FACULTY OF LAW
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The Historical Path of the Crime of Aggression and the First ICC Review Conference

Research paper submitted in partial fulfillment of the requirements for the degree of Master of Laws (LL.M) in Transnational Criminal Justice and Crime Prevention – An International and African Perspective

By

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DECLARATION

I declare that **A Historical Path of the Crime of Aggression and the First ICC Review Conference** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Robert Mugagga-Muwanguzi

Signed:……

Date:……

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DEDICATIONS

For my parents: *James Frank Kigumba Kamya* and *Edith Margret Nabwere Ssejjobwe Kamya*, who eternally inspire me to succeed against all odds. Any success that I achieve is as much your success!!

Also to all those people that have been a mainstay in my academic journey.

Aluta continua… You Will Never Walk Alone!!!

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LIST OF ACRONYMS AND ABBREVIATIONS

All ER	All England Law Reports
EJIL	European Journal on International Law
GA	(United Nations) General Assembly
ICC	International Criminal Court
ICL	International Criminal Law
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East at Tokyo
LJIL	Leiden Journal of International Law
PrepCom	Preparatory Committee
UNSC	United Nations Security Council
UK	United Kingdom
UN	United Nations
USA	United States of America

ABSTRACT

Objective of the study – The primary goal of this research study was to investigate and document the evolution and historical development of the crime of aggression.

Design / methodology / approach – The research study was primarily a desk-top based research by design and methodology. It reviews a range of published books, expert commentaries, and journal articles that provide theoretical and practical research on the evolution and development of crime of aggression through the past centuries to the present day. The discussion is majorly premised around key historical debates and events that shaped, and defined the rubric of the crime of aggression. These include: the philosophers' conceptualisation of the doctrine of 'just war' or 'unjust war', states' practice before and after the First World War and Second World War, the International Military Tribunals, the birth and role of the United Nations, the 1998 Rome Conference and the 2010 Kampala ICC Review Conference.

Findings – This study provides information on each author's perspective on the status of the crime of aggression before and after the First ICC Review Conference. The study generally concedes that although today the crime of aggression is defined under the Rome Statute, and the jurisdiction of the ICC over it spelt out; its status under the treaty regime remains distinctly different from that under international customary law.

Significance of the study – The significance of this research study lies in the fact that it is useful with regard to documenting the historical development of the crime of aggression. It also fulfils an identified need to clarify the position of the crime of aggression after the landmark First ICC Review Conference that took place in Kampala during May / June 2010.

Study type – Postgraduate university Master of Laws research paper.

CHAPTER ONE
INTRODUCTION TO STUDY

1.0 Introduction

Aggression is closely linked to the use or threat to use force by one against another. Crimes and more so aggression have probably been in existence since man decided to live in organised societies. However, as man metamorphosed through different stages of societal development, his interests changed over time, and consequently the perception of aggression has changed dramatically and systematically. It may be very difficult therefore to identify with irrefutable exactness the definite point in time when man took issue with aggression, but there are marked out timelines and linked events that seem to have galvanized or reinforced man's opinion on aggression and its undeniable effects.

The overall goal of this research study is to critically investigate and document the historical pathway of the crime of aggression to the present day. Critical to this investigation and analysis, is the contribution of the final outcome of the first International Criminal Court (hereinafter: 'ICC') Review Conference that took place in Kampala (Uganda) during the months of May and June 2010.

The findings in this research paper are discussed in five chapters: Chapter one is the introductory chapter of this research study, and covers the following preliminary sub-topics: the key-words most frequently used in this study, objectives of the study, research questions, significance of the study and research methodology used to undertake the study.

Chapter two serves two purposes. In the first instance, it presents the findings of exposition into the literary meanings and philosophical

underpinnings of the term 'aggression' within the context of state affairs or inter-state relations. In the second instance, it examined the international state of affairs that shaped the then international community's perception and conception of state precipitated aggression in 19th and 20th centuries just before the Second World War.

Chapter three examined the 'baby' steps that defined the development of the crime of aggression between London and Rome Conferences.

Chapter four reviewed and analysed the outcome of the First ICC Review Conference with regard to the provisions concerning the crime of aggression.

Chapter five on the other hand is the conclusion to this research study.

1.1 Key-words

- Aggression
- Crime of aggression
- First ICC Review Conference
- International crime(s)
- International Criminal Court
- International Criminal Law
- Rome (ICC) Statute
- United Nations
- Use of force
- War

1.2 Objectives of the Study and Research Questions

The primary objective of this study is two-fold: On the one hand, this study seeks to investigate and document the evolution and eventual development of the crime of aggression to the present day. On the other hand, the

researcher attempts to critically examine the final outcome of the 2010 ICC (Kampala) Review Conference, in so far as it defined the crime of aggression, succinctly spelt out its elements as an international crime, and established the ICC's jurisdiction over it.

The research questions that the researcher aims to answer are: How did the crime of aggression evolve and develop to its present state as an international crime? What crucial circumstances, events, institutions and people have contributed to the evolution and development of the crime of aggression? What was at stake, and what was decided at the First ICC Review Conference in Kampala-Uganda? What is the impact of the resolution that was reached at the First ICC Review Conference to the present legal order of international criminal law? What was the contribution of the outcome in clarifying, expanding or narrowing down the position of customary international law with regard to the crime of aggression? What criticisms can be made against the outcome? What potential challenges do the amendments pose for the ICC and the international community at large? What conclusions can be drawn from the findings of the research study?

1.3 Significance of the Study

It has been argued that it is desirable that any assessment of the legal limitations of the use of force (or state aggression) be made with a historical perspective.[1] The historical perspective helps one to better understand the processes, and context in which the crime of aggression evolved. The processes and mechanisms of defining the crime of aggression have (re)gained international attention and prominence because of the gross violations of human rights and rules of international humanitarian law that

[1] Brownlie Ian (1963: 1).

may take place in wars of aggression. And, also arguably due to the fact that at stake of being brought to account is not just the leadership of any aggressive state but impliedly the state itself.

It is important to point out from the outset that not many authors have written wholesome monographs on the crime of aggression. Quite very often, what exists are books on the fields of public international law and international criminal law wherein the crime of aggression is tackled under a major topic like 'international crimes'; but still not given as much coverage as the other international core crimes[2]. What however also exist without a doubt are journal articles or commentaries written on various topical issues of the crime of aggression.

As is often the case, it is however hardly possible for journal articles or commentaries to cover all aspects of a phenomenal subject matter like the crime of aggression in one article. Where the crime of aggression is covered in monographs, one hardly finds them to have been updated to cover the final outcome of the First ICC Review Conference. It is also the reality that many authors do not comprehensively investigate and document the evolution and development of the crime of aggression as an independent core international crime.

Essentially, the significance of this study lies in its objectives, where the researcher hopes to try to close the intellectual gap existing in the present literature. The researcher hopes therefore to link the intellectual times before and after the First ICC Review Conference, in so far as the crime of aggression is concerned. Through the above avenue, the researcher hopes

[2] For instance, in Antonnio Cassese's book, the author covered the following: War Crimes (chapter 4), Crimes against Humanity (chapter 5), Genocide (chapter 6), and crime of aggression with the discussion examining torture as a discrete crime (chapter 7).

to contribute to the existing body of knowledge, discourse and debates concerning the evolution, and historical development of the crime of aggression.

Another important significance of this research study is that it is meant to inform the reader whether the First ICC Review Conference was a step forward or several steps backwards for international criminal law / justice, in so far as the crime of aggression is concerned.

1.4 Research Methodology

It has already been acknowledged that the history of the evolution and development of the crime of aggression is fairly well-documented though fragmented among different writings. There is literature on its philosophical bases surrounding its foundation and *raison d'être*. There is also scattered literature examining the outcome from the First ICC Review Conference, and its possible impact on the ICC (hereinafter also referred to as the: 'Court').

This was exclusively a desk-top or literature-based investigation; where the researcher strictly examined the available primary and secondary literature on the relevant major topic and sub-topics. To this end, the researcher visited and made use of resources available in the libraries and on the internet. The findings of the study are presented systematically in a chronologically descriptive manner complemented with an analysis of some important events / institutions / documents that are significant to historical evolution of the crime of aggression.

CHAPTER TWO
TRACING THE HISTORICAL EXPOSITION OF THE REGULATION OF THE ILLEGAL USE OF FORCE BY STATES PRIOR TO FIRST WORLD WAR

> 'It is seemingly easier to evoke aggression than to dispel it, and easier to commit aggression than to define it'[3].

2.0 Introduction

Chapter two reviews and investigates the literary meanings and philosophical underpinnings of the term 'aggression' within the context of a state of affairs or inter-state relations. The purpose of this chapter is therefore to trace the historical development of the concept from the ancient times to the period when the First World War occurred. The period was characterised by a debate concerning recourse to war by states and / or their rulers, and the doctrine of 'just war'. It is clear that during the above stated period, the term of aggression was hardly or rarely used in its present form, instead the terms 'unjust wars' or 'illegal wars' were used to describe one state's violent actions against another.

2.1 Literal meanings of the term 'aggression'

History has revealed that individual states tend to define the term 'aggression' depending on their circumstances and interests.[4] The difficulty in defining the term 'aggression' has been well articulated in the following quotation:

> 'Definition must involve generalization and employ elements which require further definition. It may also be said that no definition is 'automatic', since the organ concerned must necessarily apply any criteria to particular facts. Particularly dubious

[3] Ferencz Benjamin B. (1972: 491).
[4] Friedmann Wolfgang (1964: 142).

is the argument that a criminal may take advantage of a precise definition; one might assume instead that he would welcome the absence of a definition.'[5]

In essence, most attempts at definitions tend to be 'general', 'enumerative' or a 'mixture' of both.[6] A prudent way therefore to defining the crime of aggression starts with investigating the literal English meaning behind the term 'aggression'.

According to the *Shorter Oxford English Dictionary*, the word 'aggression', originated from the Latin words – *'aggress'* or *'aggredi'* that refer to the word 'attack'.[7] Hence literarily speaking 'aggression' means 'an unprovoked attack or assault'[8]. On the other hand, the *Cambridge International Dictionary* defines the word 'aggression' as the "spoken or physical behaviour which is threatening or involving harm to someone or else"[9].

From the above two definitions, it is clear that the two key elements to understanding the concept of aggression, are that aggression usually involves an unprovoked behaviour or threats that are likely to lead to harm or injury being occasioned onto another person or a state (to put it in the context of this research).

2.2 Philosophical underpinnings attached to the term 'aggression'

It is important to note that aggression as a legal concept did not develop in a vacuum, immune from societal and political changes[10]. To the contrary, acts of war or aggression have been an ever present constant among human beings, and in fact it has been argued by some commentators that the

[5] Kemp Gerhard (2010: 165).
[6] Friedmann Wolfgang (1964: 142).
[7] Shorter Oxford English Dictionary (2007: 42).
[8] Shorter Oxford English Dictionary (2007: 42).
[9] Cambridge International Dictionary of English (1995: 26).
[10] Solera Oscar (2007:15).

notion of aggression is almost as old as human society[11]. The crime of aggression's cradle lies in the historical regulation of use armed force by states – the *jus ad bellum.*[12] Björn Länsisyrjä further contends that aggression has its roots in the 'the occurrence of war'.[13] To this end, lawyers, anthropologists, academics, diplomats and philosophers have debated this concept for the last few centuries but rarely reached near universal consensus (till the First ICC Review Conference in 2010).

Therefore, a discussion of the concept of aggression cannot be complete or sustained academically without an investigation into the topical concept of war which is intrinsically linked to aggression in inter-state or different societal relationships. It is only when one eventually arrives to a complete understanding of the early writings on theories of 'legal or illegal wars' and 'just or unjust wars' that one effectively begins to understand the early writers' perception of aggressive wars.

Ian Brownlie pointed out that although it was rare for advanced societies to leave war unregulated, they were in the same vein ready to go to war with others for reasons that were very often slight.[14] Hence, it was the society's perception of how justified a war was, for it to be seen as legal or illegal. For instance, during China of the *Ch'unch'iu* Period (722-481 B.C) war was perceived as a legal institution that only existed between equal states, and not between a feudal state and its dependencies nor between the Chinese family of states and barbarians.[15] In effect therefore, illegal wars or unjust wars could be equated to aggressive wars.

[11] Solera Oscar (2007:9).
[12] Kemp Gerhard (2010: 4).
[13] Länsisyrjä Björn (2006: 9).
[14] Brownlie Ian (1963: 3).
[15] Brownlie Ian (1963: 3).

Ancient Europe was the birth place for the first debates concerning legal or illegal wars.[16] Greek philosophy was underpinned on a practice of Greek states to assign a cause for starting or protesting a war.[17] On the other hand, the Roman approach was concerned with the formal legality of war. Consequently, for both ancient Rome and ancient Greece, there was a clear distinction between 'just war' and 'unjust war', which was laid down in formal criteria to be recognised before war could take place. A number of philosophers can be quoted in this regard.

