

CHALLENGES FACING THE PROSECUTION OF THE CRIME OF AGGRESSION

by

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Summary

This research is on the challenges that the state parties faced in including the crime of aggression under the International Criminal Court's (ICC) jurisdiction as well as the future challenges that might arise in prosecuting the crime of aggression. The crime of aggression, formerly known as crimes against peace, is the use of unlawful force by a state against another state. Its prohibition started before World War One but successful prosecutions for this crime took place after World War Two when Nazi and Japanese leaders were prosecuted by the Allied Powers.

The research will analyse some important international criminal law principles that will affect the laws prohibiting aggression since it is an international crime that has to be bound by principles already adopted and received by the international community. The biggest obstacle that the state parties had to overcome was an accepted definition of the crime for purposes of the Rome Statute. A definition was adopted in 2010 at the Kampala Review Conference but at least 30 states parties need to ratify these adoptions that will be reviewed again in 2017. The ICC will only have jurisdiction over this crime if enough ratifications are obtained from the state parties.

Other challenges include: personal jurisdiction (who the ICC may prosecute for this crime); the leadership nature of this crime; the exclusion of non-state actors from the definition of this crime; immunity of state leaders that will further complicate their prosecution if responsible for committing aggression; the inclusion of humanitarian intervention as aggression; and the application of the principle of complementarity with regard to the crime of aggression. States, particularly the United States of America, have objected to the inclusion of this crime in the Rome Statute for fear that its nationals (military and political leaders) will be held criminally liable for making political decisions to use military force against another state.

Current international affairs will be used to demonstrate why this crime has been difficult to prosecute compared to the other international crimes. After raising the challenges that the ICC might face I am going to offer possible solutions and recommendations that the ICC should first implement to be able to have more successful prosecutions of the crime of aggression.

List of Abbreviations

ICC	International Criminal Court
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East at Tokyo
SWGCA	Special Working Group on the Crime of Aggression
UN	United Nations
GA	General Assembly
ICJ	International Court of Justice
WWI	First World War
WWII	Second World War
US	United States
ILC	International Law Commission
UK	United Kingdom
NATO	North Atlantic Treaty Organization

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Chapter 1:

Introduction

1.1 Background to research topic

Initially the main reason I chose this topic was to find out why many African states are of the opinion that the International Criminal Court (ICC) is an extension of Western imperialism; and also the legal status of the former American President George W Bush and former British Prime Minister Tony Blair's invasion of Iraq. There has been great uninformed controversy about Bush (the United States not a party to the Rome Statute) and Blair (the United Kingdom a signatory to the Rome Statute) not being indicted and prosecuted for crimes of aggression during the invasion in Iraq. Meanwhile African heads of state including Sudan's Omar Hassan Ahmed al-Bashir and the late Libya's Muammar Gaddafi have been indicted for war crimes and crimes against humanity. The reason Blair will go free on charges for crimes of aggression is because the ICC did not at the time of the invasion have jurisdiction over the crime of aggression. Even if the crime of aggression was to be included under the ICC's jurisdiction, the ICC's jurisdiction does not apply retrospectively, so Blair will not be prosecuted for the crime of aggression by the ICC for the past Iraq invasion.

I am not going to take sides on these arguments of 'imperialism'; it is however important to mention a statement made by an official from a western country that does raise a red flag as to how far some states are willing to be subjected to the ICC's mandate. The late United Kingdom (UK) foreign minister, Robin Cook, once famously said: 'This is not a court set up to bring to book prime ministers of the United Kingdom or presidents of the United States.'¹

After watching a movie called *The Ghost Writer* (Summit Entertainment, USA), a political thriller based on Tony Blair's alliance with the CIA in supporting the controversial decisions of the American government, I realised that had the crime of aggression been included under the ICC's jurisdiction and an arrest warrant issued against Blair it would have been

¹ ICC Watch Press Release: 4 February 2010, 'Why won't the ICC move against Tony Blair on war crimes?' www.iccwatch.org (accessed on 21 June 2011).

probably impossible to get him the ICC.² The same difficulty the ICC is faced with in prosecuting the African leaders who have been indicted.

International politics tend to be put over the law by people who are mostly not scholars or international lawyers, many of the international newspaper articles I read did not mention the jurisdictional requirements of the ICC and process which led to the indictment of the 'African leaders'. Newspapers often mislead people on legal standings of situations as many of them are written by journalists who will stand up for their countries when faced with international politics and give one side to the story. Despite the remarks about the ICC that have been made, states that have ratified the Rome Statute have obligations to assist the ICC in the prosecution of those crimes mentioned in Article 5.

1.2 Background on the crime of aggression

The crime of aggression developed as a result of change in the international community's outlook towards war, this can be seen in the shift from *jus ad bellum* to *jus contra bellum* which resulted in the right to war being limited by laws prohibiting war.³ This has not always been the case. Before the outbreak of the First World War (WWI), the right to start a war was seen as a sovereign state right that was not subject to legal restraints as it is today.⁴

Various international instruments were created and entered into by states to put an end to illegal wars. The heart of the development in the laws prohibiting aggression is seen after the Second World War (WWII) where German and Japanese war criminals were prosecuted for crimes against peace committed during the war. The development in defining aggression was not without criticism. The International Military tribunal at Nuremberg (IMT) was criticised for being more political than juridical and that the judges were elected by the four

² This movie is an allusion to Tony Blair, the war in Iraq as well as the cosy relationship between Blair and the United States. All the characters in the movie represent factual people who were in Blair's 'circle' including the people that worked for him. The movie did not highlight the commission of aggression by the Prime Minister, but was centred around the illegal seizure of suspected terrorist by the Prime minister and their torturing by the CIA - a clear violation of human rights standards. The Prime Minister faced possible prosecutions by the ICC for war crimes unless he stayed in the United States or another country that is not a party to the ICC's jurisdiction. His life was put in danger when protesters flocked to his resident angered by the war crimes he had allegedly committed. Later in the movie he was assassinated by an angry protestor.

³ Kemp, G 'Individual criminal liability for the international crime of aggression' PhD Dissertation, Stellenbosch University, 2008, 64.

⁴ Kemp (n 3 above) 63.

Allies (United States, France, Great Britain, and the Soviet Union) and were not representative of the entire international community.⁵ This was followed by the General Assembly Resolution 3314 of 1974 which defined aggression. The fairness of the IMT and the International Military Tribunal for the Far East in Tokyo (IMTFE) is questionable mainly because individuals were prosecuted for a crime that was not defined at that time and the prosecutions were based on the judges' discretion on what it considered to be aggressive; and secondly, because those who led the proceedings were from the 'opposing side' during WWII, this alone gives enough reason to conclude that the trials were based on political motives.⁶

At the creation of the ICC the crime of aggression was included as a serious crime in *Article 5(1)(d) of the Rome Statute for the ICC* but the exercise of jurisdiction was delayed until an amendment was adopted in accordance with Articles 121 and 123. These amendments were adopted at the Kampala Review Conference in 2010. Article 8 *bis* of RC/Res. 6 adopted at the 2010 Review Conference defines the crime of aggression as the planning, preparation, initiation or the execution by someone in a leadership position of an act of aggression.⁷ These outcomes must be reconsidered for 7 years (from 2010 to 2017) and if accepted by 30 state parties the ICC will exercise jurisdiction over this crime.

Despite these criticisms, the 'crime against the peace' (or aggression) has been accepted in international law as intolerable. The prohibition of aggression has attained the status of a peremptory norm 'against which no abrogation is permitted', the seriousness of this crime is what has pushed for its development and inclusion in legal instruments as a crime that is punishable.⁸

⁵ M O'Donovan 'Criminalizing War: Towards a justifiable crime of aggression' (2007) 30 *Boston College International & Comparative Law Review* 507, 512.

⁶ O'Donovan (n 5 above) 534.

⁷ Coalition for the ICC: 'Delivering on the promise of a fair, effective and independent Court, the crime of aggression' <http://www.iccnw.org/?mod=aggression> (accessed on 27 June 2011); definitions in RC/Res. 6, Annex I, para 2, adopted by consensus at the 13th plenary meeting, on 11 June 2010, available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf [hereafter RC/Res.6] (accessed on 16 April 2012).

⁸ Article 53 of the Vienna Convention on the Law of Treaties of 1969, adopted in Vienna on 23 May 1969, entered into force 27 January 1980, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_19696.pdf (accessed on 05 November 2012).

1.3 The United Nations and its involvement in maintaining international peace and security

The United Nations (UN) was established in 1945 with the main purpose of maintaining international peace and security. There are currently 193 member states in the UN. The Security Council is the executive body of the UN tasked with the primary responsibility of taking 'effective collective measures for the prevention and removal of threats to the peace'; the five permanent members are: France, Russia, China, the United Kingdom, and the United States (US).⁹ Its Chapter VII powers derived from the UN Charter allow it to take legally binding decisions which must be adhered to by all member states. This also includes the power to determine when an act of aggression has been committed and what measures should be taken in response to such aggression.¹⁰ A unique feature of the Security Council that the other UN organs do not have is the power of its members to veto a decision taken by the Security Council. This power to act against, for example, a resolution being taken has at times been misused by states to act in self-interest. It should be realized that it is not only Western countries that act in self-interest when having to take decisions on the Security Council. Russia and China vetoed a draft UN Security Council resolution backing Arab's plan to force Syrian President Bashar al-Assad to hand his power to a deputy for democratic transition and to stop the bloodshed in Syria. The alleged reason behind the veto was to protect their long-standing arms sales relationship with Syria.

The ICC is in relationship with the UN through an agreement approved by state parties. The Relationship Agreement between the ICC and UN 'regulates the working relationship between these two organizations, and establishes the legal foundation for cooperation within their respective mandates.'¹¹ Despite the provisions of this Agreement, the obligations under the UN Charter still prevail over the obligations of state parties under the Rome Statute. Article 103 of the UN Charter provides that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

⁹ J Dugard *International law: A South African perspective 4th edition* (2011) 474, 479; Article 1(1) of the UN Charter of 1945.

¹⁰ Dugard (n 9 above) 482.

¹¹ 'Relationship Agreement between the ICC and United Nations', Coalition for the International Criminal Court, Questions and Answers, last updated 12 November 2004, http://www.iccnw.org/documents/CICCFSS-UNRelationshipAgmt_12Nov04.pdf (accessed on 31 October 2012), The Relationship Agreement between the ICC and UN entered into force on 4 October 2004.

This provision creates possibilities of other agreements between members of the UN being purposeless in matters where the UN, specifically the Security Council, has decided to be involved in the matter. With regards to the crime of aggression, the involvement of the Security Council could cause more delays in the ICC's prosecutions as well as bring in political elements that further complicate proceedings. Marja Lehto explained the essence of the politicization argument as a

concern about a confusion of mandates; a concern about judicial role and integrity of the ICC; about an encroachment by the Court [ICC] on the responsibilities of the Security Council- and finally about a necessary distinction between the legal and political spheres.¹²

The role that the UN has played in the development of criminalizing the crime of aggression will be discussed under the chapters to follow.

1.4 Problem statement

The objective of this research is to pose the challenges that the ICC could face in prosecuting the crime of aggression in the future. Prior to the adoption of the definition for the crime of aggression there was widespread debate, or rather fear, about the role that the UN Security Council would play in triggering the ICC's jurisdiction over the crime. Article 15*ter* (4) of RC/Res. 6 states that, 'a determination of an act of aggression by an organ outside the Court [ICC] shall be without prejudice to the Court's [ICC] own findings made under this Statute'. In theory the determination of aggression by the Security Council does not limit the ICC in making its own findings; however in practice this will still have to be proved after 2017 should the ICC ever be able to exercise jurisdiction over this crime.

Other challenges that will be discussed throughout this research include the issue of immunity; the requirement of 'a person in a leadership position'; the independence of the ICC from the Security Council; attributing individual liability for acts committed by a state; and the complexities of military intervention. State parties failed to take into account the increased role of non-state actors while drafting the list of persons who may be prosecuted for crimes of aggression this could generate endless political debates which could prevent efficient results.¹³

¹² J Verbitsky 'What should be the relationship between the International Criminal Court and the United Nations Security Council in the crime of aggression?' (2008) 4 *Uluslararası Hukuk ve Politika* 141, 149.

¹³ 'International Criminal Law: The globalization of crime and the criminalization of international law', presented by Prof Frederic Megret at an international law seminar, 2010,

With the AU threatening to withdraw from the Rome Statute en masse, one could say that the extension of the ICC's jurisdiction over this crime could lead to further division of the international community and state parties not cooperating with the ICC as they should.

As will be shown in the next chapters, prosecuting the crime of aggression brings about many challenges and should the ICC have jurisdiction to prosecute individuals for committing this crime in the future, more harm than good could be done if the Rome Statute is not adequately implemented. State parties will opt out from the ICC's jurisdiction for this crime and this will be a crime that is on paper but having no judicial effect. I am not suggesting that the crime of aggression should never be included under the ICC's jurisdiction. Like most people I think that it is premature for the ICC to take up such a great responsibility while it has still not 'perfected' prosecuting heads of states for the other crimes which are not so political in nature. The ICC should first eliminate these possible challenges before attempting to exercise jurisdiction over this crime. To exclude this crime from the ICC's jurisdiction forever will be undoing the developments achieved by the IMT and IMTFE.

1.5 Research questions

The main questions raised in this research are:

- What are the possible challenges that the ICC might face when prosecuting the crime of aggression?
- What role will the Security Council play in the ICC's prosecution of the crime and could that role lead to the politicization of the crime?
- What difficulties will the rule of immunity impose on the ICC in prosecuting the crime?

Other questions include:

- What implications could the 'opting out' and 'opting in' provisions have on the ICC's consistent exercise of jurisdiction over a state party?
- How can changes in state governance lead to the 'opting in' and 'opting out' provisions being abused by states that have accepted the ICC's jurisdiction over the crime?

<http://sites.google.com/site/internationalcriminallaw/Home/7-aggression-and-war-crimes> (accessed on 27 July 2011) [hereafter Megret].

