

## **“An Analysis of War Crimes as a Crime of Aggression under International Criminal Law<sup>1</sup>”**

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### **Abstract**

*Aggression is regarded as one of the core crimes under customary International Law. In general, the crime of aggression which is committed by an individual is usually based on an act of aggression committed by a State.*

*However, in recent times definition of Crime of Aggression has not found its place in International Criminal Law. This paper examines in details, the evolution of this concept through a series of creative precedents and decades of suspense. It follows the significant attempts of penalizing this offense right from Nuremberg Charter to its actual codification in the International Criminal Court Review Conference in Kampala whereby, the Statute was amended to insert a proper definition and provisions related to jurisdiction of this Court to adjudicate upon it. It also analyses various challenges concerning with the exercise of jurisdiction and process of ratification of this Amendment by the Sovereign States.*

### **Introduction:**

Since 1947, there have been no international trials for alleged crimes of aggression even though there have been instances of States committing various acts of aggression in violation of Art 2(4) of the UN Charter which have been recognized by the United Security Council.<sup>2</sup>

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<sup>2</sup> Cassese, Antonio, International Criminal Law, Oxford University Press, Second Edition, p. 153

Some examples here can be resolution 573 of 4, October, 1985, on the Israeli attack on PLO targets and the resolution 577 of 6 December 1985, on South Africa's attack on Angola.<sup>2</sup>

According to Sean D. Murphy, Member, U.N. International Law Commission (since 2012):

Those seeking to uphold the international prohibition on the use of force by one State against the territorial integrity or political independence of another often favor the idea of criminally punishing governmental leaders who initiate such force. Indeed, at least since the prosecution of the major political and military leaders at the Nuremberg and Tokyo war crimes tribunals, many States and individuals have sought to establish a global criminal tribunal for prosecuting government officials who plan and unleash inter-State aggression.<sup>3</sup>

In most of twentieth century, the desire to see such process of Justice remained unfulfilled, but in 1998 a foremost development took place. A total of 120 States adopted the Rome Statute establishing the International Criminal Court (ICC). The crime of aggression was included in the subject-matter jurisdiction of the International Criminal Court (ICC) (Article 5(l) (d) of the ICC Statute), but the competence of the ICC to prosecute aggression was made contingent upon adoption of a definition of the crime and of the circumstances under which the ICC could exercise jurisdiction (Article 5(2)).

Thus, the Rome Statute, to which 123 States are currently a party, contemplated that the ICC jurisdiction over the crime of aggression would be activated when in the future, some consensus will be reached to the w.r.t definition of Aggression as an offense and the conditions for its operation would be elaborated.<sup>5</sup> The must awaited opportunity came with the First Review Conference on the Rome Statute, on 11 June 2010 in Kampala which took concrete steps towards defining and laying down provisions as to the jurisdiction of Internal Criminal Court in prosecuting the Crime of Aggression. The crime of aggression was defined in Kampala, by general agreement, as "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 which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."<sup>4</sup>

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<sup>3</sup> Murphy, Sean, "The Crime of Aggression at the ICC" (2012), Oxford Handbook on the Use of Force, Marc Weller, ed., Oxford University Press, p. 2

<sup>4</sup>Article 8 bis of the Rome Statute of International Criminal Court, Inserted by resolution RC/Res.6 of 11 June 2010. Available at: [http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-a655eb30e16/0/rome_statute_english.pdf)

**Historical Overview and Definition:**

After World War I, the international community attempted more seriously to ban war as an instrument of politics.<sup>5</sup> The preamble to the Covenant of the League of Nations of 28 June 1919 emphatically says that it is the state parties' duty "not to resort to war," so as to ensure international peace and security.<sup>6</sup>

A major decisive step towards a comprehensive ban on war was taken with the Kellogg Briand Pact of 27 August 1928. In the preamble of the pact, the state parties declared that they "condemn recourse to war for the solution of international controversies", and renounced it, as an "instrument of national policy."<sup>7</sup> Although it could not avert the outbreak of World War II, waged by aggressive regimes who blatantly ignored their obligations towards international peace, it can however be deduced that by the end of the 1930s, international law's position toward war had changed significantly.