The beginning point of this discussion is Marcus Tullius Cicero (106 -43 B.C), who is considered the grandfather of the theory or doctrine of 'just war'. He wrote that it may be gathered from the code of the *fetiales* that no war could be considered just, unless it was preceded by an official demand for satisfaction or warning, and a formal declaration had been made[18]. It thus can be concluded from his teachings that two indispensable conditions of a procedural nature had to be met before the commencement of hostilities, these being a warning and a declaration, failure of which one would be proceeding against the norm.[19] Cicero further argues that, '…the only excuse, therefore, for going to war is that we may live in peace unharmed; and when the victory is won, we should spare those who have not been blood-thirsty and barbarous in their warfare"[20].

It is contended that the early Christian Church refused to condone war as moral in any circumstance, and to that end until A.D 170 its followers were

[16] Stanmir A. Alexandrov (1996: 1). For instance, in ancient Rome a special group of priests called the *fetiales*, decided whether a foreign nation had violated its duties toward the Romans, and was formally mandated to declared war by one of the *fetiales* throwing a lance from the Roman frontier into the foreign land.
[17] Brownlie Ian (1963: 3).
[18] Dinstein Yoram (2005: 63).
[19] Brownlie Ian (1963: 4).
[20] Miller Walter (1913: 2).

not permitted to enlist.[21] Another philosopher to propound the doctrine of "just war" was Saint Augustine of Hippo (354 – 430A.D), who argued that "just wars" are defined as those which avenge injuries orchestrated against a state.[22] He strongly argued that any pursuit of peace must, as a condition include the option of going to war as a mechanism of preserving it in the long-term, where such a war would not only be preemptive, but as well as defensive in order to restore peace[23]. To this end, wars for aggressive purposes as opposed to maintaining or restoring peace, were illegal.

The works of Saint Angustine, went on to influence many other important philosophers, among whom was Saint Thomas Aquinas (1225-1274), who taught on peace and war, and propounded the concept of justification for war under pre-determined conditions.[24] He is quoted as follows:

> 'In order for a war to be just three things are necessary. First the authority of the soverign by whose command the war is to be waged. For it is not the business of the private individual to declare war, for he can seek for redress of his rights from the tribunal of his superior… Secondly, a just cause is required, namely that those who are attacked should be attacked because they deserve it on account of some fault. Thirdly, it is necessary that the belligerents should have a rightful intention, so that they intend the advancement of good, or the avoidance of evil.'[25]

Therefore, according to Aquinas, the resort to force or war by an entity could only be sustained if waged by a sovereign, propelled by a just cause, and complimented by the right intentions.

The period leading up to the 17th century was marked by the development of a system of sovereign national states where large well organised political units (of the nature of a national monarchical government) with secular

[21] Brownlie Ian (1963: 5).
[22] Shaw Malcolm (1986: 539).
[23] Mattox John Mark (2006: 196).
[24] Brownlie Ian (1963: 6).
[25] Brownlie Ian (1963: 6).

governments and commercial interest replaced ill-defined entities feudal-like with allegiance to the Pope.[26] This slightly changed the way, war was perceived. For instance, Machiavelli (1492-1550) argued that, "war is just which is necessary" and every sovereign entity may decide on the occasion for war.[27]

On the other hand, the largely theologically influenced views of Francisco Suarez (1548-1617) on just war did not differ too much from those of Acquinas.[28] The former argued in his writings and discussion of war, that a sovereign ruler may resort to war, in default of obtaining justice from the Pope, to redress an injury inflicted and he may wage war for purposes of defence[29].

Another notable Philosopher on the just war theory, is Hugo Grotius (1583-1645). According to him, war was just and permissible as long as it was accompanied by a public declaration or was executed in self defence or self assistance to achieve what a community needed.[30]

Grotius is quoted in his *De Jure Belli ac Pacis,* published in 1625, where he writes that: '…war is the situation of those who dispute by force of arms [and for any war to be] called just…that it is not enough that it be made between Sovereigns, but it must be undertaken by public Declaration, and so that one of the Parties declare it to the other…'[31]. Grotius further observes that:

> 'In the first principles of nature there is nothing which is opposed to war; rather, all points are in its favor. The end and aim of war being the preservation of life and

[26] Brownlie Ian (1963: 11).
[27] Brownlie Ian (1963: 11).
[28] Shaw Malcolm (1986: 540).
[29] Brownlie Ian (1963: 4).
[30] Detter I. De Lupis (1987: 8).
[31] Green Leslie C. (2008: 1).

> limb, and the keeping or acquiring of things useful to life, war is in perfect accord with those first principles of nature. If in order to achieve these ends it is necessary to use force, no inconsistency with the first principles of nature is involved, since nature has given to each animal strength sufficient for self-defense and self-assistance'[32].

The 17th century saw the emergence of a seemingly international legal order to replace to replace the previous existing system of Holy Roman Empire and Pre-Reformation Europe.[33] It was during this period that a Law of Nations starts to take a strong root in continental Europe to regulate inter-state relations among a society of equal states.

It is clear that throughout both the end of 18th and the beginning of the 19th century, the views of the civilised world were changing on what constituted a 'just' and 'unjust' wars or 'legal' and 'illegal' war. This being the 'age of enlightenment', there is a clear shift of intellectual and diplomatic debate towards internationalism and common interests of humanity.[34]

In 1758, Emmerich de Vattel writing in his *Law of Nations*, argues that the sovereign who takes up arms without a lawful cause is 'chargeable with all the evils, all the horrors of the war: all the effusion of blood, the desolation of families, the rapine, the acts of violence, the ravages, the conflagrations, are his works and his crimes. He is guilty of a crime against the enemy […] he is guilty of a crime against the enemy […] he is guilty of a crime'[35]. These views are important in view of understanding the later events in the French Revolution, and in the later 19th and 20th centuries.

[32] May Larry (2008: 27).
[33] Brownlie Ian (1963: 16).
[34] Brownlie Ian (1963: 18).
[35] Reinisch August and Sahib Singh (2010: 6).

However, it was not until the defeat of Napoleon Bonaparte (1769-1821) that attempts were made to declare war or those resorting to it as illegal or criminal. In this regard, Napoleon having surrendered at Waterloo, and after being formally declared by the Congress of Vienna to be an international outlaw for having invaded France in violation of the Treaty of Paris of 1814, was deported to St. Helena by the British; who made the decision on political rather than legal grounds[36]. This in effect reflected the emerging view that to resort to war in breach of a treaty was to be regarded as illegal.

Hans Kelsen (1881-1973), who is considered one of the most influential writers of the last century, thus argued that war is only lawful when it constituted a sanction against a violation of international law by the opponent[37]. In effect, if one is to wholly ascribe to the then prevailing view, Yoram Dinstein contends that war becomes a lawful response (a sanction) in every instance of noncompliance with international law (a delict), even if that non-compliance had not involved the use of force[38].

The philosophical underpinnings are important in two respects. In the first instance, they showed the then prevailing intellectual thinking with regard to when states could go to war with other states. Secondly, the 'unjust' war doctrine laid the firm foundation upon which the 19th and 20th centuries' statesmen built their opinions of what would later amount to illegal and / or criminal wars of aggression. It has thus been argued that the just war philosophies had the beneficial effect of restricting the unlimited rights of war, especially after the rise of the nation states in Europe.[39]

[36] Green Leslie C. (2008: 4).
[37] Dinstein Yoram (2005: 67).
[38] Dinstein Yoram (2005: 67).
[39] Detter I. De Lupis (1987: 127).

2.3 The Precursors to the International Military Tribunals

The period ending the 18th century to the early years of the 19th century was characterised with implicit and explicit maneuvers that started to transpose the words 'crimes against peace', 'crimes against morality or mankind' or 'war of aggression' for 'illegal wars' or 'unjust wars'. The 19th century was particularly dominated by the unrestricted right of war and the recognition of conquests, qualified by the political system of the European Concert.[40] However, towards the end of that century, states started to question the legality of a 'right to war' and started advocating for a peaceful settlement of disputes among themselves.

It is shown in this sub-section of the research paper, that the statesmen's reluctance to agree to a definition with regard to the concept of aggression may be explained by the fact that war even then continued to play an active role in states' political strategies and policy[41].

However, it is pertinent to point out that akin to all the precursors to the International Military Tribunals, is the fact that they were all clear historical attempts that were bent towards establishing individual criminal liability for the unlawful use of force or crimes against peace or crime of aggression. Whether successful or unsuccessful, they all represented attempts at illegitimising and / or criminalising aggression.

2.3.1 Hague Peace Conferences of 1899 and 1907

The two Hague Conventions that dwelt on the subject of laws of war were negotiated at two separate Peace Conferences of 1899 and 1907 that took

[40] Brownlie Ian (1963: 19).
[41] Solera Oscar (2007: 15).

place in The Hague, The Netherlands.[42] At this point in time, the then existing international legal limitations were only concerned with the methods and means of waging war, so-called *jus in bello*, but not the right to wage war itself, *jus ad bellum*[43]. Gerhard Werle has thus observed that it was during the Hague Peace Conferences of 1899 and 1907, that the state's unlimited right to wage war first cautiously called into question[44].

Under article 1 of the Hague Convention of 1907[45], it was affirmed that the contracting powers recognised that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with a conditional declaration of war. The main value to be derived from a declaration of war was that it pinpointed the precise time when a state of war entered into force, and provided for a warning that, unless specific conditions were fulfilled by a designated deadline, war would commence *ipso facto*[46].

Interestingly, although the said convention was emphatic in its requirement of a declaration, it did not include a provision for the consequences of failure to fulfill this obligation; as would later be seen several conflicts thereafter[47].

2.3.2 The 1919 Versailles Peace Treaty

The 1919 Versailles Peace Treaty was an international legal instrument that was concluded in the Paris Peace Conference with the aim of promoting 'international co-operation' in order to 'achieve international peace and

[42] The Hague Convention of 1899 was signed on 29th July 1899 and entered into force on 4th September 1900, while the Hague Convention of 1907 was signed on 18th October 1907, and entered into force on 26th January 1910.
[43] Werle Gerhard (2009: 477).
[44] Werle Gerhard (2009: 477).
[45] Hague Convention (III) of 1907 Relative to the Commencement of Hostilities.
[46] Dinstein Yoram (2005: 30).
[47] Green Leslie C. (2008: 5).

security.[48] It effectively as a result ended the First World War between Germany and the Allied Powers. It is perhaps the most publicised and foremost attempt to apply the "concept of (individual criminal) responsibility for declaring or taking part in a war of aggression" upon the principle authors of the First World War[49].

The Paris Peace Conference, which started on 18 January 1919, established a 'Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties' that submitted its report in March 1919. Wherein, it charged Germany and her allies with extensive violations of the laws of the war, and further recommended that all persons of whatever responsibility and rank were liable to criminal prosecution for violating the laws and customs of war or the laws of humanity[50]. In terms of important international criminal law legal developments, the proclamation in itself represents a significant step in criminalising aggressive actions of states. This shift in policy drew clarity to the question of responsibility for unjustified resort to war, an issue which concerned ministries and statesmen, and not just the pacifists and idealists[51].

Not all recommendations of the Commission were adopted by the Peace Conference, but under article 227 of the (Versailles) Treaty of Peace that was drafted and adopted, it was provided that the Allied and Associated Powers would publicly arraign William II of Hohenzollern for the supreme offence against international morality and the sanctity of treaties[52]. While under article 228, the German Government expressly recognised the right of the Allied Powers to bring before military tribunals persons accused of

[48] Preamble of the Versailles Peace Treaty that came into force on 28th June 1919.
[49] Brownlie Ian (1963: 52).
[50] Beigbeder Yves (1999: 27).
[51] Brownlie Ian (1963: 52).
[52] Brownlie Ian (1963: 52). See also Green Leslie C. (2008: 5).

having committed acts in violation of the laws and customs of war. However, the Kaiser was never charged because the Dutch Government refused to hand him over, and the German Government never took any serious step to try its nationals for the aggressive war that Germany had engineered.[53]

The lack of cooperation of the Dutch and German governments coupled with the failure on part of the then existing international community to set up an international tribunal to try the Kaiser and others was largely due to lack of agreement on the legality on existence of international criminal responsibility for crime of aggression. In addition to the above, this period was characterised states insistence on the supremacy of state sovereignty. This probably partly explains why there was international mechanism put in place to try any one for the atrocities committed in the First World War.

2.3.3 Covenant of the League of Nations

The Covenant of the League of Nations was the legal instrument that was adopted at the Paris Peace Conference that ended the First World War, and effectively brought into existence the League of Nations, the United Nations primary ancestor.[54]

The Covenant of the League of Nations laid the firm foundation upon which, was built the process of regulating the use of force or aggressive wars in international law. It also represented the first efforts towards shifting a political discussion of the same issues into legal perspective[55]. Further to the above, the Covenant fundamentally reversed the international law landscape by making any war between states a matter of international concern. The

[53] Beigbeder Yves (1999: 27).
[54] Stanmir A. Alexandrov (1996: 30).
[55] Solera Oscar (2007: 21).

consequence was that war was no longer to have the aspect of a private duel but of a breach of the peace which affected the whole community[56].