- How will state official's decisions to take military intervention made in a political context be affected by the definition of the crime?
- What attitude do most of the state parties have towards the ICC having jurisdiction over the crime of aggression?
- How have states influenced the development of the crime of aggression?
- Can non-state actors be prosecuted for the crime of aggression?

1.6 Research methodology

I will only use library research including conventions, case law, and journal articles by legal scholars. An analytical and comparative approach will be followed, as this will help me get a general understanding of states towards the crime of aggression. I will also use international news articles to get current developments on the above matters. In order to reach valid legal conclusions and avoid too much political arguments, I will apply international law to these news articles.

1.7 Limitations of the research

This research will only be based on library research, and no interviews or field research will be done. I will not look at the views of all state parties due to time restraints although this could have helped me to better assess other issues that all the different state parties will consider in deciding whether or not to ratify the amendments adopted in Kampala. There is still about five years until the next Review Conference, so this research will not cover the challenges that will arise over the upcoming years as international politics continue to evolve.

1.8 Literature overview

1.8.1 Statutes, conventions, resolutions and case law

The *Rome Statute of the International Criminal Court* is the leading source and reference will be made to relevant provisions of the Statute. I will analyse the relevant provisions by applying them to current issues of international law and politics as asserted by state parties.

The *Charter of the United Nations* (UN Charter) is an important legal instrument which has an influence on the Rome Statute, as well as the functioning of the ICC as will be seen later. Provisions of the UN Charter having direct influence on the powers of the Security Council's relationship with the ICC will be dealt with.

ICC-ASP/RC/Res.6 (RC/Res. 6) that was adopted at the Kampala Review Conference in 2010 contains Amendments to the Rome Statute on the crime of aggression. This will be used to apply the current legal status on the crime of aggression to current affairs. I will also discuss various concerns that were raised about the definition adopted in Kampala.

I will use case law, mostly international, to demonstrate how principles of aggression have been applied in the past by other tribunals. The judgments of the IMT and IMTFE were the first and last time in international law that individuals were prosecuted for crimes against peace (presently, the crime of aggression). These important judgments will be referred to throughout the research as they were the milestone in the criminalization and prosecution of aggression.

1.8.2 Work by scholars

This includes commentaries on various conventions, journal articles and books. The approach that I will follow in interpreting these works is the traditional utilitarian (the idea that the morally correct course of action is the one that produces benefit for the greatest number of people) and retributivist rationales (retributive justice) as raised by Michael O'Donovan in order to suggest what specific approaches are most consistent with the goals and purposes of the law.¹⁴ He believes that the development of the crime of aggression is significant in expressing humanity's rejection of war as statecraft, the affirmation of shared international values of punishing criminals who unlawfully disturb the peace of others through violence and finally that the crime of aggression should be moved from merely being a subject of academic debate to being a fully legitimate crime.¹⁵

I will also use journal articles and books containing opposing opinions to better describe the challenges that the ICC might face in prosecuting the crime of aggression. It is important to mention some of these opposing opinions because these are issues that were raised by some state delegates at both the Rome and Kampala Review Conferences.

¹⁴ O'Donovan (n 5 above) 510.

¹⁵ O'Donovan (n 5 above) 509.

1.8.3 Reports and factsheets

Reports and factsheets published by both the *Coalition for the International Criminal Court* and the Special Working Group on the Crime of Aggression (SWGCA) provide updates on the development of the crime of aggression and the ICC.

1.8.4 Other

I will make use of various international newspaper articles to get the different opinions that the state parties and non-party states have about including the crime of aggression under the ICC's jurisdiction.

1.9 Chapter outline

- Chapter one - Introduction

This chapter gives a general background on the topic and the crime of aggression. It introduces concepts and institutions, playing a role in the prosecution of this crime, which will be discussed in this research.

- Chapter two - The historical development of the crime of aggression

This chapter will be the in depth historical development of the notion of the crime of aggression (the then acts against peace) that started as early as in the 1920s. It will also mention the challenges that the international community experienced when placing this crime in treaties and accepting the prohibition of these acts as international customary law. It will discuss relevant portions from the judgments of the IMT and IMTFE pertaining to the research topic. Important principles from these Tribunals which still have an influence on the development of the crime of aggression under the Rome Statute will be raised. This chapter will be an introductory link to the challenges under chapter three.

- Chapter three - The crime of aggression under the Rome Statute of the International Criminal Court

This is the main chapter that will highlight the possible challenges that the ICC might experience in prosecuting the crime of aggression should it be included under its jurisdiction. Most of the research questions will be answered under this chapter.

- Chapter four - The crime of aggression in national courts

It has been suggested that:

For both legal and policy reasons, states other than the nationality state - including victim states, other implicated states, and third party states exercising extraordinary bases of jurisdiction - should in general refrain from such prosecutions so that cases involving the crime of aggression proceed almost exclusively before the ICC.¹⁶

This chapter will explore the issues of prosecuting persons with immunity before the ICC and how this could prove to be even more problematic when involving prosecuting crimes of aggression. After WWII there were subsequent prosecutions for crimes against peace. These proceedings were conducted under Control Council Laws. This chapter will discuss those proceedings as a background to prosecution of international crimes in national courts in the past linked to current challenges that arise during the prosecution of leaders, for international crimes, in national courts.

- Chapter five - Recommendations and conclusion

The final chapter will put forward possible solutions and recommendations in avoiding certain downfalls that the ICC may experience, as well as the current problems that need to be fixed before the ICC can successfully prosecute the crime of aggression.

¹⁶ B Van Schaack 'Par in parem imperium non habet: Complementarity and the crime of aggression' (2012) 10 *Journal of International Criminal Justice* 133,136.

Chapter 2

The historical development of the crime of aggression

2.1 Introduction

The early notion of punishing 'sovereigns for taking up arms without a lawful cause' was expressed by Swiss jurist Emmerich de Vattel in 1758 in his *Law of Nations*, when he stated that such action is '[...] chargeable with all evils against his people [...] finally, he is guilty of a crime against mankind in general, whose peace he disturbs.'¹⁷ The intolerance towards aggressive acts committed by states started long before any legal instrument prohibiting aggressive acts was created; it was only in the 1920's following WWI that legal instruments were created expressing that waging aggressive war was an international crime.¹⁸

Justice Robert Jackson, who represented the US during the prosecution of the Nazi war criminals, played an influential part in criminalizing aggression.¹⁹ It is interesting to note that Jackson, firstly strongly advocated for the creation of an international tribunal, and secondly successfully argued for the inclusion of the crime of 'conspiracy to wage aggressive war' in the Nuremberg Charter; both principles which the current government of the US has strongly shown disinterest to be governed by.²⁰

2.2 The early stages in the development of the prohibition against waging aggressive wars

¹⁷ GM Lentner 'The role of the Security Council in connection with the crime of aggression', seminar 030238/ winter semester 2010/11 presented by Prof August Reinisch with Sahib Singh, 6 http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/letner.pdf (accessed 27 July 2011) [hereafter Lentner].

¹⁸ Lentner (n 17 above) 7.

¹⁹ HT King Jr, 'Nuremberg and crimes against peace' (2009) 41 *Case Western Reserve Journal of International Law* 273, 274; Justice Robert Jackson was the chief prosecutor at Nuremberg appointed by President Truman in 1945 to serve as US chief counsel for the prosecution of the Nazi criminals.

²⁰ King Jr, (n 19 above) 275.

Prior to 1914 states had an unlimited right to resort to war which was often asserted as a state's sovereign right.²¹ It was only after WWI that states became more serious in banning war as a means to enforce state policy by establishing the League of Nations which encouraged states to work together in achieving international peace.²² The Treaty of Versailles signed in 1919 after the defeat of Germany at the end of WWI considered measures of trying Kaiser Wilhelm II of Hohenzollern for supposedly starting the war.²³ Although the Allied Tribunal failed to prosecute him, the principle of punishing crimes against peace and the ability of international tribunals to exercise jurisdiction over these crimes was clearly established.²⁴ By 1928, with the conclusion of the Kellogg-Briand Pact, 'the contracting parties declared that war would no longer be used as an instrument of national policy or to solve international disputes.'²⁵ After WWII, the affirmation of the jurisprudential legacy of Nuremberg was not enough and a clear definition of aggression was still needed.²⁶ The International Law Commission (ILC) started a comprehensive project of preserving the legacy of Nuremberg and formulated Draft Codes of Crimes against the Peace and Security of Mankind prepared in 1954, 1991, and 1996.²⁷

The League of Nations, an international organisation created after WWI, was established to achieve the cooperation of states to work together in maintaining international peace. The Covenant of the League of Nations took effect in 1920 on the day that Germany deposited its instruments ratifying the Treaty of Versailles; Article 10 provided the unlawfulness of aggression.²⁸ There was hypocrisy in the League of Nations, a similar problem found in the UN presently, because the very states that forbid certain acts were themselves guilty of committing them; for example, the Soviet Union was expelled from the League of Nations because of its invasion of Finland in 1939.²⁹ The Assembly of the League of Nations worked towards prohibiting unlawful use of force as a tool of foreign policy, but actually did little to further the restrictions on the use of force.³⁰ A 'much more significant event' in prohibiting

²¹ Kemp (n 3 above) 63.

²² Kemp (n 3 above) 37.

²³ O'Donovan (n 5 above) 510.

²⁴ O'Donovan (n 5 above) 510; Kaiser found refuge in the Netherlands which refused to extradite him to be tried.

²⁵ Kemp (n 3 above) 64.

²⁶ Kemp (n 3 above) 142.

²⁷ Kemp (n 3 above) 143.

²⁸ Kemp (n 3 above) 37.

²⁹ Kemp (n 3 above) 120.

³⁰ International Criminal Law Manual (2010) 205.

the use of unlawful force was the signing of the Kellogg-Briand Pact in 1928.³¹ The principles in the Pact are still significant today and are found in Article 2(4) of the UN Charter which embodied the prohibition of the use (or threat) of force, but also provides exceptions to when the use of force will not be considered unlawful.³² The UN was created in 1945 after WWII and described by Inis Claude as 'a revised version of the League'.³³ The purpose of the League of Nations and the UN were essentially the same, they were both created for collective security. However, the League of Nations was ineffective: firstly, because there was no central organ that decided when resort to war was unlawful and which enforcement actions had to be taken; and secondly, because the members were not bound by the recommendations made by the Council of the League.³⁴ Both these failures of the League of Nations were remedied in the UN by the creation of various principle organs within the organisation that can make recommendations pertaining to collective security particularly the Security Council that can make recommendations binding on all members.³⁵

Prohibition against the use of force against another state contained in the UN Charter sought to prevent aggrieved states taking the law into their hands or states aggressively acting against other states by providing that states may only use force against another state in self-defence or by authorisation of the UN.³⁶ The permanent members of the Security Council are the ones guilty of acting against this prohibition while at the same time taking actions to uphold it. The consistency in the application of international criminal law is tainted and almost always in the favour of the major power players. A provision in the UN Charter that has not yet been exercised is Article 6 of the UN Charter which states that:

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organisation by the General Assembly upon recommendation of the Security Council.

What does 'persistently' mean? How often does a member state have to violate the principles in the UN Charter before being expelled? Will the Security Council ever

³¹ International Criminal Law Manual (n 30 above) 205.

³² These exceptions are contained in: Article 39 which provides for the use of force in maintaining international peace and security on authorization from the Security Council and Article 51 permitting the use of force when acting in self-defence; International Criminal Law Manual (n 30 above) 206.

³³ Kemp (n 3 above) 39.

³⁴ Kemp (n 3 above) 39.

³⁵ Article 7 of the UN Charter.

³⁶ Dugard (n 9 above) 3.

recommend that a member be expelled for using force unlawfully (force amounting to aggression) especially when that member is one of its own? The consistent fairness and effectiveness of the UN Charter and purpose of the UN itself will never be realised until the bigger states start applying the same measures on each other that they enforce against the smaller states or states that are not permanent members on the Security Council. Similarly, prosecuting the crime of aggression will not be achieved if the big powers, who are mostly the ones guilty of using force unlawfully, are not dealt with.

The UN was tasked with codifying the Nuremberg principles into a universally binding Code of Crimes Against the Peace and Security of Mankind as the creation of a definition for aggression became even more necessary as there could be no acceptable code without an agreed definition of aggression.³⁷ The UN finally reached a definition in 1974 but no provision was made to hold those responsible accountable.³⁸ Both the Draft Codes by the ILC and the definition in the General Assembly Resolution of 1974 were used in attempting to define aggression under the Rome Statute.

2.3 Early prosecutions of crimes against peace (the present crime of aggression)

Initially no international tribunals were created to prosecute war criminals although attempts were made which were ultimately unsuccessful.³⁹ Early successful prosecutions for waging aggressive wars can be seen after WWII. In response to the horrific atrocities committed by the Nazis in Europe and the Japanese in Asia, the Allies organised for the first time in history, that major war criminals belonging to the Axis countries to be prosecuted before the International Military Tribunal at Nuremberg (IMT) and later the International Military Tribunal for the Far East at Tokyo (IMTFE).⁴⁰ The last time that individuals were prosecuted and punished for aggressively using force against another state was at the post-war trials of the Axis criminals.⁴¹ The development process of criminalizing aggression and punishing those

³⁷ BB Ferencz 'Getting aggressive about preventing aggression' (1999) 6 *The Brown Journal of World Affairs* 87, 88.

³⁸ Ferencz (n 37 above) 88; General Assembly Resolution 3314 of 1974.

³⁹ International Criminal Law Manual (n 30 above) 48.

⁴⁰ International Criminal Law Manual (n 30 above) 50.

⁴¹ KA Petty 'Sixty years in the making: The definition of aggression for the International Criminal Court' (2008) 31 *Hasting International and Comparative Law Review* 531, 531.

guilty started after WWI, even though not entirely successful, with the most progress achieved after WWII.

