, accessed 20 January 2021.

German Federal Foreign Office, 22nd September 2020, 'Reform of the United Nations Security Council', German Federal Foreign Office, http://www.auswaertiges-amt.de/en/aussenpolitik/internationale-organisationen/vereintennationen/reformsr/231604, accessed 21 January 2021.

Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, 'The Council of Advisers on the Application of the Rome Statute to Cyberwarfare – Project Background and Goals', 29 October 2019, http://crimeofaggression.info/the-campaign/the-council-of-advisers-on-the-application-of-the-rome-statute-to-cyberwarfare/, accessed 30 October 2020.

International Justice Resource Center, *Universal Jurisdiction*, available at https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/, accessed 20th November 2020.

Jackson R, United States Representative to the International Conference on Military Trials, 'Opening Statement before the International Military Tribunal', 21 November 1945, HMSO, (London 1945).

Ki-moon B, 'An Age of Accountability', Address to the Review Conference on the International Criminal Court, Kampala, 31 May, 2010, https://www.un.org/africarenewal/web-features/secretary-general's-"-age-accountability"-address-icc-review-conference, accessed 12 April 2018.

Koh H, Legal Adviser for the US Department of State at Kampala, Statement on behalf of the United States, June 4, 2010, available at https://2009-2017.state.gov/s/l/releases/remarks/142665.htm.

Litvinoff M, Union of Soviet Socialist Republics, 'Definition of "Aggressor": Draft Declaration', Doc. Conf D/C.G.38, *Monthly Summary of the League of Nations*, XIII: 2 (1933), Annex.

National Security Strategy and Strategic Defence and Security Review 2015, United Kingdom, (23 November 2015), http://www.gov.uk/government/publications/national-security-strategy-and-strategic-defence-and-security-review-2015-annual-report-2016, accessed 30th October 2020.

National Security Strategy of the US in 2019, http://www.dni.gov/files/ODN/documents/National_Intelligence_Strategy_2019.pdf, accessed 30 October 2020.

Pace W, '21 Member States Launch New Initiative to Improve the Working Methods of the Security Council' (21 May 2013), available at http://www.centerforunreform.org/?q=node/541, accessed 21 January 2021.

Paulet V, 'The ICC & universal jurisdiction: Two ways, one fight', 23 May 2017, https://www.coalitionfortheicc.org/news/20170519/icc-universal-jurisdiction-two-ways-one-fight, accessed 12 December 2020.

Stevenson D, 'Europe before 1914', British Library archives, https://www.bl.uk, accessed 4th March 2020.

Trial International, Make Way for Justice #3, Universal Jurisdiction Annual Review 2017, https://trialinternational.org/wp-content/uploads/2017/03/UJAR-MEP_A4_012.pdf, accessed 23 January 2021.

Trial International, Terrorism and international Crimes: Prosecuting Atrocities for what they are, Universal Jurisdiction Annual Review 2020, https://trialinternational.org/latest-post/universal-jurisdiction-annual-review-2020-atrocitites-must-be-prosecuted-soundly-and-rigorously/ accessed 23 January 2021.

United Nations Foundation, 'Five Global Issues to Watch in 2021', available at http://www.unfoundation.org/blog/post/five-global-issues-to-watch-in-2021/, accessed 5th February 2021.

Weisbord N, 'Activation of the Crime of Aggression', Presentation before the UN General Assembly, 2 June 2017, available at http://sls.sbg.ac.at/data/Weisbord.pdf, accessed 20 October 2019.

News articles

BBC News, 'UK combat operations end in Iraq', 30 April 2009, http://news.bbc.co.uk/1/hi/8026136.stm, accessed 14 December 2020.

New York Times (20th January 2012), J. Goldsmith, 'The Shadow of Nuremberg', http://www.nytimes.com/2012/01/22/books/review/justice-and-the-enemy-nuremberg-9-11-and-the-trial-of-khalid-sheikh-mohammed-by-william-shawcross-book-review.html, accessed 15 October 2020.

BBC News, 'African Union backs mass withdrawal from ICC', 1 February 2017, http://www.bbc.com/news/world-africa-38826073, accessed 18 November 2020.

BBC News, 'Syria Torture: German court convicts ex-intelligence officer), 24 February 2021, http://www.bbc.co.uk/news/world-europe-56160486, accessed 27 February 2021.

Packham C, 'Exclusive: Australia concluded China was behind hack on parliament', September 16, 2019, available at http://www.reuters.com/article/us-australia-china-cyber-exclusive-idUSKBN1W00VF, accessed 30 October 2020.

Pomfret J, 'Opinion: Despite election result, China won't give up on Taiwan', Washington Post, 13 January, 2020,

https://www.washingtonpost.com/opinions/2020/01/13/despite-election-result-china-wont-give-up-taiwan/, accessed 30 October 2020.

Reuters, 'Timeline: Invasion, surge, withdrawal; US forces in Iraq', https://www.uk.reuters.com/article/iraq-usa-pullout-idINDEE7BH05520111218, December 18th 2011, accessed 14 December 2020.

Wilmshurst E, 'Wilmshurst resignation letter' (18 March 2003), BBC News, 24 March 2005, http://new.bbc.co.uk/1/hi/4377605.stm, accessed 11 August 2020.