In this retrospect, the preamble to the Covenant of the League of Nations emphasised the treaty parties' duty 'not to resort to war' in order to ensure international peace and security[57]. Article 10 prohibited the use of external aggression against the territorial integrity and political independence of the members of the League and creates the obligation to preserve them from such an aggression. While, article 11 provided that any war or threat of war was a matter of concern to the whole League.

As a body, the League of Nations is also important since its Sixth League Assembly adopted a resolution on 25 September 1925 which stated that 'war of aggression' constituted 'an international crime', and the Eighth League Assembly also adopted a resolution prohibiting wars of aggression on 24 September 1927[58].

Although, there is no doubt that the adoption of the Covenant of the League of Nations represented an important stride towards the conceptualisation of the crime of aggression, one must not be oblivious to its outstanding shortcomings. In this regard, the Covenant of the League of Nations did not define aggression, and did not have sanctions for aggressive states or individuals and still permitted war under certain conditions.

2.3.4 The 1923 General Treaty of Mutual Assistance

The General Treaty of Mutual Assistance was borne out of mechanisms aimed at plugging the loopholes in the Covenant of the League of Nations. Although, article 16 of the said Covenant had created a security system, it

[56] Brownlie Ian (1963: 57).
[57] Werle Gerhard (2009: 477).
[58] Brownlie Ian (1963: 71).

become apparent after the interpretative resolutions of the Second Assembly that member states did not consider themselves bound to take automatic action to implement the said article. Attempts were therefore made to provide more specific guarantees of aid to states threatened by the use of force[59].

In 1923, under the auspices of the League Assembly of the League of Nations, a draft Treaty of Mutual Assistance was drawn up that solemnly proclaimed 'that aggressive war is an international crime', with the Parties undertaking that 'no one of them will be guilty of its commission'[60]. Article 1 stated that:

> 'The High Contracting Parties declare that aggressive war is an international crime and severally undertake that no one of them will be guilty of its commission. A war shall not be considered as a war of aggression if waged by a State which is party to a dispute and has accepted the unanimous recommendation of the Council, the verdict of the Permanent Court of Justice or an arbitral award against a High Contracting Party which has not accepted it, provided, however, that the first State does not intend to violate the political independence or the territorial integrity of the High Contracting Party.'

The drafting of the General Treaty of Mutual Guarantee, was important since it is one of the important steps that reinforced the process (started by the Covenant of the League of Nations) of regulation of aggressive war in international law[61]. Its shortcomings however where that its goals were never fulfilled, the penalty it provided for aggression were purely financial for the aggressor state, and it still signaled that states were not yet too comfortable with giving up their right to resort to war.

[59] Brownlie Ian (1963: 68).
[60] Green Leslie C. (2008: 6).
[61] Solera Oscar (2007: 24).

2.3.5 The Locarno Treaties of 1925

The Locarno Treaties take their name from Swiss city of Locarno, from where they were negotiated. They are important for their influence on the development of arbitration and conciliation in the practice of post-war states in Europe[62].

Under article 2 of the said treaties, it was provided that, Germany and Belgium, and also Germany and France, mutually undertook that they would in no case attack or invade each other or resort to war against each other except for: (a) legitimate self defence; (b) action pursuant to Covenant article 16; and (c) action pursuant a decision of the League's Council or the Assembly under article 15.7 of the covenant[63]. Article 4 noted further that breaches of article 2 of the treaty and articles 42 and 43 of the Treaty of Versailles could be labeled either as simple aggression or as flagrant aggression[64].

The Locarno Treaties are very important in two respects. They expanded the grouping of acts that could ultimately fall under aggressive wars, and went a step forward to outlawing military adventures that had not sought to be resolved through international arbitration.

2.3.6 The 1924 Geneva Protocol for the Pacific Settlement of International Disputes

The Geneva Protocol for the Pacific Settlement of International Disputes was adopted by members of the League of Nations in 1924. It aimed at rectifying the deficiencies of the Covenant of the League of Nations through its article 2 that provided for a comprehensive ban on war[65]. Like the General Treaty of Mutual Assistance, it also aimed at providing for mutual guarantees

[62] Brownlie Ian (1963: 70).
[63] Solera Oscar (2007: 24).
[64] Solera Oscar (2007: 27).
[65] Werle Gerhard (2009: 478).

against aggression through creating but a system of obligatory resort to peaceful means of settlement that was combined with the security system[66].

Oscar Solera contends that although the said Protocol neither defined the term of aggression nor obtained the necessary ratifications to enter into force, it raised some important elements that were later incorporated in other international instruments[67]. For example, the preamble of the Protocol stated from the outset that 'war of aggression' constituted a violation of the solidarity between members of the international community, and formed an international crime, where states would only resort to war in cases of self defence or when acting in accordance with the Council's decisions[68]. Lastly states more importantly undertook to abstain from any act which might constitute a threat of aggression against another State[69].

Article 10 defined an aggressor state as that which resorted to war in violation of the undertakings contained in the Covenant or in the Present Protocol.

2.3.7 The 1928 Kellogg-Briand Pact

The Kellogg–Briand-Pact that is a binding treaty to this date, was concluded between the United States, France, the United Kingdom, Italy, Japan, Germany and several other independent states. It is also known by the names Pact of Paris, the General Treaty for the Renunciation of War, and the World Peace Act. It crystallised the new spirit that informed the relations between France and the United States, and which invited all the Great

[66] Brownlie Ian (1963: 69).
[67] Solera Oscar (2007: 26).
[68] Article 2 of the Protocol.
[69] Article 8 of the Protocol.

Powers to recognize the need to create a framework that called for the unconditional renunciation of war[70].

The Kellogg–Briand Pact comprises only three articles, of which the last one concerns procedural technical matters. The Preamble of the Kellogg-Briand Pact states, that 'any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty'. Article 1 provides specifically that: 'the High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations and with one another'. On the other hand, article 2 further emphaises all disputes would be settled through pacific means.

Yoram Dinstein holds the view that the Kellogg–Briand Pact helped in the development of 'international law from *jus ad bellum* to *jus contra bellum'.*[71] However, in terms of shortcomings of the Kellogg-Briand Pact, Gerhard Werle contends that although the Pact was quite clear in its intent to outlaw the use of force, it was less clear on the question of criminal liability for aggression.[72] It is also argued that although, the Pact provided for a renunciation of war as an instrument of national policy, the Pact was not clear in that it did not stipulate whether it comprised all aggressive acts or only war in its formal sense[73].

[70] Solera Oscar (2007: 30).
[71] Dinstein Yoram (2005: 83).
[72] Werle Gerhard (2009: 104).
[73] Solera Oscar (2007: 32).

2.4 Conclusion

The term 'aggression' is a concept that can only be fully understood, while taking into account its historical evolution and development over time[74]. It has been shown that the state of customary law before the era of the Convenant of the League of Nations was entrenched in a presumption of the legality of war as an instrument of self-interest, and as a form of self-help.[75] The treaties and proclamations that came into existence thereafter reinforced how far customary international law had changed from the ancient times.

From the above discussion, it is evident is that during the period under review, the terms 'act of aggression' or 'war of aggression' started to subsume the legal terms 'illegal wars' or 'unjust wars'. It is also clear that under the same period, as time shifted towards the 19th century, states started to regulate when wars could be undertaken. Effectively, the concept of aggression in its several initial variants evolved from being a military into a legal concept.

The experience of the First World War served as a catalyst in that several states started to discuss ways, rules and standards concerning the use of military force in international relations[76]. Although, it is clear that not much was achieved in defining and criminalising state aggression, it is also prudent to note that the aftermath of the First World War set the ground for debate concerning individual criminal responsibility for aggressive acts.

[74] Solera Oscar (2007: 15).
[75] Brownlie Ian (1963: 1).
[76] Solera Oscar (2007: 21).

CHAPTER THREE
THE JOURNEY FROM NUREMBERG TO ROME: THE GAINS MADE IN CRIMINALISING THE CRIME OF AGGRESSION

> 'The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment.'[77]

3.0 Introduction

This chapter examines key events and / or institutions that contributed towards defining the crime of aggression throughout the period from the Second World War to the adoption of the Rome Treaty at the 1998 UN organised Diplomatic Conference in Rome. It builds on the gains made in chapter one.

3.1 The 1945 London Agreement and the International Military Tribunals

The period after the First World War, reveals a period when statesmen started to take decisive steps towards defining what would amount to aggressive actions by states and / or the leaders of aggressor states. Historically, it marked the end of the balance of power system, re-raised the ultimate question of 'unjust war', and resulted in a new drive to rebuild international affairs around a single oversight body (the League of Nations and later the United Nations).[78]

[77] Nuremberg Judgement (1946: 45).
[78] Shaw Malcolm (1986: 542).

It was perhaps the outbreak of the Second World War, and its devastating effects that played the most decisive step in the re-conceptualisation of crime of aggression during the above stated period. The Second World War was fought between the Allied States (included: the USA, the Soviet Union, the UK, France etcetera) and the Axis States (included: Germany, Japan, Italy etcetera) running from 1939 to 1945.[79] It had fatalities of between 50 million to over 70 million.[80]

The war started when Germany invaded Poland in 1939, while Japan invaded China in 1937, and later spread to other European and Asian countries and territories. During the war, some states were greatly appalled at the level of gross violations of human rights, and started taking steps addressing the situation. An example of such maneuvers was when in 1943 some of the Allied states formed the United Nations War Crimes Commission (hereinafter 'UNWCC'). Its mandate was to investigate Nazi crimes, with a view to preparing indictments for commission of crimes against humanity and genocide.[81]

The body's mandate was later expanded to include the possibility of incorporating the waging of aggressive war within the subject-matter jurisdiction of their work on war crimes.[82] However, the said Commission later abandoned the scheme of incorporating the crime, since no agreement could be reached citing inability to reach a consensus and time constraints.[83] It was the UNWCC, which later called for the institution of the International Military Tribunal at Nuremberg and other courts, and helped establish the

[79] Sommerville Donald (2008: 5).
[80] Sommerville Donald (2008: 5).
[81](http://www1.yadvashem.org/odot_pdf/Microsoft%20Word%20-%205901.pdf). Last accessed: 20/09/2011).
[82] Schabas A. William (2007: 17).
[83] Schabas A. William (2007: 17).

official lists of war criminals that registered 36,000 suspected war criminals.[84]

When the UNWCC wound up, the ambitions of the main Allied Powers (USA, UK and USSR) were to set up a court for war crimes trials as proclaimed in Moscow Declaration of 1943.[85] It was also clear that the Allied Powers had every intention to bring to book all the Germans that where responsible for her aggressive policy. This is very clear in the said Declaration, where under the heading 'statement on atrocities', the three states noted thus:

> 'At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein. Lists will be compiled in all possible detail from all these countries having regard especially to invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece including Crete and other islands, to Norway, Denmark, Netherlands, Belgium, Luxembourg, France and Italy.'[86]

3.1.1 The Nuremberg Tribunal

After the main Allied Powers meeting in Moscow, they again met in a follow-up meeting in London.

The Moscow Declaration thus laid the basis for creation of the International Military Tribunal under the London Agreement of August 8th 1945. Article 1 of the said Agreement called for the establishment 'an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their

[84](http://www1.yadvashem.org/odot_pdf/Microsoft%20Word%20-%205901.pdf). Last accessed: 20/09/2011.
[85] Blumenthal David A. and McCormack Timothy L.H. (2008: 15).
[86] Joint Four-Nation Declaration.

capacity as members of the organizations or groups or in both capacities'. While, article 2 added that: 'the constitution, jurisdiction and functions of the International Military Tribunal shall be those set in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement'. The London Agreement therefore embodies the first clear undertaking of the international community to introduce individual criminal responsibility for a state's undertaking of aggressive wars.

The London Agreement had annexed to it, the International Military Tribunal (hereinafter: 'Nuremberg Tribunal') Charter that stipulated the laws and procedures for the criminal trials, the jurisdiction of the said tribunal and the categories of crimes that individuals could be prosecuted for. Under said Charter, articles 1 established the International Military Tribunal for the just and prompt trial, and punishment of the major war criminals of the European Axis.

Article 2 stated that it would be constituted of a principle and alternate judge from each of the four signatory states, while article 6 stated that the Tribunal would have the jurisdiction to try and punish individual persons who acted in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of crimes against peace, war crimes or crimes against humanity.

Specifically, article 6 (a), the Charter spelt out crimes against peace as including: 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'. This provision is of paramount historical significance since it constituted the first indication of what amounted to committing a crime of

aggression, although referred to in the Charter as crimes against peace. Robert H Jackson, at the time Chief Counsel of the USA and later Chief Prosecutor at Nuremberg, explained the legal basis for the inclusion of the crime of aggression within the jurisdiction of the IMT as follows:

> 'International law … is an outgrowth of treaties or agreements between nations and of accepted customs namely the Kellogg-Briand Pact (1928), the Geneva Protocol (1924), the Assembly of the League of Nations Resolution (1925 and 1927), and the Resolution of the American States (1928).. But every custom has its origin in some single act … Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements'.[87]

The Nuremberg Trials were held from November 1945 to August 1946, where twenty two German high-ranking Nazis, of whom included Hermann Goering, Joachim von Ribbentrop, Rudolf Hess and others, where put to trial.[88] The judgement of the Nuremberg Tribunal was revolutionary in so far as the crime of aggression is concerned, for it not only dwelt but introduced new international criminal law concepts.