2.3.1 Prosecutions after the First World War

As was mentioned earlier, the principle of prosecuting individuals for waging aggressive war was introduced after WWI, although not successfully carried out. At the end of WWI, the Allies set up a Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties (Commission).⁴² This Commission was made up of representatives of the US, UK, France, Italy, Belgium, Greece, Poland, Romania, Serbia and Japan.⁴³ The Commission was tasked with investigating the responsibility of starting the war, violations of law of wars and determining the appropriate tribunal for conducting trials of those found to have been responsible for the initiation of the war.⁴⁴ The Commission found that the Central Powers were responsible, and recommended that the high officials should be tried in an Allied High Tribunal that should be set up with members from all the Allied Countries.⁴⁵ This suggestion was met with criticism by the US and Japan that disagreed with there being international law that included aggression as a crime.⁴⁶

Article 228 of the Treaty of Versailles concluded at the end of WWI (after the defeat of Germany), provided that the German Government recognised the right of the Allies and Associated Powers to bring before military tribunals persons accused of violating the laws and customs of war.⁴⁷ If they were found guilty, they were to be sentenced to punishments 'laid down by law'.⁴⁸ Article 227 of the Treaty providing for the arraignment of William II of Hohenzollern for 'a supreme offence against international morality and the sanctity of treaties' was a dead letter.⁴⁹ One commentator observed that 'apart from helping to lay the

⁴² R Cryer *Prosecuting international crimes: Selectivity and the international criminal law regime* (2005), 31.

⁴³ Cryer (n 42 above) 31.

⁴⁴ Cryer (n 42 above) 31.

⁴⁵ Cryer (n 42 above) 32.

⁴⁶ Cryer (n 42 above) 32.

⁴⁷ M Lippman 'Nuremberg: Forty five years later' (1991) 7 *Connecticut Journal of International Law* 1, 4.

⁴⁸ Lippman (n 47 above) 4.

⁴⁹ T Meron 'Reflections on the prosecution of war crimes by international tribunals' (2006) 100 *The American Journal of International Law* 551, 556.

legal foundations for international criminal justice in the future, the Allies' experiment in retributive justice following the First World War was a dismal failure.⁵⁰

2.3.2 Prosecutions after the Second World War

International Military Tribunal at Nuremberg (IMT)

At the end of WWII the governments of the four Allied Powers gathered at the London Conference to draft a Charter (Nuremberg Charter) establishing an International Military Tribunal (IMT) to prosecute the Axis Power's war criminal.⁵¹ This Conference proved to be limited to political evaluations of aggression restricted by rules and principles of international law which were available at the time.⁵² It appears that 'only one year before the London Conference three of the four had gone on record that aggressive war was not in itself a crime', the same doubt existed at the Conference, but this did not prevent the Allies from signing the crime into the Nuremberg Charter that was to govern the functioning of the IMT.⁵³ The Conference has been described as having been 'less than prepared to make final and binding decisions ... on what constituted aggression in international law and politics.'⁵⁴ It is unfortunate that avoiding binding decisions has become a familiar pattern in law-making in international law and it is not surprising that compromises were made at the London Conference because direct reference to the meaning of aggression was avoided.⁵⁵

Even with the vague outcomes of the Conference and no definition or conditions of aggression being reached, the Allies still successfully charged the Axis defendants at the Nuremberg trials, 12 of whom were convicted of crimes against peace.⁵⁶ Apart from the vagueness of the crime for which these individuals were prosecuted (and some convicted) the Nuremberg trial was 'in effect a "political act" rather than an exercise in law'; the procedure taken to choose the defendants was more political than self-evident.⁵⁷ This

⁵⁰ Meron (n 49 above) 559.

⁵¹ O'Donovan (n 5 above) 512.

⁵² N Nyiri *The United Nations' search for a definition of aggression* (1989) 45.

⁵³ Cryer (n 42 above) 242; International Criminal Law Manual (n 30 above) 50.

⁵⁴ Nyiri (n 52 above) 45.

⁵⁵ Nyiri (n 52 above) 52.

⁵⁶ Nyiri (n 52 above) 52.

⁵⁷ R Overy 'The Nuremberg trials: international law in the making' in P Sands (ed) *From Nuremberg to the Hague: The future of international criminal justice* (2003) 7.

arbitrary choice can be demonstrated by a remark made by Britain's attorney-general: 'The test should be: Do we want the man for making a success of our trial? If yes, we must have him'.⁵⁸ This statement not only shows the unfairness of the proceedings but also shows that the IMT could have been created as some 'revenge' tool that the Allies used against the Axis leaders.

The prosecutions for 'crimes against peace' at the IMT were criticized as being *ex post facto* criminality which violated the *nullum crimen sine lege* principle of legality.⁵⁹ In defence to these criticisms the IMT illustrated that aggressive war had been outlawed since 1920 by initially the Kellogg-Briand Pact and other subsequent resolutions, thus the retroactive criminal liability for aggression was justified.⁶⁰ Following this argument, the US and UK leaders guilty of invading Iraq should have also been prosecuted by the International Criminal Court. However, this 'improvising' attitude taken at Nuremberg should not serve as a general manner of developing international criminal law and procedure as this will create further complications in prosecuting international crimes.⁶¹ The IMT was criticised for being more political than juridical and that the judges were elected by the four Allies (US, France, Great Britain and the Soviet Union) and were not representative of the entire international community.⁶² The fact that the judgments were final and not subject to review could have given the Allies an opportunity to secretly continue the hostilities of the war in a 'civilised' manner masked as legitimate judicial proceedings.⁶³ The judges could further impose the death penalty as an appropriate punishment while actually acting in self-interest and revenge against the Axis leaders. Since the IMT was essentially an extension of the state apparatus of each of the Allies and not an independent international organisation; the judges, belonging to Allied Power, could politely and 'lawfully kill' the enemies that they failed to kill on the battle ground.⁶⁴

⁵⁸ R Overy 'The Nuremberg trials: international law in the making' in Sands (n 57 above) 8; this statement made at the second meeting of British War Crimes Executive in June 1945, to draw up a list of defendants.

⁵⁹ Petty (n 41 above) 534.

⁶⁰ Kemp (n 3 above) 123.

⁶¹ Kemp (n 3 above) 123.

⁶² O'Donovan (n 5 above) 512.

⁶³ International Criminal Law Manual (n 30 above) 51.

⁶⁴ International Criminal Law Manual (n 30 above) 53.

Despite the allegations of being founded on victor's justice and *ex post facto* criminality, the IMT has played a major role in establishing modern international criminal law which is still contained in the Rome Statute today.⁶⁵

International Military Tribunal for the Far East in Tokyo (IMTFE)

The four major Allies issued the Potsdam Declaration, in 1945, announcing their intention to prosecute Japanese leaders.⁶⁶ The Tokyo Charter providing the structure, jurisdiction, and the functioning of the International Military Tribunal for the Far East (IMTFE) was largely modelled on the Nuremberg Charter.⁶⁷ Those indicted were 28 Japanese leaders both civilian and military who were members of a 'criminal, militaristic clique' that controlled events within the Japanese government from 1 January 1928 until 2 September 1945.⁶⁸ Their policies 'were the cause of serious world troubles, aggressive wars, and great damage to the interest of peace-loving peoples, as well as to the interests of Japanese people themselves,' and 52 of the 55 counts in the indictment related to crimes against peace.⁶⁹ The IMTFE was not as influential as the IMT, the trials dragged on for so long that by the time a judgment was reached the wartime alliance had already fallen apart.⁷⁰

Article 5(a) of the Charter for the IMTFE provided for individual criminal responsibility for crimes against peace, namely:

The planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

The defendants, like at Nuremberg, argued that aggression was not a crime for which there was individual responsibility and that the trial violated the *nullum crimen sine lege* legality principle.⁷¹ The IMTFE supported the opinion adopted at the IMT and concluded that

⁶⁵ Cryer (n 42 above) 40.

⁶⁶ International Criminal Law Manual (n 30 above) 52.

⁶⁷ International Criminal Law Manual (n 30 above) 52.

⁶⁸ C Hosoya et al *The Tokyo war crimes trial: An international symposium* (1986) 7.

⁶⁹ Hosoya et al (n 68 above) 200.

⁷⁰ Hosoya et al (n 68 above) 7.

⁷¹ International Criminal Law Manual (n 30 above) 200.

'aggressive war was a crime at international law long prior to the date of the Declaration of Potsdam.'⁷²

Criticisms of the IMTFE go to the very heart of the legitimacy of the Tribunal as well as the procedural and material aspects of the judgment.⁷³ This is attributed to the fact that unlike the IMT, the IMTFE was established unilaterally by the American Supreme Commander of the Allied Powers in the Pacific, and its Charter was not drafted at an international conference but largely by American officials.⁷⁴ This left great opportunity for the US to be politically inclined and to act in revenge against the Japanese leaders for Japan's attack on Pearl Harbor in 1941. There has been a huge change in the US position regarding the inclusion of the crime against peace as a punishable crime in international law. Initially the American representatives on the 1919 Commission established after WWI opposed the prosecution of individuals for crimes against peace, arguing that it violated *nullum crimen sine lege*.⁷⁵ They also opposed the notion of prosecuting a head of state; interesting enough by the time the Nuremberg trials took place the US actively participated in prosecuting the Nazi war criminals for crimes against peace and later unilaterally established the IMTFE to prosecute Japanese leaders.⁷⁶ Some decades later, the US strongly opposed the creation of the ICC as well as the inclusion of the crime of aggression under its jurisdiction.⁷⁷ The attitude of the US towards the ICC will be discussed in Chapter three.

Like their predecessors, the judges at the IMTFE failed to define aggression although they had the opportunity to study the proceedings at Nuremberg.⁷⁸ Nevertheless, the IMTFE added value to the ongoing debate about individual criminal liability of aggression, and like the IMT, contributed significantly to the development of international criminal law.⁷⁹

Other prosecutions of aggression following WWII

⁷² International Criminal Law Manual (n 30 above) 200.

⁷³ Kemp (n 3 above) 126.

⁷⁴ Kemp (n 3 above) 126.

⁷⁵ Meron (n 49 above) 556.

⁷⁶ Meron (n 49 above) 556.

⁷⁷ Meron (n 49 above) 556.

⁷⁸ International Criminal Law Manual (n 30 above) 200.

⁷⁹ International Criminal Law Manual (n 30 above) 50; Kemp (n 3 above) 131.

It became a practical necessity to create a law punishing those not prosecuted by the IMT or IMTFE as the London Charter was set to expire in August 1946.⁸⁰ Subsequent zonal trials were held under the Control Council Laws No. 10 that permitted the Allies to prosecute suspected war criminals not prosecuted at the previous two Tribunals.⁸¹ These trials took place in the various zones in Germany occupied by the four major Allies and were conducted by the Allies occupation courts sitting in their respective zones, under their authority, within Germany.⁸²

One major difference between the IMT, IMTFE and the trials conducted under Control Council Law No. 10 is that the latter included as acts of aggression the ‘invasion of other countries.’ Crimes against peace were also criminalised and defined by Article II (1)(a) of Control Council Law No. 10 as the:

Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

The role that these trials played in the development of the crime of aggression will be discussed further in Chapter four.

2.4 Important principles established from the IMT and IMTFE that continue to play a role under the Rome Statute of the International Criminal Court’s crime of aggression

The International Law Commission, at the request of the General Assembly, formulated the principles of international law that were recognised in the Nuremberg Charter and judgments.⁸³ Although they were never endorsed by the General Assembly in a form of a binding legal instrument, they played and still continue to play an important role in international criminal law.⁸⁴ Some of these principles will be discussed below.

⁸⁰ KJ Heller *The Nuremberg Military Tribunals and the origins of international criminal law* (2011) 12.

⁸¹ Heller (n 80 above) 12.

⁸² International Criminal Law Manual (n 30 above) 52.

⁸³ International Criminal Law Manual (n 30 above) 54.

⁸⁴ International Criminal Law Manual (n 30 above) 54.

2.4.1 A shift from state liability to individual criminally liability

It was after WWI that the drive for individual criminal liability for the crime of aggression became strong, but due to lacking political will the efforts to try guilty individuals and to create tribunals for this function failed.⁸⁵ Article 227 of the Treaty of Versailles, providing for the public prosecution of the formerly German Emperor, was the first time that a treaty addressed the individual responsibility of a head of state for committing a crime against peace.⁸⁶ This was later followed by the trials at Nuremberg and Tokyo, after WWII, also confirming that individuals are subject to and can be held responsible for violations of international law and that states are not the only actors in international law and politics.⁸⁷

According to Henry T King Jr.:

One of the revolutionary aspects of Nuremberg was that it held individuals responsible for the criminal acts they committed in the name of their country. Aggressive war was, up until then, an “act of state” that did not lead to individual liability.⁸⁸

This approach was based on works of William C. Chandler and Henry L. Stimson, which were successfully adopted it into US policy.⁸⁹ Chandler intended to correct situations like Kaiser Wilhelm II of Hohenzollern, where individuals who illegally started a war went unpunished.⁹⁰

Principle I of the Nuremberg Principles states that ‘any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment’.⁹¹ This principle prevents criminal acts of states being left unpunished and also seeks to solve the issue of ‘how do you get a state to court?’ since it is not the state that is taken to court, which is physically impossible, but individuals behind the acts of a state. This principle, however, should not obscure the fact that in some international crimes states do play a critical role and that the criminal liability of individuals is cumulative with state

⁸⁵ Kemp (n 3 above) 105.

⁸⁶ Meron (n 49 above) 556.

⁸⁷ Kemp (n 3 above) 97.

⁸⁸ King Jr. (n 19 above) 273.

⁸⁹ King Jr. (n 19 above) 274.

⁹⁰ King Jr. (n 19 above) 274.

⁹¹ International Criminal Law Manual (n 30 above) 54.

responsibility.⁹² States must remain accountable for their collective crimes imposing individual liability serves to improve compliance with the law.⁹³

The application of this principle was adopted at both the IMTFE and trials under Control Council Law No. 10. This radical move from state liability to individual criminal responsibility is one of the reasons that the US has refused to ratify the Rome Statute. The US fears that its officials will be prosecuted by an international tribunal for taking military action that is deemed to be aggressive. The continued importance and relevance of this principle with regard to the crime of aggression and the Rome Statute will be discussed in Chapter three.