After the World War II, the United Nations Organization was created. The question of defining aggression has been under consideration in the array of United Nations (UN) since genesis of the Organization.<sup>8</sup>

According to the UN Charter, prevention of "acts of aggression" has been treated as high priority issue. Among the objectives of The United Nations is to "maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of peace".<sup>9</sup> Article 2 urges members to "refrain in their international relations from the threat or use of force against . . . any state" in any manner inconsistent with the purposes of the United Nations.<sup>10</sup> Chapter VII of the U.N. Charter, comprising articles 39 to 51, gives the Security Council the power to determine the existence "of any threat to the peace, breach of the peace, or act of aggression" and decide what measures shall be taken to maintain or restore international peace and security.<sup>11</sup> Specifically, article 40 allows the Council, before

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<sup>5</sup> Werle, Gerhard, 'The Crime of Aggression between International and Domestic Criminal Law', Presentation at the XVth International Congress on Social Defence: Criminal Law between War and Peace: Justice and Cooperation in Military Matters in International Military Interventions, 20 – 22 September 2007 p. 3

<sup>6</sup> Id

<sup>7</sup> General Treaty For The Renunciation Of War (Kellogg-Briand Pact) Paris, August 27, 1928, art 1 10 Werle, supra note 1, pp. 4-5

<sup>8</sup> Historical Review of Developments relating to Aggression, United Nations Publication, Sales No. E.03.V10 ISBN 92-1-133538-8, United Nations New York, 2003, Available at: <http://legal.un.org/cod/books/HistoricalReview-Aggression.pdf> (last visited: Feb 22, 2015)

<sup>9</sup> U.N. Charter art. 1, para. 1.

<sup>10</sup> Id. at art. 2, para. 4.

<sup>11</sup> Id. at art. 39.

determining the existence of such a threat, to call upon the relevant parties concerned “to comply with such provisional measures as it deems necessary or desirable”<sup>12</sup>

But what exactly is an act of aggression? The U.N. Charter never specifically defines it, though Germany and Japan’s wars of aggression were the triggering factors which made the U.N.’s founders rethink about this entire concept.<sup>13</sup> These same founders, however, feared that struggling with a definition would bring the Charter Conference to a standstill, and the Security Council was entrusted the duty to decide what constitutes the act, a threat to peace, and an attack on peace depending on facts of each case.<sup>14</sup>

Moreover, two exceptions were made: firstly, individual or collective self-defense by states involving the use of force is authorized by article 51 of the Charter and secondly, the use of force can be authorized by the UN Security Council as under article 42 of the UN Charter.<sup>15</sup>

Here it is important to understand that an act of aggression, as discussed in the U.N. Charter is not the same as and a crime of aggression. The act is a violation committed by state parties, while the crime is the individual criminal liability that the perpetrator, abettor or planner of the act of aggression may face. While a state commits an act of aggression, an individual commits a crime of aggression.

In 1974, the General Assembly adopted a definition of aggression to provide guidance to the Security Council in determining, in accordance with the Charter of the United Nations, the Existence of an act of aggression.<sup>16</sup>

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

Explanatory note: In this Definition the term "State":( a) “Is used without prejudice to questions of recognition or to whether a State is a member of the United Nations;

(b) Includes the concept of a "group of States" where appropriate.”