As pointed out in the previous chapter, before the Nuremberg Tribunal customary international law had not developed sufficiently to a point where it had outlawed going to war or aggressive wars, and more importantly, held anyone criminally responsible for the same. Through passing judgement for the indicted German Nazi leaders, the Nuremberg Tribunal is credited with introducing the principle of individual criminal responsibility under international criminal law for international crimes.

On the contrary however, the Nuremburg Tribunal is criticised for applying *ex post facto* law, in so far as it tried Germans for the crimes against peace,

[87] Kemp Gerhard (2010: 108).
[88] Blumenthal David A. and McCormack Timothy L.H. (2008: 15).

which had not been criminalised by the time, the said illegal acts took place, which represented a breach of natural justice.[89] In answer, the Tribunal argued that perpetrators were individually responsible for violating the Kellogg-Briand Pact, which bound Germany, and which in their interpretation criminalised a war of aggression.[90] In the opinion of the Tribunal therefore, individuals who waged wars of aggression effectively had not only just breached the international laws of the day but also accrued individual criminal liability. This unheralded decision was unprecedented under the then existing international law arena.

To buttress its argument that individuals could be punished for violations of international law, the Tribunal noted that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[91] The above statement juxtaposed individual criminal responsibility for state responsibility for aggressive wars. It has been said that the above new line of thinking had found its way into the Nuremberg Charter during the early discussions concerning article 6, albeit limited to 'acting in the interests of the European Axis countries'.[92]

The Tribunal also expressed itself on whether wars of aggression were illegal and criminal. The Tribunal noted that the solemn renunciation of war as an instrument of national policy necessarily involved the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are in so doing committing a crime.[93]

[89] Werle Gerhard (2009: 482).
[90] Nuremberg Judgement (1946: 445, 446).
[91] Nuremberg Judgement (1946: 447).
[92] Heinrich Hans (2004: 43).
[93] Nuremberg Judgement (1946: 53).

An analysis of the above shows that that the Tribunal in its wisdom regarded the terms of article 6(a) as sufficient enough for a conviction for the crimes against peace, and in effect saw no need to delve into investigating the position of international law before the London Agreement of 1945. The Tribunal thus concluded that a 'war for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and as such a war is therefore outlawed by the (Kellogg-Briand) Pact'.[94] In effect, the Nuremberg Tribunal used and perceived the Kellogg-Briand Pact, as the legislation that illegalized and criminalised acts that amounted to wars of aggression.

It has been argued however that the Briand-Kellogg-Pact of 1928, on which the Tribunal relied, did not go as far as declaring war of aggression to be a crime but rather confined itself to specifying sanctions for breaches of the ban on war, state.[95] This for instance included the loss of advantages flowing from the Pact for the responsible state. On the contrary, the Tribunal drew a link between the enormity of the crime of aggression and individual criminal responsibility for perpetrators of the said crime. The Tribunal justifies the linkage by observing:

> 'The charges in the Indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole...'[96]

3.1.2 The Tokyo Tribunal

On 26 July 1945, China, the UK and the USA, subsequently joined by the USSR issued the Potsdam Declaration, which announced the intention of the

[94] Nuremberg Judgement (1946: 53).
[95] Heinrich Hans (2004: 49).
[96] Nuremberg Judgement (1946: 427).

Allies to prosecute high level Japanese officials for the same crimes committed by the Germans in the European war.[97] Unlike the Nuremberg Charter that was a result of negotiations among the four main Allied powers, Tokyo Charter came out of an executive decree issued by General MacArthur, the Supreme commander of the Allied Powers in the Far East.[98]

Under the provisions of the Tokyo Charter, article 1 established the International Military Tribunal for the Far East (hereinafter: 'Tokyo Tribunal'), with the objective of trying and punishing the major war criminals in the Far East. Article 5 empowered the Tribunal with the jurisdiction to try and punish individuals or as members of organisations of offenses which included crimes against peace, war crimes and crimes against humanity. More specifically, article 5(a) of the Charter provided for individual criminal responsibility for crimes against peace:

> '[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.'

Unlike the Nuremberg Tribunal that lasted a little over ten months, the Tokyo Tribunal took two and a half years, from May 1946 into November 1948, wherein the Allied powers brought to trial twenty-eight Japanese military and political leaders.[99]

The Tokyo Tribunal is to be criticised for its near duplication of the Nuremberg Tribunal in applying *ex post facto* law, and was essentially victors' justice since no citizens of the Allied Powers were ever tried. However, relying on the precedent set by the Nuremberg Tribunal, the Tokyo

[97] Nuremberg Judgement (1946: 186).
[98] Ehrenfreund Norbert (2007: 113).
[99] Kemp Gerhard (2010: 125).

Tribunal held that the Tokyo Charter was not *ex post facto* law but an expression of international law then in existence and generally accepted.[100] It also ruled it was not unjust to punish an aggressor but rather that it would be unjust not to do so since 'aggressive war was a crime at international law long prior to the date of the Declaration of Potsdam', and there was 'no ground for the limited interpretation of the (Tokyo Tribunal) Charter' which the defence sought to give it.[101]

The Tokyo Tribunal however conceded that it could not define the term "aggressive war," but noted that Japan's unprovoked attacks could not be characterised as anything but aggression.[102] It however linked the aggressive foreign policy of Japan to a single conspiracy of the defendants before the war to use the Japanese military and political apparatus to dominate the Far East.[103]

The Tokyo Tribunal did not have a firm legal basis for the way it articulated the doctrine of conspiracy-liability with regard to Japanese officials waging aggressive wars. In this regard, the Tokyo Tribunal totally ignored the threshold with regard to the required *mens rea* for the perceived charge of conspiracy to commit aggression. It has been argued that the defendants at the Tokyo Tribunal were not necessarily in the same position as their Nazi counterparts at Nuremberg with regard to their perceived responsibility for formulating and executing aggressive Japanese foreign policy prior to the war.[104]

[100] Tokyo Judgemement (1948: 36).
[101] Tokyo Judgement (1948: 37).
[102] Tokyo Judgement (1848: 57).
[103] Kemp Gerhard (2010: 126).
[104] Kemp Gerhard (2010: 127).

However, despite its shortcomings, the Tokyo Tribunal helped to confirm and reinforce the Nuremberg precedent in recognising the notion of individual criminal responsibility of high level officials for launching an aggressive wars, war crimes and crimes against humanity.[105]

3.1.3 The legacy and impact of the Nuremberg Tribunal

The legacy and impact of the Nuremberg Tribunal to the development of international criminal law in general, and the crime of aggression in particular, can not to be understated. Justice Jackson in his opening statement best captured one of the salient positives coming out of the Nuremberg trials:

> 'That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that Power has ever paid to Reason.'[106]

With regard to its historical legacy, Nuremberg Tribunal can be regarded as the zenith of individual criminal liability for aggression.[107] Noteworthy also is the fact that the Nuremberg Charter, Tribunal and judgement clarified and entrenched the crime of aggression (in addition to the other two categories of international crimes) in the corpus of customary international law, which the United Nations General Assembly (hereinafter: 'UNGA' or "General Assembly") later adopted and endorsed as the 'Nuremberg Principles'.[108]

In a nutshell, the Nuremberg Tribunal made a dramatic leap that derived the criminality of aggression from its character as an internationally wrongful act from the classic mechanism of international law as a system of rights and

[105] Beigbeder Yves (1999: 75). See also Ehrenfreund Norbert (2007: 113).
[106] Blumenthal David A. and McCormack Timothy L.H. (2008: 33).
107 Tomuschat Christian (2006: 839).
108 Blumenthal David A. and McCormack Timothy L.H. (2008: 108). See also Beigbeder Yves (1999: 49), Werle Gerhard (2009: 483), Griffiths R.L. (2002: 308), and Dinstein Yaram (2005: 120).

obligations that bind states.[109] As already noted above, this was totally unprecedented under the then existing customary law. It as a result moved the international law landscape from prohibiting aggressive war to criminalising aggressive war, and making individuals liable for the latter. This reasoning as part of the legacy of the Nuremberg Tribunal raised a lot of debate with regard to its legal basis and sustainability.

3.2 The United Nations and the crime of aggression

3.2.1 The mandate of the United Nations

The end of the Second World War set in motion three different but interrelated processes that were linked to the threat or use of armed force in interstate relations: The first being a reinforcement of the restriction on the use of armed force at the San Francisco Conference, the second being the United Nations' (hereinafter: 'UN') decision to continue searching for clarification on a definition of international aggression, and the third that was a bi-product of the Nuremberg and Tokyo Tribunals that called for individual criminal responsibility for acts of aggression.[110]

The international body of United Nations was born in San Francisco, United States on 26th June 1945, after fifty states signed the Charter of the United Nations, the constituent treaty that binds all members. Under the UN Charter, article 1(1) spells out one of the purposes of the United Nations as being to maintain international peace and security through taking effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.

Article 2(4) of the UN Charter enjoins the States Parties to refrain in their international relations from the threatening or using of force against the

[109] Tomuschat Christian (2006: 833).
[110] Solera Oscar (2007: 44).

territorial integrity or political independence of any state, while article 39 empowers the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression and can make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore international peace and security. Article 51 recognises the States Parties' right of self defence against any armed attack.

It would appear on the face of it, that some of the above articles create interpretation problems with regard to the acts or the crime of aggression. For instance, article 2(4), when read with article 39 of the UN Charter, does not contain a definition or explanation of the elements of aggression. In addition to the above, it is only the United Nations Security Council (hereinafter: 'Security Council' or 'UNSC') that has the sole mandate to act where the existence of acts of aggression, threats to peace and breaches of peace are determined.[111]This is problematic since it is not a judicial but a politically driven body.

It is pertinent however to point out that the UN Charter moved away from the traditional concept of war that permitted states to abuse it, and employed more closely related concepts that are connected with aggressive acts.[112] Consequently, the UN Charter very importantly introduced a number of closely linked notions to aggressive acts: "use of force" (article 2(4)), "armed attack" (article 51), "threat to peace / breach of peace / act of aggression" (article 39).[113] The notion of an act of aggression as articulated under article 39 of the UN Charter is very important since it is central to defining the parameters of what ultimately amounts to the crime of

[111] Rotberg Robert I. (2010: 25).
[112] Werle Gerhard (2009: 480).
[113] Werle Gerhard (2007: 5).

aggression. Although there seems to be a change in use of terminology under the UN Charter (prohibition of threat or use force) as compared to the precursors to the Nuremberg Tribunal such as the Kellogg-Briand Pact that expressly used the term 'aggression', the principle remains same, the regulation of illegal wars.

Within the UN Charter, the present-day *jus ad bellum* anchors itself in article 2(4), and which helps to redress the shortcomings of the Kellogg–Briand Pact by requiring all States Parties of the UN to refrain from threats or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[114] But is important to point out that article 2(4)'s use of the term 'force' instead of 'war', instigates debate as to what constitutes 'force' or 'unlawful force' or even "threat of force" for that matter.

Through the incorporation of the above provisions, the use of force is no longer accepted as an instrument of foreign policy since the *jus ad bellum* became the *jus contra bellum*.[115] The above stated injunction in the UN Charter against the use of inter-state force is the cornerstone of present-day customary international law on crime of aggression.[116]

3.2.2 The 1974 UN General Assembly Resolution

Recognising 'that there is a widespread conviction of the need to expedite the definition of aggression', the UNGA through Resolution 2330 (XXII) of 18 December 1967 established a Special Committee on the Question of Defining Aggression, that at its 1974 session, adopted by consensus a draft definition of aggression that it recommended to the General Assembly for adoption.[117]

[114] Dinstein Yoram (2005: 93).
[115] Kemp Gerhard (2010: 96).
[116] Dinstein Yoram (2005: 94). See also Leslie C. Green (2008: 11).
[117] UN Doc. (A/9619).

The UN General Assembly Resolution 3314 (XXIX) of 14 December 1974 (hereinafter: '1974 UN Definition of Aggression') expounded on the term 'act of aggression'.

Article 1 of the 1974 UN Definition of Aggression, defined an act of aggression as the 'the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state.' Seven examples of acts of aggression are set out under article 3 of the 1974 UN Definition of Aggression.