2.4.2 The leadership element of the crime of aggression

When dealing with the crime of aggression there will be immunity linked to the leadership status of an individual and consequently the one cannot be discussed without the other. The leadership element of the crime of aggression established at Nuremberg was accompanied by a clear rule that the official position of defendants as heads of state or responsible officials in Government Departments shall not be considered as freeing them from responsibility or mitigating punishment.⁹⁴ The Tokyo Charter differed from the Nuremberg Charter and Rome Statute, because it considered the official position of a leader as a mitigating factor to be considered in sentencing.⁹⁵ Given that both the IMT and IMTFE prosecuted and convicted the major Nazi and Japanese leaders, it is clear that this rule was consistently observed prior to the establishment of the ICC.⁹⁶

Today this is a different story. A plea of immunity has been amongst the first things raised when leaders are indicted for the atrocities that they have committed. There remains great doubt that leaders belonging to the states on the Security Council will ever be indicted for the crime of aggression. This is a good rule on paper, but the reality of its application still has a long way to be cured, especially under the Rome Statute where the provisions dealing with this principle offer no practical way to prosecute head of states because they contradict each

⁹² Meron (n 49 above) 574.

⁹³ Meron (n 49 above) 574.

⁹⁴ International Criminal Law Manual (n 30 above) 51; Article 7 of the Nuremberg Charter: this rule was also formulated as Nuremberg Principle III.

⁹⁵ Article 6 of the IMTFE Charter; Article 7 of the Nuremberg Charter discussed n 94 above; Article 27(1) of the Rome Statute excludes official position of an individual as a mitigating factor in sentencing.

⁹⁶ International Criminal Law Manual (n 30 above) 296.

other. Article 27 and 98 of the Rome Statute dealing with immunity and the surrender of persons to the ICC will be discussed in Chapter four.⁹⁷

What is, however, important for discussion under this Chapter is the standard that the leadership requirement of this crime was initially based. All three tribunals (the IMT, IMTFE, and those created under Control Council Law No. 10) followed a ‘shape and influence’ standard that a person had to meet before they could be prosecuted for the crime of aggression.⁹⁸ The Nuremberg Military Tribunal in the *High Command* case held that:

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.⁹⁹

It further explained this standard as meaning that:

The individual must possess actual knowledge that an aggressive war is intended and that if launched it will be an aggressive war; in addition to possessing this knowledge, after he acquires it he must be *in a position to shape or influence the policy* that brings about its initiation or its continuance after initiation, either by furthering, hindering or preventing it.¹⁰⁰

[Own emphasis]

In terms of the ‘shape and influence’ standard, private economic actors (industrialists) and political or military officials of a state who are involved in another state’s act of aggression could be prosecuted for the crime of aggression.¹⁰¹ The Special Working Group on the Crime of Aggression (SWGCA) adopted the ‘direct and control’ requirement for the crime of aggression under the Rome Statute, this shows a significant retreat from the Nuremberg principles.¹⁰² This was a good move by the SWGCA because adopting the ‘shape and

⁹⁷ In terms of Article 27 of the Statute, the official capacity of a person is irrelevant; Article 98 states that state parties must cooperate with the ICC in surrendering an accused person to the court by waiving immunity of an official. No person can be indicted for aggression by the ICC without these two provisions being applied since those who can be prosecuted will be persons in an official position with immunity status attached to it. The problem of immunity will become a common factor in all prosecutions of the crime of aggression, and if Articles 27 and 98 are not fixed to complement each other, convictions of the crime of aggression will most likely never take place.

⁹⁸ KJ Heller ‘Retreat from Nuremberg: The Leadership requirement in the crime of Aggression’ (2007) 18 *European Journal on International Law* 477, 477.

⁹⁹ Heller (n 98 above) 486.

¹⁰⁰ Heller (n 98 above) 486.

¹⁰¹ Heller (n 98 above) 477.

¹⁰² Heller (n 98 above) 477.

influence' standard and including private economic actors and political or military officials from a third state would have created an even greater reason for states to decline ratifying the amendment on the crime of aggression. Private economic actors carrying on business in states that are the usual culprits of committing aggression would be hesitant to continue their business in those states, because of the fear of being accused for being responsible for shaping and influencing the commission of aggression by another state. This would have resulted in states opposing the inclusion of aggression under the Rome Statute so that they can secure private economic actors funding their governmental agencies. The restricted approach in the Rome Statute will help in reducing complications and lengthy investigations into the crime of aggression; but could also result in some people who do not qualify as leaders chargeable for this crime, but actively involved in acts of aggression by a state, going free.

2.5 Conclusion

The trials after WWII were not without impact although they were mostly politically motivated and led by victor's justice. The impact they had on the development of the crime of aggression cannot be denied.

Chapter 3

The crime of aggression under the Rome Statue of the International Criminal Court

3.1 Introduction:

This chapter will focus on the crime of aggression as it is presently defined in the Rome Statue. The next paragraphs will look at the possible and already present challenges that the ICC will face in prosecuting the crime of aggression. It is no secret that power politics have infiltrated international law, specifically international criminal law, worse so when states have to account for their violations of international law. Including the crime of aggression in the Rome Statute was not without challenges and scepticism. Some concerns raised by delegates at the Rome Diplomatic Conference on the establishment of the ICC were that-

- a) the crime of aggression is regarded as a crime committed by states and not by individuals;
- b) aggression is too much of a political concept that is not susceptible to a legal definition; and
- c) the paramount role of the Security Council in maintaining international peace and security would be eroded by the inclusion of the crime under the Rome Statute (shared responsibilities between the Security Council and the ICC).¹⁰³

3.2 A crime without an initial definition

The major problem was that the crime of aggression was included as a crime in the Rome Statue without a definition. When the Rome Statue was formally adopted in 1998 states decided to continue without a definition for the crime of aggression, and the conditions under which the ICC could exercise jurisdiction for the prosecution of the crime.¹⁰⁴ This created more complications as state parties continued to debate and struggle to reach consensus on various elements the definition should contain.

¹⁰³ Kemp (n 3 above) 262.

¹⁰⁴ Coalition for the ICC factsheet: 'ICC and the crime of aggression', last updated January 2008 <http://www.iccnw.org> (accessed on 27 June 2011) [hereafter Coalition for the ICC factsheet, January 2008].

3.2.1 Defining aggression

Negotiators at the 1998 Rome Conference used the UN General Assembly Resolution 3314 of 1974 as a basis to reach a definition, but nonetheless failed to reach consensus.¹⁰⁵ States such as the US and the UK did not want to accept any legal restraints that would restrict and criminalise their freedom to exercise military intervention.¹⁰⁶ Other states demanded that the crime be included under the ICC's jurisdiction and that the exclusion of this crime would make the ICC and its purpose unacceptable.¹⁰⁷

A mistake that the state parties made was to include a crime without a definition or conditions for exercising jurisdiction. This same 'leaving-out till a later stage' action was done when state parties to the 1948 Genocide Convention left out 'political groups', as part of the definition, against whom acts of genocide may be committed. This compromise was made so that more state ratifications could be secured since there were states that feared that their internal fight against rebels would amount to genocide.¹⁰⁸ The compromise made by the state parties to continue adopting the Rome Statute without a definition or jurisdictional conditions for the crime of aggression was both advantageous and disadvantageous. It was advantageous because the functioning of the ICC to prosecute and end impunity for the other crimes (genocide, crimes against humanity and war crimes) would not be delayed. Disadvantageous because there is now a listed crime that it might never prosecute anytime soon. This has resulted in the criticism of the ICC's ability to end impunity without losing its ability to function independently from international politics.

Despite the slow development in the ICC's ability to prosecute individuals for the crime of aggression, its status as a morally unacceptable conduct as well as an international crime is secured.¹⁰⁹ International lawyers do not dispute the criminalization of aggression, but rather the details of its possible codification at the ICC.¹¹⁰

¹⁰⁵ Coalition for the ICC factsheet, January 2008 (n 104 above).

¹⁰⁶ BB Ferencz 'Enabling the International Criminal Court to punish aggression' (2007) 6 *Washington University Global Studies Law Review* 551, 558.

¹⁰⁷ Ferencz (n 106 above) 558.

¹⁰⁸ Eng, KT 'Redefining Genocide' http://www.genocidewatch.org/images/AboutGen_Redefining_Genocide.pdf (accessed on 16 November 2011).

¹⁰⁹ CP DeNicola 'A Shield for the "Knights of Humanity": The ICC should adopt a humanitarian necessity defence to the crime of aggression' (2008) 30 *University of Pennsylvania Journal of International Law* 641, 651.

¹¹⁰ DeNicola (n 109 above) 652.

3.2.2 The definition adopted at the Kampala Review Conference of the Rome Statute

A Review Conference was held in Kampala (Uganda) in 2010 to discuss, among other things, the crime of aggression. The Review Conference was attended by delegations from the Assembly of States Parties, observer states, and states that do not have observer status, intergovernmental organizations, non-governmental organization and other entities.¹¹¹ A Special Working Group on the Crime of Aggression (SWGCA), established in 2002 by the Assembly of States Parties, was tasked with submitting proposals on the crime of aggression 12 months before the Review Conference.¹¹² This mandate was not without challenges. The SWGCA had to come up with a definition for a crime that had little jurisprudence, a crime that had last been prosecuted in the 1940s, in comparison to the other core crimes.¹¹³ The SWGCA successfully came up with a definition that was adopted without changes in Kampala.¹¹⁴ This definition was based on the UN General Assembly Resolution 3314 of 1974 and defines both the 'crime of aggression' as well as 'acts of aggression'.¹¹⁵ The '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, constitute a manifest violation of the Charter of the United Nations.¹¹⁶

An 'act of aggression' is defined as

¹¹¹ Review Conference of the Rome Statute, Kampala (Uganda), 31 May- 11 June 2010, ICC-PIDS-FS-11-001/10_Eng. www.icc-cpi.int (accessed on 28 February 2012).

¹¹² Coalition for the ICC factsheet, January 2008 (n 104 above).

¹¹³ MC Weed 'International Criminal Court and the Rome Statute: 2010 Review Conference Congressional Research Service', 10 March 2011, 4 <http://www.fas.org/sgp/crs/row/R41682.pdf> (accessed on 28 February 2012)

¹¹⁴ Weed (n 113 above) 6.

¹¹⁵ Weed (n 113 above) 6.

¹¹⁶ RC/Res. 6, Annex I, para.2; full text available from: http://www.iccpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (accessed on 28 February 2012).

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.¹¹⁷

The difference between these two is that an ‘act of aggression’ will be attributed to a state while a ‘crime of aggression’ is attributed to an individual.¹¹⁸ Even though this definition has been accepted without changes, scepticism and criticism of the ICC having jurisdiction to prosecute individuals for this crime still remain. Critics have raised a number of problems with the definitions. These include¹¹⁹:

- It does not explain enough which specific individuals qualify as officials who may ‘exercise control over or direct the political or military action of a state’. This uncertainty has created fear that lower-level commanders and officers may be included under this definition which will have a negative impact on their decision making if they believe that they may be prosecuted;
- Whether the military action can only be a ‘manifest violation’ of the UN Charter when all three elements of ‘character, gravity and scale’ are first confirmed. The use of the term *however temporary* could include small incursions which will be made prosecutable;
- The definition is overbroad and could include uses of force or military intervention or responsibility to protect in countries, where there are atrocities committed against civilians.

From an examination one could say that the vagueness of the definition could give states accused of aggression a valid exit point from being prosecuted. To remedy these problems, state parties annexed a list of Understandings to the amendment with the purpose of guiding the ICC in interpreting the provisions.¹²⁰

The sixth Understanding states that

It is understood that aggression is the most serious and dangerous form of illegal use of force; and that a determination whether an act of aggression has been committed requires

¹¹⁷ RC/Res. 6, Annex I, para. 2. acts listed in the provision qualify as acts of aggression as set out by the UN General Assembly resolution 3314 of 1974.

¹¹⁸ G Halpern and L Betteridge ‘Questions and answers on the crime of aggression and the United States: Negotiations of the ICC’ The American Non-Governmental Organizations Coalition for the International Criminal Court updated 19 August 2008 [hereafter Halpern and Betteridge].

¹¹⁹ Weed (n 113 above) 7.

¹²⁰ Weed (n 113 above) 7.

consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

This Understanding seems to be directed at minimising the possibility of prosecuting military intervention aimed at stopping atrocities committed against civilian populations.¹²¹ The seventh Understanding gives the threshold required for a 'manifest violation of the UN Charter', there must be acts of a sufficient 'character, gravity and scale' together to create such a violation.¹²² It further states that 'no one component can be significant enough to satisfy the manifest standard by itself'; all three elements must be present, and incidents of a small scale carried out by lower ranking officers seem to be excluded by the wording of this Understanding.¹²³

3.3 Personal jurisdiction for the crime of aggression

One of the difficulties that the delegations at the Rome Conference were faced with was drafting a definition for the crime of aggression that would serve as a basis for individual criminal liability, since acts of aggression are committed by states.¹²⁴ As discussed in chapter two, the principle that individuals and not states are to be prosecuted for aggression was established at Nuremberg. The principle that individuals can be held criminally liable for the crime of aggression is presently regarded as customary international law.¹²⁵ A definition that would attribute liability to an individual was needed to make the prosecution of aggression possible, since it is impossible for a state to stand trial before the ICC.¹²⁶ The difficulties that the 'leadership requirement' could pose in the future as well as the challenge in prosecuting individuals with immunity will definitely add more problems to prosecuting aggression. The definition failed to recognise the increasing role of non-state actors, something that in my opinion could have been avoided considering the number of states in

¹²¹ Weed (n 113 above) 7.

¹²² Weed (n 113 above) 8.

¹²³ Weed (n 113 above) 8.

¹²⁴ Kemp (n 3 above) 263.

¹²⁵ Kemp (n 3 above) 113.