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<sup>12</sup>McCabe, Alexander, “Balancing Aggression and Compassion in International Law: The Crime of Aggression and Humanitarian Intervention”, 83 Fordham L. Rev. 991 (2014). Available at: <http://ir.lawnet.fordham.edu/flr/vol83/iss2/20> (last visited Feb 22, 2015)

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Source: International Crime Database, Crime of aggression Available at: <file:///C:/Users/1485007/Documents/International%20Criminal%20Law/Article%20work/ICD%20%20Crime%20of%20aggression%20-%20Asser%20Institute.htm> (last Visited February 22, 2015)

<sup>19</sup> McCabe, supra note 9, p. 6

<sup>16</sup> Supra note 5, p. 15

In Article 3 Aggression was first recognized as an international crime resulting in individual criminal liability under international law in the Charter of the International Military Tribunal at Nuremberg (IMT).<sup>17</sup>

Its Article 6 (a) gave the IMT jurisdiction over crimes against peace, “namely, planning,

Preparation, initiation or waging of a war of aggression, or war in violation of international treaties, agreements or assurances, or preparation in a common plan or conspiracy for the accomplishment of any of the foregoing” This wording is duplicated in article 5 (a) of the Tokyo Charter. The IMT in its judgment of 1946 stated that the crime of aggression “[...] is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.”

In 1998, Rome Statute of the International Criminal Court was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which provided that the Court shall have jurisdiction over the crime of aggression once a provision has been adopted defining the crime of aggression and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.<sup>18</sup>

Article 8<sup>19</sup> of the Rome Statute clearly defines ‘Crime of aggression’. It says:

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

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

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

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

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<sup>17</sup> Supra note 5, p. 12

<sup>18</sup> Rome Statute of the International Criminal Court, adopted on July 17, 1998, A/CONF. 183/9, art 5.

<sup>19</sup> Amendments to the Rome Statute of the International Criminal Court on the crime of aggression, Resolution

RC/Res.6, Adopted at the 13th plenary meeting, on June 11, 2010, by consensus

- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein. Objective and Subjective Elements:-

#### **A. Perpetrators: - Aggression as a Leadership Crime:**

Crime of aggression by its terms is a leadership crime; the defendant must hold a position by which he or she “effectively ... exercise[s] control over or ... direct[s] the political or military action of a State.” The language adopted excludes non-governmental actors, such as persons leading a terrorist group (e.g., Al Qaeda), leaders of an insurgency, or industrialists in a country even if they have substantial involvement in and influence upon governmental conduct.<sup>20</sup>

Defining aggression as a leadership crime makes this crime, in comparison with other crimes by ICC, unique in two respects:

- (a) It adds a political dimension to the crime of aggression which is not a necessary element in genocide, crimes against humanity, or war crimes; and
- (b) It limits the basis of liability to principal or co-principal perpetrators.<sup>21</sup>

The political dimension can be understood in the light of being the link between the crime of aggression and an act of aggression, which is as stated earlier, an act of state.

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<sup>20</sup> Van de Vyver, Johan, “Prosecuting the Crime of Aggression in the International Criminal Court”, Emory University School of Law, Public Law & Legal Theory Research Paper Series Research Paper No. 11-176

<sup>21</sup> Supra note 18<sup>26</sup> Id.

From basic features of aggression it can be understood that such crime (i) is never perpetrated by single individuals acting severally; instead it occurs out of collective action of plurality of persons; (ii) it can be attributed to political and military leaders and other senior state officials (or leading organs of non-state entity); that is those who mastermind the plan or organize the crime.<sup>22</sup>

The ICC definition specifies that a person be ‘in a position effectively to exercise control over or to direct the political or military action’ of the State which committed the act of aggression. While this phrase adequately circumscribes the leaders of the government and of the military, it retracts from cases like Von Leeb and others<sup>23</sup> (The High Command Case), where it was stressed that war activity is the implementation of a predetermined national policy. Therefore, it includes the criminality of persons with power to shape and influence policy.<sup>24</sup>

### **B. Planning, Preparation, Initiation or Waging:**

The act of the individual leaders or other high level policy makers was described in Article 6 of the Nuremberg Charter as the ‘planning, perpetration, initiation of waging’ of war of aggression and participation in a common plan in conspiracy for the foregoing.<sup>25</sup> Participation in the formulation of aggressive plans, largely of course dependent on Hitler’s decisions was one of the most typical bases for criminal responsibility in Nuremberg IMT and subsequent proceedings.<sup>26</sup>