Although, not legally binding, the 1974 UN Definition of Aggression is nevertheless quite a significant text with interpretative value and helps to indicate the international community's perception of the notion of aggression.[118]

It also helps to reinforce the undefined notion of aggression in the UN Charter. It introduced a new 'just war doctrine', where the authority to determine whether or not inter-state violence is permitted no longer belongs to the state or its people but lies squarely with the Security Council.[119] An interpretation of articles 1 and 3 of the 1974 UN Definition of Aggression leads one to conclude that an act of aggression includes both grave and lesser acts intense war. Although the Security Council has scarcely quoted the resolution in its decisions, it would appear that the aim of the resolution was not to criminalise aggression, but to aid the Security Council in determining if an act of aggression had occurred.[120]

[118] Kemp Gerhard (2010: 156). See also Volger Helmut (2010: 15).
[119] Rolling Bert V.A (1986: 418).
[120] Meleško Marek (2010: 142). See also Zuppi Alberto L. (2007-2008: 19).

Whereas article 5(2) of the Definition of Aggression pronounces war of aggression to be a crime against international peace, the said Definition as a whole is not buttressed the criminal ramifications of aggressive war.[121] It should also be emphasised that the definition was not exhaustive and left the Security Council a broad area of discretion, since it was free to categorise other acts as aggression under the UN Charter; and it did not specify that aggression could entail state responsibility and individual criminal liability.[122]

It is to be concluded however that although, the 1974 Definition of Aggression, focused on state-liability and not individual criminal liability, ignored the element of *mens rea*, it brings the world closer to an understanding of what acts would constitute aggression under international law.[123] Its relevance under customary international law is underlined when it was considered in discussions concerning the crime of aggression in Rome and in Kampala.

3.2.3 The International Court of Justice

The International Court of Justice (hereinafter: 'ICJ') is the principal judicial organ of the United Nations that was established in June 1945 by the UN Charter.[124] The Court entertains contentious legal disputes between States submitted to it by them and requests for advisory opinions on legal questions referred to it by United Nations organs and specialized agencies.[125] In adjudicating disputes between states, the ICJ has passed judgement on inter-state disputes concerning the unlawful use of force.

[121] Dinstein Yoram (2005: 125).
[122] Cassese Antonio (2008: 152). See also Schabas A.William (2007: 135).
[123] Kemp Gerhard (2010: 161).
[124] Article 1, Statute of the International Court of Justice.
[125] http://www.icj-cij.org/court/index.php?p1=1 (Last accessed on 20/09/2011).

Although states tend to frame the issues under contention as concerning the commission of aggression, the ICJ has never passed an express determination concerned with the commission of aggression; the ICJ generally frames the issue, not surprisingly, as whether a state has used force in violation of article 2(4) of the Charter.[126] Whereas, it cannot be disputed that use of force and aggression tend to overlap, one cannot thus escape the conclusion that the ICJ favours the broader interpretation of the concept. It is noted that earlier in 1970, the ICJ in a *dictum* that revolutionised international law, the said Court mentioned the outlawing of acts of aggression as the first of a list of examples of obligations *erga omnes*[127]*.*

In the *Nicaragua* case the ICJ adjudged that the list of acts spelt out under article 3 of the Resolution 3314 amounted to aggression and reflected the prevailing customary international law.[128] The court further observed that the US had in effect breached article 2(4) through its use of unlawful force against Nicaragua. In the *DR Congo* case, just like in the previous case the ICJ adjudged Uganda to have engaged in unlawful use of force in the DRC even when it raised the claim of self defence. [129]

There seems to be no consensus in the academic world whether the ICJ's positive judgement that a state used unlawful force against another state can be equated to the committing of an act of aggression as expressed under customary international law.[130]

[126] Stein Mark S. (2005: 18).
[127] Armed Activities on the Territory of the Congo (D.R. Congo v. Uganda).
[128] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), I.C.J. 14, 103 (1986).
[129] Case concerning armed activities on the territory of the Congo (Democratic Republic of Congo v Uganda) 45 ILM 271 (2006).
[130] Kress Claus (2007: 858). See also Palaus Andreas (2010: 1124) and Politi Mauro and Nesi Giuseppe (2004: 26).

3.3 The Preparatory Workings towards creating the ICC

3.3.1 The International Law Commission

The International Law Commission (hereinafter: 'ILC')[131] was at the epi-centre of defining and codifying the crime of aggression since the 1950s. It helped formulate the Nuremberg Principles (which are essentially the principles of international law that are recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Nuremberg Tribunal), which were eventually adopted by the UN General Assembly in 1950.[132]

On 17th November 1950, the UNGA, in resolution 378 (V) referred to the ILC a proposal made by the USSR regarding the agenda item "Duties of States in the event of the outbreak of hostilities" that provided that the General Assembly, "considering it necessary ... to define the concept of aggression as accurately as possible," declares, inter alia, that "in an international conflict that State shall be declared the attacker which first commits" one of the acts enumerated in the proposal.[133]

Consequently in 1951, during the third session, ILC considered the issue whether it should enumerate aggressive acts or try to define aggression in general terms.[134] The ILC concluded that it was futile to define aggression by a detailed enumeration of aggressive acts, since no enumeration could be exhaustive.[135] The ILC considered it inappropriate to limit the freedom of judgement of the competent organs of the United Nations by a rigid, and a

[131] The International Law Commission was established by the United Nations General Assembly in 1948 for the "promotion of the progressive development of international law and its codification. See http://untreaty.un.org/ilc/summaries/7_5.htm (Last accessed 01/10/2011).
[132] Kemp Gerhard (2010: 140, 142). The author states, that, 'One important clarification that the ILC included in their commentary on the Nuremberg Principles, was on the meaning of the words 'waging of a war of aggression'. It was noted that some members of the ILC regarded this to extend criminal liability for 'waging' a war of aggression to all persons (in uniform) who fought in the war in question. However, the ILC interpreted the judgment at Nuremberg to limit responsibility for 'waging' a war of aggression to senior military officers and personnel and senior State officials.
[133] UN doc. A/C.1/608.
[134] *Yearbook of the International Law Commission, 1951*, vol. II, document A/CN.4/44.
[135] http://untreaty.un.org/ilc/summaries/7_5.htm (Last accessed 01/10/2011).

necessarily incomplete list of acts constituting aggression hence choosing to search for a general and abstract definition.[136] Important to note is that this attempt was unsuccessful for many subsequent years that followed due to lack of agreement.

However, on 10th December 1981, UNGA through Resolution 36/106 re-invited the ILC 'to resume its work with a view of elaborating on the draft Code of Offences against the Peace and Security of Mankind and to examine it with the required priority in order to review it, duly taking into account the results achieved by the process of the progressive development of international law'.[137] The ILC appointed a Special Rapportuer on the subject, who proceeded with his on the draft code during the thirty-fourth session in 1982, thirty-fifth session in 1983, forty-third session in 1991, forty-sixth session in 1994 and forty-seventh session in 1995.[138]

It was during the forty-eighth session of the Commission, in 1996, that the ILC adopted the final text of the 'draft Code of Crimes against the Peace and Security of Mankind' in which Part Two included the crimes of: aggression (article 16), genocide (article 17), crimes against humanity (article 18), crimes against UN and associated personnel (article 19), and war crimes (article 20).[139]

Article 16 of the Draft Code of Crimes against the Peace and Security of Mankind (1996) was closely modeled on the Charter of the Nuremberg Tribunal: 'An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression

136 http://untreaty.un.org/ilc/summaries/7_5.htm (Last accessed 01/10/2011).
137http://untreaty.un.org/ilc/summaries/7_4.htm (Last accessed 01/10/2011). See also Zuppi Alberto (2007-2008: 180).
138 http://untreaty.un.org/ilc/summaries/7_4.htm(Last accessed 01/10/2011).
139 *Yearbook of the International Law Commission, 1996,* vol. II (Part Two), paras. 43 to 50.

committed by a State shall be responsible for a crime of aggression.'[140] More importantly, the ILC did not provide a definition of the crime of aggression, and included a provision under which any proceeding dealing with an act of aggression or connected therewith could not be initiated unless the Security Council had made a determination that the state in question had committed an act of aggression.[141]

There is great importance to be attached to the work of the ILC. It is important to note that article 16 of the ILC's 1996 draft Code confirmed that the crime of aggression constituted a crime under international law.[142]Gerhard Werle observed in this regard that: 'The reports and drafts … are aids in determining customary international law and general principles of law, and thus have significant influence on the development of international criminal law. The various revisions of the [draft Codes] have proved particularly influential for substantive international criminal law.'[143]

3.3.2 The Ad Hoc Committee on the Establishment of the ICC

In order to consider the major substantive issues that arose from the draft Code prepared by the ILC and to prepare for an international conference, the UNGA established the Ad Hoc Committee on the Establishment of an International Criminal Court that met twice in 1995.[144] However, there was not much progress achieved under the committee from the recommendations forwarded by the ILC.

140 Helmut Volger (2010: 18).
[141] Triffterer Otto (2008: 135, Para. 17).
[142] Kress Claus (2010: 1181).
[143] Werle Gerhard (2009:)
[144]http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm (Last accessed 01/10/2011).

3.3.3 The Preparatory Committee on the Establishment of an International Criminal Court

Under Resolution 50/46 of 11 December 1995, UNGA established a Preparatory Committee on the Establishment of an International Criminal Court (hereinafter: 'PrepCom') to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the ILC. The PrepCom took into account the different views expressed during its meetings, while it prepared a widely acceptable consolidated text of a convention for an international criminal court as a step towards consideration by a future diplomatic conference of plenipotentiaries.[145] The PrepCom met from 1996 to 1998, a period in which, the said committee was tasked with preparing a draft international instrument (to be discussed by the Diplomatic Conference) that was to establish the ICC.[146]

The said committee identified two areas as possible points of departure in its discussions on the crime of aggression, that is: the provision on aggression in the Nuremberg Charter and the 1974 UN Definition of Aggression, which it found as not being acceptable for inclusion as part of definition of the crime of aggression.[147] The discussions concerning both the definition of the crime of aggression, as well as the role for the Security Council demonstrated the deep divisions that existed among the delegates and the States they represented.[148] It was also clear in the PrepCom discussions, that a number of states used the 1974 UN Definition of Aggression as a working definition, hence giving support to the approach where the definition would contain an enumeration of acts constituting aggression.[149]

[145] http://untreaty.un.org/cod/icc/statute/finalfra.htm (Last accessed: 01/10/2011).
[146] http://untreaty.un.org/cod/icc/statute/finalfra.htm (Last accessed: 01/10/2011).
[147] Kemp Gerhard (2010: 264).
[148] Triffterer Otto (2008: Para. 18).
[149] Kemp Gerhard (2010: 267).

Presumably the main objective that reined at this stage was to restrict individual criminal responsibility to only clear cut cases of illegal and massive use of armed force leading to the invasion of foreign territory as laid out in the Nuremberg precedent.[150] Germany's Proposal seemed to have received most support in the discussions; it described aggression as:

> 'an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in [manifest] contravention of the Charter of the United Nations [with the object or result of establishing a [military] occupation of, or annexing, the territory of such other State or part thereof by armed forces of the attacking State.'[151]

Although, the proposal was not adopted by the PrepCom due to lack of consensus among members of the said committee, it later acted as point of reference for the delegate deliberations at the later diplomatic conference.

3.3.4 The 1998 Rome Diplomatic Conference and the Rome Statute

During the Rome Conference, the same issues that confronted the Preparatory Committee came back to haunt the delegates.[152] The states present at the Rome Conference faced two inherent difficulties: (1) how to define the prohibited acts of aggression with sufficient clarity; and (2) who would determine that an act of aggression had occurred, hence 'triggering' the court's jurisdiction over individual liability.[153] While many delegations regarded the crime of aggression as essentially a crime committed by states rather than individuals, other delegations regarded aggression as too 'political' a concept that was not susceptible to legal definition.[154] In addition to the above, there were also some delegations that were concerned that the paramount role of the Security Council in matters of international peace

[150] Triffterer Otto (2008: Para. 135).
[151] Lee Roy S. (1999: 83).
[152] Triffterer Otto (2008: Para. 137).
[153] O'Donovan Michael (2007: 508). See also Roy S. Lee (1999: 84).
[154] Schabas A. William (2007: 8).

and security would be eroded by the inclusion of aggression in the ICC Statute.[155]

Eventually during the deliberations, no agreement was forthcoming among the delegates on a conclusive definition of the crime of aggression, and the role of the Security Council, although not extensively dealt with during the Conference due to lack of time.[156] In the end, states agreed on a compromise where the Statute of the ICC would incorporate the crime of aggression, but the Court's jurisdiction over the crime would be suspended until states had agreed on a definition in the future, and on how the jurisdiction of the Court would be triggered.[157] In the final text of the Rome Statute that was adopted reflected a compromise between the delegations opposed to and those in favour of the inclusion of aggression, but also reflected some of the concerns of many of the delegations regarding the conditions under which the ICC should exercise its jurisdiction, as well as the perceived role of the Security Council as expressed under UN Charter Chapter VII.[158]

The final provision agreed upon was included under article 5(1) (d) that grants the ICC jurisdiction over the crime of aggression. It is salient to note that Article 5(2) provides that the definition "shall be consistent with the relevant provisions of the Charter of the United Nations", an indication of the future role the Security Council may or should play in relation to this crime.[159]

[155] Kemp Gerhard (2010: 262). See also Drumb Mark A. (2009: 291).
[156] Kirsch Philippe and Holmes John T (1999: 8).
[157] O'Donovan Michael (2007: 508).
[158] Kemp Gerhard: 262). See also McDougall Carrie (2007: 158).
[159] Lee Roy S. (1999: 84).