¹²⁶ International Criminal Law Manual (n 30 above) 36; the ICC has jurisdiction over natural persons who were 18 years and older at the time the alleged crime was committed (Article 26); Article 25 provides for individual criminal liability - international criminal law does not prosecute states but the individual (state agent) who commits a wrongful act that may be attributable to a state, the state will be internationally responsible.

which rebel activities have weakened governmental authority.¹²⁷ The SWGCA should have taken this into consideration during its drafting processes. For example, ICC will face difficulties in according liability for aggression committed by NATO. Although NATO falls under the concept ‘use of armed force by a state’, attributing individual liability to nationals of those member states will result in political problems.¹²⁸ NATO facing any charges of aggression remains an illusion as long as some of NATO member states are permanent members of the Security Council. An enormous amount of funding of the ICC comes from these states, for example the US and European countries, who commit the worst acts of aggression.¹²⁹ Indictments of the nationals from those states will result in the withdrawal of funds that the ICC needs to stand as a functioning institution. The ICC has to first realise which states put butter on its bread, or yet give it its bread, before attempting to prosecute any aggressing big power state.

3.3.1 Leadership crime

The Amendments of the Elements of Crimes adopted in Kampala define a perpetrator of aggression as ‘a person in a position effectively to exercise control over or to direct the political or military action of a state which committed the act of aggression.’¹³⁰ This definition makes it clear that only leaders who can effectively control the political or military action of the aggressing state will be criminally liable and not ordinary soldiers. The IMT followed a less restrictive approach: only persons who could ‘shape and influence’ the state’s actions could be prosecuted.¹³¹ The ‘direct and control’ requirement adopted by the SWGCA shows

¹²⁷ Megret (n 12 above).

¹²⁸ L O’Connor *Humanitarian intervention and the crime of aggression: The precarious position of the “knights of humanity”* Bachelor of Laws (Honours) Dissertation, University of Otago, 2010, 8; NATO (North Atlantic Treaty Organization) is a regional intergovernmental military alliance based on the North Atlantic Treaty signed on 4 April 1949; the reality of prosecuting NATO countries for any crime remains almost impossible because the ‘principle NATO countries (US and Britain) enjoy immunity from prosecution by virtue of the vetoes they wield on the Security Council,’ in Media Monitors Network: ‘There was never any question that Milosevic was above the law. But is NATO?’ by Stephen Gowans, 04 July 2001 <http://www.mediamonitors.net/gowans15.html> (accessed on 06 November 2012).

¹²⁹ ICC Watch ‘Why won’t the ICC move against Tony Blair on war crimes?’ Press Release: 4 February 2010 http://www.iccwatch.org/pressrelease_4feb10.html (accessed on 21 June 2011).

¹³⁰ RC/Res.6, Annex II, Elements in para.2.

¹³¹ Heller (n 98 above) 477.

a move away from the Nuremberg principles.¹³² Some observers have criticised the definition as not sufficiently explaining which individuals qualify as officials stated above or what level of control such an official must possess.¹³³ This alleged uncertainty could prevent states from ratifying the amendment because of the fear of risking their leaders being prosecuted for taking political decisions to go to war.¹³⁴

Immunities

Immunity afforded to the persons who can be prosecuted for the crime of aggression is another factor which will bar successful prosecutions by the ICC. One cannot discuss prosecution for the crime of aggression without touching on the subject of immunity since immunity has a direct bearing on the leadership characteristic of the crime. Article 27 provides that the immunity attached to a person in a leadership position shall not prevent the ICC from exercising jurisdiction over them. Contrasting this provision is Article 98 which provides that the ICC must respect diplomatic immunity and international immunity agreements, during the arrest and surrender of a person for prosecutions before it. Different case law have attempted to give a guideline to overcoming this problem, but the practical reality of arresting state leaders still shows to be impossible to solve. This issue will be discussed in greater detail under Chapter four. It seemed appropriate to introduce this subject under the list of the most important challenges.

3.3.2 The increased role of non-state actors

The failure to address the liability of non-state actors started during the trials at the IMT, when the IMT never questioned the notion of non-governmental actors committing aggression.¹³⁵ The International Court of Justice (ICJ), in the *Armed Activities on the Territory of the Congo (DRC v Uganda)*¹³⁶ also did not address the legal consequences of failed states since it is not designed to adjudicate disputes involving non-state actors, but

¹³² Heller (n 98 above) 477.

¹³³ Weed (n 113 above) 7.

¹³⁴ Weed (n 113 above) 7.

¹³⁵ Heller (n 98 above) 482.

¹³⁶ *Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v Uganda*, Judgment, ICJ 2005, 116 (19 Dec. 2005).

between states.¹³⁷ This is different in the ICC where it may prosecute rebel leaders. The Rome Statute left out the prosecution of non-state actors for crimes of aggression, by allowing only the prosecution of ‘persons in a position effectively to exercise control over or to direct the political or military action of a state’ or states that send non-state actors to commit aggression on its behalf.

International criminal law does not prosecute states but if an individual who is, for example, a state agent commits a wrongful act that may be attributable to that state, that state will be internationally liable.¹³⁸ Only once the act of aggression has been attributed to a state, will the state official meeting the requirement adopted in Kampala be prosecuted. This raises the question of the level of involvement that the state must have before the wrongful act of the perpetrator can be attributable to it, or said that the perpetrator was acting on behalf of it.¹³⁹

The *Nicaragua* case (ICJ, 1986)¹⁴⁰ used the ‘effective control’ test to define when conduct of non-state actors can be attributed to a state:

for this conduct to give rise to a legal responsibility of the United States, it would in principle have to be proved that that state had *effective control* of the military or paramilitary operations [of the contras] in the course of which the alleged violations were committed.¹⁴¹

Despite the high degree of control, the US could not be held liable for individual activities of the contras because it had no effective control and those acts could be committed by the contra members without control by the US.¹⁴²

A different test is the ‘overall control test’ laid out in the *Tadic Appeal Judgement* (ICTY, 1999).¹⁴³ Here the Appeals Chamber held that:

¹³⁷ SA Barbour & ZA Salzman “‘The tangled web’: The right of self defence against non-state actors in the armed activities case’ (2008) 40 *International Law and Politics* 53, 64.

¹³⁸ International Criminal Law Manual (n 30 above) 36.

¹³⁹ Annex I, Article 8bis para. 2(g): ‘The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed forces against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein’ amounts to an act aggression.

¹⁴⁰ In *Military and Paramilitary Activities in and Nicaragua (Nicaragua v United States of America)*], Merits, Judgment, ICJ Reports 1986, 14, (hereafter the *Nicaragua* case).

¹⁴¹ JG Stewart ‘Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict’ (2003) 85 *International Review of the Red Cross* 313, 324.

¹⁴² Stewart (n 141 above) 324.

¹⁴³ In *Prosecutor v Tadic*, T-94-1-A, judgement, 15 July 1999 (hereafter the *Tadic Appeal Judgement*).

...control by the state must be of an overall character, namely that, it must compromise more than the mere provision of financial assistance or military equipment or training...the state must have 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 to that group but it does not go as far as to include the issuing of specific orders by the state, or its direction of each individual operation.¹⁴⁴

There have been different opinions regarding the application of these two tests to the crime of aggression. Since only state officials can be prosecuted for aggression it must be shown that the acts of aggression committed by non-state actors, who are mostly not in friendly relations with the state, can be attributed to the officials of that state. This, if not correctly determined, could result in state parties opting out because of fear that it may be prosecuted for acts committed by powerful rebels controlling areas of its territory.

The bombing of Afghanistan by the US and UK has been explained on the basis of the right to self-defence since the Taliban government had allowed Al-Qaeda terrorists to train and operate in its territory, their conduct could be attributed to the government of Afghanistan.¹⁴⁵ It can be argued that Article 51 of the UN Charter does not say that the armed attack must come from the state, in other words the attack can come from non-state actors in the territory of another state.¹⁴⁶ This re-interpretation of the UN Charter taken mostly by the US, in justifying acting against states where Al-Qaeda members are suspected to be present, could end up constituting international customary law.¹⁴⁷ The ICJ was unwilling to take this approach when it stated that:

Article 51 of the UN Charter... recognises the existence of an inherent right of self-defence in the case of an armed attack by one state against another state. However, Israel does not claim that the attacks against it are imputable to a foreign state. [...] therefore Israel could not in any event invoke those resolutions in support of its claim to be exercising a right to self-defence.¹⁴⁸

The ICJ found that US support to the contras amounted to aggression under par2(g) of Article 8*bis* of RC/Res. 6 and that the principle contained in this paragraph is customary international law.¹⁴⁹ Another example of conduct falling under this provision as aggression,

¹⁴⁴ Stewart (n 141 above) 325; Tadic Appeal Judgement, para.137.

¹⁴⁵ Dugard (n 9 above) 505.

¹⁴⁶ Dugard (n 9 above) 506.

¹⁴⁷ Dugard (n 9 above) 506.

¹⁴⁸ Dugard (n 9 above) 506.

¹⁴⁹ MJ Glennon 'The blank-prose crime of aggression' (2010) *The Yale Journal of International Law* 71, 94.

is the US invasion of Cuba at the Bay of Pigs in 1961, here the US actively assisted Cuban rebels who landed on the Cuban mainland with the purpose of overthrowing the government of Fidel Castro.¹⁵⁰ The drafters of RC/Res.6 failed to take into account rebels in failed states. It only gives provision to states that commit aggression through non-state actors but does not give criminal liability to non-state actors acting on their own behalf. Aggression by rebels is likely to increase as globalization increases their ability to organize, acquire sophisticated weapons, and commit cross border attacks.¹⁵¹ For example, in the DRC the rebels have so much influence that private mining companies reportedly pay taxes to the rebel group (MLC) leader and not to the government.¹⁵²

The position of rebel groups in control of failed states can in my view be interpreted in two ways. Firstly, the rebel group leaders can be seen as the entity that exercises or has direct control over the political or military action of the state, and can thus be held liable for any acts of aggression. This interpretation has no 'back bone' because rebels cannot be seen as the legitimate government of a state in international law and it is highly unlikely that UN state members will sit in the same room with rebel groups during international conferences. To accept this interpretation as correct will cause many problems in failed states where there are more than one rebel groups that have firm control over portions of the state's territory. The case in Libya, where rebels (National Transitional Council) were appointed and internationally recognised as the legitimate governing authority, is different to where rebels forcefully invade and take over a government. The former group could perhaps be held liable for crimes of aggression. The second interpretation which I view as being correct is that rebels in the territory of failed states do not act as agents of that states. As only persons who are in leadership positions effective enough to exercise control over the military and political actions of the state may be held liable for crimes of aggression; rebel leaders cannot be held liable for acts of aggression committed against another states, since they act in their own interest and not in the interest of the state.

The problem remains that non-state actors are not explicitly bound by the same restrictions, use of force *in bello or ad bellum*, as states; this suggests that they can wage aggressive wars more often than states and not be punished for it.¹⁵³ They can be prosecuted for the other crimes but not aggression.

¹⁵⁰ Glennon (n 149 above) 94.

¹⁵¹ SA Barbour & ZA Salzman (n 137 above) 101.

¹⁵² SA Barbour & ZA Salzman (n 137 above) 63.

¹⁵³ SA Barbour & ZA Salzman (n 137 above) 102.

3.4 The role of the Security Council

Article 5(2) of the Rome Statute states that the provision adopted in terms of Article 121 and 123 regarding jurisdiction for the crime of aggression ‘shall be consistent with the relevant provisions of the Charter of the United Nations.’ The interpretation of this provision was what sparked the debates about the role that the Security Council would play in the prosecution of aggression. Before aggression could be punishable, the ILC had to solve the problem of the difference between an act of aggression, which is committed by a state or similar entity; and the crime of aggression, the liability of which is attributed to an individual.¹⁵⁴ In 1996 the ILC concluded that an act of aggression is a prerequisite for an individual to be prosecuted for aggression and that the Security Council had to decide whether an act of aggression had been committed by a state; this means that the permanent members will have control over whether any individual should be prosecuted for the crime.¹⁵⁵

Do we really want to make prosecution of one of the gravest crimes dependent on a political body in which the great power states have veto powers to shield themselves and their allies entirely from prosecutions?¹⁵⁶ This question was what stood between state parties decision to accept the amendments in Kampala. This, and how the provisions in the UN Charter would influence the ICC in exercising its prosecuting powers. Article 39 of the UN Charter gives the Security Council the responsibility to determine the existence of any threat to peace, or an act of aggression and to make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international, peace and security (Chapter VII Powers). Conflicting interpretations of this provision by different states initially complicated the role which the Security Council should play in prosecuting the crime of aggression. The US, China and Russia (not parties to the Rome Statute) argue that Article 39 gives them the ‘exclusive’ power to make determinations of the existence of an act of aggression; to follow this interpretation would mean that the Security Council’s pre-determinations is an essential prerequisite to the ICC’s ability to proceed prosecuting an individual for the crime of aggression.¹⁵⁷ The danger of adopting this approach is the possibility of permanent members shielding themselves or their allies who

¹⁵⁴ Ferencz (n 106 above) 562.

¹⁵⁵ Ferencz (n 106 above) 562.

¹⁵⁶ A Paulus ‘Second Thoughts on the Crime of Aggression’ (2009) 20 *European Journal on International Law* 1117, 1125.

¹⁵⁷ Letner (n 17 above) 13.

have committed acts that would otherwise have been deemed as aggressive from the jurisdiction of the ICC.¹⁵⁸ Opposing states, African and Latin-American, argue that Article 24 of the UN Charter only gives the Security Council ‘primary’ and not ‘exclusive’ powers in maintaining international peace and security.¹⁵⁹

Other states support the involvement of the Security Council and are of the opinion that this will prevent the Prosecutor from abusing his powers to investigate and prosecute crimes of aggression.¹⁶⁰ A politicized Security Council and a politicized Prosecutor are both not beneficial for prosecuting aggression. Was this just another blame shifting excuse to further delay the chances of states being prosecuted for aggressive acts? In an effort to bypass the Security Council ‘blockade’, suggestions were made that the General Assembly may act in determining acts of aggression as well as maintaining international peace and security in situations that the Security Council fails to act, as is provided in Paragraph 1 of the Uniting for Peace Resolution of 1950.¹⁶¹ The General Assembly is also a very political platform and to allow the General Assembly the power to consider a matter that is already on the Security Council’s agenda might not be in the best interest of the accused, as another political dimension will be added to prosecuting aggression.¹⁶²

Article 15ter(4) of RC/Res. 6 states that ‘a determination of an act of aggression by an organ outside the Court [ICC] shall be without prejudice to the Court’s [ICC] own findings under this Statute.’ There is still Article 16 of the Rome Statute that the Security Council could use to delay prosecutions by the ICC for personal gains by the permanent members.¹⁶³ Even though a determination by the Security Council is not a prerequisite for the prosecution of aggression it may still refer matters for prosecution in which the Prosecutor still has freedom to determine the direction for prosecution based on the

¹⁵⁸ Paulus (n 156 above) 1125.