Here the most prominent case study can be United States v. Krauch et al (I.G Farben Case).<sup>27</sup> In Farben, 24 members of I.G. Farben’s managing board were charged with planning, preparing, initiating and waging wars of aggression (Count 1) and with participating in a common plan or conspiracy to commit crimes against peace (Count 5). Farben’s massive production of synthetic rubber, gasoline, light metals, explosives and chemical weapons aided and boosted the Nazis’

aggressive plans; according to Judge Herbert, ‘Farben largely created the broad raw material basis without which the policy makers could not have even seriously considered waging

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<sup>22</sup> Cassese, supra note 1, p. 159

<sup>23</sup> United States V. Wilhelm von Leeb et al, 12 LRTWC 1 at 59 (1948)

<sup>24</sup> See Heller, Kevin, ‘Retreat from Nuremberg: The Leadership Requirement in Crime of Aggression, The European Journal of International Law Vol. 18 no.3 © EJIL 2007

<sup>25</sup> Nuremberg Trial Proceedings Vol. 1, Charter of the International Military Tribunal

<sup>26</sup> Cryer, Robert, Friman Hakan, Robinson Darryl, Wilmschurst, Elizabeth, “An Introduction to International Criminal Law and Procedure”, Cambridge University Press, Ed-2 pp. 319-320.

<sup>27</sup> United States v. Krauch et al., Military Tribunal VI (Farben Judgment), 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952) 1299 (Herbert Concurrence).



aggressive war'. Nevertheless, the Tribunal acquitted all of the defendants due to lack of required evidences<sup>28</sup>

### **C. Act of Aggression:-**

There can't be a crime of aggression in the absence of an act of aggression. It is the collective act of a State committed against another State. There are two questions: (i) how is the collective act lead to individual criminal responsibility and (ii) what are the rules of International Law regarding the collective act, as so described?<sup>29</sup>

The attempt to divide these two concepts—state responsibility and individual criminal responsibility can be found in article 16 of the Draft Code of Offences against the Peace and Security of Mankind which referred to “aggression committed by a State.”<sup>30</sup> There is an obvious link between the international responsibility of the state for aggression and individual criminal responsibility for crimes of aggression.<sup>31</sup> Thus, only after a State has been declared as an aggressor, as per provisions of Charter of United Nations and the definition of aggression annexed to General Assembly resolution 3314, can an individual be tried as per this legal nexus for his individual criminal responsibility in relation to the Rome Statute.<sup>32</sup>

Self Defense:

The relevant provision of the Charter in Article 51, which provides in part:

‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.’

The Charter doesn't elaborate on the pre-conditions for unlawful use of force in self-defense, but international law says that self-defense is lawful only if it is necessary to use force, and only if that force is proportionate, that is , it is not excessive in relation to the need to avert to an attack. <sup>33</sup>

### **D. Mental Element:**

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<sup>28</sup> Heller, Supra note 23, p. 7

<sup>29</sup> Heller, supra note 23, at p. 320

<sup>30</sup>Baek, Buhm-Suk, "The Definition and Jurisdiction of the Crime of Aggression and the International Criminal

Court" (2006).Cornell Law School Graduate Student Papers. Paper 19. p. 16

[http://scholarship.law.cornell.edu/lps\\_papers/19](http://scholarship.law.cornell.edu/lps_papers/19)

<sup>31</sup> Id

<sup>32</sup> Id.

<sup>33</sup>Cryer, supra note 25, at p 323



As per the legal maxim, '*Actus reus non facit reum nisi mens sit rea*', the crime also requires criminal intent. It is to be proved that the perpetrator intended to participate in planning or waging aggression, and was well aware of the scope, significance and consequences of the action taken and substantially contributed to shaping or influencing the planning or waging of aggression.<sup>34</sup> A leader or high ranking military officer or senior state officials or leading private may also bear responsibility if he has knowledge of other leaders' plans and nevertheless willfully pursues the criminal purpose of furthering the aggressive aims.<sup>35</sup>

Aggression under Rome Statute and the Kampala Conference:

Rome Statute:

The crime of aggression was among the most dissident issues in line-up at the 1998 Rome Conference which established the International Criminal Court ("ICC").<sup>36</sup> A number of developing countries, particularly the non-aligned members and members of the Arab group, as well as some major industrialized powers, including Canada, Germany, Italy, Japan, and Greece, batted for the inclusion of a definition of aggression in the Statute, while the United States and many of its Western allies opposed it.