The inclusion of the crime of aggression under the Rome Statute of the ICC reflected a significant step towards a longstanding effort to define it and grant a court jurisdiction over individual perpetrators of the same crime.

3.4.0 Post Rome developments leading into the Review Conference

3.4.1 The Preparatory Commission for the ICC

At the end of the Rome Conference, delegates adopted Resolution F on the establishment of the Preparatory Commission for the International Criminal Court that was an annex to the Final Act of the Rome Conference that adopted the Rome Statute.[160]

The Preparatory Commission's mandate was to draft: (a) rules of procedure and evidence; (b) elements of crimes; (c) a relationship agreement between the Court and the United Nations; and (d) basic principles governing a headquarters agreement to be negotiated between the Court and the host country.[161] The same body was in addition to the above, to draft the: (a) financial regulations and rules; (b) an agreement on the privileges and immunities of the Court; (c) a budget for the first financial year; (d) the rules of procedure of the Assembly of States Parties; and (e) proposals for a provision on aggression.[162] The Preparatory Commission appointed various working groups on the above items that met between 1999 and 2002.[163]

The Working group on the Crime of Aggression was however unable to reach a consensus on the outstanding issues concerning the definition of the crime and the role if any of the Security Council since a number of the states

[160] UN Doc. A/CONF.183/10, Annex I, F. See also Triffterer Otto (2008: 136).
[161] Trahan Jennifer (2011: 54).
[162] Trahan Jennifer (2011: 54).
[163] CICC Background Paper (2010: 4).

involved maintained their previous positions.[164]It did however make some progress on the role the Security Council, where two options were put forward. Otto Triffterer thus explains:

> 'One option – if adopted would have provided that the Security Council would be requested by the Court as to whether in a given situation the crime of aggression has been committed. In absence of a decision of the Security Council within a given period of time, the Court could then proceed with its investigations or prosecution. An alternative proposal – basing itself on the well known Uniting-for-Peace-Resolution of the General Assembly – provided that, if the Security Council was not able in reaching any such determination within a given time frame, the General Assembly would then be asked in turn by the Court to make such a recommendation. Again, where no such recommendation is made in due course, the Court could – under the proposal as them submitted – still go forward with its proceedings.'[165]

The above recommendations served as the basis for the future debate on the crime of aggressions.

3.4.2 The Special Working Group on the Crime of Aggression

During the first session of the Assembly of States Parties to the Rome Statute in September 2002, the delegates adopted a resolution on the continuity of work in respect to the crime of aggression of which it was agreed that:

> '(1) a special working group on the crime of aggression (herein after: 'SWGCA') shall be established, open on an equal footing to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, for the purpose of elaborating the proposals for a provision on aggression in accordance with the Rome Statute (article 5, paragraph 2) and Resolution F (paragraph 7); (2) the special working group shall submit such proposals to the Assembly for consideration at a Review Conference; and (3) the special working group shall meet

[164] Triffterer Otto (2008: 136). See also Trahan Jennifer (2011: 54).

[165] Triffterer Otto (2008: 136). See also Kress Claus and Von Holtzendorff Leonie (: 1183).

during the regular sessions of the Assembly or at any other time that the Assembly deems appropriate and feasible.'[166]

The SWGCA met in various locations between September 2003 and February 2009 where it held deliberations and concluded its work.[167] The discussion papers compiled by the Preparatory Commission Coordinators from Tanzania and Argentina served as valuable points of reference and guidance to the discussions of the Special Working Group on Aggression.[168] Kemp observed that the discussion paper proposed by the Chairman of the Working Group in January 2007 reflected two approaches. He stated;

'It proposed an Article 8*bis* to be inserted into the Rome Statute of the ICC. This proposed Article provides for two variants. Variant (a) reflects the *differentiated* approach and Variant (b) the *monistic* approach.

'*Variant (a):*

1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person (leads) (directs) (organizes and/or directs) (engages in) the planning, preparation, initiation or execution of an act of aggression/armed attack

Variant (b):

1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person orders or participates actively in the planning, preparation, initiation or execution of an act of aggression/armed attack

continue under both variants:

[which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations] [such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof].

[166] Resolution ICC-ASP/1/Res.1 of 9 September 2002. See UN Doc. ICC-ASP/1/3 (2002: 328).
[167] Kress Claus and Von Holtzendorff Leonie (: 1184). See also Trahan Jennifer (2011: 56).
[168] Kemp Gerhard (2010: 281).

2. For the purpose of paragraph 1, "act of aggression" means an act referred to in [articles 1 and 3 of] United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.'[169]

It was thus the outcome from SWGCA's 2009 Proposal that provided a foundation for the First ICC Review Conference in Kampala, Uganda. The monistic approach in variant (b) seems to have been the most acceptable to the delegates at the Review Conference.

3.5.0 Conclusion

The discussion in this chapter has highlighted the judicial and legislative history of the crime of aggression from the Second World War that started in late 1930s to the 1998 Rome Conference. The above period helped to redefine the customary international law nature of the crime of aggression that individuals can criminally be held liable for committing the said crime.

Although, the provisions of the UN Charter and the 1974 UN Definition of Aggression did not criminalise aggression, they in themselves gave a new sense of direction to the international community's quest to define it in the preparatory works for the creation of the ICC.

It thus can also be concluded that the adoption of the Rome Statute of the ICC was fundamentally a historical achievement, although its undoing lay in the fact that the Rome Statute put the crime of aggression in a state of abeyance.[170]

[169] Kemp Gerhard (2010: 284). See also Zuppi Alberto L. (2007-2008: 3,4) and Kress Claus and Von Holtzendorff Leonie (2010: 1189).
[170] Blokker Niels and Kress Claus (2010: 889).

CHAPTER FOUR
EXAMINING THE OUTCOME OF THE FIRST ICC REVIEW CONFERENCE

'In 1998, we made Rome a by-word for international criminal justice. Let us now write Kampala in that illustrious history, as well. Let it be known as the place where the international community … coming together in concert … closed the door on the era of impunity and … acting in concert …ushered in the new Age of Accountability.'[171]

4.0 Introduction

This chapter is meant to highlight main discussions and negotiations, and examine the final outcome of the First ICC Review Conference of 2010 that took place in Kampala, Uganda. The discussion focuses on provisions of the landmark resolution with a specific analysis of the outcome with regard to the crime of aggression. The chapter also critiques, and discusses the impact of the outcome on the ICC.

4.1.0 The negotiations and final outcome of the Review Conference

The First ICC Review Conference took place in Kampala (Uganda) from 31st May to 11th June 2010.[172] During night-time of 11th to 12th June 2010, the Assembly of States Parties to the ICC adopted Resolution RC/Res. 6 by consensus.[173]

Resolution RC/Res. 6 contains article 8*bis* (defines a crime of aggression), articles 15*bis* and 15*ter* (provides for the ICC's jurisdiction over the crime of aggression), and annex III that contains the "Understandings regarding the

[171] http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-BanKi-moon-ENG.pdf (Last accessed on 01/10/2011).
[172] Marschner Laura and Olma Isabelle (2010: 529).
[173] Heinsch Robert (2010: 715).

amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression".

The primary challenge that confronted the delegates at the Review Conference concerned whether they could reach agreement on the ICC's jurisdiction over the crime of aggression, and the said court's relationship with the Security Council.[174]

4.2.0 Individual criminal responsibility for the crime of aggression

The notion of individual criminal responsibility for the crime of aggression is entrenched in article 8*bis* (1). Therein, it states: '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.'

From the above provision, it is clear through the use of the word 'a person' that the crime of aggression can only be committed by a natural individual person, and not an artificial person. This is in tandem with the other international crimes under the jurisdiction of the International Military Tribunals, the ICC and the Ad Hoc Tribunals. It however differs from the Nuremburg Tribunal, which also had the jurisdiction to try political organisations.

When article *8bis* (1) is dissected, a number of conclusions can be drawn from the above provision. In the first instance, it can be concluded that the

[174] Heinsch Robert (2010: 716). See also Trahan Jennifer (2011: 57).

four main acts of commission of the crime of aggression for the principal perpetrator are: planning, preparation, initiation or execution. It is however to be contended that the above stated list does not exclude other modes of participation since the new paragraph 3*bis* to be inserted in article 25 states that the provisions of the former, in principle also apply to the crime of aggression. The origins of this provision are said to have been article 6 (a) of the Charter of the Nuremberg Tribunal, where the word 'execution' is used to replace "waging of a war".[175]

A second important conclusion form 8*bis* (1) is that the crime of aggression is what can be termed as a 'leadership crime'. This unique quality is expressed through the use of the statement that it is a 'person in a position effectively to exercise control over or to direct the political or military action of a state'. The implication of this provision is that it is only the top echelons (political and military of leaders) of a state that are susceptible to being charged and tried for the crime of aggression. Hence the ordinary soldiers and state officials would never be included under this ambit.[176] In this regard, this was one of the primary distinguishing features between the crime of aggression and other international crimes under the jurisdiction of the ICC.

The fact that the crime of aggression is distinctly a leadership crime raises a pertinent question of how it relates to article 25 of the Rome Statute. This was resolved through the insertion of article of 3*bis* within article 25 that provides that the crime of aggression would only apply to persons in a leadership position to direct the political or military action of a State, and as

[175] Heinsch Robert (2010: 721). See also Ambos Kai (2010: 465).
[176] Trahan Jennifer (2011: 56).

a consequence closing the door to accessory responsibility perpetrators.[177] It is also important to note that unlike other international crimes that can be tried under the Rome Statute, it is impossible for an individual acting alone, absent state action, to commit the crime of aggression.[178]

The third important conclusion concerns the qualification of the act of aggression in article 8*bis* (1), which states that by 'its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.' This raises very controversial and emotive questions like for instance: In the first instance, what in essence, legally constitutes character, gravity and scale? Secondly, what would technically amount to a manifest violation of the Charter of the United Nations? Thirdly, does the manifest have to include all three features, one or two of them to be considered a violation of the UN Charter?

It has been argued that the requirement of a manifest violation under three qualities was intended to exclude "borderline cases" or those 'falling within a grey area' both factually (when the act of state does not meet the required 'gravity' or 'scale', like for instance minimal border incursions), as well as legally (that is, debatable cases, where the act of state due to its 'character' does not constitute a manifest violation of the Charter).[179]

The threshold is neither found in the UN Charter nor in the 1974 UN Definition of Aggression.[180] It has been asserted that if one traversed the *travaux preparatoires*, it becomes clear that the inclusion qualification was meant to exclude all violations of the prohibition of the use of force that are controversial and not manifest violations of UN Charter like for instance

[177] Heinsch Robert (2010: 734).
[178] Trahan Jennifer (2011: 56).
[179] Trahan Jennifer (2011: 56).
[180] Heinsch Robert (2010: 726).

situations of 'humanitarian intervention' or 'responsibility to protect', anticipatory self defence attacks, cross-border exchanges of fire and cross border incursions.[181]

4.3.0 The definition of the crime of aggression

The definition of the crime of aggression did not raise too much debate since consensus had been built during earlier meetings of the SWGCA. Consequently, the 2009 SWGCA Proposal on the definition of the crime of aggression was adopted by Review Conference with an addition of the respective Elements of Crimes but without any other significant changes.[182]

For purposes of the definition of the crime of aggression, reference has to be made to article 8*bis* (1), which defines the said crime 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 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'. Article 8*bis* (2) adds the following, while clarifying that, "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.'

It would appear that the above provision is near cumulative reflection of article 2 of the 1974 General Assembly Resolution 3314 and article 6 (a) of the Nuremburg Charter. Both provisions of articles 8*bis* must be read together to conceptualise what the definition of a crime of aggression entails. In essence, simply put, a crime of aggression involves the planning,

[181] Heinsch Robert (2010: 730).
[182] Heinsch Robert (2010: 721).

preparing, initiating or executing of armed force that is contrary to the UN Charter by a leader of one state against another state.

Through the use of the word 'manifest', it has been argued that the above definition when operationalised, will not apply to the 'ordinary' violations of the use of force but to the most 'egregious' cases.[183] This on the outset seems to differ from the existing customary international law that would on the face of it cover other ordinary prohibitions of the use of force.

It goes further to note that any of the seven listed acts of aggression (regardless of a declaration of war) qualify as an act of aggression. The listed acts are exactly the same as those spelt out under article 3 of the 1974 UN General Assembly Resolution 3314 on the Definition of Aggression. It has been argued that the reproduction of the Resolution 3314 in article 8*bis* (2) is problematic since it was never construed to be used in cases involving individual criminality (but for state responsibility), and the list is not exhaustive.[184]

In effect, only clear cases of aggression are covered by the definition hence leaving out actions like 'humanitarian' or 'responsibility to protect' interventions.[185] It has been thus argued that the amendments reflect shades of modernity, but remain largely 'conservative' at the same time since it extends individual criminal responsibility from the traditional concept of 'war of aggression' to 'acts of aggression' listed in Article 8*bis*.[186]

[183] Paulus Andreas (2009: 1124).
[184] Heinsch Robert (2010: 723). See also Paulus Andreas (2009: 1120).
[185] Marschner Laura and Olma Isabelle (2010: 532).
[186] Carsten Stahn (2010: 876).