¹⁵⁹ Lentner (n 17 above) 13; Article 24 of the UN Charter.

¹⁶⁰ C Davis et al ‘The Crime of Aggression and the International Criminal Court’ (2011) 17 *The National Legal Eagle* 10, 11.

¹⁶¹ The General Assembly has passed a resolution and authorised economic sanctions - the General Assembly found that ‘China, by giving direct aid and assistance to those who were already committing aggression in Korea... has itself engaged in aggression in Korea,’ in Ferencz (n 106 above) 563, 564.

¹⁶² Kemp (n 3 above) 304.

¹⁶³ No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Chapter of the United Nations, has requested the Court [ICC] to that effect; that request may be renewed by the Council under the same conditions.

evidence available to him.¹⁶⁴ However, there are still restrictions and conditions if the Prosecutor initiates proceedings for aggression. Firstly, if the case involves a non-party state's nationals or territory of a state party that has opted out, the case cannot proceed; secondly, the Prosecutor has to first ascertain whether the Security Council has determined that an act of aggression was committed.¹⁶⁵ In theory this assures the independence and reliability of the ICC in prosecuting aggression, but the path this will take can only be determined once the ICC starts exercising jurisdiction over this crime. The Security Council, of which all the permanent members are power players, has been described as using the ICC as an imperialistic tool in attaining its self-interest objectives.¹⁶⁶

The actual role that the Security Council will play in the ICC's prosecution of aggression could possibly result in many state parties, especially African states, choosing to opt out from the ICC's jurisdiction over aggression.

3.5 The consequences of the 'opting in' and 'opting out' provisions

Article 15*bis*(4) of RC/Res. 6 provides that the ICC may exercise jurisdiction for the crime of aggression, 'unless that state party has previously declared that it does not accept such jurisdiction by lodging a declaration [...].' This provides for the opting out choice of state parties who do not wish to fall under the ICC's jurisdiction for crimes of aggression committed by its nationals or on its territory. If a state party ratifies the amendments then it will fall under the ICC's jurisdiction for aggression (opting in). The opting out clause is a safe back exit, or rather front exit, for states who do not wish to accept liability for their acts of aggression. Some have interpreted Article 15*bis* as contradicting Article 120 of the Rome Statute that prohibits reservations to the Statute.¹⁶⁷ The ICC will only have jurisdiction when: there's aggression between two state parties which have both opted in and where a state party who has opted in aggresses against a state party who opted in and later opted out.¹⁶⁸ The last case results in states being covered as victims but not aggressors; this weakens the

¹⁶⁴ AR Coracini 'More thoughts on what exactly was agreed in Kampala on the crime of aggression'" 2010 *European Journal of International Law: Talk!* <http://www.ejiltalk.org/more-thoughts-on-what-exactly-was-agreed-in-kampala-on-the-crime-of-aggression/> (accessed on 28 February 2012).

¹⁶⁵ For more on these restrictions and conditions see Weed (n 113 above) 11.

¹⁶⁶ 'Western Hypocrisy: Accusing Gaddafi of war crimes' <http://ed-strong.com/?p=3074> (accessed on 11 July 2011).

¹⁶⁷ Coracini (n 164 above).

¹⁶⁸ Davis et al (n 160 above) 12.

ICC's ability to equally apply the law to all state parties and defeats its purpose of ending impunity.¹⁶⁹

It is important to consider how change in state governance might influence a state party's decision to opt in or opt out from the ICC's jurisdiction for the crime of aggression. Prosecuting aggressive wars was an American creation and William C Chanler, a law partner of the Secretary of War, was among the first to argue that there should be individual liability for the crime of aggression, and that individuals who started aggressive war should be punished.¹⁷⁰ This idea was adopted by President Franklin Delano Roosevelt in 1945, and thereafter became a part of American policy to include it in war crimes proposals.¹⁷¹ The US policy has changed tremendously over the decades and its representatives have spoken against the crime being included under the Rome Statute for fear that its soldiers might be prosecuted for committing the crime of aggression. The US has recently noted that the Kampala outcomes were positive but that the

prosecutor cannot charge nationals of non-state parties, including US nationals, with the crime of aggression. No US national can be prosecuted for aggression so long as the US remains a non-state party. And if we were to become a state party, we'd still have the option to opt out from having our nationals prosecuted for aggression. So we ensure total protection for our Armed Forces and other US nationals going forward.¹⁷²

Even though the US has attempted to block the adoption of the crime of aggression, a change in attitude was seen in the Obama Administration that is now cooperating with the ICC. China and Russia are also fully cooperating non-party states, but this does not give assurance that these states will become members to the Rome Statute anytime soon. Before creating these opting in and opting out clauses, the SWGCA should have considered that should most state parties opt out from the ICC's jurisdiction over aggression, there will be an unequal application of law between the state parties. The weaker state parties might also opt out if they feel threatened of being picked on by the ICC and Security Council. This will result in there being no prosecutions for aggression though the waging of aggressive wars increases.

¹⁶⁹ Davis et al (n 160 above) 12.

¹⁷⁰ King, Jr. (n 19 above) 273.

¹⁷¹ King, Jr. (n 19 above) 274.

¹⁷² Lentner (n 17 above) 16.

3.6 Increasing military intervention

In Kampala the US legal advisor, Harold Koh, unsuccessfully argued that

If Article 8*bis* [the proposed crime of aggression definition] were to be adopted, understandings would need to make clear that those who undertake efforts to prevent war crimes, crimes against humanity or genocide ... do not commit “manifest” violations of the UN Charter...Regardless of how states may view the legality of such efforts, those who plan them are not committing the “crime of aggression” and should not run the risk of prosecution.¹⁷³

This was another effort made by the US Delegation to exempt US nationals from prosecutions. Even though such a proposal was never annexed, some observers have suggested that the annexed sixth Understanding seems to minimise the possibility of prosecutions flowing from military interventions.¹⁷⁴ The use of force against another state that was not authorised by the Security Council or taken in self-defence, is illegal and amounts to aggression.¹⁷⁵ Therefore, military intervention undertaken outside these exceptions by a group of states for example NATO, would fall within the adopted definition of the crime of aggression irrespective of how states may view such conduct.¹⁷⁶

If the Rome Statute does not set clear and binding guidelines as to when military intervention in the territory of another state will be prosecuted as aggression, the punishment of those guilty will only end in ‘international debates and opinions’ without the perpetrators being punished. For example, NATO’s humanitarian intervention in Kosovo has been debated with different opinions with allies trying to protect each other, and it seems unlikely that any of NATO’s members will ever be held to criminally account for their actions. While many viewed NATO’s actions as unlawful under international law, international consensus was that it was ‘morally permissible’, in other words it was an unauthorised use of force that amounted to an ‘excusable breach’.¹⁷⁷ The US and its allies invaded Iraq on false allegations that Iraq was producing weapons of mass destructions and had links with Al-Qaeda; despite their illegal invasion the US and UK justified their actions by pleading an ex

¹⁷³ O’Connor (n 128 above) 6.

¹⁷⁴ Weed (n 113 above) 7.

¹⁷⁵ Article 2(4) of the UN Charter; 51 and 39 serve as exceptions to the prohibited use of force.

¹⁷⁶ O’Connor (n 128 above) 10.

¹⁷⁷ O’Connor (n 128 above) 17.

post facto rationale for the invasion by arguing that they helped free the Iraqi people from the oppression of the Saddam Hussein regime.¹⁷⁸

3.7 Criticisms and possible consequences of prosecuting aggression

With the AU's past threat that African states will withdraw en masse from the Rome Statute, the ICC's jurisdiction over aggression may result in further division of the international community. If the Prosecutor or the Security Council fail to act promptly against acts of aggression, victim states might retaliate against aggressing states which will cause international conflicts. Rwanda retaliated against the DRC when the Security Council failed to act in stopping the attacks against Rwanda, from within the territory of the DRC by Rwandan Hutu militia forces that had fled Rwanda after the genocide. The political nature of this crime might lead to delayed justice which is not in the interest of the victims who will be caught in the crossfire. The Prosecutor might also focus too much on prosecuting responsible leaders for aggression that he neglects prosecuting the commission of the other crimes (war crimes or crimes against humanity) during the same conflict.¹⁷⁹ The ICC is still an establishing court, adding aggression to its crimes could burden it with more work and costs. It could be best for the ICC to 'perfect' prosecuting the other crimes before attempting to prosecute aggression. Richard Goldstone came out against including aggression by saying that: 'The issues that would arise from dealing with allegations of aggression would give ammunition to critics who claim it [the ICC] is a politicized institution.'¹⁸⁰

3.8 Conclusion:

The possible challenges that the ICC might face in prosecuting aggression could be reduced by the cooperation of all states parties, but this has proved to be almost impossible. The success of the ICC is to a large extent determined by how the 'normal' person (without legal knowledge about the ICC) on the ground where atrocities are committed, sees it in succeeding ending impunity and punishing those responsible for violating his or her human rights. Many Africans see the ICC as a tool and puppet of Western imperialism, and a ground where the big powers can freely bully the weaker states. The US is not a party to the

¹⁷⁸ Kemp (n 3 above) 86.

¹⁷⁹ Halpern and Betteridge (n 118 above).

¹⁸⁰ Opinio Juris 'Richard Goldstone comes out against an ICC "crime of aggression"' by Julian Ku, 26 May 2010 opiniojuris.org/2010/05/26 (accessed on 15 April 2012).

Rome Statute but has had so much influence on what the crime of aggression should look like on paper while getting into bilateral agreements with other states that protect US nationals from being surrendered to the ICC.¹⁸¹ The possible future prosecutions of aggression could bring more harm than good if the Rome Statute is not fairly implemented. This could result in more states opting out from its jurisdiction and more crimes of aggression left unattended. The crime of aggression could end up being a crime on paper, but having no judicial effect.

¹⁸¹ Empire Strikes Black 'The ICC: Imperialist crime cover-up' by Diana Johnstone, 2 June 2011 <http://empirestrikesblack.com/2011/06/the-icc-imperialist-crime-cover-up/> (accessed on 11 July 2011).

Chapter 4

The crime of aggression in national courts

4.1 Introduction

The ICC is complementary to national criminal courts.¹⁸² In terms of this principle national courts are given priority in prosecuting the crimes in Article 5 of the Rome Statute; and only when it is determined that national courts are 'unable' or 'unwilling' to conduct *bona fide* prosecutions of those crimes will the ICC be allowed to commence prosecutions.¹⁸³ The political nature of this crime could lead to more problematic and lengthy prosecutions compared to the prosecutions of the other core crimes in national courts. This chapter will look at the origin of prosecuting international crimes in national courts; the principle of complementarity; and the issue of immunity when prosecuting state leaders in both international and national courts.

4.2 Prosecutions under Control Council Law no. 10

Various zonal trials were held to prosecute suspected war criminals that were not prosecuted at the IMT or IMTFE.¹⁸⁴ The Allied Control Council, an international body that governed occupied Germany after WWII, passed Control Council Law No. 10 that permitted the Allies to hold their own trials in the occupied zones in accordance with international law that had already been codified in the London Charter.¹⁸⁵ What is relevant for discussion under this chapter is whether the trials held qualified as national prosecutions that applied international law. The tribunals established under Control Council Law No. 10 generally took

¹⁸² Preamble and Article 1 of the Rome Statute.

¹⁸³ International Criminal Law Manual (n 30 above) 349; Article 17 of the Rome Statute.

¹⁸⁴ Heller (n 80 above) 12.

¹⁸⁵ T Giannini & S Farbstain 'Corporate accountability in conflict zones: how Kiobel undermines the Nuremberg legacy and modern human rights' (2010) 52 *Harvard International Law Journal Online* 119, 127.

an international characteristic.¹⁸⁶ However, some critics insisted that they were ‘purely American Tribunal[s] which no longer possesses the prerequisites of a Military Tribunal.’¹⁸⁷

Although both the tribunals and the Office Chief of Council for War Crimes (OCC) made statements implying that the tribunals were American and not international, *this is incorrect*, because they were a creation of various Zone Commanders acting on behalf of the Four Allied Powers that did not only consist of Americans ... If the defining feature of an international tribunal is that it is created with the consent and approval of the international community, the NMTs [tribunals created under Control Council Law No. 10] cannot be considered international ... they were neither international nor American but inter-allied special tribunals created pursuant to Law No. 10, a multilateral agreement enacted by the Allied Control Council as the supreme legislative authority in Germany.¹⁸⁸ [Own emphasis]

Another aspect of these tribunals that is important is the type of law they applied.

There is no doubt that the tribunals applied international law contrary to the conclusion of the critics of these tribunals who argued that the tribunals applied the law of occupation, American law or German law ... *their arguments are incorrect* since the crimes that were prosecuted, in particular crimes against peace, reflected pre-existing international law rules and crimes included in the London Charter that were accepted as international law by the international community.¹⁸⁹ [Own emphasis]

The legacy left by these tribunals of applying international law for the prosecution of international crimes in national courts still plays an important role today. The Control Council Law No.10 tribunals prosecuted crimes against peace but the prosecution of aggression in national courts is something that might never be seen again in the future, because the participants at the Kampala Review Conference suggested that future prosecution should be left to the ICC.¹⁹⁰ This will be discussed in more detail below.

4.3 The principle of complementarity

¹⁸⁶ Heller (n 80 above) 109.

¹⁸⁷ Heller (n 80 above) 110.

¹⁸⁸ Heller (n 80 above) 110 - 113.

¹⁸⁹ Heller (n 80 above) 119 - 123; for more arguments given by various judges of these tribunals and legal scholars on the legal nature and law applied by these tribunals, see the cited book at pages 109-124.