At the end of the conference, the chairman, veteran Canadian diplomat Philippe Kirsch, orchestrated a compromise whereby the crime of aggression was included as article 5(1)(d) of the Rome Statute, but the definition and the conditions for the exercise of jurisdiction were omitted pending agreement at a future review conference.<sup>37</sup>

Articles 5(1) (d) and (2) ICC Statute, which read as follows:

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes::: (d) the crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such provision shall be consistent with the relevant provisions of the Charter of the United Nations.

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<sup>34</sup> Cassese, supra note 1, p. 159, also see United States v. Krupp Von Bohlen und Halbach et al., Military Tribunal III (Krupp Order), 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1950).

<sup>35</sup> Id.

<sup>36</sup> Hebel, Herman & Robinson, Darryl, "Crimes Within the Jurisdiction of the Court, in The International Criminal Court: The Making Of The Rome Statute" 79, 85 (Roy S. Lee ed., 1999)

<sup>37</sup> Id.

The Rome compromise on the crime of aggression was complemented by the following Paragraph 7 in Resolution for the conference's Final Act:

The (Preparatory; C.K. /L.v.H.) Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the State Parties in accordance with the relevant provisions of this Statute.<sup>38</sup>

The Preparatory Commission (Prep Com) for the ICC took up the matter. The Commission held 10 sessions between spring 1999 and summer 2002.<sup>39</sup> In its third session, it created the Working Group on Aggression, which was guided first by Tuvako Manongi (Tanzania) and then by Silvia Fernandez de Gurmendi (Argentina). This working group did not make significant progress, but its efforts resulted in a helpful summary of the main positions in the Coordinator's Discussion Paper of 11 July 2002 (2002 Discussion Paper).<sup>40</sup>

Soon after the entry into force of the ICC Statute on 1 July 2002, the Assembly of States Parties (ASP) expressed its desire to continue and complete the work on the crime of aggression.<sup>46</sup> The ASP established the Special Working Group on the Crime of Aggression (SWGCA) which concluded work in 2009. The proposals for a provision on aggression elaborated by the SWGCA (2009 Proposals) were vital in the negotiations on the crime of aggression' and paved the way for the Kampala compromise.<sup>47</sup>

The delegations at the Prep Com and Special Working Group were quite aware that while the determinations by the Security Council on act of aggression was a political decision, the ICC was required to review the situation by applying a totally different procedure under a judicial process.<sup>41</sup> This difference in the assessment systems of the ICC and the Security Council can result in different findings. Therefore, the ICC and the council have to work together closely to ensure consistency in such decisions. Surely, this has to be done with a full respect to the independence of the ICC so that it may fulfill its role for the international justice.<sup>49</sup>

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<sup>38</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Vol. I, Final Documents, Annex I, at 72

<sup>39</sup> KreB, Claus and Holtzendorff, Leonievon, "The Kampala Compromise on the Crime of Aggression", Journal of International Criminal Justice 8 (2010), 1179-1217 p. 5

<sup>40</sup> Id.

<sup>46</sup> Id.

at p. 6

<sup>47</sup> Id.

<sup>41</sup> Baek, Buhm-Suk, "The Definition and Jurisdiction of the Crime of Aggression and the International Criminal Court" (2006). Cornell Law School Graduate Student Papers. Paper 19. Available at: [http://scholarship.law.cornell.edu/lps\\_papers/19](http://scholarship.law.cornell.edu/lps_papers/19) <sup>49</sup> Id.