4.4.0 The elements of crime for the crime of aggression

Article 8*bis* (1) states the required *acteus reus* for the crime of aggression as being the planning, preparation, initiation or execution, by a person in a leadership position. However, it has been contended that the above are just alternatives in themselves, since the requirement is that the accused should have made a substantial contribution to the act of aggression in any one of the above stated actions.[187]

The above provision is silent on the specific mental elements for the said crime. The effect of the above situation is that, one has to make reference to the general clause in article 30 of the Rome Statute.[188] In this regard, the said article 30 (1) states that the 'person shall be criminally liable if the material elements are committed with intent and knowledge'. Under article 30 (2), a person has 'intent' with regard to their conduct, he or she engages in the conduct or in relation to a consequence that person means to cause the outcome or is aware that it will happen under the ordinary course of events. On the other hand, 'knowledge' means 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.[189]

Annex II of the Resolution contains amendments to the Elements of Crimes for the crime of aggression. Therein, under the introduction, it is stated that any of the acts mentioned in article 8 bis (2) qualify as act of aggression (also referred to material elements). It goes further to note that 'manifest' is an objective qualification and the there no requirements to prove that the perpetrator made a legal evaluation as to whether the use of armed force was inconsistent with the UN Charter or the manifest nature of the violation

[187] Samford (2010: 23).
[188] Triffterer Otto (2008: 895, 914). See also Heinsch Robert (2010: 732).
[189] Article 30 (3) of the Rome Statute.

of the UN Charter.[190] The above resonates with the spirit of article 32 (2) of the Rome Statute that spells out that a mistake of law with regard to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal liability.[191]

Under the amended elements of crime, it is provided that there six considerations that are in tandem with article 30 of the Rome Statute:

> '(1). The perpetrator planned, prepared, initiated or executed an act of aggression. (2). The perpetrator was a person in a position effective to exercise control over or to direct the political or military action of the State which committed the act of aggression. (3). The act of aggression – 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 – was committed. (4). The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations. (5). The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations. 6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.'

An individual can commit the crime of aggression through any of the acts listed under 8*bis* (2), which are to be construed as the material elements for the commission of the crime of aggression.

4.5.0 The jurisdiction issues of the ICC for the Crime of Aggression

Under the Resolution RC/Res.6, the issues concerning jurisdiction over the crime of aggression are divided under two articles: (a) article 15*bis* concerns the state referrals and Prosecutor's *proprio motu* investigative powers, and (b) article 15*ter* concerns Security Council referrals.

[190] Annex II of Resolution RC/Res. 6, 21.
[191] HeinschRobert(2010:732).Seealso http://www.iccnow.org/?mod=aggression&idudctp=22&show=all#22 (Last accessed on 05/10/2011).

With regard to State Party referrals or investigations undertaken under the Prosecutor's *proprio motu* powers, the ICC's prosecutor has to first find out whether the Security Council has determined that an act of aggression has been committed.[192] It is only after the Security Council has made such a determination that the prosecutor can proceed with the investigation of the crime of aggression.[193]

Where no such determination has been made by the Security Council, the prosecutor may proceed with the investigation of the crime of aggression upon receiving authorisation of the Pre-Trial Division, and the Security Council has not decided otherwise in accordance with article 16.[194]It has been contended that the requirement that Pre-Trial Division authorise the commencement of investigations complements the substantive requirement that the state act of aggression must have constituted a manifest violation of the UN Charter.[195]

Under Security Council referrals, article 15*ter* (1) states that, 'the Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article'. Article 13 (b) of the Rome Statute on its part provides that the Court may exercise jurisdiction over a crime in a situation which has been referred by the Security Council (under Chapter VII of the UN Charter) to the Prosecutor. The spirit of article 13 is again echoed in paragraph 2 of the annexed Understandings regarding the amendments to the Rome Statute of the

[192] Article 15*bis* (6). The prosecutor has to inform the UN Secretary General of the situation confronting the court, and provide all relevant information and documents.
[193] Article 15*bis* (7).
[194] Article 15*bis* (8).
[195] Blokker Niels and Kress Claus (2010: 894).

International Criminal Court on the crime of aggression.[196] The implication here is that with the Security Council referring a situation to the ICC, it has already made a determination of an act of aggression, and there is by inference no need to make a new determination. It has been also argued that such a provision gives the Security Council more flexibility in decision making that might be helpful 'should the Security Council wish to retain its past conspicuous reluctance to make a determination that an act of aggression has occurred.'[197]

It is important to note that with regard to the crime of aggression and a non State Party, the ICC has no mandate to exercise jurisdiction over its nationals or on its territory. The implications of this provision are that the Assembly of State Parties departed from the spirit of article 12 that permits the Court to exercise jurisdiction over nationals of non State Parties. In addition to the above, articles 15*bis* (9) and 15*ter* (4) provide that a determination of act of aggression by an organ outside the Court shall not be prejudicial to the Court's own findings.

Such a provision is meant to protect and guarantee the independence of the Court's decision from conclusions or determinations of other non ICC bodies such as the Security Council that are largely politically motivated.[198] It is important to add that, in terms of jurisdiction *ratione temporis*, the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15*bis* (3) is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.[199] There is also a deferral or delayed jurisdiction condition incorporated in the amendments since it states that a

[196] Annex III of Resolution RC/Res.6.
[197] Blokker Niels and Kress Claus (2010: 893).
[198] Heinsch Robert (2010: 741).
[199] Annex III of Resolution RC/Res.6, Para. 3.

two-thirds majority of the ASP must be available in order for ICC to exercise jurisdiction over the crime of aggression in 2017 or a period after.[200]

With regard to domestic jurisdiction over the crime of aggression, under the new amendments, it was agreed that they do not limit or prejudice already existing or developed rules of international law or create a new right or obligation to exercise domestic jurisdiction over the crime when committed by another state.[201] The deduction that one can make from the above is that the delegates seemed aware that todate there isn't a universal agreement on the crime of aggression, and how it would be incorporated domestically.

4.6.0 The entry into force of crime of aggression provisions

The three important conditions that must be fulfilled before the ICC can exercise jurisdiction over the crime of aggression. In the paragraph 1 of the preamble to Resolution RC/Res.6, it is provided that, '…the amendments of Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and notes that any State Party may lodge a declaration referred to in article 15 bis prior to ratification or acceptance.'

Article 121 (5) provides that any amendments of articles 5, 6, 7 and 8 shall enter into force for those States Parties that have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In addition to the above, it is to be noted that identical articles 15*bis* (2) and 15*ter* (2) provide another condition, that the Court may only start to exercise jurisdiction with regard to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties. The third condition is spelt out in another identical provision stated

[200] Articles 15*bis* (3) and 15*ter* (3).
[201] Annex III of Resolution RC/Res.6, Paras. 4 and 5.

under articles 15*bis* (3) and 15*ter* (3). Therein, it is provided that the Court shall exercise jurisdiction over the crime of aggression only after a decision has been taken after 1 January 2017 by the same majority of States Parties as required for the adoption of an amendment to the Statute.

4.7.0 The Opt-Out clause over crime of aggression

One of the unprecedented and surprising inclusions under the amendments brought by Resolution RC/Res.6 was the introduction of opt-out clause for States Parties to the Rome Statute, with specific regard to the crime of aggression. Under article 15 bis (4) of the said Resolution, the Court may not exercise jurisdiction over the crime of aggression for a State Party that declared that it does not accept jurisdiction through the lodgment with the Registrar of a Declaration stating the same.[202] This provision raises more questions than answers that can be provided like for instance: Why would State Party that has accepted the amendment opt out, and why would a State Party that has not accepted the amendments, lodge a declaration.[203] The amendments of the Rome Statute apply to all State Parties, unless they decide to opt out of them.

4.8.0 The impact of Resolution RC / Res. 6

The amendments provide an important point of reference in the assessment of aggressive use of force by states against others.[204] Resolution RC / Res. 6 will therefore have an impact on statesmen, international relations and the work of the ICC itself.

The outcome of the First ICC Review Conference that redefined the crime of aggression and gave the ICC jurisdiction will and can act as a deterrent force

[202] The provision further notes that the withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.
[203] Heinsch Robert (2010: 739).
[204] Trahan Jennifer (2011: 2).

to both States Parties and non States Parties, in the future to stay away from committing acts of aggression against other states. This is so since it creates individual criminal responsibility for the said crime and makes it a leadership crime. Although the ICC has no jurisdiction over the non States Parties, the Court can still investigate and prosecute, if the situation was referred by the Security Council. The fact that the ICC can investigate and try individuals for the crime removes aggression partly from the realm of policy, and places it more firmly on the 'radar screen' of domestic legislators, prosecutors, and judges.[205]

The amendments go a long way in extending the reach of international criminal justice and ending impunity for those responsible for perpetrating the crime of aggression. When the amendments take effect after 2017, it will grant the ICC the mandate and opportunity to investigate and prosecute all the four international crimes stipulated under the Rome Statute.

In effect therefore, the results of the First ICC Review Conference strengthen the ICC's capacity to hold the world's worst criminals accountable for their actions and give the world a new means to deal with states' aggressive maneuvers.[206]

4.9.0 The criticisms leveled against and challenges for the ICC arising from Resolution RC / Res. 6

Resolution RC / Res. 6 is bound to receive and present some challenges for the ICC when the amendments come into force. They include the following:

[205] Stahn Carsten (2010: 876).
[206] http://archive2.globalsolutions.org/press_releases/icc_conference_takes_steps_end_aggression (Last accessed on 05/10/11).

4.9.1 Uncertain and a postponed jurisdiction for the ICC

The ICC has to yet for an uncertain date that will come after 1 January 2017, when a determinant decision will have been taken by the States Parties to the Rome Statute, in order for it to start trying individuals for the crimes of aggression. This effectively means that the ICC's jurisdiction over the crime of aggression is postponed, and it will take a long time before the world ever witnesses the first indictments and / or prosecutions for crimes of aggression. Yet, it is a reality that acts of aggression still continue to take place unaddressed, and if no clear majority authorises the ICC after the above date, the Kampala outcome could turn out to be just a definition and nothing more.[207]

Some however argue that postponed jurisdiction of the ICC somewhat addresses the frequently raised concern that the Court was still way too young to handle the crime of aggression, and allows the ICC to prepare its Pre-Trial Division to meet the new challenges brought by the new crime. [208]

4.9.2 Threat to state sovereignty

With the new amendments, the crime of aggression unlike the other international crimes is essentially a leadership crime. The primary target is the top leadership of an aggressor state, of whom could include the head of state, cabinet ministers, heads of department and military leaders. There have thus been suggestions that the crime of aggression can be perceived as a threat to state sovereignty.[209] This is so since an indictment against the leadership of a country could easily be equated to an indictment of the state itself. Practically, it may be difficult to separate a whole leadership from the state itself.

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[207] Marschner Laura and Olma Isabelle (2010: 533). See also Trahan Jennifer (2011: 83).
[208] Blokker Niels and Kress Claus (2010: 891, 892).
[209] Werle Gerhard (2009: 476).

4.9.3 Criticism of the leadership clause

It can be argued that the incorporation of a leadership clause in the Rome Statute for the crime of aggression unfairly or unfavourably restricts the possible potential perpetrators for the crime of aggression and encourages impunity. There could be other individuals that could be liable for the perpetration of the crime but go un-charged because of the above threshold.[210]

In this regard, the potential perpetrators should include people that hold lots of societal influence such as traditional rulers, the mass-media players, civil society leaders and religious leaders; who may also be linked to the state or its institutions in some countries but not necessarily be part of the government or military setup. It was revealed, for instance, in the German Industrialists trials (and other trials) after the Second World War that people with economic power could significantly participate or influence wars of aggression.[211]

The characterisation and categorisation of crime of aggression as a leadership crime presents difficulties for the complementarity principle in the Rome Statute. In terms, of practical implementation, there will be challenges of domestic investigation and prosecution of the crime of aggression.[212]

4.9.4 The issue of 'manifest violation'

The requirement of 'manifest violation' as used in article 8*bis* is bound to create challenges in its interpretation. Questions will be raised on what legally constitutes a manifest violation? Does it include all perceived or potential legal and non legal acts of aggression such as those under humanitarian interventions, 'responsibility to protect' interventions, and for

[210] Kai Ambos (2010: 489).
[211] Stahn C. and Sluiter G. (2008: 715).
[212] Stahn Carsten (2010: 880).

instance, also Israel's raid of Entebbe to rescue her kidnapped nationals. The Court will certainly have a challenge to determine what acts by their character, gravity and scale constitute a manifest violation of the UN Charter.