¹⁹⁰ Weed (n 113 above) 13.

The prosecution of international crimes in national courts is based, among other things, on the practical considerations of efficiency and effectiveness since states (national courts) will usually have the best access to evidence, witnesses, and resources to conduct the trials.¹⁹¹ The enforcement of international criminal law norms in national courts has gained significant importance especially in the absence of an international criminal court, but aggression is soon to be an exception to this practice.¹⁹² An obvious reason for this as expressed by Yoram Dinstein also amounts to a challenge facing the national prosecutions for the crime of aggression:

The rationale for entrusting an international criminal court with jurisdiction over crimes against peace is palpable. Trials of other international crimes (principally, war crimes and crimes against humanity) have a lot of merit even when conducted before domestic courts. But the nature of crimes against peace is such that no domestic proceedings can conceivably dispel doubts regarding the impartiality of the judges ... Any panel of judges comprised exclusively of enemy (or former enemy) nationals will be suspected of irrepressible bias¹⁹³

Another reason why prosecutions of the crime of aggression will undoubtedly fail in national courts is because national courts tend to take the side of their government and have in the past showed unwillingness to review their government's conducts that were against international law standards; while some national courts have showed no interest in applying international law (e.g. Afghanistan and China), some states do (e.g. the Netherlands and South Africa).¹⁹⁴

There is no doubt that the complementary role of national courts in the prosecution of international crimes has been a great success towards ending impunity for the other international crimes.¹⁹⁵ However, a drastic different approach was taken when states considered the prosecution of aggression in national courts. Can the exception that is to be applied to the principle of complementarity when dealing with cases of aggression prove that the prosecution of aggression poses more challenges than solutions, or will states come up with an acceptable and practically possible way to successfully prosecute state leaders who commit aggression? The outcomes of the Kampala Review Conference will be discussed

¹⁹¹ B Olugbuo 'Positive complementarity and the fight against impunity in Africa' in C Murungu & J Biegan (eds) *Prosecuting international crimes in Africa* (2011) 251.

¹⁹² Kemp (n 3 above) 170.

¹⁹³ Kemp (n 3 above) 171.

¹⁹⁴ A Nollkaemper *National courts and the international rule of law* (2011) 6.

¹⁹⁵ Kemp (n 3 above) 169.

below, and it will be shown how the principle of complementarity will be applied under the Rome Statute when prosecuting aggression.

4.3.1 Complementarity under the Rome Statute

Complementarity under the Rome Statute obligates state parties to prosecute individuals in their national courts for the crimes listed in the Statute. The ICC will only prosecute individuals for these crimes when a state that has jurisdiction over a crime is *unable* or *unwilling* to prosecute, or when any other factor mentioned in Article 17 is present.¹⁹⁶ In order to determine the *unwillingness* of a national court, Article 17(2) provides that the Court [ICC] 'having regard to the principles of due process recognised by international law' shall consider whether the purpose of the national proceedings or decision was to shield the accused, proceedings were delayed unjustifiably, and whether the proceedings were not conducted independently or impartially or in a manner inconsistent with the intent to bring the accused to justice.¹⁹⁷ Article 17(3) provides that in order to determine *inability* the Court [ICC] shall consider whether

due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

For example, the Pre-Trial Chambers found that the state of the Democratic Republic of Congo was *unwilling* and *unable* to investigate and prosecute Thomas Lubanga and therefore held that the case was admissible before the ICC.¹⁹⁸ This principle provided for in the Rome Statute has its origin in the 1994 International Law Commission Draft Statute which in its preamble states that the 'International Criminal Court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.'¹⁹⁹ Issues regarding how complementarity and the ICC would affect state sovereignty were agreed upon before the Rome Review Conference; these issues arose from states being concerned about whether the ICC would take over their national court's efforts to hold their citizens liable for international crimes

¹⁹⁶ Weed (n 113 above) 13.

¹⁹⁷ WA Schabas *An introduction to the International Criminal Court 3^d edition* (2007) 174.

¹⁹⁸ Schabas (n 197 above) 180.

¹⁹⁹ B Olugbuo 'Positive complementarity and the fight against impunity in Africa' in Murungu & Biegon (n 191 above) 252.

committed within their territory.²⁰⁰ The purpose of the complementarity principle in the Rome Statute is not to hinder national prosecutions by states but instead promote national prosecutions for those crimes listed in Article 5. The former Chief Prosecutor Mr Luis Moreno- Ocampo stated that

the effectiveness of the International Criminal Court should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court [ICC], as a consequence of the regular functioning of national institutions, would be a major success.²⁰¹

Many people see the ICC as a failure because not many cases have been concluded before it. There has only been one case, Thomas Lubanga, concluded before it while all the others are still pending. Victims of atrocities want to see responsible leaders standing before an international forum, which resembles prosecution by the world, without realising that successful trials are most likely to take place before national courts.

Most of the obligations for national prosecutions of international crimes are based on other sources of law, for example, customary international law, conventions or domestic criminal codes.²⁰² How this would apply to the crime of aggression was given little attention and the Understandings adopted in Kampala that were meant to give solutions are, in my opinion, an effort by the US Delegation to avoid US leaders from being prosecuted by national courts for allegedly committing the crime of aggression.²⁰³ The view that had initially prevailed at the 2004 Princeton meeting discussions was that Article 17 should apply to the crime of aggression without any modifications, but the US Delegation argued against this view and Understanding five was drafted as an indirect reaction to this concern.²⁰⁴

Understanding five states that –

²⁰⁰ B Olugbuo 'Positive complementarity and the fight against impunity in Africa' in Murungu & Biegon (n 191 above) 252.

²⁰¹ B Olugbuo 'Positive complementarity and the fight against impunity in Africa' in Murungu & Biegon (n 191 above) 253.

²⁰² J Trahan 'The Rome Statute's Amendment on the crime of aggression: Negotiations at the Kampala Review Conference' (2011) 11 *International Criminal Law Review* 49, 77.

²⁰³ C Kreß and L von Holtzendorff 'The Kampala compromise on the crime of aggression' (2010) 8 *Journal of International Criminal Justice* 1179, 1216.

²⁰⁴ Kreß and von Holtzendorff (n 203 above) 1216.

It is understood 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.

Since there was not much guidance from the Assembly of States Parties (ASP) on how the principle of complementarity should apply regarding the crime of aggression, the only guidance that can be inferred is a subtle preference that states do not incorporate this crime into their national penal codes.²⁰⁵ This is found in Understanding four which states that-

It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purposes of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.²⁰⁶

The reason behind adopting this Understanding was to prevent states prosecuting officials of other states for 'state-sanctioned military and political decision making'.²⁰⁷ The acceptance of these Understandings defeat the purpose of complementarity a principle that the ICC was established on. Although these Understandings are not binding on state parties their adoption in Kampala shows a general acceptance that aggression prosecutions and jurisprudence will be limited to the ICC, and national courts will not conduct such prosecutions.²⁰⁸ The question of arrest and surrender of accused to the ICC still remains. There are already problems around the arrest and surrender of persons to the ICC mainly due to the conflicting provisions of Articles 27 and 98 which have been given different interpretations. Some of these problems will be discussed below. The different approach to the application of complementarity that states suggested should be taken raises the question 'will the complications facing the prosecution of aggression add exceptions to the already developed rule of customary international law?'

4.4 Immunity

Due to the leadership characteristic of the crime of aggression the ICC will inevitably come across the challenge of prosecuting individuals, who possess immunity, for the alleged commission of this crime. Immunity granted to state representatives does not only prohibit

²⁰⁵ Van Schaack (n 16 above) 133.

²⁰⁶ Annex III of Resolution RC/Res 6.

²⁰⁷ Weed (n 113 above) 13.

²⁰⁸ Weed (n 113 above) 13.

the actual trial, it also prohibits the extradition and surrender of that individual to a court of law.²⁰⁹ There are two categories of immunity: *functional immunity* which protects the individual carrying out official business of a state; and *personal immunity* which protects the person of certain individuals who are important in carrying out state administration, such as head of state, and lapses when that individual leaves such office.²¹⁰ The concept of prosecuting head of states or persons in official positions, despite the immunity that they have, was enforced at the IMT and IMTFE. The difference between these two Tribunals was that the Nuremberg Charter did not consider the official position of a defendant as a mitigating factor while the Tokyo Charter did.²¹¹ A similar provision in the Rome Statute as the one in the Nuremberg Charter is Article 27 which states that the official capacity of an individual is irrelevant for prosecution before the ICC. On the surface it seems as though the Rome Statute has excluded the defence of immunity from prosecutions, but when this Article is read with Article 98, a contradiction in the provisions can be seen.²¹² Articles 103 and 25 of the UN Charter seem to offer a solution in compelling ICC state parties to cooperate in the arrest and surrender of officials with immunity, but these provisions will only be effective in matters where the Security Council acting under its Chapter VII Powers has referred a case to the ICC.²¹³

Article 12 of the Nuremberg Charter provided for trials in absentia if the accused 'has not been found or if the Tribunal, for any reason, finds it necessary, in the interest of justice, to conduct the hearing in his absence.' This is different under the Rome Statute Article 63(1) provides that 'the accused shall be present during the trial' unless the accused shows disruptive behaviour in which case certain measures will be taken as laid out in Article 63(2). It is only the confirmation of charges before the Pre-Trial Chamber that may be held in absence of the accused upon the Prosecutor's request or on its own motion.²¹⁴ Standards

²⁰⁹ International Criminal Law Manual (n 30 above) 295.

²¹⁰ International Criminal Law Manual (n 30 above) 295.

²¹¹ International Criminal Law Manual (n 30 above) 51; Article 6 of the International Military Tribunal for the Far East (IMTFE) Charter; Article 7 of the Nuremberg Charter.

²¹² Article 98 provides that the ICC cannot proceed with a request and surrender of a person if a state party would have to act in violation of its obligations under international law with regards to immunities with another state [Own emphasis].

²¹³ Article 25 provides that all UN member states must cooperate in carrying out the decisions of the Security Council, and Article 103 which states that the obligations of member states under the UN Charter shall prevail over any other international agreements that they might have; the Security Council can refer a situation to the Prosecutor in terms of Article 13(b) of the Rome Statute.

²¹⁴ Article 61 of the Rome Statute.

governing the arrest and surrender of persons to stand trial were clearly set out under Control Council Law No. 10.²¹⁵ As mentioned earlier, the standards in the Rome Statute governing the arrest and surrender of accused are inconsistent which has resulted in difficulties when prosecuting heads of state.

4.4.1 The origins of prosecuting persons with immunity

The notion of prosecuting heads of states or leaders with immunity has become common as more atrocities committed by such persons increase. There are three possible scenarios that can govern the prosecution of the crime of aggression in national courts: firstly, universal jurisdiction suggests that national courts of state parties can exercise jurisdiction over violations of *jus cogens*; secondly, Understanding five states that the amendments shall not be interpreted as creating obligations to prosecute aggression in national courts; and lastly, state parties who have incorporated the crime of aggression into their national penal codes can prosecute individuals for committing aggression. In all these three scenarios, there will remain an immunity stumbling block of how national courts will practically overcome the challenge of prosecuting officials of other states for committing the crime of aggression.

The development of universal jurisdiction for international crimes has raised more questions regarding the immunities of foreign leaders or state officials.²¹⁶ There is no generally accepted definition for universal jurisdiction, but it has been described as being:

based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.²¹⁷

The Princeton Principles proposed that in terms of universal jurisdiction states may prosecute individuals for committing 'serious crimes under international law' amounting to violations of *jus cogens*, such as the crime of aggression that has been accepted as a *jus*

²¹⁵ Article III and IV of Control Council Law no. 10.; DA Mundis 'Completing the mandates of the ad hoc international criminal tribunals: lessons from the Nuremberg process?' (2004) 28 *Fordham International Law Journal* 59, 598.

²¹⁶ Chatham House meeting summary: International Law Programme 'Prosecuting former heads of state for international crimes', 24 November 2011, 3 www.chathamhouse.org (accessed on 28 February 2012) [hereafter Chatham House meeting summary].

²¹⁷ International Criminal Law Manual (n 30 above) 338.

cogen.²¹⁸ This support of prosecuting aggression in domestic courts was a controversial issue among the group of experts involved in the Princeton Project initiative: a more defensible conclusion that has been expressed is that 'current law does not provide strong support for the exercise of domestic jurisdiction over the crime of aggression.'²¹⁹

The question of whether immunity should stand when prosecuting heads of state and other officials has been a controversial issue since the *Pinochet* case.²²⁰ The customary nature of the rule waiving functional immunities in prosecutions of international crimes has been confirmed in international and particular national case law.²²¹ The House of Lords in the *Pinochet* case denied immunity of a former head of state of Chile, Pinochet, for acts of torture, by submitting that immunity cannot be applied when an individual enjoying such is prosecuted for serious crimes under international law.²²² The generally accepted view is that immunity should not be upheld when prosecuting individuals for serious crimes under international law.²²³ Responsibility should not only be attributed to a state but also responsible leaders behind the commission of the aggressive acts.²²⁴ According to Salvatore Zappala, the criminally liable state official cannot claim functional immunity before a foreign court.²²⁵

The prosecution of state officials enjoying immunity with regard to acts carried out in their official capacity is 'an area of international law that is presently very much in flux'; the only relatively clear point is the ICJ decision in the *Arrest Warrant* case (*Democratic Republic of the Congo v Belgium*, ICJ 2002).²²⁶ The ICJ concluded that 'it was unable to identify an exception under customary international law to the rule that state officials enjoy immunity

²¹⁸ Kemp (n 3 above) 237.

²¹⁹ Van Schaack (n 16 above) 144.

²²⁰ Chatham House meeting summary (n 216 above) 3; *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147, [1999] 2 All ER 97, this case dealt with the extradition of a former head of state of Chile, Pinochet, by Spanish authorities for acts of torture that he committed in Chile.

²²¹ Kemp (n 3 above) 244; International Criminal Law Manual (n 30 above) 296.

²²² Kemp (n 3 above) 244; International Criminal Law Manual (n 30 above) 296.

²²³ Kemp (n 3 above) 244.