**The Kampala Compromise:**

In Kampala, Uganda, from May 31-June 11, 2001, at the first Review Conference on the International Criminal Court, States Parties to the ICC took place. The main objective of the Review Conference was to consider a limited number of amendments to the Rome Statute, focusing in particular on the crime of aggression; the revision of Article 124 of the Statute; and the amendment to Article 8 of the Statute to include the use of certain weapons as war crimes in the context of a conflict of a non-international character.<sup>42</sup> As regards to Crime of Aggression, eventually a consensus on all three major points of contention: the definition of aggression, the question of state consent, and the role of the Security Council.

The State parties reached consensus ad idem, adopting an amendment to the Rome Statute defining the crime of aggression and agreeing on conditions for the ICC's exercise of jurisdiction over it. Only crimes occurring after the further decision of the States Parties in 2017 (or thereafter) could fall within the scope of the ICC's jurisdiction, not crimes that occur in earlier years, even if thirty States had ratified or accepted the amendments before 2017.

**Jurisdiction:**

Article 15 bis<sup>43</sup> talks about exercise of jurisdiction over the crime of aggression (State referral, proprio motu). The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute. Here the Security Council also has a dominant position under provisions of Art 15 ter.

Article 15 bis Exercise of jurisdiction over the crime of aggression (State referral, proprio motu) says:

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

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<sup>42</sup> Smith, Lorraine, What did the ICC Review Conference achieve? EQ: Equality of Arms Review  
A publication of the International Bar Association's ICC Monitoring and Outreach Programme, VOLUME  
2 Issue 2, Nov, 2010

<sup>43</sup> Inserted by resolution RC/Res.6 of 11 June 2010. Depository notification C.N.651.2010

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such declaration may be affected at any time and shall be considered by the State Party within three years.
5. In respect of a State that is not a party to this Statute; the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.
6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-general of the United Nations of the situation before the Court, including any relevant information and documents.
7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
8. Where no such determination is made within six months after the date of notification, the prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.
9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5. :::

Article 15 Exercise of jurisdiction over the crime of aggression (Security Council referral):

- (1) The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.
- (2) The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
- (3) The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
- (4) A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's findings under this Statute.
- (5) This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

In a way it can be said that Article 15 bis of the ICC Statute, which deals with State Party referrals and proprio motu investigations, acts as special judicial filter that the Pre-Trial Division must, in all cases, authorize the commencement of an investigation.

But historically, the determination of the existence of aggression has been the sole responsibility of the United Nations Security Council, which is empowered under the UN Charter to “maintain international peace and security.”<sup>44</sup> It was the International Law Commission who proposed that, in view of the Security Council’s responsibilities under the UN Charter<sup>45</sup>, the way to resolve the problem was to require that, before ICC could exercise jurisdiction, there had to be a prior determination by Security Council that a State had committed an act of aggression which is the subject of proceeding.<sup>46</sup> The legal determination will then be for the ICC to decide.

However, the Council’s role has been criticized through and through. The fact that its five permanent members (U.S., U.K., France, China, and Russia – also the world’s five largest arms exporters) can veto Security Council decisions means that agreement on effective action to maintain peace and security has often proved elusive.<sup>47</sup> Here we can take the example of American Aggression in Vietnam or the recent Russian military intervention in Ukraine and outside the context of ICC’s jurisdiction, even the NATO bombings in Yugoslavia during Kosovo War which killed thousands of civilians and displaced 2, 00,000 ethnic Serbs. Uranium bombs and cluster munitions used in guise of humanitarian intervention, is seen by many scholars as an un-called for act of aggression which went unpunished and unquestioned due to involvement of the powerful aggressor Nations

Another important provision with respect to exercising jurisdiction is Article 121(5) of the ICC Statute reads as follows:

Any amendments to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory. This means, the Court does not have jurisdiction over crimes of aggression involving States that are not parties to the Rome Statute, be it the aggressor, or the victim of aggression. Accountability is confined to the States Parties only – which can also be interpreted as an incentive for Non-States Parties

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<sup>44</sup> Source: World Federalist Movement - Canada, International Criminal Court: Breakthrough on Crime of Aggression, Available at: [http://www.worldfederalistscanada.org/documents/ICCMediaRelease\\_000.pdf](http://www.worldfederalistscanada.org/documents/ICCMediaRelease_000.pdf) (last visited Feb 22, 2015)

<sup>45</sup> Article 23(2) of the ILC’s 1994 Draft ICC Statute suggested making ICC proceedings for the crime of aggression dependent upon a prior determination of the Security Council of an act of aggression.