4.9.5 Legal weight to be attached to Annex III concerning the Understandings

Resolution RC / Res. 6 has Annex III that incorporates the Understandings to the amendments. They raise the challenge of deciding what relevance and legal weight can be attached to the 'Understandings'. This is especially important since they were not part of the preparatory works of the ICC but a creation of the Review Conference.

4.9.6 Incorporation of UN General Assembly Resolution 3314

It has been argued that the reproduction of the Resolution 3314 in article 8*bis* (2) is problematic since it was never construed for use in cases involving individual criminality (but for state responsibility), and the list is not exhaustive. When the amendments come into operation after 2017, this is bound to become a serious point of discussion for bureaucrats, academics, diplomats and legal practitioners. The issue is of paramount importance given the fact that since article 8*bis* (2) expressly states that the act of aggression is to be determined in accordance with Resolution 3314, yet importantly article 4 of the latter states that the list is not exhaustive. It raises the question of legality and specificity in the context of what is to be included hereunder.

As per articles 15*bis (*3) and 15*ter* (3), the ICC can only start to exercise jurisdiction over the crime of aggression after 1st January 2017, and after the ratification of thirty States Parties to the Rome Statute (as per articles 15*bis* (2) and 15*ter* (2). Whereas this is attainable, it does postpone the

jurisdiction of the ICC for the crime of aggression for a little while. It has been argued however that such a time period benefits every state since it permits States Parties to re-align their national regime to the amendments, and buys time for the ICC to establish itself as a permanent court that tries international crimes.[213]

4.9.7 The Opt-Out clause for States Parties

The inclusion of an opt-out clause (article 15*bis* (4)) in the Rome Statute presents more negatives than positives. It has been argued that this clause could have been inserted in the Rome Statute to defeat the objectives of those that gave the ICC the power to try perpetrators of the crime of aggression.[214] The effect is that with its inclusion, the crime of aggression is defined but the ICC cannot effectively try any one for it given the fact that it creates an escape route out of the court's jurisdiction. Amnesty International has argued that by allowing States Parties to protect their leaders from prosecution for the crime of aggression, there are risks that the credibility of the ICC will be brought to question and undermine its work.[215]

4.10.0 Examining Resolution RC/Res.6 vis-à-vis customary international law on the crime of aggression

To understand the reach of customary international law over the crime of aggression, one must draw the distinction between 'what is illegal' and 'what is criminal'. Gerhard Werle, states that under customary international law, it is only aggressive war, as a particularly grave and obvious form of aggression that is criminalised.[216] Before the First World War, the right of a state to resort to war, the *jus ad bellum*, was not outlawed, a situation that

[213] Heinsch Robert (2010: 738).
[214] Stahn Carsten (2010: 880).
[215] http://www.amnesty.org/en/news-and-updates/opt-out-system-risks-undermining-icc-2010-06-15 (Last accessed on: 05/10/2011).
[216] Werle Gerhard (2009: 481). This view has also been upheld by the English House of Lords in Regina v. Jones (2006: 147).

changed dramatically after the said war, when it was outlawed.[217]However, the present customary international law on the crime of aggression is primarily the bi-product of the judgements of the Nuremberg and Tokyo Tribunals, state practice and the spirit expressed in the instruments of the last century.

In this regard, reference is made to articles 6 (a) and 5 (a) of the Nuremberg and Tokyo Tribunals respectively that created a crime against peace for planning, preparing, initiating or waging a war of aggression, or a war in violation of international instruments or obligations. The criminality of waging aggressive war was affirmed in UN General Assembly Resolution 95 (1) of 1946 and the 1974 UN Definition of aggression.[218] It has been argued that the 'Nuremberg and Tokyo trials embodied the state practice that is necessary for the creation of customary international law' that was affirmed by states' official statements with regard to the 1974 UN Definition of Aggression.[219]

The final inclusion of the crime of aggression under the 1998 Rome Statute of the ICC was a clear testament of the States parties of its criminality under customary international law.[220] In effect therefore, acts of aggression that do not reach the level of intensity of aggressive war are not criminal under customary international law.[221]Another quality linked to the above is that the attacker must aim to subjugate another state and use its resources for the benefit of the attacking state.[222]The threshold for criminal responsibility under customary international law is high since the definition of the term

[217] Bachmann Sascha-Dominik and Kemp Gerhard (2010: 311).
[218] Werle Gerhard (2009: 483).
[219] Werle Gerhard (2007: 8).
[220] Cassesse Antonio et al (2002: 431).
[221] Politi G. and Nesi M. (2004: 93).
[222] Werle Gerhard (2009: 485).

"war of aggression" also effectively defines the scope of acts of aggression that are criminalised.[223]

Under customary international law, the crime of aggression is a leadership crime. Although, the Charters of the Nuremberg and Tokyo Tribunals were silent on the nature of perpetrators that could be tried for the crime of aggression, it is inferred from the Tribunals judgements that it is only key political and military individuals could accrue criminal responsibility.[224] A crucial mental element with regard to the crime of aggression is that there must be 'intent', where the perpetrator was aware of the aggressive aims of the war, and still goes ahead to participate in its planning, preparation, initiation or waging.[225]

The above creates quite a narrow limitation of the offence, which would appear to have been expanded by the amendments of the outcome from the First ICC Review Conference. It would appear that with the amendments, the ICC's jurisdiction was expanded just beyond aggressive wars to include all the acts spelt out in the 1974 UN General Assembly Definition of Aggression Resolution 3314.

The extent was also however restricted (comparable to customary international law) to within a certain threshold requirement that the acts 'by character, gravity and scale [constitute] a manifest violation of the Charter of the United Nations.'[226] It can thus be argued that the new definition of aggression under the amended Rome Statute and that recognised by the Military Tribunals is substantially the same. Like under customary

[223] Werle Gerhard (2009: 487).
[224] Dinstein Yoram (2005: 133).
[225] Werle Gerhard (2009: 490).
[226] Werle Gerhard (2009: 493).

international law, the amendments to the Rome Statute categorise the crime of aggression as a leadership crime.

Just like under customary international law that recognises the role of the Security Council with regard to acts of aggression (under article 24 of the UN Charter), the amended Rome Statute maintains this recognition with some modifications of what role the body would play in determining acts of aggression. In addition to the above, it must be argued that both under customary international law and the new amendments to the Rome Statute, the concept of aggression remains centered on use of illegal interstate violence as reflected in the nexus requirement of a leadership requirement for perpetrators and the definition of the term 'act of aggression' as 'use of armed force by a State'.[227]

4.11.0 Conclusion

There is no doubt today, that the crime of aggression is not just the supreme but it represents one of the most if not the most serious breach of fundamental rules of the international community.[228] The outcome from the First Review Conference in Kampala marked the culmination of an almost century-old debate about the international criminalisation of aggression.[229]

The fact that delegates at the Kampala Conference reached a consensus on the crime of aggression is to be applauded and celebrated, for it represented a significant step forward for development of international criminal law. The States Parties to the Rome Statute were in Resolution RC/Res.6 not only able to define the crime of aggression but also spell out the jurisdiction of the ICC over the said crime. The question of the ICC's jurisdiction over the crime of aggression was of utmost importance since it evolved and also spelt

[227] Carsten Stahn (2010: 876).
[228] Bonafè Beatrice I. (2009: 25).
[229] Blokker Niels and Kress Claus (2010: 894).

out how the court would relate with the Security Council. The new amendments certainly raise new opportunities and challenges for the young permanent court, and will without a doubt have a significant influence on the ICC and the world at large when they eventually come into force.

CHAPTER FIVE
GENERAL CONCLUDING REMARKS AND PROPOSED WAY FORWARD

5.0 General research study conclusions

The crime of aggression in its several variants has evolved and developed by leaps over the last two centuries. This differs greatly from the original thinking aligned to the notion of war as was, for instance, articulated by the Prussian General *Carl von Clausewitz* in a famous quote attributed to him: 'War is merely a continuation of politics by other means.'[230] Today, the use of illegal wars by states against other states is regulated with criminal sanctions for individuals at the centre of perpetrating them.

In this study, it has been conclusively shown that the historical development of aggression was and is still closely linked to how societies perceived going to war with another society. From ancient times, through to the last few centuries, aggression was and has been linked to the use of the terms: 'just' and 'unjust' wars plus 'legal' and 'illegal' wars. It was only in the early 20th century after the First World War that the debate started to change to consider the possible criminal element in illegal wars.

Another conclusion to this study is that the Nuremberg Tribunal was effectively the birth place of the modern day crime of aggression. It was the Nuremberg Tribunal that fundamentally moved the legal jurisprudence from emphasis on unlawful wars to illegal wars, and finally to criminal wars. Since a state cannot be criminally charged, the Nuremberg Tribunal introduced not only the crime of aggression (in form of crimes against peace) but also individual criminal responsibility for the same. In this regard, Benjamin B. Ferencz has rightly opined that:

[230] Werle Gerhard (2007: 3).

> 'The most important achievement of the Nuremberg trials, after over 40 million people had died in World War Two, was the confirmation that war-making was no longer a national right but had become, and henceforth would be condemned, as an international crime. That great historical step forward toward a more rational and human world order under law must not be allowed to perish.'

It is also to be concluded that the UN Charter and the 1974 UN Definition on Aggression were very important in the conceptualisation and eventual development of the crime of aggression to its present state. Although silent on individual criminal responsibility for the crime of aggression, both helped refine how the international community would ultimately define the crime. For some decades, the cold war between the Eastern and Western blocs seemed to have shelved any serious discussion concerning the crime of aggression after the Second World War. True to this, none of the statutes of the international hybrid courts that were created after the international military tribunals did mention the crime of aggression.

It was the groundbreaking Rome Statute which established the ICC that returned the crime of aggression to the radar of the international community. Although article 5 of the Rome Statute included the crime of aggression, it was neither defined nor was the ICC's jurisdiction over it stated.

It took over ninety years since the German Kaiser Wilhelm II escaped charges for "committing the supreme offence against international morality and the sanctity of treaties" during the First World War, and over sixty five years since the "crime against peace" was included in the Charter of the Nuremberg Tribunal, for the international community to define the crime of

aggression at the First ICC Review Conference.[231] It is thus fair to conclude that with the amendments to the Rome Statute at the Review Conference, the crime of aggression is today fully established as part of the corpus of international crimes.

It is also to be concluded that just like 1998 Rome Diplomatic Conference that adopted the Rome Statute of the ICC, 2010 Kampala ICC Review Conference was another historical achievement, as far as the crime of aggression is concerned.[232] It brought to an end a complex process that had span decades to define and codify the crime of aggression. It does appear that the fact that the ICC will not be able to try anyone for the crime of aggression till after 1st January 2017 was the price that had to be paid in order for the international community to reach a consensus with regard to the crime of aggression.[233]

It is a conclusion of this study that the final outcome from the First ICC Review Conference was important since it helped to elaborate some of the areas of customary international law that were still unclear. Under customary international law, it was clear that the crime of aggression entailed elements of state perpetrated aggression against another state by the leadership of the former state. In effect, the high ranking leaders of a state could be tried for the crime of aggression. However, the rubric of customary international law was not clear on what acts could be included as amounting to crimes of aggression. The amendments to Rome Statute helped to give a definition, and clarify to some extent what acts could perhaps be categorised as amounting to crimes of aggression.

[231] Heinsch Robert (2010: 716).
[232] Blokker Niels and Kress Claus (2010: 889).
[233] Marschner Laura and Olma, *The First Review Conference of the International Criminal Court,* 534. Available at www.zis-online.com.

It is also reasonable to conclude that the amendments to the Rome Statute with specific regard to the crime of aggression are a negation to the complementarity principle, a cornerstone on which of the Rome Statute is premised, and the ICC anchored. The ICC has the power to exercise its jurisdiction over persons responsible for committing crimes that are of the most serious of concern to the international community within a complementarity framework.[234]

Under article 17 of the Rome Statute, the ICC has a mandate to investigate and prosecute each of the international crimes under its jurisdiction where the State Party is unwilling or unable to do so. However, under the amendments to the Rome Statute, the States Parties adopted an understanding to the effect that the amendments are not to be 'interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another state'.[235] The effect of this turnaround is to negate the complementarity principle for the crime of aggression where individual States Parties are not obligated to try the crime, and create a new class of international crimes under the Rome Statute regime.

However, looking at the challenges that confronted the delegates to the Kampala Conference, it is fair to say that the outcome was largely a success, and in the words of UN Secretary General it is time "to turn up the volume" for individual criminality accountability for the crime of aggression.[236] One will certainly have to wait eagerly to see how it plays out after 1st January 2017, to see whether and when the world will ever see the first individual

[234] Preamble and article 1 of the Rome Statute.
[235] Paragraph 5 of Annex III of Resolution RC/Res. 6.
[236] Ban Ki-moon, UN Secretary General, Speech made First ICC Review Conference, Kampala, Uganda, 31 May 2010, 6. Available at: http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-BanKi-moon-ENG.pdf.

investigated and charged with the crime of aggression under the Rome Statute.

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