²²⁴ Kemp (n 3 above) 244.

²²⁵ Kemp (n 3 above) 244.

²²⁶ Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) Judgment, ICJ Reports 2002 (14 February 2002), this case dealt with the legal status of a Belgium court indictment of a foreign minister of the DRC for war crimes and crimes against humanity committed in the DRC; Chatham House meeting summary (n 216 above) 4.

from prosecution before domestic courts for international crimes [...].²²⁷ This case did not give a conclusion on whether the separate functional immunity that all state officials have in carrying out their official duties will stand in court during proceedings against that person.²²⁸ Although there has been a widely accepted view that there is an emerging exception regarding functional immunity for international crimes, national courts and state practice show a different and inconclusive picture.²²⁹ The importance of certainty regarding the status of functional immunity during aggression prosecutions is important because military commanders and other high-ranking officials who have control over the 'military and political acts of a state' are persons who may be charged with this crime. The ICJ also emphasised that this did not amount to impunity and made it clear that the state official could still be tried by international criminal tribunals, the sending state can waive immunity, or the courts in the sending state can prosecute that person.²³⁰

Whether dealing with aggression or other international crimes it should be kept in mind, as expressed by the European Court of Human Rights and the ICJ in *Al Adsani* and *Arrest Warrants* cases respectively, that 'Pinochet did not mean a general sweeping away of state immunity'.²³¹ A strictly international forum for the prosecution of aggression has been suggested by a majority, but the issue of immunity from prosecution in national courts still remains for those states who will possibly, in the future, find themselves prosecuting individuals for the crime of aggression.²³² These will be states that have incorporated aggression into their domestic penal codes and those that are still to do so.

4.4.2 Immunities under the Rome Statute

The conflict in provisions of Articles 27 and 98 have been an issue of academic debate since the indictment of Sudanese President, Omar Hassan Ahmad Al Bashir, by the ICC in 2009

²²⁷ International Criminal Law Manual (n 30 above) 299.

²²⁸ Chatham House meeting summary (n 216 above) 4.

²²⁹ Chatham House meeting summary (n 216 above) 4.

²³⁰ International Criminal Law Manual (n 30 above) 299; JD van der Vyver 'Prosecuting President Omar Al Bashir in the International Criminal Court', 6, research discussion presented at the Institute for International and Comparative Law in Africa, 15 March 2011, <http://web.up.ac.za/default.asp?ipkCategoryID=15429&archive=1&ArticleID=6751> (accessed on 31 October 2012).

²³¹ Chatham House meeting summary (n 216 above) 9.

²³² Van Schaack (n 16 above) 134.

for crimes against humanity, war crimes, and genocide committed in Darfur. This was spurred on by the African Union's (AU) opposition of Al Bashir's indictment by the ICC when the AU endorsed a decision at a meeting held in July 2009 stating that

the AU member states shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.²³³

The main purpose of Article 98 is that the ICC may not request a state to surrender or assist it in its prosecutions if the requested state would have to act inconsistently with its obligations with a third state under international. This contradiction between Articles 27 and 98 arise 'if "the third state" mentioned in Article 98 is interpreted to not only a non-party state but also a party to the Rome Statute.'²³⁴ That is why 'third state' has been accepted to mean a non-party state because state parties have an obligation to cooperate.²³⁵ The core goal of ending impunity behind the creation of the ICC should be the determining factor when interpreting all the provisions in this Statute.²³⁶ This was the consideration on which the Pre-Trial Chamber based its decision to carry on with the charges against Al Bashir as a head of state of a non-party state; it concluded that his immunity was irrelevant by observing that Article 27 was included in the Statute to achieve this goal.²³⁷

The US concluded bilateral immunity agreements (Article 98 agreements) with a majority of the state parties to the Rome Statute; the purpose of these agreements is to exempt US citizens from any possible surrender to the ICC.²³⁸ Legal experts have contended that signing these agreements by state parties are breach of international law; the ICC's advocates also condemn these agreements as US 'inexcusable attempt to gain impunity' from the Rome Statute crimes.²³⁹ The conclusion of these agreements will pose one of the greatest challenges in prosecuting US aggression especially since the US has been one of the countries known to commit aggressive acts; for example, the invasion of Iraq.

²³³ JD van der Vyver (n 230 above) 1.

²³⁴ JD van der Vyver (n 230 above) 4.

²³⁵ JD van der Vyver (n 230 above) 4.

²³⁶ D Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 (2) *Journal of International Criminal Justice* 333, 336.

²³⁷ Akande (n 236 above) 336.

²³⁸ A Arieff et al 'International Criminal Court cases in Africa: Status and policy issues' Congress Research Services, 7 March 2011, 3 <http://www.fas.org/sqp/crs/row/RL34665.pdf> (accessed on 21 June 2011).

²³⁹ Status of US bilateral immunity agreements (BIAs) Coalition for the International Criminal Court Factsheet http://www.iccnw.org/documents/CICCFBS_BISstatus_current.pdf (accessed 3 September 2012).

Some provisions in the UN Charter will assist the ICC in carrying out its functions where the provisions of the Statute are unable to do this. Member states of the UN, which also includes non-party states of the ICC, have to comply with all Security Council decisions, and their obligations under the UN Charter prevails above all other international obligations that member states have in terms of other agreements.²⁴⁰ The role afforded to the Security Council in determining acts of aggression will further enforce UN member state's obligation to comply with the ICC irrespective of whether or not they are state parties to the ICC. Since it has been suggested and widely accepted that states do not prosecute aggression and that such prosecutions should be left solely for the ICC; Articles 27 and 98 must be fixed so that they complement each other, successful prosecutions of aggression are largely dependent on this.

4.5 Conclusion

There have been no domestic prosecutions for crimes of aggression since after WWII despite the commission of this crime in some states.²⁴¹ For example, a German court dismissed claims brought by German politicians under a code prohibiting aggression in connection with Germany's involvement in NATO's intervention in Kosovo, on the basis that the case lacked standing.²⁴² Although states have generally not codified the crime of aggression in their penal codes in the past, it remains to be seen if this trend will continue now that a consensus definition of the crime has emerged.²⁴³ Leaving prosecutions for the crime of aggression to the ICC seems like a good solution but this does not mean that its prosecutions will be any easier.

²⁴⁰ Article 25 and 103 of the UN Charter.

²⁴¹ Van Schaack (n 16 above) 144.

²⁴² Van Schaack (n 16 above) 144.

²⁴³ Van Schaack (n 16 above) 145.

Chapter 5

Recommendations and conclusion

5.1 The approach that the ICC should take in prosecuting the crime of aggression

A traditional utilitarian (the idea that the morally correct course of action is the one that produces benefit for the greatest number of people) and retributivist rationales (retributive justice) as raised by Michael O'Donovan are most consistent with the goals and purposes of the law.²⁴⁴ In other words the ICC should apply the provisions on the crime of aggression with the aim of ending impunity and as a warning to other states: that those who commit this crime will be prosecuted. However, this will only be possible once the stumbling blocks already present in prosecuting international crimes are removed and in particular those threatening future prosecutions of the crime of aggression. The political nature of this crime does not make it easy to prosecute but with intact rules and procedures in place the ICC could get onto the right path on its way to successful aggression prosecutions. Some of the challenges that are already present are due to certain state practices that have become somewhat accepted by the international community. For example, the big political powers get away with certain unlawful conduct by imposing financial sanctions against states that do not play along to their 'games'. The US has been guilty of withholding financial or other support from states that do not cooperate with its ideas. The ICC must look at prosecuting aggressive war in a cold objective sense without being influenced by international politics.

5.2 The remaining problem with the definition of 'acts' and 'crimes' of aggression

The lack of an acceptable definition for the crime of aggression under the Rome Statute was the major problem behind the ICC's delayed ability to exercise jurisdiction over it. The definition that was adopted at the Kampala Review Conference in 2010 still contains some vagueness that might create further problems for the ICC when prosecuting aggression and

²⁴⁴ O'Donovan (n 5 above) 510.

by then it will be too late to change those adopted amendments. Unless the Understandings contained in Annex III of RC/Res 6 are accepted by all the state parties, they will be nothing but supplementary means of interpretation that the ICC can choose to ignore once the aggression amendments come into force.²⁴⁵ The legal status that these Understandings will have is one of the things that should have been clarified before the amendments were adopted because most of the vagueness in the definition of acts and crimes of aggression were to be given meaning by these Understandings. If they have no binding effect on the ICC then cases of aggression will lack standing due to vagueness and this will leave space for states to interpret aggression in ways that best suits their interest. Most, if not all, of the Understandings were initiated by the US to exempt its nationals from any liability that might arise from the use of force against another state by its military. The continued ‘manipulation’ of states to form laws on aggression in a way that will protect its nationals from criminal liability is a crucial thing that should not be tolerated, because those ‘manipulated’ laws create complications when prosecuting international crimes.

5.3 A clear definition of illegal military intervention

Ever since NATO’s military intervention in Kosovo and the invasion of Iraq by the US and its allies; the world at large has been awaiting the actions that the ICC would take in holding those responsible accountable for similar acts in the future. The textual difference between Article 8*bis* (1) describing aggression by its ‘character, gravity and scale’ constituting a manifest violation of the UN Charter’; and Understanding six focusing on the ‘gravity of the acts and their consequences’, has been criticised as drafted in favour of US state interest.²⁴⁶ The Understanding reflects the US’ desire to see the ICC exempting unilateral humanitarian intervention not authorised by the Security Council from qualifying as criminal and prosecutable as aggression.²⁴⁷ An interpretative approach that focuses on the ‘consequence’ of a military operation that may have been in violation of Article 2(4) of the UN Charter allows states to argue that its military action in another state helped improve the situation of the state in which action was taken.²⁴⁸ For example, the US and UK justified its invasion of Iraq by arguing that they helped free the Iraqi people from the oppression of the

²⁴⁵ KJ Heller ‘The uncertain legal status of the aggression understandings’ (2012) 10(1) *Journal of International Criminal Justice* 229, 229.

²⁴⁶ Heller (n 245 above) 232.

²⁴⁷ Heller (n 245 above) 233.

²⁴⁸ Heller (n 245 above) 233.

Saddam Hussein regime.²⁴⁹ An approach that moves away from the purpose of the ICC, to end impunity, could never be justified even if an ‘*ex post facto rationale*’ for using illegal force is argued by the aggressing state. The leading factor in prosecuting international crimes should be whether international law was violated and not the subjective reasoning of a state, or else no one will ever be prosecuted for aggression, or any international crime, because most international criminal law violations are committed in an effort to promote a state, an individual or a group’s interest.

5.4 Development of international law

The ASP failed to take into account the increased role that non-state actors play in international law.²⁵⁰ By not modifying the definition initially applied at the IMT and later contained in General Assembly Resolution 3314 of 1974, the state parties made it possible for non-state actors acting independently from a state to be exempted from the jurisdiction of the ICC in prosecutions for aggression. They can still be charged with the commission of the other crimes, but not aggression. The state parties should consider making provision for such prosecutions.

State parties to the ICC and other participating states that were present at the Kampala Review Conference settled on moving away from an already developed rule of customary international law: the principle of complementarity. By adopting Understanding four and five, the state parties moved away from the rule of complementarity that had been governing the ICC since its establishment. If correctly applied, this move could be to the advantage of the ICC in helping it prosecute aggression without the political challenges that will be present in national proceedings. Making aggression a crime that should be left to be prosecuted by the ICC alone will prevent third states from taking sides and imposing retaliatory charges in the nature of ‘lawfare’ against the aggressive state.²⁵¹ The reason that I see as being at the core of leaving the ICC to prosecute aggression is the practical difficulty that national courts will face in gaining access to classified state information and secrets that could have been the driving force behind the decision to take military action against another state.²⁵² I do not see states allowing national courts of other states to have access to such information,

²⁴⁹ Kemp (n 3 above) 86.

²⁵⁰ Megret (n 13 above).

²⁵¹ Van Schaack (n 16 above) 150.

²⁵² Van Schaack (n 16 above) 153.

especially if this can be used in other situations not directly linked to a case of aggression. The handling of evidence that could prejudice the national security of another state if disclosed during proceedings is regulated in the Rome Statute.²⁵³ This will be difficult, if not impossible, to achieve in a national court where its state could see an opportunity to use that information to advance its interest or the interest of other states it has relations with.

With regard to the immunity of state officials the state parties should fix the provisions of Articles 27 and 98, they should be given an interpretation that promotes the ending of impunity; and state parties should also cooperate with the ICC by waiving immunity of its nationals who commit this crime.²⁵⁴

5.5 Conclusion

Excluding the prosecution of aggression from the ICC's jurisdiction has been suggested as representing 'a significant step backwards' from the legacy left behind from the IMT, IMTFE and Control Council Law No. 10 trials.²⁵⁵ I agree with this, but at the same time it has to be kept in mind that the ICC is still not 'mature' enough to prosecute the crime of aggression from 2017 should it get enough state ratifications. It should focus on 'perfecting' prosecuting the less-political crimes before burdening itself with the crime of aggression. Should the ICC be able to exercise jurisdiction over aggression in 2017 it might become too 'excited' in prosecuting this crime that it has not been able to prosecute since it (the ICC) came into force, and this might result in it ignoring the prosecution of the other crimes. With all the things that need to be changed for the prosecution of aggression to be possible and successful, state parties need to change their attitude. The success of the ICC depends greatly on the good attitude and cooperation of state parties. For example, the conclusion of Article 98 agreements with the US shows states willingness to compromise with their obligations under the Rome Statute. If states are willing to forsake their duties over financial gain or other state interests, then we should prepare ourselves for endless 'talk without action' debates around ending aggressive acts of states. A lot of changes in the operation of the ICC and international law still need to take place. It is not whether enough state parties will ratify the amendments in 2017 that should determine the success of the ICC in finally

²⁵³ Article 72 provides for the protection of national security information.

²⁵⁴ Akande (n 236 above) 336; JD van der Vyver (n 230 above) 6.

²⁵⁵ O'Donovan (n 5 above) 516.

having this crime under its jurisdiction. The determining factor of the ICC's success should be the number of successful aggression prosecutions it achieves and the ending of impunity.

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