<sup>46</sup> Cryer, *supra* note p. 25

<sup>47</sup> *Supra* note p. 45

to join the Statute in its 2010 version.<sup>48</sup> An additional factor to bear in mind is that at least one of the States Parties involved – be it the presumed aggressor or victim – must have ratified the amendments on the crime of aggression.<sup>49</sup>

ICC has only prospective jurisdiction w.r.t to crimes punishable under it. Same goes for Crime of Aggression. As per Article 11(1), the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. As per Article 11(2), if a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

On 8 May 2012, Liechtenstein ratified, as the first country, these amendments on the crime of aggression; there after 19 more countries have ratified it including Germany, Spain, Poland, Belgium, Estonia, Uruguay etc.<sup>50</sup> Challenges:

The ‘Oxford Handbook on Use of Force’ explains the Problem of Alleged Aggression by a Coalition<sup>51</sup> as follows:

The existence of ICC jurisdiction over some States but not over other States, however, may well raise a dilemma for the ICC if faced with alleged aggression by a group or coalition of States. Assume that a group of four States engages in alleged aggression against a fifth State. State A is a State Party to the Rome Statute that has ratified the amendments without reservation, State B is a State Party that has ratified the amendments but opted out of the ICC’s jurisdiction, State C is a State Party that has not ratified the amendments, and State D is a non-State Party. In the absence of a Security Council referral, the ICC presumably only has jurisdiction over action by the leaders of State A (if the “positive understanding” or “softened consent-based regime” Interpretations is correct, it would also have jurisdiction over State A. Yet when investigating and prosecuting that alleged aggression, it seems inevitable that the ICC, in essence, would have to assess the culpability States B, C, and D. The leaders of those States presumably would not be defendants in the ICC’s courtroom but,

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<sup>48</sup> The Global Campaign for Ratification and Implementation of Kampala Amendments on Crime of Aggression Available at: <http://crimeofaggression.info/> (last visited Feb 21, 2015)

<sup>49</sup> As per Art 12(2) In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national

<sup>50</sup> Status of Ratification and Implementation of the Kampala Amendments on the Crime of Aggression Update No. 16 (information as of 5 December 2014), the Global Institute for the Prevention of Aggression

<sup>51</sup> Murphy, *supra* note 1, p18

given the nature of the crime at issue, the ICC in effect would be discussing and passing upon the conduct of those other leaders.

Another matter of confusion is that it is unclear exactly what kinds of action, by their “character, gravity, and scale,” rise to the level of a “manifest violation” of the U.N. Charter.

As for the Security Council’s role, it may come into conflict with powers of trial chamber of ICC.

The Council might have decided not to declare a certain crisis as involving an act of aggression, perhaps out of a sense that it would aggravate the situation, only to have the ICC bring charges against senior leaders involved in the crisis for the crime of aggression.<sup>52</sup>

#### **CONCLUSION:**

The control of war is the supreme problem which human society must solve.<sup>53</sup> In this era of volatile international relations, capitalism and fundamentalist terror, aggressive acts are quite likely. Laws and statutes cannot bring about world peace and deter aggression on their own. Thus political will is the need of the hour. Global consensus is required to ratify and implement these laws and precautions. More and more States should come forward to ratify the Amendments to Rome Statute. More talks, negotiations and deliberations must be made as to reform of the Security Council.

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<sup>52</sup> Murphy, *supra* note 1 , p. 18

<sup>53</sup> Jessup, Philip, “The Crime of Aggression and the Future of International Law”: *Political Science Quarterly*, Vol. 62, No. 1 (Mar., 1947), pp. 1-1, p9,10